Employers Beware: Violating USERRA Through Improper Pre-Employment Inquiries

Captain Daniel J. Bugbee

The Uniformed Services Employment and Reemployment Rights Act (USERRA) provides a wide range of protections for those who serve in our country's military. Constructed as an anti-discrimination statute, USERRA covers a wide variety of employment rights, including ensuring fairness during initial hiring. While courts have held that similar anti-discrimination statutes—such as the Americans with Disabilities Act (ADA) and Title VII of the Civil Rights Act—prevent employers from asking certain inappropriate questions during pre-employment interviews, the only court that has yet decided whether USERRA gives servicemembers the same protections answered in the negative. This result was puzzling, as USERRA's protections, like those under the ADA and Title VII, begin during initial hiring and are just as extensive when one compares the language and purpose of the three statutes. Because courts have already determined the ability to raise the presumption that an applicant's protected status was a motivating factor in an adverse employment decision through inappropriate interview questions under the ADA and Title VII, this Article argues that the result under USERRA should be the same. Courts should find that it protects military personnel—reservists, in particular—from inappropriate pre-employment inquires into the extent of their continuing or future military obligations.

INTRODUCTION

The familiar and repetitious on-campus interviews for your law firm's summer program are well under way. Droves of law students appear at your office dressed in their new suits, eager for a chance to impress you, one of the hiring partners. You glance down at their resumes to ensure that you have some relevant questions to ask. Suddenly, one resume stands out—the applicant served in the military and was deployed to Iraq. Naturally, you start the interview off with questions about the applicant's military work history; after all, this stressful experience is surely relevant to what type of lawyer this applicant will be. You ask questions such as: "Tell me about your experience in Iraq," and "How has your military service impacted you?" During the conversation, you learn that the law student is still in the Army Reserves. This, of course, spurs a new line of inquiry: "How much longer do you have to serve?" "Are you at risk for another deployment, and if so, when?" "What type of a time obligation

does your reserve duty entail?"

These are all logical questions for a potential employer to ask, but have you violated the Uniformed Services Employment and Reemployment Rights Act (USERRA)[1] by asking them? This Article argues that, just like the Americans with Disabilities Act (ADA)[2] and Title VII of the Civil Rights Act,[3] there are certain questions that will presumptively establish that the applicant's status as a reservist in the United States military was a motivating factor in an adverse employment decision, which is forbidden under USERRA.

One district court, in an unpublished opinion, held that interview questions posed to a servicemember did not amount to discrimination under USERRA.[4] This Article will argue that, contrary to the district court opinion, future courts should find certain interview questions sufficient to establish that an employer used an applicant's status as a reservist as a motivating factor in an adverse employment decision. While largely ignored by the district court, this result is dictated by both USERRA's plain language and numerous judicial decisions interpreting that language broadly in light of USERRA's policy. Further support is gained from USERRA's similarity to other anti-discrimination statutes—specifically the ADA and Title VII—that courts have already determined protect job applicants against improper pre-employment inquiries into their protected status.

Part I of this Article examines USERRA's history, the policy behind it, and the protections it provides. Part II explores the role of the reservist in today's military, which explains why USERRA litigation will likely increase in the future as the military continues to demand more from its reserves. Part III explains how USERRA applies during the hiring process, how one court failed to apply this protection to interview questions, and how courts have found that impermissible interview questions violate similar anti-discrimination laws. Part IV then argues that inappropriate pre-employment inquiries may also run afoul of USERRA, despite the single unpublished opinion holding to the contrary. Finally, Part V provides examples of such pre-employment interview questions with explanations of how they violate the statute. Throughout this analysis, this Article provides information that the legal community has largely overlooked—the potential for interview questions to violate USERRA[5]—raising both employer and applicant awareness of this important topic.

1 Uniformed Services Employment and Reemployment Rights Act, 38 U.S.C. §§ 4301–4334 (2008).

2 Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101–12213 (2006).

3 Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e–2000e17 (2006).

4 Hart v. Hillside Township, No. 03-5841(JAG), 2006 WL 756000 (D.N.J. Mar. 17, 2006), *aff'd on other grounds sub nom*. Hart v. Township of Hillside, 228 F. App'x. 159, 162 (3d Cir. 2007).

5 *See*, *e.g*., Courtney B. Sapire, *Reducing the Hiring Risk Factor*, 70 TEX. BAR J. 540, 541 (2007) (listing questions employers should not ask during interviews, without mentioning those regarding military status).

I. USERRA SERVES AS THE NEWEST AND STRONGEST PROTECTION PROVIDED BY CONGRESS TO UNITED STATES SERVICEMEMBERS

USERRA is the latest in a series of statutes passed by Congress to protect servicemembers from negative repercussions resulting from their military service. As the most expansive protection yet enacted, USERRA applies to all aspects of employment.[6] An analysis of both its history and its plain language reveals that USERRA should be applied in the pre-employment context to prevent employers from using a reservist's protected status as a motivating factor in an adverse employment decision.

A. Congress Enacted Increasingly Protective Legislation to Prevent Servicemembers from Suffering Disadvantages as a Result of their Military Obligations, Culminating with USERRA

Congress' first effort to provide legislative protections to members of the military came during World War I with the passage of the Soldiers' and Sailors' Civil Relief Act of 1918 (SSCRA).[7] In order to protect members of the military from potential harm due to their service, the SSCRA included a non-binding order that courts use their powers of equity to avoid unjust results for servicemembers in a broad range of civil cases.[8] This statute expired, but was eventually reenacted over twenty years later during World War II.[9] The SSCRA has been modified many times since, most recently in 2008.[10] This updated statute, now called the Servicemembers Civil Relief Act (SCRA), provides wide-ranging protections to deployed servicemembers against evictions, penalties for breach of contract, default judgments, and expiration of statutes of limitations, among others.[11] Some of these protections are mandatory, while others are within the discretion of the court or must be applied for by the servicemember.[12]

Congress first protected servicemembers' reemployment rights by passing the Selective Training and Service Act of 1940 (STSA).[13] The STSA required employers to hold positions open for servicemembers called away for military service under specified circumstances—for example, when the servicemember was still capable of performing job duties and

6 Uniformed Services Employment and Reemployment Rights Act, 38 U.S.C. § 4311 (2006) (covering "initial employment, reemployment, retention in employment, promotion, or any benefit of employment").

7 Soldiers' and Sailors' Civil Relief Act, ch. 20, 40 Stat. 440 (1918).

8 *See id*. at 441. The original SSCRA was drafted in six weeks by Major John Wigmore, Dean of Northwestern University's Law School and author of Wigmore on Evidence. *See* H.R. REP. NO. 108-81, at 33 (2003). He had been called to active duty and attached to the Army Judge Advocate General Corps. *Id*. "The original SSCRA provisions covered default judgments, stays of proceedings, evictions, mortgage foreclosure, insurance, and installment contracts." *Id*.

9 Soldiers' and Sailors' Civil Relief Act of 1940, ch. 888, 54 Stat. 1178–91.

10 *See* Servicemembers' Civil Relief Act, Pub. L. No. 108–189, 117 Stat. 2835 (2008).

11 Servicemembers' Civil Relief Act, 50 U.S.C. app. §§ 501–91 (2008).

12 *Id*. § 521.

13 Selective Training and Service Act of 1940, ch. 720, § 8(b), 54 Stat. 885, 890.

applied for reemployment within forty days of returning from active duty.[14] This statute was modified and renamed several times, eventually becoming the Veterans Reemployment Rights Act (VRRA) during the Vietnam War.[15] Congress modified these statutes to provide increasingly broader protections for servicemembers.[16] Congress' decision to expand these protections was a response to reports that servicemembers, particularly reservists, faced increasing discrimination that had not been alleviated through previous legislation.[17] This discrimination came in the form of employers denying promotions to reservists or even terminating their employment due to their military obligations.[18]

The VRRA remained in effect until 1994, when Congress passed USERRA. USERRA served both to simplify the VRRA and expand its protections.[19] Notable just from the title (the Uniformed Services *Employment* and Reemployment Rights Act),[20] USERRA protects not only reemployment rights, but other employment rights as well, such as rights to pension or health benefits.[21] Congress explained that this strongly written statute was designed to "encourage noncareer service [i.e., reserve service] . . . by eliminating or minimizing the disadvantages to civilian careers and employment . . . [and to] minimize the disruption to the lives of persons performing service in the uniformed services as well as to their employers, fellow employees, and their communities."[22]

USERRA's purpose to "encourage noncareer service" should be understood as assisting in both the recruiting and retention of servicemembers by the United States military.[23] As with most decisions in life, a person's choice to volunteer in the armed services is made by weighing the costs against the benefits. Without USERRA's protections, the fear of losing, or being inhibited from gaining civilian employment

14 *Id*.

15 *See* Judith Bernstein Gaeta, *Kolkhorst v. Tilghman: An Employee's Right to Military Leave Under the Veterans' Reemployment Rights Act*, 41 CATH. U. L. REV. 259, 264–66 (1991).

16 The 1988 version of the act stated: "Any [employee with reserve obligations] . . . shall not be denied . . . retention in employment, or any . . . other incident or advantage of employment because of any obligation as a member of a Reserve component of the Armed Forces." 38 U.S.C. § 2021(b)(3) (1988).

17 *See*, *e.g.*, S. REP. NO. 90-1477, at 1–2 (1968), *reprinted in* 1968 U.S.C.C.A.N. 3421, 3421 (discussing the continued need to further protect reservists).

18 *Id*.

19 *See* H. Craig Manson, *The Uniformed Services Employment and Reemployment Rights Act of 1994*, 47 A.F. L. REV. 55, 59 (1999) ("USERRA also represents a simplification of the original veterans' reemployment legislation that, over the years, had become less comprehensible as various amendments were added."); Konrad S. Lee, *"When Johnny Comes Marching Home Again" Will He Be Welcome at Work?*, 35 PEPP. L. REV. 247, 256–57 (2008) (noting that USERRA expanded VRRA's protection to reservists that served in active duty voluntarily, instead of just involuntarily).

20 Uniformed Services Employment and Reemployment Rights Act of 1994, Pub. L. No. 103–353, § 1, 108 Stat. 3149, 3149 (1994) (emphasis added).

21 *See* Manson, *supra* note 19, at 77–78.

22 Uniformed Services Employment and Reemployment Rights Act, 38 U.S.C. § 4301(a)(1)–(2) (2006).

23 Lee, *supra* note 19, at 251–52 ("USERRA was intended to provide protections for the purpose of encouraging military recruitment.").

would cause many individuals to forego service or to quickly end their service. With USERRA's full protections in place, this added cost of military service is mitigated.

B. USERRA Applies Broadly to Protect Servicemembers from Discrimination in All Aspects of Employment, Including Discrimination During Initial Employment Decisions

USERRA is organized into three major sections, with each providing a specific form of protection: (1) non-discrimination in employment; (2) reemployment rights for persons absent for military service; and (3) preservation of employment benefits (e.g., health insurance or pension benefits) for persons absent for military service.[24] The statute explicitly prohibits an employer from denying

> [a] person who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform services in an uniformed service . . . *initial employment*, reemployment, retention in employment, promotion, or any benefit of employment [because of] that membership, application for membership, performance of service, application for service, or obligation.[25]

An analysis of this language reveals two important features of the statute that illustrate its breadth:

First, USERRA protects a multitude of persons with a variety of connections to military service. Specifically, it covers any person who is a member of the uniformed services.[26] This consequently includes members of the reserves and active components of all branches of the United States military.[27] It also applies to those who contemplate joining either component, regardless of whether they enlist.[28] Finally, it applies to those veterans who have performed military service in the past.[29] To be eligible for protection, a veteran must have received an honorable discharge.[30] The language of the statute therefore covers almost any person who is serving, has served, or potentially will serve in the United States military.

Second, USERRA's protections apply to a wide range of employers. The statute defines "employer" very broadly to include "any person,

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24 Manson, *supra* note 19, at 59.

25 38 U.S.C. § 4311(a) (2006) (emphasis added).

26 Uniformed services are defined in the statute as "the Armed Forces, the Army National Guard and the Air National Guard when engaged in active duty for training, inactive duty training, or full-time National Guard duty, the commissioned corps of the Public Health Service, and any other category of persons designated by the President in time of war or national emergency." 38 U.S.C. § 4303(16) (2006).

27 *See* McClain v. City of Somerville, 424 F. Supp. 2d 329, 334 (D. Mass. 2006) ("Congress intended the benefits of USERRA to apply to both reservists and active duty personnel.").

28 38 U.S.C. § 4311(a) (2006) (applying USERRA's protections to "[a] person who . . . applies to be a member of . . . a uniformed service").

29 *Id*. (applying USERRA's protections to "[a] person who . . . has performed . . . service in a uniformed service").

30 *Id*. § 4304 (2006).

institution, organization, or other entity that pays salary or wages for work performed or that has control over employment opportunities."[31] Notably, unlike other federal anti-discrimination statutes, such as Title VII,[32] USERRA offers no exception for employers with only a small number of employees.[33] However, specific types of employers are exempted from USERRA, such as religious institutions, Native American tribes, foreign governments, and international organizations.[34]

When a plaintiff claims that an employer violated USERRA's discriminatory prohibitions, courts apply a burden-shifting analysis to decide whether the employer used the plaintiff's military service as a basis for its adverse employment decision.[35] When conducting this evaluation, courts construe the statute liberally in favor of the plaintiff.[36] This liberal interpretation has led courts to go as far as reading a cause of action for a hostile work environment into USERRA's protection of the "benefit of employment."[37]

The burden-shifting analysis begins when the plaintiff establishes a prima facie case of discrimination.[38] This is done by showing by a preponderance of the evidence that the servicemember's military status was a motivating factor in the employer's adverse employment decision.[39] A motivating factor does not need to be the sole cause for the decision.[40] Instead, as one court explained, a motivating factor "is one of the factors that a truthful employer would list if asked for the reasons for its decision."[41]

Once the servicemember establishes a prima facie case under USERRA, the burden shifts to the employer to demonstrate that the servicemember's protected status was not a motivating factor in the adverse employment decision.[42] This can be done by establishing another legitimate reason for its decision and showing that the decision would have been the same regardless of the plaintiff's protected status.[43] Unlike a Title

31 *Id*. § 4303(4)(a).

32 42 U.S.C. § 2000e(b) (2006) (defining employer as a person with at least fifteen employees for purposes of the statute).

33 *See* David A. Lowe & Andrew P. Lee, *Military Leave and the Workplace at War: USERRA Overview and Update*, *in* 763 PRACTICING LAW INST., LITIG. & ADMIN. PRACTICE SERIES COURSE HANDBOOK NO. H-763 929, 932 (2007), *available at* 763 PLI/LIT 929 (Westlaw) (citing Cole v. Swint, 961 F.2d 58, 60 (5th Cir. 1992).

34 Lowe & Lee, *supra* note 33, at 932.

35 *See* Sheehan v. Dep't of the Navy, 240 F.3d 1009, 1013 (Fed. Cir. 2001) (describing USERRA's burden-shifting analysis).

36 McGuire v. United Parcel Serv., 152 F.3d 673, 676 (7th Cir. 1998).

37 Vickers v. City of Memphis, 368 F. Supp. 2d. 842, 845 (W.D. Tenn. 2005).

38 *Sheehan*, 240 F.3d at 1013 n.3.

39 *Id*. at 1013.

40 Sanguinetti v. United Parcel Serv., 114 F. Supp. 2d 1313, 1318 (S.D. Fla. 2000), *aff'd*, 254 F.3d 75 (11th Cir. 2001).

41 *Id*. (quoting Brandsasse v. City of Suffolk, 72 F. Supp. 2d 608, 617 (E.D. Va. 1999)) (internal quotations omitted).

42 *Brandsasse*, 72 F. Supp. 2d at 617.

43 *See id*.

VII action, the USERRA employer bears not only the burden of producing evidence for this affirmative defense, but also the burden of persuading the court.[44] An employer's failure to carry the burden of persuasion on its affirmative defense results in a verdict for the plaintiff.

II. RECENT INCREASES IN THE BURDEN PLACED ON THE ARMED FORCES RESERVES INCREASES USERRA'S RELEVANCE AS MORE RESERVISTS NEED ITS PROTECTIONS

In the initial employment context, one must know more than just how courts analyze cases arising under USERRA. One must also understand the individuals protected by the statute, specifically reservists, who are the most likely to need USERRA's protection. The unique situation facing reservists today—post-9/11—increases the magnitude of the imposition they place on their respective employers. This increases the likelihood that an employer will factor an applicant's reservist status into its hiring decision. Further, a court is more likely to recognize the increased relevance of USERRA's protections in light of the increased burden on today's reservist.

A. Congress Created the Military Reserves to Augment Active Forces During Times of War

Congress created the reserves through its power granted by Article I of the United States Constitution:

> The Congress shall have the Power . . . To raise and support Armies . . . To provide and maintain a Navy . . . To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions; To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States.[45]

Historically, militias have existed since the very beginning of the United States.[46] However, these militias belonged to the various states and were governed by state statutes.[47] Congress began bringing these state militias under the control of the federal government in the early 1900s.[48] In 1912, Congress established the Army Reserves by passing the Army Appropriations Act.[49] In 1915, Congress formally created the Naval Reserve Force.[50] Congress followed this by bringing the states' National Guard forces under the control of the federal government in 1916 to

44 *Sheehan*, 240 F.3d at 1014 (comparing the burden shifting scheme of USERRA to that of Title VII).

45 U.S. CONST. art. I, § 8, cl. 1, 12, 13, 15, 16.

46 *See* TIMOTHY J. LOWENBERG, NAT'L GUARD ASSOC., THE ROLE OF THE NATIONAL GUARD IN NATIONAL DEFENSE AND HOMELAND SECURITY 1 (2005), *available at* http://www.ngaus.org/ngaus/files/ccLibraryFiles/Filename/000000000457/primer%20fin.pdf.

47 *Id*.

48 *See* Act of June 3, 1916, ch. 134, 39 Stat. 166 (1916).

49 *See* Act of August 24, 1912, ch. 391, 37 Stat. 569, 590 (1912).

50 *See* Naval Appropriations Act for Fiscal Year 1916, ch. 83, 38 Stat. 928, 940 (1915).

support World War I.[51] The next major restructuring of the reserves occurred following World War II. This restructuring came in the form of the National Security Act of 1947, which created the Air Force and Air Force Reserve, and placed each reserve force under its active counterpart's command.[52]

The modern reserves were created when Congress passed the Reserve Forces Act of 1955, which established that reserve participation requires forty-eight scheduled training periods (a full day equals two training periods) and no more than seventeen days of continuous training annually, or up to thirty days of active duty without a training period requirement.[53] These requirements have changed only slightly since the Act's passage, when the maximum of seventeen days was changed to a minimum of fourteen days.[54] During the next fifty years, this "one weekend a month and two weeks a year" requirement placed relatively little burden on employers, who were accustomed to giving employees weekends off and losing employees for several weeks each year for vacation, illness, or other reasons. However, as explained *infra* in Part II.B., the actual demands on individual reservists—with the correlative effects on their employers—have increased since the 1950s, and dramatically so since September 11, 2001.

B. The Modern Impact of Reserve Service Places Increased Strain on both Reservists and their Employers

Perhaps the largest catalyst for the evolution of the "one weekend a month and two weeks a year" service requirement to the more demanding, current norm was Congress's 1976 amendment to Title 10 of the United States Code. This amendment gave the President the authority to use reservists for operational missions without declaring a national emergency.[55] This change corresponded with Congress's adoption, following the draft in 1973, of a "Total Force" policy that allowed for increased use of reserve forces.[56]

Modern reserve forces since the 1970s have been divided formally into seven components: (1) The Army National Guard of the United States, (2) The Army Reserve, (3) The Navy Reserve, (4) The Air National Guard of the United States, (5) The Air Force Reserve, (6) The Marine Corps

51 *See* Act of June 3, 1916, ch. 134, 39 Stat. 166 (1916).

52 National Security Act of 1947, ch. 343, § 207–08, 61 Stat. 495, 502–03.

53 Reserve Forces Act of 1955, ch. 665 § 2, 69 Stat. 598.

54 National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, § 110147(a)(1), 108 Stat. 2972, 2973–74 (1994).

55 *See* H.R. REP. NO. 94–1069, at 1 (1976), *reprinted in* 1976 U.S.C.C.A.N. 1034 (codified as amended at 10 U.S.C. § 673(b) and renumbered to 10 U.S.C. § 12304).

56 *See generally* Ryan Wedlund, *Citizen Soldiers Fighting Terrorism: Reservists' Reemployment Rights*, 30 WM. MITCHELL L. REV. 797, 802–04 (2004) (describing the concept behind and development of the "Total Force" policy).

Reserve, and (7) The Coast Guard Reserve.[57] They serve the purpose of providing "trained units and qualified persons . . . in time of war or national emergency, and at such other times as the national security may require, to fill the needs of the armed forces whenever more units and persons are needed than are in the regular components."[58] The Army and Air National Guard components have the additional purpose of serving their respective states' needs according to the applicable state laws and constitutions.[59]

The demand placed on the military since September 11, 2001, has proven to be beyond the ability of the active component to fulfill; consequently, the demand on the reserves has increased dramatically. While the minimum reserve obligation has not substantially deviated in the last fifty years from the standard "one weekend a month and two weeks a year,"[60] most reservists now find it to be anything but the norm. The current, more extensive, obligations of reservists consist of unit training, individual training, and deployments.

Unit training is the time individual reservists must spend with their respective units, which traditionally consisted of one weekend a month and two weeks a year.[61] This standard serves as a minimum;[62] therefore, it can be increased when needed. During recent increases in the operational tempo of reserve units, the federal government allocated funds to increase the length of most, or sometimes all, weekends to what is called a Military Unit Training Assembly Five (MUTA 5).[63] This entails servicemembers coming in on Friday evenings, instead of Saturday mornings, for their one weekend a month. Further, the two weeks of annual training is being extended for many units to three or even four weeks.[64]

Besides the training each reservist engages in with his or her assigned unit, each reservist must also fulfill individual training obligations that consist of initial entry training, professional development training, and attending skill development schools. Initial entry training must be

57 10 U.S.C. § 10101 (2006)

58 *Id*. § 10102.

59 *See* Lowenberg, *supra* note 46, at 1–2.

60 10 U.S.C. § 10147 (2006). *See also* Joining the Military – Military.com, http://www.military.com/Recruiting/Content/0,13898,rec_step04_questions_guardreserve,,00.html (describing how Select Reserve Units are referred to as "weekend warriors" and serve "one weekend a month, two weeks a year").

61 10 U.S.C. § 10147 (2006).

62 *Id*. (requiring reservists to "serve on active duty for training of *not less than* 14 days") (emphasis added).

63 *See* Military Reserve Component Retirement Overview – Military Benefits – Military.com, http://www.military.com/benefits/military-pay/retired-pay/military-reserve-component-retirement-overview. Reservists are paid based on participation in a unit training assembly (UTA). UTAs typically range from four to twelve hours. Multiple UTAs (MUTAs) typically are either a MUTA-4 (all day Saturday and Sunday) or MUTA-5 (Friday afternoon through Sunday).

64 Sydney J. Freedberg, Jr., *As Military Begins to Draw Down, National Guard Ramps Up*, NAT'L J., Dec. 26, 2007, http://www.govexec.com/dailyfed/1207/122607nj1.htm ("The federal government is funding states' efforts to give Guard soldiers additional weekend drills and extended annual training periods . . . probably two to three weeks of additional annual training.") (internal quotations omitted).

completed by everyone entering the reserves,[65] unless it has already been completed during prior active service; it provides a reservist with the initial skills required to perform his or her Military Occupational Specialty (specifically assigned area of expertise). The length of training varies by job, but it can last up to eighty-one weeks.[66] Professional development training is required for most reservists to be promoted to the next rank. The length of this training is generally more reasonable, but in some cases it can take several months.[67] Finally, reservists wishing to expand their military skill set can volunteer for a variety of skill development schools—such as Airborne[68] or Ranger[69] schools—that can last from a few weeks to several months.[70]

In addition to training, reservists face the significant and increasing time obligation of deployments. While the number of active duty forces have shrunk, deployment obligations incurred by the United States have not. Initially, during the late 1990s, deployments for reservists began as six-month rotations in Bosnia, Kosovo, or Egypt as part of peacekeeping forces.[71] Later, the heaviest call-up of the reserves since World War II began in support of the Global War on Terrorism.[72] Now, the reserve forces find themselves facing multiple, long-duration call-ups in support of combat operations.[73] Almost half a million reservists have been deployed overseas since September 11, 2001.[74] Most current deployments are to either Iraq or Afghanistan, and they may last from three months to over a year.[75] In addition to the actual time spent overseas, reservists are usually

65 10 U.S.C. § 510(c)(1) (2006).

66 *See* GoArmy.com > Careers & Jobs > Cryptologic Linguist (35P), http://www.goarmy.com/JobDetail.do?id=97 (stating that a Cryptologic linguist's initial training takes up to eighty-one weeks).

67 *See* Navy Times, Professional Military Education: Guard and Reserve Members, http://www.navytimes.com/benefits/education/Online_hbgr06_education_militaryedprofessional4/ (last visited Aug. 21, 2008). The Fleet Seminar Program can take up to three year to complete. *Id*.

68 U.S. Army Infantry Homepage, 1st Battalion, 507th Parachute Infantry Regiment, Basic Airborne Course, https://www.infantry.army.mil/airborne/airborne/ (last visited Aug. 21, 2008) (providing instruction on parachuting).

69 U.S. Army Ranger School, https://www.benning.army.mil/rtb/rtbmain.asp (last visited Jan. 13, 2009) (infantry-based leadership school).

70 Ranger schools takes sixty one days if each phase is passed the first time, but some individuals take more than twice that time to complete it. *See* ATRRS Homepage, https://www.atrrs.army.mil./atrrscc/courseInfo.aspx?fy=2008&sch=071&crs=2E-SI5S-5R%2f011-SQIV-G&crstitle=RANGER&phase= (listing the Ranger School course length as "8 weeks 5.0 days").

71 After the brief Persian Gulf War, 4,500 Guard troops were deployed as peacekeepers in Bosnia, Kosovo, and the Sinai. *See* Sydney J. Freedberg Jr., *The Guard's Turn to Surge*, NATIONAL JOURNAL, Dec. 15, 2007, at 24 ("Even there, the assumption was that it was going to be six months [per deployment] and it wasn't going to be repeated . . . .").

72 U.S. Gen. Accounting Office, *Reserve Forces: Observations on Recent National Guard Use in Overseas and Homeland Mission and Future Challenges: Testimony Before the H. Comm. on Government Reform*, GAO-04-670T, at 1 (2004), *available at* http://www.gao.gov/new.items/d04670t.pdf (statement of Janet A. St. Laurent, Director, Defense Capabilities and Management).

73 Freedberg, *supra* note 64.

74 *Id*. ("Since September 11, 2001, the military has relied heavily on reservists to conduct overseas operations.").

75 Ann Scott Tyson, *Possible Iraq Deployments Would Stretch Reserve Force: Leaders Express Concern Over Troop Rotation Plans*, WASH. POST, Nov. 5, 2006, at A1 (describing the length of

brought into active service to be trained for a period of time before being deployed for the operation—up to six months in some cases.[76]

The reserves, particularly the National Guard, are subject to other missions in addition to these overseas deployments. Notably, National Guard forces have been deployed to provide security for airports,[77] to augment federal law enforcement agencies conducting border security operations, and to aid in relief after natural disasters, such as the massive deployment in response to Hurricane Katrina in 2005.[78] The length of these deployments vary, depending both on the nature of the operation and, at times, the choice of the individual reservist.[79]

These extensive obligations make the term "reserve" seem ironic. As of September 30, 2007, just fewer than 600,000 reservists had been called into active duty for Operations Noble Eagle, Enduring Freedom, and Iraqi Freedom.[80] At one point in 2004, approximately one-third of all soldiers serving in Iraq came from National Guard forces.[81] While this number has since decreased due to the reorganization of the active Army, it will likely increase once again as active forces find themselves exhausted due to the recent "surge" operations in Iraq.[82] Thus, the extent of reservists' obligations is not likely to decline in the near future.[83] As a retired Marine Major General put it, "Let's face it: There are no national security missions that we can carry out now or in the future that will not have the Guard and Reserve involved."[84]

III. CASE LAW FIRMLY ESTABLISHES USERRA'S PROTECTION DURING INITIAL HIRING

To protect these citizen-soldiers, who wear the dual hat of civilian employee and servicemember, Congress passed USERRA. In addition to holding reservists' civilian jobs open while they serve in the above-mentioned capacities,[85] case law firmly establishes that USERRA's

reserve mobilizations).

76 Lowenberg, *supra* note 46, at 5 (noting that it usually requires eighteen months of activation to produce a deployment of "12 months or less").

77 *Id*. at 2.

78 About 41,000 Guard members were used across Alabama, Mississippi and Louisiana. *See National Guard Stretched Thin*, CBS NEWS, Sep. 10, 2005, http://www.cbsnews.com/stories/2005/09/10/katrina/main832586.shtml.

79 For example, National Guard soldiers were initially sent to the Southwest border for one month, but given the opportunity to extend for a longer duration. *See* Sgt. Jim Greenhill, *Operation Jumpstart a Success, Officials Say*, NAT'L GUARD BUREAU, Dec. 11, 2006, http://www.ngb.army.mil/news/archives/2006/12/121106-OJS_success.aspx (noting the voluntary nature of service at the border).

80 COMM'N ON THE NAT'L GUARD AND RESERVES, TRANSFORMING THE NATIONAL GUARD AND RESERVES INTO A 21ST-CENTURY OPERATIONAL FORCE 236 (2008).

81 *Id*. at 6.

82 *See* Freedberg *supra* note 64.

83 *Id*.

84 Judy Woodruff, *National Guard Underfunded, Not Prepared for Crises*, PBS, Mar. 1, 2007, http://www.pbs.org/newshour/bb/military/jan-june07/military_03-01.html.

85 38 U.S.C. § 4311 (2006).

protections apply during the hiring process.

A. Current Case Law Illustrates the Breadth of USERRA's Pre-Employment Protections

Beginning with the VRRA, Congress has sought to protect reservists from discrimination during the hiring process.[86] Congress intended to reinstate this protection when it enacted USERRA.[87] In two cases brought under the VRRA and USERRA respectively, courts made it clear that employers may not decide against hiring a servicemember because of the extent of his or her future military obligation.

In *Beattie v. Trump Shuttle, Inc.*,[88] an Air Force Reserve Colonel brought an action against a potential employer for refusing to offer him employment due to his unavailability for the employer's training program.[89] The Colonel volunteered for career progression training as a part of his military service, and this caused the initial temporary absence from his civilian job.[90] Despite the optional, rather than mandatory nature of this training, the Unites States District Court for the District of Columbia held that the plain language of the VRRA protected the Colonel from discrimination during the initial hiring process.[91] The court made clear that his prospective employer could not rely on his military service-related absence as a reason for failing to offer him employment.[92]

A second case involving initial hiring discrimination against a reservist arose under USERRA.[93] In *McClain v. City of Somerville*, a servicemember was unavailable to participate in initial police department training due to his military service, and was denied employment.[94] The servicemember successfully brought a suit under USERRA against the city for failing to hire him.[95] The United States District Court for the District of Massachusetts held that the employer discriminated based on the servicemember's obligation to perform service, which is explicitly

86 Veteran's Reemployment Rights Act, 38 U.S.C. § 2021(b)(3) (1990) (protecting against discrimination against any reservist "who *seeks* or holds" an employment position) (current version at 38 U.S.C. § 4301 (2000)).

87 Congress specifically indicated that it intended USERRA to include the prohibition against discrimination in initial hiring. H.R. REP. NO. 103–65, at 23 (1993) ("Section 4311(a) would reenact the current prohibition against discrimination which includes discrimination against applicants for employment") (citing *Beattie v. The Trump Shuttle, Inc.*, 758 F. Supp. 30 (D.D.C. 1991)).

88 758 F. Supp. 30 (D.D.C. 1991). Although *Beattie* was brought under the VRRA, its relevance is established through House Reports for § 4311(a)—USERRA's prohibition on initial hiring discrimination—which expresses a desire to reenact the protection discussed in *Beattie*. *See* H.R. REP. NO. 103–65, at 23.

89 *Id.* at 31.

90 *Id.*

91 *Id.* at 33.

92 *Id.*

93 McClain v. City of Somerville, 424 F. Supp. 2d 329 (D. Mass. 2006).

94 *Id.* at 331.

95 *Id.* at 330, 337.

prohibited by the statutory language of USERRA.[96]

In both of these cases the courts relied on the statute's plain language applying to initial hiring decisions.[97] Neither case analyzed whether the employers' decisions not to hire the servicemembers were based on the applicants' military service, but instead focused on the defendants' arguments that the respective scenarios fell outside the scope of the statutes' protections.[98] Thus, neither case mentioned whether an employer runs afoul of USERRA's prohibition against discrimination during initial hiring if it asks questions designed to elicit information about the potential impacts of an applicant's military service.

B. The Only Case to Consider the Issue Decided that USERRA Did Not Protect a Reservist from Pre-Employment Inquiries into the Burden of his Military Service

In *Hart v. Hillside Township*,[99] a prospective employer asked a New Jersey National Guard soldier applying for a fire-fighter position several questions regarding the potential burdens his service might impose.[100] Specifically, the employer asked the following questions:

> (1) Are you still in the National Guard?
>
> (2) Do you have to do [sic] certain amount of training each year?
>
> (3) How much time does that involve, say annually, that you have to put in with the National Guard?
>
> (4) Now, how flexible are they—I'm trying to get—ascertain, you have to be there certain weekends or—or [sic] is there a flexibility in scheduling, or . . .
>
> (5) What does that usually entail, so much per month is it or . . .
>
> (6) When is that—when is that two weeks, in the summer?
>
> (7) In other words, if you work—you know, the schedule here, it's 24 hours and 72 off. Could it—could you choose a weekend when you're not working here possibly or . . .
>
> (10) How long is your tour in the National Guard? As long as you want? Or . . .[101]

96 *Id*. at 333 ("By USERRA's plain terms, then, Somerville's failure to hire McLain violated the statute: Somerville, a covered employer, denied initial employment to McLain, a member of the Army, because of McLain's obligation to perform service in that uniformed service in the fall of 2001.").

97 *Id*.; *Beattie*, 758 F. Supp. at 33.

98 *Beattie*, 758 F. Supp. at 32 (discussing the defendant's argument that the applicant's service was not an "obligation" within the meaning of the statute, that the statute only applied to reemployment, and that the applicant had to be available for work at the time of the discrimination); *McClain*, 424 F. Supp. 2d at 334 (addressing the defendant's argument that the statute does not apply to active duty personnel).

99 Hart v. Hillside Township, No. Civ.A. 03-5841(JAG), 2006 U.S. Dist. LEXIS 16577 (D.N.J. Mar. 17, 2006), *aff'd on other grounds sub nom. Hart v. Township of Hillside*, 228 F. App'x. 159, 164 (3d Cir. 2007).

100 *Hart*, 2006 U.S. Dist. LEXIS 16577 at *2–4.

101 *Id*. at *4.

This line of questioning expressly inquires into the burden that the applicant's National Guard service—his protected status—would impose on the employer. The United States District Court for the District of New Jersey, however, found the inquiries to be "merely logistical questions that are not discriminatory on their face."[102] Thus, the court granted the employer's motion for summary judgment.[103]

On appeal, in an unpublished opinion, the United States Court of Appeals for the Third Circuit "assume[d] without deciding that Hart met his *prima facie* burden of showing that his membership in the National Guard was a substantial or motivating factor."[104] The Court of Appeals went on to affirm the case based on the employer's ability to carry its burden by showing other factors, unrelated to the applicant's military service, which supported the district court's decision.[105] By not deciding whether these inquiries satisfied a plaintiff's prima facie case under USERRA, the Third Circuit failed to address the soundness of the reasoning of the district court.

C. Cases Interpreting Other Anti-Discrimination Statutes have Prohibited the Use of Certain Pre-Employment Inquiries

Several cases under similar federal anti-discrimination statutes have looked at the legality of inappropriate pre-employment inquiries. They have unanimously held that such questions are sufficient to establish a plaintiff's prima facie case. Two anti-discrimination statutes—the ADA and Title VII—prove particularly useful due to the availability of substantial case law. The ADA, Title VII, and USERRA all share similar purposes and language.[106] Therefore, cases interpreting these statutes would logically serve as persuasive authority for reaching a similar result under USERRA—that improper pre-employment inquiries raise the presumption that an employer took an applicant's protected status into account when making an adverse employment decision.[107]

Under anti-discrimination statutes, courts generally prohibit the use of all pre-employment inquiries that screen out members of a protected class, unless those classifications are valid predictors of job performance or can be justified as a "business necessity."[108] Over time, courts have consistently held that certain questions violate specific anti-discrimination

102 *Id*. at *28.

103 *Id*. at *43.

104 Hart v. Township of Hillside, 228 F. App'x. 159, 162 (3rd Cir. 2007) (internal quotations omitted).

105 *Id*. at 162–63.

106 *See infra* Part IV.

107 *See*, *e.g*., Garrett v. Circuit City Stores, 449 F.3d 672, 680–81 (5th Cir. 2006) (using Title VII as precedent in determining whether USERRA claims may be arbitrated).

108 *See*, *e.g*., Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) ("If an employment practice which operates to exclude . . . cannot be shown to be related to job performance, the practice is prohibited.").

statutes. For instance, in *Barbano v. Madison County*,[109] the United States Court of Appeals for the Second Circuit decided that certain interview questions—specifically whether a female job applicant would become pregnant and quit in the future, or whether her husband would mind if she had to "run around the country with men"—were discriminatory under Title VII because neither related to a bona fide occupational qualification.[110] Another case involving Title VII held that questions that would tend to have the effect of denying one race an equal opportunity for employment are likewise discriminatory.[111] Courts deciding discrimination cases under the ADA have looked with disfavor at questions that would reveal a potential disability, such as "[w]hat current or past medical problems might limit your ability to do a job?"[112] All of these interview questions raised the presumption that an employer improperly took an applicant's protected status into account when making an adverse employment decision.[113]

Countless publications providing human resource advice offer summaries of questions that violate anti-discrimination laws.[114] Most of these offer a wide array of questions that would violate various federal employment statutes, such as "Do you have any disabilities?" or "How old are you?"[115] While a few publications mention discrimination based on *past* military service, presumably under USERRA—suggesting that it is illegal to ask the characterization of a veteran's discharge—they are notably silent when it comes to questions that may invoke the protected status of a reservist.[116] More frequently, discriminatory questions regarding military service are overlooked altogether.[117] Thus, there is a strong possibility that employers will violate USERRA by asking certain interview questions.

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109 Barbano v. Madison County, 922 F.2d 139, 143 (2d Cir. 1990).

110 *Id*.

111 Gregory v. Litton Sys., 316 F. Supp. 401, 403 (C.D. Cal. 1970) (referring to application questions about arrests that did not lead to convictions, which, according to the court, singles out certain minority groups that are often arrested without evidence of a crime).

112 EEOC v. Wal-Mart Stores, 11 F. Supp. 2d 1313, 1317 (D.N.M. 1998).

113 *See* Merrick T. Rossein, *Title VII: Race, Color, Sex and National Origin*, *in* 1 EMP. L. DESKBOOK HUM. RES. PROF. § 9:13 (2007):

> Employers should avoid any question on employment applications and during job interviews that request information that should not be used in the decision-making process. This would include questions about an applicant's race, national origin, marital status, and childbearing or child-care plans. These questions might later be used as evidence of employer bias.

114 *See*, *e.g.*, *Illegal Interview Questions*, USA TODAY, Jan. 29, 2001, http://www.usatoday.com/careers/resources/interviewillegal.htm (providing examples of prohibited questions); MATTHEW J. DELUCA & NANETTE F. DELUCA, MORE BEST ANSWERS TO THE 201 MOST FREQUENTLY ASKED INTERVIEW QUESTIONS 137–38 (2001).

115 *See Illegal Interview Questions*, *supra* note 114.

116 *Id*.

117 *See*, *e.g.*, Courtney B. Sapire, *Reducing the Hiring Risk Factor*, 70 TEX. B.J. 540, 541 (2007) (listing subjects of questions to avoid, but not discussing current military service).

IV. DESPITE ONE UNPUBLISHED OPINION HOLDING THE OPPOSITE, USERRA DOES PROTECT APPLICANTS FROM INAPPROPRIATE INTERVIEW QUESTIONS

While the district court in *Hart* held that questions about how an applicant's National Guard service would impact his ability to perform a civilian job were "merely logistical" and "not discriminatory on their face,"[118] this reasoning ignores the plain language and policy behind USERRA. Additionally, the court failed to note USERRA's similarity to analogous anti-discrimination statutes, as well as case law holding that the protections of these statutes can be invoked through "merely logistical" interview questions.

A. USERRA's Plain Language and Policy Justify the Protection of Reservist's from Inappropriate Pre-Employment Inquiries

The plain language of USERRA states: "A person who is a member of . . . a uniformed service shall not be denied initial employment . . . by an employer on the basis of that . . . obligation."[119] The USERRA plaintiff need only establish that his or her service obligation was a motivating factor in the employer's adverse employment decision.[120] It does not need to be the sole cause, but just one of the factors that "a truthful employer would list if asked for the reasons for its decision."[121] While the district court in *Hart* relied on the explanation of the interviewers during litigation that they did not consider the plaintiff's military obligation to be negative,[122] this ignores the fact that litigants' memories are often favorable to their desired outcome. It is illogical to assume that questions about the extent of a reservist's obligation and his ability to work his military duties around his civilian employer's schedule do not imply that the employer might use that information as a motivating factor in making an adverse employment decision. Therefore, in taking the employer at its word, the court ignored the rationale behind the rule that a motivating factor is one that a "*truthful* employer" would give for its decision.[123]

The policy justifications behind USERRA further support the view that an employer violates USERRA by asking questions about the future obligations of a reservist. This policy is reflected in USERRA's broad language, which extends protection to a person who merely "*applies* to be a

118 Hart v. Hillside Township, No. Civ.A. 03-5841(JAG), 2006 WL 756000 at *9 (D.N.J. Mar. 17, 2006), *aff'd on other grounds sub nom.*, Hart v. Township of Hillside, 228 F. App'x. 159, 164 (3d Cir. 2007).

119 38 U.S.C.A § 4311(a) (2006).

120 *See* Sheehan v. Dep't of the Navy, 240 F.3d 1009, 1013 (Fed. Cir. 2001).

121 Sanguinetti v. United Parcel Serv., 114 F. Supp. 2d 1313, 1318 (S.D. Fla. 2000), *aff'd*, 254 F.3d 75 (11th Cir. 2001).

122 *Hart*, 2006 WL 756000, at *8.

123 *Sanguinetti*, 114 F. Supp. 2d at 1318 (emphasis added).

member of" the military.[124] No other anti-discrimination statute applies to individuals that are inchoate members of the protected class. Further, the statute's legislative intent is notably friendly to reservists, as it seeks "to encourage noncareer service in the uniformed services by eliminating or minimizing the disadvantages to civilian careers and employment which can result from such service."[125] This policy has led courts to construe USERRA liberally "in favor of those who served their country."[126] Therefore, the *Hart* court's offhand dismissal of suspect interview questions as "merely logistical" runs counter to the broad protection Congress sought to provide to those serving in the armed forces reserves.[127]

B. USERRA's Similarities to Other Anti-Discrimination Statutes Justifies a Similar Result for Questions Regarding the Potential Burden of an Applicant's Protected Status on an Employer

A comparison of USERRA to other anti-discrimination statutes strengthens the conclusion that USERRA provides similar protections during the hiring process. USERRA's text and context closely parallel both the ADA and Title VII. All three broadly cover qualified individuals,[128] protect against harms related to multiple aspects of employment, including hiring,[129] and require a nexus between what qualifies the individual for the statutes' protections and the alleged employment-related harm.[130] Additionally, the ADA's statement of purpose closely parallels that of USERRA.[131] Both the ADA and USERRA also require an employer, at times, to treat covered individuals differently than other employees in order to ensure they receive the same benefits as their non-protected coworkers.[132]

Noting the similarities between these three statutes, it is enlightening to return to the "logistical" questions that courts have held to be discriminatory under the ADA and Title VII. First, under Title VII, a

124 38 U.S.C.A. § 4311 (2006) (emphasis added).

125 H.R. REP. 103–65, at 2 (1993).

126 *See* McGuire v. United Parcel Serv., 152 F.3d 673, 676 (7th Cir. 1998) (internal citation omitted).

127 Hart v. Hillside Township, No. Civ.A. 03-5841(JAG), 2006 U.S. Dist. LEXIS 1657 at *28 (D.N.J. Mar. 17, 2006).

128 38 U.S.C. § 4311(a) (2006) ("A person who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform services in a uniformed service . . . ."); 42 U.S.C.A. § 2000e-2 (West 2006) ("any individual"); 42 U.S.C.A. § 12112(a) (West 2006) ("a qualified individual").

129 38 U.S.C. § 4311(a) (2006) ("denied initial employment"); 42 U.S.C.A. § 2000e–2 (a)(1) (West 2006) ("fail or refuse to hire"); 42 U.S.C.A. § 12112(a) (West 2006) ("the hiring").

130 38 U.S.C. § 4311(a) (2006) ("on the basis of"); 42 U.S.C.A. § 2000e–2 (West 2006) ("because of"); 42 U.S.C.A. § 12112 (West 2006) ("because of").

131 Andy P. Fernandez, *The Need for the Expansion of Military Reservists' Rights in Furtherance of the Total Force Policy: A Comparison of the USERRA and ADA*, 14 ST. THOMAS L. REV. 859, 881 (2002) (discussing the similarities in the two statutes' purpose statements).

132 Fink v. City of New York, 129 F. Supp. 2d 511, 519 (E.D.N.Y. 2001) (noting that, like the ADA, USERRA requires that "the employer must sometimes treat veterans differently from other employees in order to assure that they receive the same benefits as their co-workers").

question about whether a woman intends to get pregnant has been held to be discriminatory.[133] The question involved the applicant's protected status (her gender) and sought to uncover whether that status would logistically infringe on her ability to comply with her employment obligations—presumably, if pregnant she would take maternity leave or leave her employment altogether. Next, under the ADA, a court held that questioning a man's ability to fully utilize his prosthetic arm was discriminatory.[134] Again, the employer sought to determine whether the applicant's protected status (his disability) could logistically burden the employer in the future by hindering the applicant's ability to perform certain tasks.

The similarities between these anti-discrimination statutes, their purposes, and the nature of questions that courts find discriminatory, support a conclusion that an employer violates USERRA by asking "merely logistical" questions. Reservists today find themselves subject to an increasingly burdensome "obligation" that is protected under USERRA.[135] This raises the presumption that employers, by asking logistical questions, are really seeking to uncover the probability that a reservist's service obligations will impinge on his or her availability for civilian employment. While an employer may still utilize the affirmative defense that the servicemember's protected status was not a motivating factor in its employment decision, a court should find that a reservist has established a prima facie case through evidence of questions regarding the extent of future reserve obligations.

V. FOUR CATEGORIES OF QUESTIONS WOULD VIOLATE USERRA

Similar to other federal anti-discrimination statutes, there are some types of interview questions that are permissible, and other categories of questions that could run afoul of USERRA. As noted by one human resource manual, employers may ask certain benign questions about an applicant's past military work experience, such as "whether or not the applicant has served in the military, period of service, rank at time of discharge, and type of training and work experience received while in the service."[136] Presumably, each of these questions would be relevant enough to a business necessity to support the inquiry, because these questions truly help the employer evaluate the applicant's experience and qualifications for the job. However, other questions about an applicant's future military service are likely to raise a presumption of discriminatory intent under USERRA.

133 Barbano v. Madison County, 922 F.2d 139, 143 (2d Cir. 1990) (citing King v. Trans World Airlines, 738 F.2d 255, 258 (8th Cir. 1984)).

134 EEOC v. Wal-Mart Stores, 11 F. Supp. 2d 1313, 1320–21 (D.N.M. 1998).

135 38 U.S.C.A. § 4311(a) (2006).

136 *See* Questions #7, PAC. UNIV. HUMAN RES. HR TRAINING & DEV., INTERVIEW QUESTIONS: LEGAL OR ILLEGAL? (2003), *available at* http://www.pacificu.edu/hr/training/interview/pdfs/LegalOrIllegalInterviewQuestions.pdf.

The first category of impermissible questions can be referred to as *current obligation questions*. These questions relate to how much time an applicant expects to dedicate to the reserves. Examples would be: "How often do you train with the reserves?" or "How long is your annual training?" As mentioned earlier, the typical "one weekend a month and two weeks a year" obligation is no longer the norm for most reservists.[137] Once hired, an applicant must be given time off to attend any training, both required and voluntary.[138] It is natural for an employer to be concerned about employing a person who may be unavailable for the job for several weeks and numerous weekends each year. However, Congress has clearly provided through the plain language of USERRA that this burden cannot be used as the basis for making an adverse employment decision; if these questions were asked, it would be hard to avoid the conclusion that an employer has discriminated against an applicant because of his or her military status.

The second category of impermissible interview questions is *future deployment questions*. These are probably the most common types of pre-employment questions faced by reservists today. This category includes questions such as: "Is your unit scheduled for an upcoming deployment?" or "How likely is it that you will be deployed?" As the United States depends more on its reserve forces to sustain deployments, both internally and abroad, more and more employers will experience the pain of losing employees for military service. As a result, employers will become increasingly cognizant of the likelihood of losing reservist-employees to future deployments. Almost every employment lawyer is aware of the strong protection provided by USERRA for reemployment rights.[139] As these lawyers educate their clients about USERRA's protections and employers either experience or imagine the difficulty of holding open an employee's position for a year or more, employers will undoubtedly hesitate to make a job offer to someone who is likely to be deployed. Again, this would constitute an impermissible motivating factor in the employer's decision of whether to hire the applicant.

The third category of impermissible questions consists of *duration of service questions*. This category is the most straightforward. It encompasses questions such as: "How much longer do you have to serve?" Like the previous two categories, this type of question seeks information about how long an employer could expect to be subjected to the conflicting and superior requirements of the United States military.

Finally, the fourth category covers *service-related disability questions*; these types of questions are prohibited by USERRA as well as by the ADA.[140] The media has paid much attention lately to the number of

137 *See supra* note 60 and accompanying text.
138 *See* Beattie v. Trump Shuttle, Inc., 758 F. Supp. 30, 33 (D.D.C. 1991).
139 *See* Lowe & Lee, *supra* note 33, at 931–32.
140 *See supra* Part III.B.

servicemembers returning with physical and mental injuries.[141] The most prolific disability in the headlines is Post-Traumatic Stress Disorder (PTSD).[142] An unwary interviewer may be tempted to slip in a question about whether an applicant suffers from PTSD because its effects and frequency are becoming well-known, and its symptoms are not obvious during a quick encounter like an interview. While many might think this category is irrelevant due to the heightened sensitivity regarding disability related questions under the ADA,[143] it is worth mentioning here for two reasons. First, USERRA claims can be easier to bring than ADA claims, which requires plaintiffs to show that they are otherwise qualified for the job.[144] Second, USERRA applies to more employers, as it is not limited to employers with a certain number of employees like the ADA.[145]

If no servicemember may be "denied initial employment . . . by an employer on the basis of . . . [his or her] obligation,"[146] then questions that would fall into one of these four categories cannot be asked. Or, if such questions are asked, courts should hold that the questions serve as prima facie evidence that an applicant's protected military status served as a motivating factor in the employer's adverse employment decision. An employer would thus be required to plead and prove an affirmative defense under USERRA—a requirement no employer wants to face.

CONCLUSION

"Employers should expect to face more claims under the Uniformed Services Employment and Reemployment Rights Act . . . ."[147] This observation, made by a Justice Department lawyer at an American Bar Association Conference in March of 2007, seems rather foreboding, but nonetheless accurate. In light of the current international commitments of the United States and the current military force structure, it is unlikely that the strain on the reserves will lighten anytime soon. Likewise, it is unlikely that Congress will eliminate USERRA's broad protections in the near future. On the contrary, the trend seems to be a gradual increase in protections for servicemembers.[148] As USERRA's protections transfer some of the inconveniences of military service from the backs of reservists to employers, one can expect interviewers to have further incentives to

141 *See*, *e.g.*, Jeff Donn & Kimberly Hefling, *War injuries strain vets' system, observers say*, USATODAY, Sep. 29, 2007, http://www.usatoday.com/news/health/2007-09-29-warinjured_n.htm (discussing the high costs of caring for wounded veterans).

142 *Id*.

143 *See supra* Part III.B.

144 *See* Kevin P. McGowan, *Military Leave: ABA Panelists Explore Interplay of Laws on Military Leave, Family Leave, Disabilities*, 58 Daily Lab. Rep. (BNA) C-1 (Mar. 27, 2007).

145 *See* 42 U.S.C.A. § 2000e(b) (2006) (limiting application of the ADA to employers with at least fifteen employees).

146 38 U.S.C.A. § 4311(a) (2006).

147 *See* McGowan, *supra* note 144, at C-1.

148 Each statute passed by Congress to protect servicemembers has provided either identical or heightened protections. *See supra* Part I.A.

inquire into the extent of a reservist's future commitments. Despite one unpublished opinion holding to the contrary, the language and policy behind USERRA, and USERRA's similarity to other anti-discrimination statutes which already provide such protections, suggest that a future case involving questions into the extent of a reservists future service commitments will likely result in a verdict for the plaintiff. This possibility can be mitigated by having employment attorneys educate both themselves and their clients about the types of employment inquiries that are acceptable to ask applicants in the military reserves.

How to Fund and Administer Post-Death Subtrusts in a Declining Economy

David E. Libman, Esq.[*]

INTRODUCTION

Married couples often set up Joint Revocable Living Trusts as a means to avoid probate and reduce estate administration costs.[1] Joint Revocable Living Trusts avoid probate by transferring title to the property during life, but they do not avoid income or estate taxes to the grantor. Income from the Joint Revocable Living Trust (a grantor trust) is taxable to the grantor during life.[2] In a community property state, community property used to fund a Joint Revocable Living Trust retains its community property character.[3] As such, upon the first spouse's death, his gross estate includes his community share of the Joint Revocable Living Trust property, which means that his community share of the property could be subject to estate taxes.[4] As a means of reducing those estate taxes down to zero at the first

[*] David E. Libman, Esq. is a California attorney who was admitted to the California bar in December 2001. Mr. Libman received his J.D., *magna cum laude*, from Chapman University School of Law in 2001. In May 2008, Mr. Libman received his LL.M. in Business Law–Taxation from UCLA School of Law. Presently, Mr. Libman works at the taxation law firm of Wood & Porter in San Francisco, CA (www.woodporter.com). This discussion is not intended as legal advice and cannot be relied on for any purpose without the services of a qualified professional. The opinions in this article are solely those of the author and should not be attributed to Wood & Porter or anyone else other than David E. Libman. Mr. Libman wishes to thank his supervising professor, Andrew Katzenstein, Esq., for his gracious help and supervision in connection with the writing of this article. Mr. Libman also wishes to thank Rob Wood, Esq. for his advice, comments, and feedback regarding this article.

1 Est. Plan. Analysis (RIA) ¶ 33,104 (2008) (discussing the estate planning advantages of a revocable lifetime living trust). In California, trusts are revocable unless the trust instrument says it is irrevocable. CAL. PROB. CODE § 15400 (Deering 2004).

2 I.R.C. § 676(a) (2008); 26 C.F.R. § 1.676(a)-1 (2004).

3 *See, e.g.*, CAL. FAM. CODE § 761(a) (Deering 2006) (regarding revocable trusts, "community property that is transferred in trust remains community property during the marriage").

4 In particular, under I.R.C. section 2038(a), the value of the decedent's gross estate includes "the value of all property . . . where the enjoyment thereof was subject at the date of his death" to the decedent's power "to alter, amend, revoke, or terminate" that property interest. I.R.C. § 2038(a) (2008). Similarly, Section 2036 includes in decedent's gross estate property in which he retained a possession, enjoyment, or income interest; or for which he retained the right to designate persons who shall possess, enjoy, or receive income from the property. I.R.C. § 2036(a) (2008). Even if decedent relinquishes his Section 2036 or 2038 interests in trust property prior to death, if such relinquishment occurs within three years of the decedent's death, Section 2035 might still draw that property back into the decedent's estate if it would have been included in the decedent's gross estate under Sections 2036, 2037, 2038, or 2042. I.R.C. § 2035(a) (2008). All references to "Sections" in this article shall be to the Internal Revenue Code unless otherwise noted. In the case of pronouns that could be referring to males or females, the masculine form will be used throughout.

death, however, the Joint Revocable Living Trust often establishes an A, B, C Subtrust Plan.

Upon the death of the first spouse, an A, B, C Subtrust Plan distributes property within the Joint Revocable Living Trust to an A Trust (the Survivor's Trust), a B Trust (the Credit Shelter Trust), and a C Trust (the Marital Deduction Trust).[5] Trust A, the Survivor's Trust, receives the surviving spouse's share of community assets. Trust B, the Credit Shelter Trust (also sometimes called a "Bypass Trust"), typically receives assets wrapped in the protection of the remaining applicable exclusion amount available to the first-to-die decedent spouse—the amount of assets that can be in the decedent's gross estate without being subject to estate tax.[6]

Through the conclusion of 2008, the applicable exclusion amount is $2 million, which is reduced by up to $1 million to the extent that decedent gifted property out of his gross estate during life.[7] Trust C, the Marital Deduction Trust, receives the decedent's property that did not fund the Credit Shelter Trust, and avoids estate taxes via Section 2056's marital deduction.[8] Thus, the basic structure looks like this:

<table>
<tr><td colspan="3">Joint Revocable Living Trust</td></tr>
<tr><td>↓</td><td colspan="2">↓</td></tr>
<tr><td>Surviving spouse's community share</td><td colspan="2">Decedent's community share</td></tr>
<tr><td>↓</td><td>↓</td><td>↓</td></tr>
<tr><td>Trust A (Survivor's Trust)</td><td>Trust B (Credit Shelter Trust)</td><td>Trust C (Marital Deduction Trust)</td></tr>
</table>

The Joint Revocable Living Trust often distributes assets to its subtrusts (in particular, Trusts B and C) via various forms of pecuniary (fixed-dollar amount) or fractional share formula clauses, which can have greatly varying funding and tax consequences.[9] These formula clauses, and the planning that occurs in conjunction with administering them, often *assumes assets will appreciate*.

5 *See* Monica Dell'Osso & Frayda L. Bruton, [3 Est. Plan.] Cal. Transactions Forms § 15:82 (1999); BORIS I. BITTKER, ELIAS CLARK, & GRAYSON M.P. MCCOUCH, FEDERAL ESTATE AND GIFT TAXATION 551 (9th ed. 2005) (discussing how a particular formula clause could reduce estate taxes to zero).

6 *See* I.R.C. § 2010(a), (c) (2008).

7 *Id*. The applicable exclusion amount rises to $3.5 million in 2009 and is eliminated in 2010 due to the repeal of the estate tax. *Id*.; *see also* Sebastian V. Grassi, Jr., *Choosing the Appropriate Marital Deduction Funding Formula*, 33 EST. PLAN. 27, 27 (2006).

8 I.R.C. § 2056 (2008).

9 *See generally* Grassi, Jr., *supra* note 7.

For example, assume you have a pecuniary bequest that requires distribution to the Credit Shelter Trust of assets in kind valued as of their date of distribution. Also assume you expect those assets to appreciate significantly in value after the decedent's death. It makes sense to fund that bequest with assets in kind as soon as possible in order to (1) avoid significant capital gains realization between date of death and date of distribution values, and (2) to capture later asset appreciation free from estate taxation under the shield of the Credit Shelter Trust.[10] Appreciation, however, cannot always be assumed. As of the writing of this article, numerous experts are either predicting a United States recession or acknowledging that a recession is already occurring.[11]

This article focuses on suggestions regarding the funding and administration of post-death subtrusts in a declining economy. What follows throughout the remainder of this article is a discussion of (1) the basic mechanics of the A, B, C Subtrust Plan; (2) an explanation of various subtrust funding clauses and their effects, including when and how those clauses result in the Joint Revocable Living Trust's realization and recognition of gain or loss; and (3) a set of suggestions for the funding and administration of subtrusts that focuses on what might work best when assets are depreciating. Specifically, the latter set of suggestions includes an assessment of the following possibilities:

1. When a pecuniary bequest of assets in kind distributed at date of distribution values could fund the Credit Shelter Trust with depreciating assets, postpone funding.
2. When a pecuniary bequest of assets in kind could fund the Marital Deduction Trust with depreciating assets, consider funding promptly.
3. In a declining economy, consider using fractional share formula for subtrust funding.
4. A Section 643(e) election may provide a means to recognize loss on certain types of distributions to subtrusts that would not have normally allowed for loss recognition.
5. When depreciating assets could result in underfunding of the Credit Shelter Trust, disclaimers or Partial QTIP Elections may cure what went wrong in funding.
6. Try to avoid a Section 754 election when receiving partnership property that has decreased in value below its inside basis.
7. Pre-death transfers of assets may be a way to avoid a step-down in

10 *See* Jerry A. Kasner, Benton C. Strauss & Michael S. Strauss, 2 Post Mortem Tax Plan. (RIA) ¶ 13.04[8]–[10] (3d ed. 2008), *available at* 1999 WL 1020364.

11 Justin Fox/Davos, *Can the World Stop the Slide?*, TIME, Feb. 4, 2008, at 26; Daniel Gross, *The Unspeakable R Word*, NEWSWEEK, Mar. 10, 2008, at 24; James C. Cooper, *It Sure Looks Like A Recession*, BUSINESS WEEK, Mar. 17, 2008, at 11.

basis of certain assets and, thus, preserve the loss in those assets.

8. In limited circumstances, the Section 2032 alternate valuation date election may be a way to save on estate taxes.

I. THE BASICS: SOME MECHANICS OF THE A, B, C SUBTRUST PLAN

With an A, B, C Subtrust Plan, proper planning of subtrust funding can help reduce (1) estate taxes, (2) generation skipping transfer ("GST") taxes, and (3) ordinary and capital gains income taxes, not only for the distributing trust/estate, but also, potentially, for its beneficiaries. In making planning considerations, it is helpful to keep in mind the basic differences in tax rates. As of 2008, the current high rate for long-term capital gains is 15% (but not for collectibles, which is 28%).[12] The current high income tax rate for individuals and estates is 35%.[13] The current top estate tax rate is 45%.[14] GST transfers such as a "taxable distribution, taxable termination, or direct skip" are taxed at the maximum estate tax rate of 45%.[15]

Thus, all other things being equal, total tax avoidance is preferred. If that is not possible, it is better to pay capital gains rates than ordinary income rates. And it is better to pay income tax rates than it is to pay GST or estate tax rates. On the first death, estate tax can be avoided on the Survivor's Trust and via the Credit Shelter and Marital Deduction Trusts. Furthermore, an exemption from GST tax can be attributed to a subtrust. Therefore, a discussion of some of the mechanics of how those subtrusts can be manipulated is in order.

A. General Power Appointment Versus QTIP Marital Deduction Trusts

Section 2056(a) allows a marital deduction from the value of the decedent's gross estate of an "amount equal to the value of any interest in property which passes or has passed from the decedent to his surviving spouse."[16] Section 2056(b)(1) disallows a decedent from taking the marital deduction if he passes a "terminable interest" to his surviving spouse.[17] A "terminable interest" is an interest that will terminate or fail "on the lapse of time, on the occurrence of an event or contingency, or on the failure of an event or contingency to occur."[18] Terminable interests can include life estates, terms of years, or defeasible fees passed from the decedent to the surviving spouse.[19]

12 I.R.C. § 1(h) (2008).

13 *See id*. § 1(a)–(e); Rev. Proc. 2007-66, 2007-2 C.B. 970, *modified and superseded, but not with respect to the applicable 35% income rate, by* Rev. Proc. 2008-54, 2008-38 I.R.B. 722.

14 I.R.C. § 2001(c) (2008).

15 *Id*. §§ 2001(c), 2641(b).

16 *Id*. § 2056(a).

17 *Id*. § 2056(b)(1).

18 *Id*. § 2056(b).

19 26 C.F.R. § 20.2056(b)-1(b) (2004).

Certain Marital Deduction Trusts provide an exception from the disqualifying "terminable interest rule," namely, the Marital Deduction Trusts envisioned by Subsections 2056(b)(5) (the "General Power of Appointment Trust") and 2056(b)(7) (the "QTIP Trust"). With a Section 2056(b)(5) General Power of Appointment Trust, the decedent gets the marital deduction for a transfer in trust in which the surviving spouse (1) is entitled for life to receive "all the income from the entire interest" or a "specific portion thereof," (2) has a general power of appointment over that trust property to appoint the same to herself or her estate, and (3) in which no third party has the power to appoint that trust interest to "any person other than the surviving spouse."[20]

The General Power of Appointment Trust can cause the first-to-die spouse some pre-death concern that his or her surviving spouse might ultimately gift or will trust property to someone the first-to-die would not like. For this reason, many estate planners and their clients prefer the Section 2056(b)(7) QTIP Trust. A Section 2056(b)(7) QTIP Trust allows an exception to the terminable interest rule if "qualified terminable interest property" (hereafter "QTIP") passes from the decedent to the surviving spouse.[21] To benefit from this QTIP exception, the decedent's executor must make a proper irrevocable election on the decedent's estate tax return to transfer QTIP property with a "qualifying income interest for life" to the surviving spouse.[22] A "qualifying income interest for life" means (1) the surviving spouse must be entitled to all income from the property no less than annually; and (2) that no person, not even the surviving spouse, has power to appoint "any part of the property to any person other than the surviving spouse" while the surviving spouse is alive.[23]

Unlike the Section 2056(b)(5) General Power Of Appointment Trust, the Section 2056(b)(7) QTIP Trust does not provide the surviving spouse with a general power of appointment, thus avoiding the concern inherent in a General Power of Appointment Trust that the surviving spouse would give trust property to someone the first-to-die might not have chosen.[24] Even though the QTIP Trust essentially allows the first-to-die to dictate where the property therein will go after the surviving spouse's death, the value of the QTIP property interest that passed to surviving spouse will ultimately be included in the surviving spouse's gross estate.[25]

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20 I.R.C. § 2056(b) (2008); *see also* 26 C.F.R. § 20.2056(b)-5(j) (2004).

21 I.R.C. § 2056(b)(7) (2008).

22 *Id*. § 2056(b)(7)(B)(i)–(v).

23 *Id*. § 2056(b)(7)(B)(ii); 26 C.F.R. § 20.2056(b)-7(d), (e)(2) (2004).

24 I.R.C. § 2056(b)(7)(B)(ii)(II) (2008); *see also* 26 C.F.R. § 20.2056(b)-5(g) (2004) (regarding the general power of appointment in a Section 2056(b)(5) trust).

25 I.R.C. § 2044(b)(1)(A) (2008).

1. Partial QTIP Elections

Keep in mind that the decedent's executor makes the QTIP election on the decedent's estate tax return: Regulation 20.2056(b)-7(d)(3)(i) permits that election to be partial.[26] When a Partial QTIP Election is made, the QTIP trust will not fail simply "because the portion of the property for which the election is not made passes to or for the benefit of persons other than the surviving spouse."[27] Hence, the Partial QTIP Election can provide a means of fully funding the Credit Shelter Trust, which will be discussed in greater detail *infra*.

2. Generation Skipping Tax Issues and Why it Might be Better to Use a 2056(b)(7) QTIP Trust to Utilize a Reverse QTIP Election

The QTIP Trust also uniquely offers generation skipping tax ("GST") benefits—in particular, the option of a Reverse QTIP Election, which is not possible with a Section 2056(b)(5) General Power of Appointment Trust. GST transfers (such as taxable distributions, taxable terminations, or direct skips) are taxed at the maximum federal estate tax rate, which is 45% through 2009.[28] Each person gets a GST exemption amount equal to the applicable exclusion amount—currently, $2 million in 2008.[29]

Many times, the Credit Shelter Trust has beneficiaries and provisions that would lead to GST transfers. As such, it is often desirable to allocate GST exemption status to that Credit Shelter Trust. But allocation of GST exemption status to a trust must be made to the entire trust (not just portions of the trust or specific assets).[30]

Assume that a decedent has used up $1,000,000 of his applicable exclusion amount during life, leaving only $1,000,000 of applicable exclusion amount available to fund the Credit Shelter Trust at death. Assume also that, for whatever reason, the decedent has his full $2,000,000 of GST exemption available at death. By allocating $1,000,000 of GST exemption to the Credit Shelter Trust, the decedent would waste the remaining $1,000,000 of his available GST exemption *but for* the ability to make a Reverse QTIP Election.

A Reverse QTIP Election allows the decedent to be treated as transferor of the QTIP trust for GST purposes, even though the QTIP trust will be

26 26 C.F.R. § 20.2056(b)-7(d)(3)(i) (2004).

27 *Id*.

28 I.R.C. §§ 2641(b), 2001(c) (2008). Typically, for GST purposes, property is "valued as of the time of the generation-skipping transfer." *Id*. § 2624(a). Nonetheless, direct skip property that is included in the transferor's gross estate automatically receives its estate tax value, which will be the alternate valuation date value, if the estate elects the same. *Id*. § 2624(b); 34B AM. JUR. 2D *Fed. Tax'n.* ¶ 146, 174 (2008). Similarly, all property that transfers in taxable terminations due to the decedent's death may be alternatively valued as of the Section 2032 alternate valuation date. I.R.C. § 2624(c) (2008).

29 I.R.C. §§ 2631(c), 2010(c) (2008).

30 26 C.F.R. § 26.2632-1(a) (2004).

included in the surviving spouse's estate for estate tax purposes.[31] The Reverse QTIP Election is irrevocable and must be made on the tax return on which the election is made, such as a Form 706 return upon the decedent's death.[32] Because GST exemption can only be allocated to an entire trust, a partial Reverse QTIP Election is not allowed.[33] As such, unless the entire QTIP Trust will qualify for GST exemption without severance (which is unlikely), the solution to this dilemma is to set up two QTIP Trusts from the outset: one that is GST exempt and one that is GST non-exempt.[34]

If the exempt and non-exempt QTIP Trusts are to be severed on a fractional basis, they *need not* be funded proportionately, but may be funded non-proportionately, "provided funding is based on either the fair market value of the assets on the date of funding or in a manner that fairly reflects the net appreciation or depreciation in the value of the assets measured from the valuation date to the date of funding."[35] If the exempt and non-exempt QTIP trusts are to be severed based on a pecuniary amount to be paid on the basis of values other than date of distribution values, then the trustee must "allocate assets to the pecuniary payment in a manner that fairly reflects net appreciation or depreciation in the value of the assets in the fund available to pay the pecuniary amount measured from the valuation date to the date of payment."[36]

II. AN EXPLANATION OF SUBTRUST FUNDING CLAUSES

The Joint Revocable Living Trust or will typically distributes to the Credit Shelter and Marital Deduction Trusts via formula clauses, which generally fall into two broad categories: pecuniary formula clauses and fractional share formula clauses.[37] Pecuniary formulas bequest assets with an ascertainable dollar value into a particular trust, leaving the residue to go to the other trust.[38] For example, a pecuniary credit share formula funds the Credit Shelter Trust with a pecuniary amount and leaves the residue to fund the Marital Deduction Trust.[39]

Conversely, a pecuniary marital formula funds the Marital Deduction Trust with a pecuniary amount and leaves the residue to fund the Credit Shelter Trust.[40] Fractional formulas fund one trust (e.g., the Marital Deduction Trust) with a fraction in which the numerator is the desired value of

31 I.R.C. §§ 2652(a)(3), 2044 (2008); Kathryn G. Henkel, Est. Plan. & Wealth Preservation: Strategies & Solutions (RIA) ¶ 5.05[6][a] (2003), *available at* 1999 WL 1017502.

32 26 C.F.R. § 26.2652-2(a)–(b) (2004).

33 *Id*. § 26.2632-1(a).

34 *Id*. § 26.2654-1(b); Henkel, *supra* note 31, ¶ 5.05[6][a].

35 26 C.F.R. § 26.2654-1(b)(1)(ii)(C) (2004).

36 *Id*. § 26.2654-1(a)(ii)(B), (b)(1)(ii)(C).

37 BITTKER, CLARK, & MCCOUCH, *supra* note 5, at 549; William P. Streng & Mickey R. Davis, Retirement Plan. Tax & Fin. Strategies (RIA) ¶ 12.03[4] (2003), *available at* 2000 WL 59417.

38 BITTKER, CLARK, & MCCOUCH, *supra* note 5, at 549–50.

39 Streng & Davis, *supra* note 37, ¶ 12.03[4][d].

40 *Id*. ¶ 12.03[4][e].

the trust, and the denominator is the value of the residue of all assets from which that Marital Deduction will be carved; what is left passes to the residuary share (e.g., the Credit Shelter Trust).[41]

The following is an example of a will provision that distributes to a Trust A Survivor's Trust; a Trust B Credit Shelter Trust *via a pecuniary bequest of property in kind*; and a Trust C QTIP Trust, which receives the residue of the decedent's community share:

> If my wife survives me the trust estate shall be divided into three (3) trusts, hereinafter called Trust "A", Trust "B" and Trust "C", respectively. Trust "A" shall contain my wife's share of our community property. Trust "B" shall contain a sum equal to the largest amount that can pass free of federal estate tax under this Article by reason of the unified credit allowable to my estate but no other credit and after taking account of dispositions under previous Articles of this Will and property passing outside of this Will which do not qualify for the marital or charitable deduction and after taking account of charges to principal that are not allowed as deductions in computing my federal estate tax. For the purpose of establishing the sum disposed of by this Article the values finally fixed in the federal estate tax proceeding relating to my estate shall be used. I recognized that no sum may be disposed of by this Article and that the sum so disposed of may be affected by the action of my Executors in exercising certain tax elections.
>
> The balance of my estate shall pass into Trust "C". All state death taxes on Trust "C", and any expenses deducted on the federal income tax rather than estate tax return, shall be charged against Trust "B". The Executor shall satisfy the bequest to Trust "B" in cash or kind, or partly in each; assets allocated in kind shall be deemed to satisfy this amount on the basis of their values at the date or dates of distribution to Trust "B". The selection of assets in making distributions in satisfaction of the bequest shall not be subject to question by any beneficiary, and no adjustment shall be made to compensate for disproportionate allocation of unrealized gain for federal income tax purposes. If my wife does not survive me, the residue of my estate shall pass to Trust "B". Said trusts shall be held, administered and distributed as hereinafter provided . . . .[42]

A. An Explanation Regarding Distributable Net Income and Realization of Capital Gains and Losses

Cash or property distributions from an estate or trust normally carry out distributable net income ("DNI"), which may be (1) deductible from the estate or trust's taxable income and (2) includible in the beneficiaries' gross income.[43] When receiving a distribution of non-cash property, the value of DNI that the beneficiary is deemed to receive is the lesser of the

41 BITTKER, CLARK, & MCCOUCH, *supra* note 5, at 549–50; James B. Bertles & Joel H. Yudenfreund, *Choosing a Formula Clause Based on Funding Effects*, 19 EST. PLAN. 165, 170 (May/Jun. 1992).

42 Est. Plan. Analysis (RIA) ¶ 38,411 (2008).

43 I.R.C. §§ 643(a) (defining distributable net income), 651 ("Deduction for trusts distributing current income only"), 661 ("Deduction for estates and trusts accumulating income or distributing corpus"), 662 ("Inclusion of amounts in gross income of beneficiaries of estates and trusts accumulating income or distributing corpus") (2008); Bertles & Yudenfreund, *supra* note 41, at 166.

property's adjusted basis or its fair market value at the date of distribution.[44] DNI does not include capital gains or losses from the sale or exchange of capital assets.[45] And pecuniary bequests fulfilled with cash do not entail realization of capital gains or losses.[46]

1. Estates and Trusts May Realize Gain or Loss by Fulfilling a Pecuniary Bequest with an In-Kind Property Distribution

Estates or trusts will recognize gain or loss if the fiduciary (1) fulfills a pecuniary bequest of a beneficiary's right to receive a specific dollar amount with an in-kind property distribution, or (2) elects to have the distribution receive gain or loss treatment under Section 643(e).[47] Absent a Section 643(e) election, funding a fractional share or fairly representative bequest does not result in realization or recognition of gain or loss for the estate or trust because the property being distributed is not satisfying a specific pecuniary bequest.[48]

To provide some context, pursuant to Section 2031, a decedent's gross estate is generally valued at its fair market value as of the decedent's date of death, unless the decedent's executor elects a Section 2032 alternate valuation date (discussed *infra*).[49] Pursuant to Sections 1014(a) and 643(e), the basis of property received from a decedent is generally its fair market value as of the date of the decedent's death (unless the decedent's executor has elected the Section 2032 alternate valuation date) adjusted for gain or loss recognized by the estate or trust on the distribution.[50]

Essentially, therefore, Section 1014(a) has the effect of stepping up or down a decedent's basis on the date of death. There are, however, exceptions. For example, Section 1014's date of death valuation rule does not apply with respect to income in respect of a decedent ("IRD").[51] Satisfaction of a pecuniary bequest with the right to receive IRD can accelerate recognition of income by the recipient of that right; in that case, the recipient must recognize the fair market value of that IRD right at the time of the transfer.[52] IRD exceptions aside, however, the big picture to keep in

44 I.R.C. § 643(e)(2) (2008); Bertles & Yudenfreund, *supra* note 41, at 166.

45 I.R.C. § 643(a)(3) (2008).

46 Boris I. Bittker & Lawrence Lokken, 2 Fed. Tax'n Income Est. & Gifts (RIA) ¶ 40.4.2 (3rd ed. 2000); s*ee also* BITTKER, CLARK, & MCCOUCH, *supra* note 5, at 550.

47 Marc M. Stern & Robert S. Tippett, *Income Taxation of Trusts*, *in* FUNDAMENTALS OF POSTMORTEM TRUST ADMINISTRATION PROGRAM HANDBOOK 209, § 11.50, at 241 (CEB Apr./May 2004).

48 Bertles & Yudenfreund, *supra* note 41, at 167, 170–71.

49 I.R.C. § 2031(a) (2008); 26 C.F.R. § 20.2031-1(b) (2004); 10 Jacob Rabkin & Mark A. Johnson, Current Legal Forms with Tax Analysis (MB) § 7.35 (2007) (ch. 7 by William P. LaPiana). Date of death valuation includes property that the decedent transferred during life, but which still ends up included in the value of his gross estate at death. *Id*.; *see also* Ingleheart v. Comm'r, 77 F.2d 704, 711 (5th Cir. 1935).

50 I.R.C. §§ 1014(a), 643(e)(1) (2008); 26 C.F.R. § 1.1041-1(a) (2004).

51 I.R.C. § 1014(c) (2008).

52 *See id*. § 691(a)(2); 26 C.F.R. § 1.691(a)-1(b) (2004) (defining income in respect of a decedent); Est. Plan. Analysis (RIA) ¶ 80,474 (2008).

mind is that estates or trusts may realize gain or loss on the distribution of in-kind property if the fiduciary is fulfilling a pecuniary bequest to a beneficiary "in satisfaction of a right to receive a distribution of a specific dollar amount, of specific property other than that distributed."[53]

When an estate or trust funds a trust via a specific pecuniary bequest of property in kind, the estate realizes capital gains or loss for income tax purposes based on the change in valuation of that property between decedent's *date of death* and the estate's *date of distribution*.[54] Given that the administration of an estate can be a lengthy process, the gain or loss that can occur between death and distribution can be substantial if significant appreciation or depreciation occurs during that time. After the distributing estate or trust recognizes its gain or loss, the beneficiary trust's basis in the property received is its fair market value on the date of distribution.[55]

2. The Section 645 Election Can Preserve Loss Recognition When Distributing From a Joint Revocable Living Trust to a Subtrust

Funding a subtrust with depreciated property could lead to realizing a loss. Section 267, however, disallows recognition of loss on distributions between related parties, including between the trustee of a trust and "a beneficiary of such trust."[56] Given that a subtrust could be the beneficiary of a Joint Revocable Living Trust, Section 267 could technically disallow recognition of loss on a distribution from a Joint Revocable Living Trust to a Credit Share or Marital Deduction Trust.

Nevertheless, Section 267(b)(13) provides an exception that allows for recognition of loss on distributions for sales or exchanges "in satisfaction of a pecuniary bequest" between "*an estate* and a beneficiary of such *estate*."[57] Section 267(b)(13)'s exception, however, only uses the word "estate" not "trust."[58] Be that as it may, Section 645 allows both the executor of the estate (if one exists) and the trustee of a "qualified revocable trust" (i.e., a trust deemed owned by the decedent's estate under section 676) to *elect* to treat that "qualified revocable trust" as part of the *estate*.[59] Therefore, in the case of a distribution from a Joint Revocable Living Trust, a Section 645 election can be made in order to allow recognition of a loss because that trust can now be deemed an *estate* and come within the Section

53 26 C.F.R. § 1.661(a)-2(f) (2004); *see also* Kenan v. Comm'r, 114 F.2d 217, 219 (2d Cir. 1940); Bertles & Yudenfreund, *supra* note 41, at 166.

54 26 C.F.R. § 1.1014-4(a)(3) (2003) (noting that (1) if property with a fair market value of $175,000 on the decedent's death was used to fund a trust pursuant to a specific pecuniary bequest, and (2) if that property had appreciated to $200,000 on the date of transfer into the trust, then the estate transferring that property to the trust would realize $25,000 of gain, and the trust would take that property with a date of distribution basis of $200,000).

55 *Id*.

56 I.R.C. § 267(a)(1), (b)(6) (2008); Stern & Tippett, *supra* note 47, at § 11.50, at 241.

57 I.R.C. § 267(b)(13) (2008) (emphasis added).

58 *Id*.

59 I.R.C. § 645(a), (b)(1) (2008). To make a Section 645 election, Form 8855 must be filed by the due date that a Form 1041 is due for the taxable estate.

267(b)(13) exception.[60]

B. Pecuniary Formulas and Revenue Procedure 64-19

Suppose that a pecuniary marital share funding clause for a Marital Deduction Trust gives the fiduciary discretion to select assets for funding in kind to be valued at their *date of death* values with the residue going to the Credit Shelter Trust. Because assets used for funding are deemed to have *date of death* values, such a bequest avoids capital gains or loss on those assets between the date of death and date of distribution.[61] Moreover, because the fiduciary has discretion to select the assets in kind, he might allocate depreciating assets to the Marital Deduction Trust and appreciating assets to the Credit Shelter Trust to later reduce the size of the surviving spouse's estate, and, correspondingly, the estate tax due on such estate.[62]

Before 1964, fiduciaries often utilized the foregoing type of "heads we win, tails you lose" selection in their funding choices.[63] In 1964, however, the IRS issued Revenue Procedure 64-19 to specifically address when and whether it would allow the marital deduction in situations where a fiduciary has discretion to "satisfy bequests in kind with assets at their value as finally determined for Federal estate tax purposes," in effect their value as of the *date of death*.[64]

Revenue Procedure 64-19 disallows the marital deduction for pecuniary funding clauses seeking to satisfy bequests of non-cash assets with *date of death* values in situations where that fiduciary had no clear limitation as to how to allocate assets.[65] Revenue Procedure 64-19, however, allows the marital deduction if applicable laws or the distributing instrument (e.g., a will or trust) instructs the fiduciary to use either a *true worth* or *fairly representative* formula.[66] The fiduciary, however, may not be given discretion to choose either the true worth or fairly representative method, or a mixture of them.[67]

60 *Id*. §§ 645(a), 267(b)(13); Scott H. Malin, *Strategies for Handling Difficult Fiduciary Income Tax Issues*, 25 EST. PLAN. 410, 414 (Nov. 1998).

61 Dell'Osso & Bruton, *supra* note 5, at § 15:46, at 43.

62 *Id*.

63 Kathryn G. Henkel, Est. Plan. & Wealth Preservation: Strategies and Solutions (RIA) ¶ 49.02[2][a] (2003), *available at* 1999 WL 1017869.

64 Rev. Proc. 64-19 § 1, 1964-1 C.B. 682, 683; David B. Gaw, *Subtrust Allocation and Funding on the Death of the First Spouse*, *in* FUNDAMENTALS OF POSTMORTEM TRUST ADMINISTRATION PROGRAM HANDBOOK 389, § 14.30 , at 433–34 (CEB Apr./May 2004).

65 Rev. Proc. 64-19 § 2.03, 1964-1 C.B. 682, 683.

66 *Id*. § 2.01–.02.

67 *Id*. § 2.02–.03; Dell'Osso & Bruton, *supra* note 5, at § 15:46, at 43; Est. Plan. Analysis (RIA) ¶ 44,838 (2008) (citing as authority a "Speech by Chief Counsel, 10/19/64"); *cf*. Rev. Rul. 90-3, 1990-1 C.B. 175 (emphasizing a fiduciary's duty to act impartially and fairly towards the beneficiaries).

1. True Worth Pecuniary Formulas

Revenue Procedure 64-19's *true worth formula* option allows the marital deduction when the fiduciary is *required* to distribute assets that have "an aggregate fair market value at the *date*, *or dates*, *of distribution* amounting to no less than the amount of the pecuniary bequest or transfer, as finally determined for Federal estate tax purposes."[68] For example, when funding a pecuniary Marital Deduction Trust under a true worth formula, at the *date of distribution*, that Marital Deduction Trust would receive assets in kind valued at no less than the amount of the pecuniary bequest; the residue would fall to the other Credit Shelter Trust.[69] A true worth formula clause might include the following language:

> My personal representative shall select and distribute to the trustee the cash, securities and other property, including real estate and interests therein, that will constitute the trust, *employing for the purpose values current at the time of distribution*.[70]

True worth pecuniary formulas take the form of (1) true-worth marital deduction formulas, which fund the Marital Deduction Trust with the pecuniary amount, leaving the residue to the Credit Shelter Trust; or (2) true-worth credit shelter trust funding formulas (a.k.a. reverse pecuniary marital deduction funding formula), which fund the Credit Shelter Trust with the pecuniary amount, leaving the residue to the Marital Deduction Trust.[71]

With true worth pecuniary formulas, appreciation in asset values after the date of death ends up increasing the size of the residuary bequest.[72] Depreciation in asset values after the date of death ends up decreasing the size of the residuary estate.[73] Revenue Ruling 90-3 addresses whether fluctuations in the amount of residuary distribution to the Marital Share (e.g., following a pecuniary credit shelter funding formula) would disqualify it for the marital deduction.[74] Ultimately, the IRS determined that "the possibility that post death fluctuations in the fair market value of estate assets may diminish the residuary bequest to the surviving spouse does not cause the residuary bequest to be a nondeductible terminable interest for purposes of section 2056(b) of the Code."[75]

When a subtrust receives distributions via a true worth pecuniary formula, the distributing trust recognizes gains or losses (if a Section 645 election was made) on the difference in the assets' value between the date of

68 Rev. Proc. 64-19 § 2.02, 1964-1 C.B. 682, 683 (emphasis added).

69 Grassi, Jr., *supra* note 7, at 30; Dell'Osso & Bruton, *supra* note 5, at § 15:46, at 43; Streng & Davis, *supra* note 37, ¶ 12.03[4][e]; Gaw, *supra* note 64, at § 14.31, at 434.

70 VARLEY H. TAYLOR, JR., 6A VERNON'S OKLA. FORMS 2D: ESTATE PLANNING § 8.11(b) (2002). (emphasis added).

71 *Id*. § 8.11(e); Grassi, Jr., *supra* note 7, at 30.

72 Gaw, *supra* note 64, at § 14.31, at 434.

73 *Id*. § 14.32, at 435.

74 Rev. Rul. 90-3, 1990-1 C.B. 175.

75 *Id*.

death and date of distribution; that gain or loss will be attributed to the residuary share.[76] The beneficiary trust's basis in the property received is its fair market value on the date of distribution.[77]

2. The Fairly Representative Formula

Revenue Procedure 64-19 also allows for a *fairly representative method* funding option, under which the fiduciary must satisfy the pecuniary bequest to the Marital Deduction Trust by distributing assets "fairly representative of [post-death] appreciation or depreciation in the value of all property thus available for distribution in satisfaction of such pecuniary bequest or transfer."[78] If the fairly representative formula is used, "the marital deduction is equally determinable and may be allowed in the full amount of the pecuniary bequest or transfer in trust passing to the surviving spouse."[79]

Basically, this means that if you are going to fund a pecuniary bequest based on *date of death* values, when making the distribution you need to use assets that are fairly representative of appreciation that has occurred since the decedent's *date of death*. A fairly representative formula clause might be worded as follows:

> My executor shall value the property distributed in satisfaction of this bequest at the adjusted basis of such property for federal income tax purposes; provided, however, that my executor must select property of my estate that, in the aggregate, is fairly representative of the total of all appreciation or depreciation in the value of all property available for distribution in satisfaction of this bequest between the date of valuation for federal estate tax purposes and the date or dates of distribution.[80]

Funding the Marital Deduction Trust under a *fairly representative formula* is not automatically treated as a sale or exchange and does not automatically result in a realization of capital gains or losses by the distributing trust.[81] The basis in the property distributed is its carryover date of death value.[82] With a fairly representative formula, appreciation and depreciation that occurs in the decedent's gross estate between the date of death and date of distribution almost always results in overfunding or underfunding of both the Martial Deduction Trust and the Credit Shelter Trust.[83]

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76 I.R.C. § 645 (2008); Gaw, *supra* note 64, §§ 14.31, 14.35, at 434–36.
77 26 C.F.R. § 1.1014-4(a)(3) (2004).
78 Rev. Proc. 64-19 § 2.02, 1964-1 C.B. 682, 683; Est. Plan. Analysis (RIA) ¶ 44,838 (2008).
79 Rev. Proc. 64-19 § 2.02, 1964-1 C.B. 682, 683.
80 Henkel, *supra* note 63, ¶ 49.02[2][a][v].
81 *See* Gaw, *supra* note 64, § 14.33, at 435–36.
82 *See* I.R.C. § 1014(a) (2008).
83 Gaw, *supra* note 64, § 14.33, at 435; Bertles & Yudenfreund, *supra* note 41, at 169.

3. The Minimum Worth Formula

Several commentators and practitioners suggest that Revenue Procedure 64-19 also allows for the use of a "minimum worth" hybrid type formula.[84] A minimum worth formula funds a pecuniary bequest with assets valued at the *lesser* of their *date of death* or *date of distribution* values.[85] A minimum worth clause may look like this:

> My executor shall value the property distributed in satisfaction of this bequest at the lesser of the adjusted basis of such property for federal income tax purposes or the fair market value of such property as of the date or dates of distribution.[86]

The *lowest basis possible* nature of the minimum worth clause means that funding will not result in gain realization but could result in recognition of loss—provided, of course, that the proper Section 645 elections are made.[87] At least one commentator suggests that the minimum worth formula is almost never used today and is not conducive for GST exemption planning.[88]

C. Formula Clauses Unaffected by Revenue Procedure 64-19

1. Proportionate and Non-Proportionate Fractional Share Formulas

Revenue Procedure 64-19 does not apply, and hence does not forbid, the marital deduction for bequests or transfers of fractional shares "under which each beneficiary shares proportionately in the appreciation or depreciation in the value of the assets to the date, or dates, of distribution."[89] Fractional share clauses typically fall into two categories: (1) proportionate funding clauses, which apply the funding fraction based on *date of death* values; and (2) non-proportionate funding clauses, which apply the fraction based on *date of distribution* values of the residuary share available for distribution.[90]

A proportionate fractional share marital formula might look like this:

> I give to my spouse [or to a qualifying trust for her benefit] the fraction of my residuary estate determined as follows. The numerator shall be the smallest amount that, if allowable as a marital deduction for federal estate tax purposes, will result in no federal estate tax being due from my estate, taking into account all other deductions allowed for federal estate tax purposes, the unified credit, the amount of gift tax payable with respect to post-1976 taxable gifts, and the state death tax (but only to the extent that the latter credit does not increase the state death tax payable to any state). The denominator of the fraction shall be the federal estate tax value of my residuary estate so determined. For purposes of this

84 *See, e.g.*, Bertles & Yudenfreund, *supra* note 41, at 165–66; Henkel, *supra* note 63, ¶ 49.02[2][a][iv]; Grassi, Jr., *supra* note 7, at 30; Gaw, *supra* note 64, § 14.34, at 436.

85 Grassi, Jr., *supra* note 7, at 30; Gaw, *supra* note 64, § 14.34, at 436.

86 Henkel, *supra* note 63, ¶ 49.02[2][a][iv].

87 *Id*. ¶ 49.02[4][b][v]; Bertles & Yudenfreund, *supra* note 41, at 167.

88 Grassi, Jr., *supra* note 7, at 30.

89 Rev. Proc. 64-19 § 4.01(1), 1964-1 C.B. 682.

90 TAYLOR, JR., *supra* note 70, § 8.11(f)–(g); Grassi, Jr., *supra* note 7, at 32–34; Bertles & Yudenfreund, *supra* note 41, at 170–71.

> gift, my residuary estate shall include only assets that would qualify for the federal estate tax marital deduction if they were distributed outright to my spouse.[91]

With the foregoing formula in mind, assume you have a decedent with a completely unused $2,000,000 applicable exclusion and $5,000,000 of his community share to be split between the Marital Deduction and Credit Shelter Trusts. In that situation, the numerator of the fraction will be $3,000,000 ($5,000,000 – $2,000,000), and the denominator will be $5,000,000. That 3/5 fraction will be multiplied against each asset available for distribution.

The foregoing proportionate fractional funding can often present an administrative hassle for the fiduciary.[92] This is because for purposes of distribution, the fraction for the proportionate fractional share formula is applied to each asset available for distribution on a pro-rata basis, and each asset is fractionalized.[93] Moreover, the process of fractionalizing each asset strips the fiduciary of the ability to select which assets go into which trust.[94]

To overcome the lack of fiduciary discretion inherent in a proportionate fractional share clause, practitioners often like to modify the foregoing proportionate formula clause by adding language that makes it a non-proportionate "pick and choose" clause.[95] With the "pick and choose" clause, each time there is a distribution, the fraction is applied to the value of the asset pool available for funding.[96] Unlike the proportionate fractional share formula, which does not require any revaluation of assets after the date of death, the "pick and choose" formula necessitates revaluing all the assets available for distribution each time that a distribution is made.[97] Thereafter, the fiduciary has *discretion* to satisfy whatever dollar amount the fraction yields by picking and choosing assets in kind for distribution.[98]

I suggest language that looks something like the following could be added to the foregoing proportionate formula clause example in order to make it a "pick and choose" clause:

> In making the distributions contemplated above, the trustee shall have discretion to select assets in kind for distribution, which discretion shall not be subject to question by any beneficiary. Each time the trustee makes a distribution, all assets then available for distribution shall be revalued as of their date of distribution, and the fraction shall be applied to those assets based on their revaluation as of the date of that distribution.

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91 Streng & Davis, *supra* note 37, ¶ 12.03[4][f].

92 Bertles & Yudenfreund, *supra* note 41, at 171; Grassi, Jr., *supra* note 7, at 32.

93 Streng & Davis, *supra* note 37, ¶ 12.03[4][f]; TAYLOR, JR., *supra* note 70, § 8.11(f); Bertles & Yudenfreund, *supra* note 41, at 170–71.

94 TAYLOR, JR., *supra* note 70, at § 8.11(f)(2).

95 *Id*. at § 8.11(g); Streng & Davis, *supra* note 37, ¶ 12.03[4][f].

96 Grassi, Jr., *supra* note 7, at 32–33; Bertles & Yudenfreund, *supra* note 41, at 171.

97 Grassi, Jr., *supra* note 7, at 33.

98 *Id*.

Revenue Ruling 69-486 dealt with a trustee who had no authority to make a non-proportionate distribution in kind but did so because of a mutual agreement between the beneficiaries.[99] The Service held that such a non-proportionate distribution, when not within the discretion of the trustee, would receive exchange status, which could therefore result in the estate realizing capital gains.[100] Various subsequent IRS private letter rulings have suggested that there will be no income tax consequence (i.e., no realization of gain or loss) with a "pick and choose" formula when the fiduciary is given discretion to pick and choose the assets.[101]

Funding with fractional share bequests, whether proportionate or non-proportionate, yields tax results that are similar to the "fairly representative" method discussed above. Because the fractional share bequests automatically reflect a fractional share of appreciation or depreciation that occurs between the date of death and date of distribution, they do not generate any capital gain or loss for income tax purposes.[102] The recipient's basis in the property is its carryover date of death value (i.e., the fair market value at the date of the decedent's death).[103]

Appreciation or depreciation in the decedent's gross estate typically results in either over-funding or under-funding of the respective Marital Deduction Trust and Credit Shelter Trust shares.[104] As a result, typically, a fractional share bequest does not allow the Credit Shelter Trust to capture any of the benefits of post-death appreciation or depreciation that may occur between date of death and date of distribution.

2. Bequests of Specific Assets

Revenue Procedure 64-19 does not apply to bequests of specific assets, meaning that such bequest could qualify for the marital deduction without violating Revenue Procedure 64-19.[105] Because a specific asset bequest does not constitute a sale, the estate realizes "no gain or loss from the distribution of property specifically bequeathed."[106] The beneficiary's basis in the asset received is its fair market value on the date of decedent's death.[107]

99 Rev. Rul. 69-486, 1969-2 C.B. 159.

100 *Id*.

101 Kasner, Strauss, & Strauss, *supra* note 10, ¶ 13.04[4] (citing Private Letter Rulings 7929054, 8029054, and 8119040).

102 BITTKER, CLARK, & MCCOUCH, *supra* note 5, at 551; *see also* 26 C.F.R. § 1.1014-4(a)(3) (2003); Bertles & Yudenfreund, *supra* note 41, at 171.

103 I.R.C. §§ 1014(a), 643(e) (2008); 26 C.F.R. §§ 1.1014-1(a), 1.1014-4(a) (2003).

104 Grassi, Jr., *supra* note 7, at 31–34.

105 Rev. Proc. 64-19 § 4.01, 1964-1 C.B. 682.

106 Kenan v. Comm'r, 40 B.T.A. 824, 827 (B.T.A. 1939), *aff'd,* 114 F.2d 217, 219–21 (2d Cir. 1940).

107 I.R.C. §§ 1014(a), 643(e)(1) (2008); 26 C.F.R. §§ 1.1014-1(a), 1.1014-4(a) (2003).

3. Pecuniary Bequests to be Satisfied With Cash, In Kind Without Discretion, or When Assets Selected by The Fiduciary for In Kind Distribution Must be Distributed at Date of Distribution Values

Revenue Procedure 64-19 does not apply to a pecuniary bequest or transfer in trust, whether in a stated amount or an amount computed by the use of a formula, if:

> (a) The fiduciary must satisfy the pecuniary bequest or transfer in trust solely in cash, or
>
> (b) The fiduciary has no discretion in the selection of the assets to be distributed in kind, or
>
> (c) Assets selected by the fiduciary to be distributed in kind in satisfaction of the bequest or transfer in trust are required to be valued at their respective values on the date, or dates, of their distribution.[108]

The consequences to the foregoing types of bequests are as follows: Cash distributions do not constitute a sale and therefore do not entail realization of gain or loss by the estate.[109] Rather, as is discussed *supra*, a cash distribution from a trust normally carries out distributable net income that may be (1) deductible from the trust's taxable income and (2) includible in the beneficiaries' gross income.[110] And obviously, the beneficiary's basis in the cash would be the value of the cash.

Specific assets to be distributed in kind without fiduciary discretion presumably would or would not receive sales treatment, depending on whether they were to be distributed based on date of death or date of distribution values. And fiduciary distributions of assets to be selected in kind and valued as of their date of distribution would receive sale treatment and realize gain or loss, the result being that the subtrusts receiving the distributions would take a basis in those assets equal to their fair market value as of the date of distribution.[111]

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108 Rev. Proc. 64-19 § 4.01, 1964-1 C.B. 682.

109 *See* Bittker & Lokken, *supra* note 46, ¶ 40.4.2; *see also* BITTKER, CLARK, & MCCOUCH, *supra* note 5, at 550.

110 I.R.C. § 643(a) (defining distributable net income), § 651 (deduction for trusts distributing current income only), § 661 (deduction for estates accumulating income or distributing corpus), § 662 (including amount in gross income of beneficiaries or estates and trusts accumulating income or distributing corpus) (2008); Bertles & Yudenfreund, *supra* note 41, at 166.

111 26 C.F.R. §§ 1.661(a)-2(f), 1.1014-4(a)(3) (2004); *see also* Henkel, *supra* note 63, ¶ 49.02[4][b][v]. In that regard, incidentally, the IRS has ruled in a Technical Advice Memorandum that when the fiduciary is given broad discretion to fund a pecuniary Credit Shelter Trust (thus funding the Martial Deduction Trust with the residue), such discretion will not disqualify the marital deduction if the fiduciary is required to act in an impartial manner with respect to all beneficiaries in funding that Credit Shelter Trust. I.R.S. Tech. Adv. Mem. 8649002 (Aug. 14, 1986) *available at* 1986 WL 371019; *see also* Est. Plan. Analysis (RIA) ¶ 44,838 (2008).

III. SUGGESTIONS REGARDING SUBTRUST FUNDING AND ADMINISTRATION WHEN ASSETS ARE DEPRECIATING

A. When a Pecuniary Bequest of Assets In Kind Could Fund the Credit Shelter Trust with Depreciating Assets, Postpone Funding

As mentioned above, a pecuniary distribution of assets in kind based on date of distribution values typically results in recognition of capital gains or losses by the estate.[112] With that in mind, assume a market where assets are generally appreciating and you have a client with a significant Joint Revocable Living Trust interest (e.g., a $5,000,000 community property share) that will distribute to both a Credit Shelter Trust and a Marital Deduction Trust. Assume further that the Credit Shelter Trust can shield all unused applicable exclusion amounts up to $2,000,000, which would leave approximately $3,000,000 for a Marital Deduction Trust.

In the foregoing example, it might make sense to fund the smaller of the two trusts (i.e., the Credit Shelter Trust) with a pecuniary true worth formula. This approach can completely fill the Credit Shelter to its $2,000,000 limit; it will also result in fewer potential capital gains than would be the case if the $3,000,000 Marital Deduction Trust funded with the pecuniary bequest.

If, on the other hand, the Marital Deduction Trust is expected to be smaller, it could potentially make more sense to fund it with a pecuniary true worth formula. In a depreciating market, however, that could prevent you from filling the Credit Shelter to its capacity because it will receive the negative fluctuation of the residue.[113]

For the sake of further explanation, assume that a Joint Revocable Living Trust distributes to a Credit Shelter Trust with a pecuniary true worth formula, which would subject the distribution to capital gains and loss treatment. If assets are expected to appreciate significantly in between the *date of death* and the *date of distribution*, it makes sense to fund that pecuniary credit share bequest as soon as possible in order to (1) avoid significant capital gains realization between date of death and date of distribution values, and (2) capture later appreciation on those assets free from estate taxation by virtue of the shield of the Credit Shelter Trust.[114] A delay in pecuniary funding of that Credit Shelter Trust (while assets appreciate) results in (1) greater potential for capital gains on funding, and (2) a larger residue falling into the Marital Deduction Trust at the time of distribution.

112 Gaw, *supra* note 64, § 14.32, at 435.

113 *See* discussion *infra* Part III.B.1; *see also* BITTKER, CLARK, & MCCOUCH, *supra* note 5, at 551 (posing the question of when it makes sense to fund the Credit Shelter or Marital Deduction Trusts with a pecuniary true worth formula); Grassi, Jr., *supra* note 7, at 29 (discussing how the residuary Credit Shelter Trust of a pecuniary marital deduction formula will "enjoy any appreciation (or suffer any depreciation) that occurs during the administration of the grantor's estate").

114 *See* Kasner, Strauss, & Strauss, *supra* note 10, ¶ 13.04[8]–[10].

Ultimately, when the second spouse dies, there will be more property subject to estate tax in his or her estate.[115]

On the other hand, if assets are expected to *depreciate* between the *date of death* and *date of distribution*, the value of the residuary trust will decrease.[116] Furthermore, after funding, the assets used to satisfy the specific dollar amount that funded the pecuniary trusts may continue to decline in value. For example, if you funded a Credit Shelter Trust with property in kind worth $2,000,000 in January 2008, by July 2008, that property might only be worth $1,700,000. Therefore, especially when funding a pecuniary Credit Shelter Trust, an incentive exists to fund with assets that are less likely to depreciate further after funding—provided that you comply with Revenue Procedure 64-19 and use date of distribution values for valuation instead of date of death values.[117]

When assets are declining in value, there is an incentive to postpone pecuniary distributions to the Credit Shelter Trust to (1) allow the estate to realize greater capital losses when the Credit Shelter Trust actually funds, and (2) allow for the possibility of placing more assets in the Credit Shelter Trust because of their lower date of distribution values. After funding, if the economy shifts and those assets in the Credit Shelter Trust start appreciating, a greater number of assets will be able to appreciate free from estate taxation.

The following possible pecuniary credit share formula clause might be effective in addressing the foregoing concerns that can come from the effects of asset appreciation or depreciation:

> As soon as is reasonably possible after the decedent's date of death, (1) the Trustee shall determine the amount of the decedent's remaining applicable exclusion amount ("Remaining Applicable Exclusion Amount") available to the decedent as of the decedent's date of death, and (2) the Trustee (or a qualified investment advisor of the Trustee's choosing) shall make an assessment (the "Valuation Assessment") as to which assets in the decedent's estate are likely to appreciate or depreciate in value during the duration of estate administration, including an assessment of the extent to which such appreciation or depreciation may occur. Once that Valuation Assessment is made, the Trustee shall have discretion to select assets in kind and distribute the same into the Credit Shelter Trust to the extent of the Remaining Applicable Exclusion Amount.
>
> All assets selected by the Trustee to be distributed in kind to the Credit Shelter Trust shall be valued at their respective values on the date, or dates, of their distribution. If, based on the Valuation Assessment, the Trustee determines that the Credit Shelter Trust can be filled primarily with assets that are either likely to appreciate or not likely to depreciate, then the Trustee shall attempt to distribute such assets into the Credit Shelter Trust as soon as reasonably possible after the decedent's death in order to avoid unnecessary capital gains taxes based on the

115 *See id*.
116 Gaw, *supra* note 64, § 14.32, at 435.
117 Bertles & Yudenfreund, *supra* note 41, at 166–67; Rev. Proc. 64-19 § 2, 1964-1 C.B. 682.

> passage of time.
>
> If, on the other hand, based on the Valuation Assessment, the Trustee determines that the Credit Shelter Trust will have to be filled with assets that are not likely to appreciate or that are likely to depreciate, then the Trustee shall wait to distribute such assets to the Credit Shelter Trust until the latest time possible so as to avoid needless waste of the Remaining Applicable Exclusion Amount by virtue of distributing depreciating assets to the Credit Shelter Trust before it was necessary to do so.
>
> In utilizing his or her distributing discretion, including with respect to timing of distributions, the Trustee shall comply with all Federal, State, and local laws. Any questions regarding whether the Trustee acted reasonably with respect to the time of a distribution shall be considered in light of only the information reasonably available to the Trustee at the time of the distribution, and not in light of information that only became available after such distribution.
>
> All residuary assets that the Trustee does not distribute into the Credit Shelter Trust shall be distributed to the Marital Deduction QTIP Trust, but the Trustee has discretion, if he or she believes it necessary, to distribute certain assets into the Marital Deduction QTIP Trust before he has completed all distributions into the Credit Shelter Trust.
>
> In the event that circumstances could result in underfunding of the Credit Shelter Trust to the full extent of the Remaining Applicable Exclusion Amount, the Trustee shall have discretion to make a Partial QTIP Election in order fully fund the Credit Shelter Trust. Furthermore, to the extent that the surviving spouse properly disclaims (pursuant to Section 2518) any interest in the Marital Deduction QTIP Trust at a time when the Credit Shelter Trust is not fully funded to the extent of the Remaining Applicable Exclusion Amount, then such disclaimed interest shall be distributed to the Credit Shelter Trust to the extent of the Remaining Applicable Exclusion Amount.[118]

B. When a Pecuniary Bequest of Assets In Kind Could Fund the Marital Deduction Trust with Depreciating Assets, Consider Funding Promptly

What if you have a pecuniary marital share formula under which the residue falls to the Credit Shelter Trust? If assets are depreciating, does it still make sense to postpone funding? Perhaps not. As mentioned *supra*, with the pecuniary marital share formula, the residuary Credit Shelter Trust reaps the benefits of appreciation or suffers the detriment of depreciation that occurs between the date of death and the pecuniary distribution to the Marital Deduction Trust.[119] That is, if the fiduciary waited a long time to satisfy the pecuniary bequest to the Marital Deduction Trust with assets that are depreciating, he would need even more assets to satisfy that pecuniary dollar amount, which means that the residuary Credit Shelter Trust would receive even less.

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118 See discussion *infra* Part IV.E for further explanation of Partial QTIP Elections and disclaimers.

119 Grassi, Jr., *supra* note 7, at 29.

On the other hand, if near the date of death, the fiduciary promptly funded the Marital Deduction Trust with assets based on date of distribution values that are expected to depreciate further in value, he would have satisfied that bequest with fewer assets than would be necessary later. This prompt funding of the pecuniary marital share at least leaves open the possibility that those residuary assets that funded the Credit Shelter Trust could appreciate over time. As such, when assets are depreciating, it may make more sense to fund the pecuniary marital share promptly.

C. In a Declining Market, Use of a Fractional Share Formula Could be Desirable

Assume that a trust distributes to its subtrusts via a fractional share formula, which will not result in any realization of gain or loss upon the distribution absent a Section 643(e) election. If assets are generally depreciating, then the strategy of funding the Credit Shelter Trust right away via a pecuniary bequest in order to avoid capital gains no longer applies. After all, unfortunately there are few or no capital gains to avoid. Rather, after that fractional distribution, the fractionalized assets distributed will simply retain their carryover date of death value.[120] Therefore, a fractional share "pick and choose" formula might be more attractive than it would normally be in an appreciating market.

The fractional share "pick and choose" formula offers the fiduciary discretion—after applying the fraction to the assets available for distribution—to choose which assets end up in which subtrust without having to worry about violation of Revenue Procedure 64-19.[121] Moreover, because the "pick and choose" fractional share requires revaluation of all assets available for distribution each time a distribution occurs, each distribution has the effect of *naturally equalizing* any appreciation and depreciation that has occurred up to that point in time.[122]

Still, a pecuniary true worth formula based on date of distribution values also offers a great deal of "pick and choose" flexibility for the distributing fiduciary.[123] Therefore, unless there is a concern that the fiduciary will not be able to gauge which assets should go in which trust—in which case the *naturally equalizing* effect of a "pick and choose" fractional formula might be desirable—a pecuniary true worth formula still seems like it would be a preferable formula choice because of its flexibility.

120 26 C.F.R. § 1.1014-4(a)(3) (2004).

121 Rev. Proc. 64-19 § 4.01, 1964-1 C.B. 682, 684 (mentioning non-applicability of Revenue Procedure 64-19 to fractional share bequests "under which each beneficiary shares proportionately in the appreciation or depreciation in the value of assets to the date, or dates, of distribution").

122 Jeffery N. Pennell & Richard H. Clark, *Estate Tax Marital Deduction*, [Est. Gifts & Trusts] Tax Mgmt. (BNA) No. 843-2nd, at A-150 (Mar. 7, 2005).

123 *Id*. at A-125.

D. If All Assets Distributed in a Fairly Representative or Fractional Bequest Have Depreciated, Consider Using a Section 643(e) Election to Recognize Loss

As discussed *supra*, certain types of fractional share, fairly representative, and residuary bequests do not ordinarily result in the realization of gain or loss by the estate or trust. Nevertheless, under Section 643(e)(3), the fiduciary of an estate or trust may elect to recognize gains or losses on a distribution of non-cash property in kind to a beneficiary, in which case the property is treated as though it were sold to the beneficiary at its fair market value.[124] Regulation section 1.661(a)-2(f) suggests that a Section 643(e) election presents a gain/loss realization *option* "in addition" to the required realization of gain and loss for specific pecuniary bequests of in-kind property discussed *supra*.[125] Therefore, a Section 643(e) election provides an option that can give sales treatment to fractional share, fairly representative, and residuary bequests for purposes of realizing (and then recognizing) gain or loss.[126]

One concern might be that even if a Section 643(e)(3) election allows for recognition of loss, such loss would not be deductible in the case of a distribution from a Joint Revocable Living Trust to a subtrust due to the disallowance of deductions between related taxpayers (such as fiduciaries and beneficiaries of a trust) contained in Section 267.[127] Nonetheless, a Section 645 election to treat the qualified revocable trust as an estate may allow the loss recognition of a Section 643(e)(3) election without the impediment of Section 267 related party disallowance.[128] Another concern lies in the language of Section 643(e)(3)(B), which requires that a Section 643(e) election applies "to all distributions made by the estate or trust during a taxable year," meaning that the election may not be discretionarily used only for particular asset distributions.[129]

In light of the foregoing, a fiduciary may want to consider a Section 643(e)(3) election where the Joint Revocable Living Trust's use of fairly representative or fractional distributions throughout the year results in a net distribution of depreciated assets for which no loss would normally be recognized. Depending on how the math works out, it might be worth it to the trust (deemed the estate via a Section 645 election) to recognize the net loss via the Section 643(e) election. In any given tax year, the distributing trust

124 I.R.C. § 643(e)(3) (2008); John L. Peschel & Edward D. Spurgeon, Fed. Tax'n Trusts, Grantors, and Beneficiaries (RIA), ¶ 3.05[2][a], (3d ed. Aug. 1998), *available at* 1999 WL 1032362; *see also* IRS Website, http://www.irs.gov/instructions/i1041/ch02.html#d0e6290 (follow "Question 7" hyperlink under "Other Information") (last visited Aug. 22, 2008).

125 26 C.F.R. § 1.661(a)-2(f) (2004).

126 Henkel, *supra* note 63, ¶ 49.02[4][a]; Bertles & Yudenfreund, *supra* note 41, at 170–72.

127 I.R.C. §§ 267(a)(1), (b)(6) (2008).

128 *Id*. §§ 267(a)(1) & (b)(6), 643(e)(3), 645; *see also id*. § 267(b)(13) (creating an exception to the loss disallowance between related parties "in the case of a sale or exchange in satisfaction of a pecuniary bequest [between] an executor of an estate and a beneficiary of such estate").

129 I.R.C. § 643(e)(3)(B) (2008); Henkel, *supra* note 63, ¶ 49.02[4][a].

may deduct the capital losses only to the extent of up to $3,000 in excess of the amount of its capital gains.[130] Any loss beyond that $3,000 over gain threshold can be carried over to future years until fully utilized.[131] Although $3,000 may not seem like much in any given year, the ability to net accumulated losses against anticipated gains in subsequent years could ultimately result in valuable tax savings for the estate or distributing trust.[132]

E. Consider Using a Disclaimer and/or a Partial QTIP Election in Order to Fully Fund a Credit Shelter Trust that was Underfunded because of Depreciating Assets

Section 2518 allows a person to submit an irrevocable and unqualified written disclaimer of an interest passing to him within nine months of receipt, so long as (1) the disclaimant has not accepted any benefits of the interest disclaimed, and (2) the interest disclaimed will pass to the disclaimant's spouse or someone else without any direction from the disclaimant.[133] If the disclaimant makes a qualifying disclaimer, then gift, estate, and GST transfer taxes apply as though the disclaimed interest had never been transferred to the disclaimant.[134] In some situations where the expected size of the estate may not even exceed the applicable exclusion amount, it might be advisable to simply abandon use of a formula clause altogether, leave the entire estate to the surviving spouse, and include instructions in the will or Joint Revocable Living Trust that any amount the surviving spouse disclaims should be used to fund a Credit Shelter Trust.[135]

Assume, however, that the distributing instrument creates and funds a Marital Deduction Trust and a Credit Shelter Trust. If such funding results in an underfunding of the Credit Shelter Trust share, a disclaimer of the Marital Deduction Trust share by the surviving spouse may be a means to fill that Credit Shelter share to its full capacity.[136] The surviving spouse would, however, need to make such a disclaimer before he or she took any of the benefits of the QTIP trust (e.g., before receiving income from the same). Otherwise, the disclaimer would be ineffective.[137] If a disclaimer is to achieve the desired results of shifting funds to the Credit Shelter Trust, it is advisable for the will or Joint Revocable Living Trust to include language instructing that property disclaimed from the Marital Deduction Trust should go to the Credit Shelter Trust.[138]

130 I.R.C. § 1211(b) (2008); Stern & Tippett, *supra* note 47, § 11.49, at 240.

131 I.R.C. § 1212(b)(1)(B) (2008); Stern & Tippett, *supra* note 47, § 11.49, at 240.

132 I.R.C. § 1211(b) (2008).

133 26 C.F.R. § 25.2518-2(a) (2004); I.R.C. § 2518 (a), (b) (2008).

134 26 C.F.R. § 25.2518-1(a)(3)(b) (2004).

135 Grassi, Jr., *supra* note 7, at 35; *see also* 26 C.F.R. § 20.2056(b)-7(d)(3)(i) (2008); Henkel, *supra* note 31, ¶ 5.05[6][a].

136 Streng & Davis, *supra* note 37, ¶ 12.03[7].

137 Jerry A. Kasner, Benton C. Strauss & Michael S. Strauss, 2 Post Mortem Tax Plan. (RIA) ¶ 15.10 (3d ed. 1998), *available at* 1999 WL 1020381; I.R.C. § 2518(b)(3) (2008).

138 Streng & Davis, *supra* note 37, ¶ 12.03[7].

On the positive side, a disclaimer approach provides tremendous flexibility in the ability to fund the Credit Shelter Trust with whatever amount the surviving spouse is willing to disclaim. On the negative side, you need a surviving spouse that is willing to make such a disclaimer.[139] As such, a Partial QTIP Election has several potential advantages over a disclaimer if the goal is to make adjustments to the amount of assets that will ultimately end up in the Credit Shelter Trust.[140]

With a Partial QTIP Election, the decedent's executor (not the surviving spouse) has the discretion to make a Partial QTIP election.[141] And the Partial QTIP Election does not necessarily need to be made within nine months of the decedent's death, given the ability to obtain a six month extension beyond the nine month deadline after the decedent's date of death to file the estate tax return.[142] Thus, the decedent's executor has extra time, beyond what is available for a disclaimer by the surviving spouse, to determine whether a Partial QTIP Election is warranted in order to adequately fund the Credit Shelter Trust.[143] If underfunding of the Credit Shelter Trust is a concern—for example, because of concerns that a residue will be smaller in light of a declining economy—it might make sense to include language in the will or Joint Revocable Living Trust giving the fiduciary discretion to make a Partial QTIP Election.

On the other hand, a disclaimer could be better than a Partial QTIP Election as a means of placing appreciating assets in the Credit Shelter Trust and depreciating assets in the Marital Deduction Trust. This is because when an executor makes a Partial QTIP Election, the Regulations require that the "partial election must be made with respect to a fractional or percentage share of the property [available for QTIP treatment] so that the elective portion reflects its proportionate share of the increase or decrease in value of the entire property."[144] As such, a Partial QTIP Election cannot shift certain appreciating assets to one trust while shifting other depreciating assets to another trust.[145]

Assume the distributing instrument allows the fiduciary to distribute assets in kind, (e.g., pursuant to a pecuniary formula). If, before funding of the QTIP trust, the surviving spouse disclaims a portion of the same, then the fiduciary will presumably have discretion to distribute certain appreciating assets to the Credit Shelter Trust—assuming that the will or Joint Revocable Living Trust has appropriate language directing disclaimed interests to the Credit Shelter Trust.[146]

139 *See* Grassi, Jr., *supra* note 7, at 34.
140 Kasner, Strauss & Strauss, *supra* note 137, ¶ 15.10.
141 I.R.C. § 2056(b)(7)(B)(v) (2008); 26 C.F.R. § 20.2056(b)-7(d)(3)(i) (2004).
142 I.R.C. §§ 6075(a), 6081 (a) (2008); 26 C.F.R. § 20.6081-1(a)–(c) (2004).
143 Kasner, Strauss & Strauss, *supra* note 137, ¶ 15.10.
144 26 C.F.R. § 20.2056(b)-7(b)(2) (2008).
145 Kasner, Strauss & Strauss, *supra* note 137, ¶ 15.10.
146 *Id*.

F. If Possible, Avoid a Section 754 Election when Receiving Partnership Property that has Decreased in Value Below its Inside Basis

Normally, when a partner obtains a partnership interest in a sale or exchange, he takes a cost basis (i.e., an outside basis) in his partnership interest.[147] If that partner dies after the partnership assets have appreciated or depreciated, then, according to Section 743(a), the inside "basis of partnership property shall *not be adjusted* as the result of a transfer of an interest in a partnership by sale or exchange or on the death of a partner *unless the election provided by Section 754* (relating to optional adjustment to basis of partnership property) is in effect with respect to such partnership or unless the partnership has a *substantial built-in loss* immediately after such transfer."[148] Thus, if a decedent has an interest in a partnership with assets that have appreciated from their inside basis value, and that decedent dies passing that interest to a beneficiary (e.g., like a subtrust), the beneficiary's inside basis in those assets would remain the same as the decedent's unless a valid Section 754 election has been made.[149]

For example, assume a four-person partnership, consisting of Partners A, B, C, and D, with equal partnership interests (i.e., 25% per partner). The partnership has as its only asset a long-term capital asset worth $100,000 with an inside basis of $40,000 (i.e., $10,000 per partner). Each partner has a partnership interest worth $25,000 (25% of 100,000) and an inside basis in the asset of $10,000 (25% of 40,000). If the capital asset is sold for $100,000, each partner realizes $15,000 of gain (i.e., $100,000 – $40,000 = $60,000, and 25% of $60,000 = $15,000).

On the other hand, what if the partnership did not sell the $100,000 capital asset and Partner D died, leaving his partnership interest to a beneficiary ("Benie")? Benie's outside basis in D's partnership interest would be $25,000. Absent a Section 754 election, Benie's inside basis in the $100,000 long-term capital asset would remain $10,000 (i.e., Partner D's carryover inside basis). If the partnership sold that $100,000 capital asset the next day, Benie would have to realize the same $15,000 of gain that will be respectively realized by Partners A, B, and C.[150]

If the partnership had properly filed a Section 754 election, Benie's adjusted inside basis in the $100,000 capital asset would have been adjusted upward to $25,000, rather than remain at $10,000, in order to reflect the difference in value between Benie's outside proportionate $25,000 partnership interest share and Partner D's pre-death $10,000 inside basis in

147 I.R.C. § 742 (2007); STEPHEN A. LIND, STEPHEN SCHWARZ, DANIEL J. LATHROPE, & JOSHUA D. ROSENBERG, FUNDAMENTALS OF BUSINESS ENTERPRISE TAXATION 260–61 (Foundation Press 3d ed. 2005).

148 I.R.C. § 743(a) (2008) (emphasis added).

149 *Id*.

150 *See generally* LIND ET AL., *supra* note 147, at 260–68 (discussing Section 743(a) and the Section 754 election).

the capital asset.[151] Benie would not realize any gain on that sale. A Section 754 election could also decrease Benie's inside basis in the partnership property if Benie's outside proportionate partner share basis was worth less than Partner D's previous inside basis in partnership property.[152]

In light of the foregoing, when assets are appreciating and a partnership interest passes from a decedent to a beneficiary (including a beneficiary subtrust), a Section 754 election makes sense because it adjusts the beneficiary's inside basis in partnership property upwards and thus minimizes capital gains and/or income to that beneficiary. On the other hand, if assets are depreciating, a Section 754 election becomes less appealing, especially for assets that might have a higher inside basis than their actual fair market value. By not making the Section 754 election when assets depreciate, a subtrust beneficiary to a decedent's partnership interest might be able to reap the benefits of deducting losses on the transfer of partnership property, which has retained the decedent partner's inflated inside basis.[153]

The benefits of avoiding the Section 754 election with depreciating assets can only be realized to the extent the property does not have what Section 743(d) refers to as a "substantial built-in loss."[154] That is, if a partnership's adjusted basis in the property exceeds that property's fair market value immediately after the transfer by greater than $250,000, then the partnership has a substantial built-in loss with respect to that property.[155] Section 754's basis adjustment is mandatory (not an election) for "substantial built-in loss" property, and it has the effect of decreasing that inflated adjusted basis in the partnership property to the value of the transferee's proportionate partnership interest.[156]

To be clear, Section 743's mandatory "substantial built-in loss" basis adjustment rule does not apply to certain electing investment partnerships or securitization partnerships.[157] Specifically, a loss limitation rule applies to electing investment partnerships, under which the "transferee partner's distributive share of losses (without regard to gains) from the sale or exchange of partnership property" is only allowed to the extent that "such losses exceed the loss (if any) recognized by the transferor . . . on the transfer of the partnership interest."[158] For securitization partnerships, no mandatory substantial built in loss rule or loss limitation rule applies.[159]

151 *See* I.R.C. §§ 754, 743(b), 734(b) (2008); *see also* Don W. Llewellyn, *Estate Planning For the Departing Executive: Conserving the Estate—A Comprehensive Overview—The Impact Of Recent Tax Reform*, 4 J.L. & COM. 277, 302 (1984).

152 *See* I.R.C. §§ 754, 743(b), 734(b) (2008); *see also* Llewellyn, *supra* note 151, at 302.

153 *See* LIND ET AL., *supra* note 147, at 262.

154 I.R.C. § 743(b), (d) (2008).

155 *Id*. § 743(d)(1) (2008).

156 I.R.C. § 743(b)(2) (2008); *see also* LIND ET AL., *supra* note 147, at 262.

157 I.R.C. § 743(e)–(f) (2008).

158 *Id*. § 743(e)(2); 33 AM. JUR. 2D *Federal Taxation* ¶ 2126 (2008).

159 I.R.C. § 743(f) (2008); 33 AM. JUR. 2D *Federal Taxation* ¶ 2127 (2008).

G. A Transfer of Certain Depreciated Assets Pre-Death May Preserve Loss by Avoiding a Step Down in Basis at Death

Because an estate receives depreciated property from the decedent at its date-of-death fair market value, whatever loss the decedent might have had in that property could go permanently unrecognized in the case of property that receives a step-down in basis.[160] One pre-death strategy to avoid this scenario is to have a spouse (e.g., husband) facing imminent death transfer depreciated property to his spouse (e.g., wife) before death by gift.[161] In that case, pursuant to Section 1041(b), the donee spouse takes the property with the same depreciated basis that it had in the hands of the donor "immediately before the transfer," thus preserving the loss inherent in that depreciated property.[162]

In fact, with such a transfer between spouses, the donee spouse takes the donor's basis regardless of "whether the adjusted basis of the transferred property is less than, equal to, or greater than its fair market value at the time of the transfer."[163] Keep in mind, however, that in a community property state like California, there could be a question of whether the gift received by the donee spouse is separate property or still 50/50 community property.[164] Therefore, the couple should probably do a transmutation agreement to the effect that any remaining community interest of the donor in the gift to the donee spouse shall be considered the donee spouse's separate property.[165]

A donor may also potentially preserve loss in depreciated property by gifting it to a non-spousal donee.[166] Section 1015 makes the basis of such gifts to non-spousal donees the same as in the hands of the "donor or the last preceding owner by whom it was not acquired by gift."[167] Unlike with gifts between spouses, with gifts between non-spouses, Section 1015(a) instructs that if the basis exceeds the property's fair market value, "then for the purpose of determining loss the basis shall be [the property's] fair market value."[168] Therefore, a gift to a non-spousal donee is only effective in avoiding a step-down in basis (and thus a permanent non-recognition of loss) if the donee holds the property received until its value goes back up and exceeds the donor's fair market value basis at the time of the gift.[169]

160 Robert A. Coplan, *Opportunities and Risks for Planners During a Recession*, 18 EST. PLAN. 203, 208 (July/Aug. 1991); I.R.C. § 1014(a) (2008).

161 Coplan, *supra* note 160, at 208.

162 I.R.C. § 1041(b) (2008); 26 C.F.R. § 1.1041-1T, A-11 (2008).

163 26 C.F.R. § 1.1041-1T, A-11 (2008).

164 In California, property a spouse acquires by gift during marriage is that spouse's separate property. CAL. CONST. art. I, § 21; CAL. FAM. CODE § 770(a)(2) (West 2004).

165 *See* WILLIAM W. BASSETT, CALIFORNIA COMMUNITY PROPERTY LAW § 4:16 (2008); CAL. FAM. CODE § 852 (West 2004) (describing the requirements of transmutation agreements).

166 Coplan, *supra* note 160, at 208.

167 I.R.C. § 1015(a) (2008).

168 *Id*.

169 Coplan, *supra* note 160, at 208.

Keep in mind that with either of the foregoing gifting scenarios, pursuant to Section 2035, the property could be drawn back into the donor's estate if (1) the donor dies within three years of the gift; *and* (2) the property, if it had not been given away, would have been included in the decedent's estate under Section 2036 (regarding transfers with a retained life estate), Section 2037 (regarding certain reversionary interests retained by the transferor), Section 2038 (regarding certain revocable transfers), and Section 2042 (regarding proceeds of life insurance).[170] Otherwise, because Section 2035 applies only to the aforementioned four statutes, it does not apply to outright gifts that do not implicate the foregoing four statutes made within three years of the decedent's death.[171]

As an alternative to transferring via gift, selling an asset that is declining in value before death will cut losses on that asset, and at the same time allow the decedent to realize that loss (and recognize loss to the extent that it exceeds capital gains by $3,000) for income tax purposes.[172] Such a sale (provided it is not fraudulently made merely for the purpose of avoiding taxes) will not risk drawing that property back into the decedent's estate under Section 2035.

H. If Estate Tax Will be Due on the First-To-Die Spouse's Estate, Consider Electing Section 2032's Alternate Valuation Date to Reduce Estate Tax

Any article that focuses on what to do when assets depreciate probably warrants at least a brief discussion of Section 2032's alternate valuation date election. When it is an option, Section 2032's alternate valuation date applies three different rules for valuation of the decedent's estate:

> (1) Property the estate "distributed, sold, exchanged, or otherwise disposed of, within 6 months after the decedent's death" thereafter is valued at its *date of distribution* value.[173]
>
> (2) Property not otherwise "distributed, sold, exchanged, or otherwise disposed of" within that 6-month period shall be valued as of the alternate valuation date.[174]
>
> (3) Estate interests that change in value between the decedent's death and the alternate valuation date due to the "mere lapse of time" receive their date of death (as opposed to alternate valuation date) values, "with adjustment for any difference" in those values "as of the later date *not due to mere lapse of time*."[175]

170 I.R.C. §§ 2035, 2036, 2037, 2038, 2042 (2008).

171 *Id*. § 2035(a)(2).

172 *See generally id*. §§ 1211, 1212, 1221, 1222.

173 *Id*. § 2032(a)(1).

174 *Id*. § 2032(a)(2) (setting the alternate valuation date at six months after the decedent's death).

175 *Id*. § 2032(a)(3) (emphasis added); 26 C.F.R. § 20.2032-1(a)(3) (2004). Such "mere lapse of time" property includes assets like life estates, remainders, and patents that naturally decrease in value solely because of the passage of time. 26 C.F.R. § 20.2032-1(f) (2004). In essence, the Code retains those properties' date of death valuations and only allows alternate valuation for decreases in their value unrelated to the mere passage of six months. *Id*.

Section 2032(c) only allows the alternate valuation date election if such election will decrease *both* (1) the value of the decedent's gross estate and (2) the "sum of the tax imposed . . . with respect to property includible in the decedent's gross estate."[176] The goal of most A, B, C Subtrust Plans is to reduce any estate tax to zero on the first spouse's death.[177] Hence, the alternate valuation date is not generally be an option on the first death.[178]

If, however, Section 2032 is an option, it provides some excellent planning opportunities in a declining market beyond the obvious effects of reducing the value of the gross estate and the amount of the estate tax.[179] In particular, since property "distributed, sold, exchanged, or otherwise disposed of" within six months of the decedent's death is valued at its *date of distribution* value, a fiduciary should consider selling property before the six month alternate valuation date in those cases where it is desirable to ensure that certain property ends up in certain beneficiaries' hands.[180]

Such a sale before the six-month deadline will cut the estate's losses on property expected to continue declining in value. The sale will not, however, reduce estate tax on that depreciating property, which would presumably be worth less if it continued to decline in value up to the six month alternate valuation date. For property that is expected to continue declining in value even after it passes to a Marital Deduction Trust, such a sale before the six-month alternative valuation date in the first spouse's estate avoids the even greater step-down in basis that is likely to occur on the death of the surviving spouse.[181]

Finally, a sale of certain items of property after the date of death but before the elected alternate valuation date may also make sense in those situations where it is expected that property will decline in value during the six month period but then begin to appreciate again before the actual *six months after death* alternate valuation date. For example, if a fiduciary strongly felt that property would be at its lowest value as of three months after the date of death, then distributing that property at its lowest value date will have the ultimate effect of reducing the amount of estate tax due after the alternate valuation date election.

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176 I.R.C. § 2032(c) (2008). Regulation 20.2032-1(b)(1) further explains that the "election may be made only if it will decrease both the value of the gross estate and the sum (reduced by allowable credits) of the estate tax and the generation-skipping transfer tax payable by reason of the decedent's death with respect to the property includible in the decedent's gross estate." 26 C.F.R. § 20.2032-1(b)(1) (2008).

177 BITTKER, CLARK, & MCCOUCH, *supra* note 5, at 551.

178 Sandra Price, *Estate Tax Returns*, *in* FUNDAMENTALS OF POSTMORTEM TRUST ADMINISTRATION PROGRAM HANDBOOK 253, § 12.21, at 307 (CEB Apr./May 2004).

179 *See* I.R.C. § 2032(c) (2008). When the alternate valuation date is an option, the decedent's estate tax return reflecting that election must include itemized (1) descriptions of all property in the decedent's gross estate at the time of death, (2) disclosures of all "distributions, sales, exchanges, and other dispositions" that occurred within six months of the decedent's death, and (3) valuations of all such items of property. 26 C.F.R. § 20.6018-3(c)(6) (2008).

180 I.R.C. § 2032(a)(1) (2008).

181 *See id*. § 1014 (a).

I. If Enacted, the Portable Applicable Exclusion Could Avoid the Effects of Depreciation

In June 2006, the House of Representatives approved House Resolution 5638, known as the Permanent Estate Tax Relief Act of 2006, by a relatively substantial 269-156 vote.[182] HR 5638 sought to (1) substantially increase the applicable exclusion amount to $5,000,000, and (2) render the applicable exclusion amount portable by adding to the surviving spouse's applicable exclusion amount the "aggregate deceased spousal unused exclusion amount."[183] HR 5638 would require the first-to-die spouse's executor to make an irrevocable election that would allow the "unused exclusion amount" to be later used by the surviving spouse.[184]

Within weeks of its House passage, the Senate received HR 5638 and read it into Senate proceedings twice and then placed it on the Senate's legislative calendar.[185] Nonetheless, the Senate never took any further action regarding HR 5638 after the resolution was placed on its legislative calendar.[186] Essentially, at this stage, HR 5638 appears to be legislatively dead.

A portable exclusion amount would allow a surviving spouse to avoid the problem associated with having a first-to-die spouse fund a Credit Shelter Trust with assets destined to further decline in value before the surviving spouse's death. Think about it: If the first-to-die spouse had $2,000,000 worth of depreciating assets that funded a Credit Shelter Trust and were worth only $1,000,000 by the time the surviving spouse died, then the Credit Shelter trust proved to be an inferior choice to a portable exclusion amount. In that example, if the first-to-die had not funded a Credit Shelter Trust at all, but instead had elected (via his executor) to give the surviving spouse the portable exclusion, then at the surviving spouse's death, the full $2,000,000 of the first-to-die's unused applicable exclusion amount would still be available to shield assets from estate tax. Instead, because the assets depreciated to $1,000,000 in the Credit Shelter Trust of the first-to-die, essentially $1,000,000 of value that could have been protected from estate tax evaporated between the first and second death.

On the other hand, the problem with the portable exclusion is that it does not increase in value between the first and second death, thus preventing the estate-tax-free appreciation that can occur in a Credit Shelter Trust. In the foregoing example, if the $2,000,000 of assets in the Credit Shelter Trust would have increased to $3,000,000 by the death of the surviving

182 Permanent Estate Tax Relief Act of 2006, H.R. 5638, 109th Cong. §§ 2(b), 3(a) (2006), *available at* http://www.govtrack.us/congress/billtext.xpd?bill=h109-5638 (last visited Aug. 24, 2008) [hereinafter H.R. 5638]. For a summary of all actions related to H.R. 5638, including votes, see the Thomas Library of Congress website, http://thomas.loc.gov/cgi-bin/bdquery/z?d109:HR05638:@@@X (last visited Aug. 24, 2008) [hereinafter *Summary Regarding HR 5638*].

183 H.R. 5638, *supra* note 182, at § 3(a).

184 *Id*.

185 *Summary Regarding HR 5638*, *supra* note 182.

186 *Id*.

spouse, $1,000,000 in extra value would have escaped estate tax. If the decedent's executor had foregone the Credit Shelter Trust in favor of the portable exclusion amount, only $2,000,000 in value would be available to the surviving spouse as a portable exclusion amount at her death. The extra $1,000,000 in appreciation would not have escaped estate taxation.

CONCLUSION

No one particular solution or strategy is a universal panacea for dealing with subtrust funding and administration in a declining market. There are, however, many approaches and strategies that can help make the best of the difficult scenarios presented by a declining economy. In terms of the big picture, the following major points discussed above bear repeating:

1. When a pecuniary bequest of assets in kind distributed at date of distribution values could fund the Credit Shelter Trust with depreciating assets, postpone funding.
2. When a pecuniary bequest of assets in kind could fund the Marital Deduction Trust with depreciating assets, consider funding promptly.
3. Although a fractional share formula may not have seemed that desirable when the economy was good, now that it is declining, the fractional share formula may be less unattractive and possibly even desirable.
4. A Section 643(e) election provides a means to recognize loss on certain types of distributions to subtrusts (e.g., pursuant to fractional share or fairly representative formulas), which would not have normally allowed for loss recognition.
5. In some circumstances, such as when depreciating assets could result in underfunding of the Credit Shelter Trust, disclaimers or Partial QTIP Elections may be desirable to fix what went wrong in funding.
6. If possible, avoid a Section 754 election when receiving partnership property that has decreased in value below its inside basis.
7. Pre-death transfers of assets may be a way to avoid a step-down in basis of certain assets and, thus, preserve the loss in those assets.
8. In limited circumstances, the Section 2032 alternate valuation date election may be a way to save on estate taxes.

Good luck, and, hopefully, the economy will soon be on the road to recovery, so that you will rarely need to consider any of the foregoing strategies.

Recasting Complaints: An Argument for Procedural Alternatives

Paul David Menair[*]

In the time that has passed since the academic debate regarding "substance-specific" procedure reform that took place during the 1980's and 1990's, numerous changes in the civil procedure landscape targeted at specific substantive categories of litigation have either been formally adopted in the Federal Rules of Civil Procedure or judicially adopted, despite the continuing trans-substantive premise of the Rules. This Article suggests that increased tailoring of procedure to specific cases may be inevitable and that reformers could better approach such tailoring by creating alternative non-exclusive procedural mechanisms, rather than by adapting existing procedure to the "type" of case in a mandatory fashion. This approach, modeled after the variety of "special statutory proceedings" that currently exist in state law, would encourage and allow reformers to avoid political conflict and the inevitable unintended consequences of containerizing lawsuits into litigation categories like the "product liability case." The approach might also help address some of the other concerns of critics of substance-specific procedure, such as the threat of a return to technical rules of common law pleading.

INTRODUCTION

Imagine that you are a young lawyer who has filed a lawsuit against a trustee in a state court. Your complaint demands, among other things, an "accounting" of the trust fund.[1] Perhaps you are not entirely sure what that thing called an "accounting" would actually look like if you got it, but you ask for it anyway.[2]

Now imagine that, with your complaint, you diligently sent out a complete set of written discovery requests, including routine requests for copies of account statements and other financial records of the trust—material that you believed to be eminently within the scope of allowable discovery under your state's civil procedure code.[3] In response, you

* J.D., Georgia State University, 2003.

1 *See* DAN B. DOBBS, LAW OF REMEDIES: DAMAGES-EQUITY-RESTITUTION § 4.3(5) (2d ed. 1993) (discussing the accounting remedy).

2 You would not be alone in being confused. *See* Joel Eichengrun, *Remedying the Remedy of Accounting*, 60 IND. L.J. 463, 476 (1985) (citing cases showing that "some confusion remains" with respect to the meaning of the accounting remedy in contemporary practice).

3 Most likely modeled on Federal Rule of Civil Procedure 26(b)(1) (defining the scope of

receive an objection stating that your opponent refuses to provide the requested material because to do so would be the "functional equivalent" of the relief sought in your demand for an accounting.[4]

Assuming there are no controlling cases in your jurisdiction to show that this is clearly wrong, what does one make of this assertion? On the one hand, it seems ludicrous to contend that a trustee can avoid producing ordinarily discoverable documents just because the complaint includes a demand that the court order the defendant to do something that seems conceptually similar.[5] On the other hand, there is certain logic to the argument that if a demand for an "accounting" is understood as a demand that the court order the defendant to produce certain information, it seems unfair to allow the plaintiff to get the same information without having to first prove entitlement to the remedy.[6]

This confusion arises from competing understandings of the accounting remedy. Some would argue that at least one such understanding—accounting as a procedural mechanism for obtaining information about the trust fund—has been rendered meaningless by contemporary discovery practices, even if it continues to haunt the legal imagination.[7] The confusion has led to a call for reform of the substantive law by "remedying the remedy" of accounting to make it clear that what is meant is simply accounting for profits as an element of damages.[8] However, contemporary discovery practice may be an imperfect substitute for the remedial discovery conducted under pre-reform equity procedure—managed discovery conducted before a special master after a preliminary showing of entitlement to the judicial resources of the court.[9] Accordingly, this recollection of the old meaning of accounting may suggest the possibility of innovation in the form of "selective substance-specific procedure."[10]

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discovery as including "any nonprivileged matter that is relevant to any party's claim or defense").

4 The author has encountered this objection on several occasions in practice.

5 *See* Eichengrun, *supra* note 2, at 476 (arguing that contemporary discovery practice makes the aspect of the remedy that he calls "accounting for discovery" obsolete).

6 Eichengrun argues that this "logic" is simply confusion arising from a misunderstanding of the remedy. *See id*. The present author will present a somewhat different argument. *See infra* Part IV.

7 *See* Eichengrun, *supra* note 2, at 476; *see also* DOBBS, *supra* note 1, § 4.3(5) (adopting Eichengrun's description of the remedy in contemporary practice).

8 *See* Eichengrun, *supra* note 2, at 476.

9 *See* JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE: AS ADMINISTERED IN ENGLAND AND AMERICA §§ 436–45 (13th ed. 1988) (describing the remedy in equity under the old system).

10 *See* Stephen N. Subrin, *Fudge Points and Thin Ice in Discovery Reform and the Case for Selective Substance-Specific Procedure*, 46 FLA. L. REV. 27, 28–29 (1994) (proposing "selective substance-specific procedure" as alternative terminology for what commentators had previously described as "non-trans-substantive procedure."); *see also* Robert Cover, *For James Wm. Moore: Some Reflections on a Reading of the Rules*, 84 YALE L.J. 718 (1974) (initiating the discussion of substance specific reform); Robert G. Bone, *Securing the Normative Foundations of Litigation Reform*, 86 B.U. L. Rev. 1155, 1159 (2006) (arguing that Cover's "deeper point" was that "sometimes the justification for a procedural choice necessarily had to take account of substantive policies," and there may be value in making this connection explicit); Stephen B. Burbank, *The Transformation of American Civil*

Any proposal to adapt different procedures to different types of civil action inevitably harkens back to the dark, ancient days of common law pleading rules—a frightening prospect for some.[11] Contemporary civil procedure professors mention the "forms of action," if they mention them at all, as being only of limited and primarily theoretical interest to the contemporary student.[12] The fundamental premise of civil procedure as it is taught in law school today is derived from Rule 2 of the Federal Rules of Civil Procedure: "There is one form of action."[13] This "trans-substantive" premise of civil practice assumes that the entire scope of civil litigation is best governed by a single set of procedural rules.[14] Since the late 1980's, certain academics have advocated a partial return to substance-specific procedure.[15] However, other scholars have roundly criticized any proposal to depart from the trans-substantive premise. These critics insist that substance specificity would open the door to the evils supposedly associated with the old system—notably a waste of judicial resources in settling procedural disputes and resolving cases on technicalities rather than on the merits.[16]

Procedure: The Example of Rule 11, 137 U. PA. L. REV. 1925, 1929–41 (1989) (defending substance specificity and criticizing proponents of trans-substantivity for relying on judicial discretion to tailor general rules to individual cases in the name of procedural neutrality); Carl Tobias, *The Transformation of Trans-Substantivity*, 49 WASH. & LEE L. REV. 1501, 1508 (1992) (arguing that "the trans-substantive center will not hold"); Jeffrey W. Stempel, *Halting Devolution or Bleak to the Future: Subrin's New-Old Procedure as a Possible Antidote to Dreyfuss's "Tolstoy Problem*," 46 FLA. L. REV. 57 (1994) (discussing Subrin's specific proposals).

11 *See* Paul D. Carrington, *Making Rules to Dispose of Manifestly Unfounded Assertions: An Exorcism of the Bogy of Non-Trans-Substantive Rules of Civil Procedure*, 137 U. PA. L. REV. 2067, 2068 (1989) (describing substance-specific procedure as "a ghost in the darkness surrounding academic discussions of the future of civil procedure.").

12 *See, e.g.*, STEPHEN C. YEAZELL, CIVIL PROCEDURE, 371–93 (4th ed. 3d prtg. 1996). Yeazell duly notes Subrin's argument for a selective return to substance specific procedure but maintains that the primary reason why students should understand common law pleading is its relevance to understanding its lingering impact on substantive law. *See id*. at 372–73 (citing Stephen Subrin, *How Equity Conquered the Common Law: The Federal Rules in Historical Perspective*, 135 U. PA. L. REV. 909 (1987) [hereinafter *How Equity Conquered*]).

13 FED. R. CIV. P. 2; *see also* Subrin, *How Equity Conquered*, *supra* note 12 (discussing the evolution of contemporary civil practice).

14 *See, e.g.*, Carrington, *supra* note 11, at 2068 ("[J]udicially-made rules directing courts to proceed differently according to the substantive nature of the rights enforced is an idea that has been wisely rejected in the past and must be rejected for the present and for the future.").

15 *See supra* note 10 and accompanying text.

16 *See, e.g.*, Carrington, *supra* note 11. For a brief summary of arguments in favor of trans-substantive procedural rules, see William B. Rubenstein, *The Concept of Equality in Civil Procedure*, 23 CARDOZO L. REV. 1865, 1885 (2002):

> First, trans-substantive rules are efficient. If the same set of procedural rules governs every form of action, lawyers and judges need only master this one form. Moreover, trans-substantive rules are efficient in that adjudicatory resources do not have to be expended determining which rules of procedure to apply to a given action. Second, trans-substantive rules make procedure more transparent and adjudication on the merits more likely, because the time not spent on selecting the appropriate procedural rules can instead be spent assessing the merits of the action. Finally, trans-substantive rules appear fair because all cases are treated 'equally.'

(footnote omitted).

It is worth noting that "substance-specific procedure" does exist, and always has existed, at the state level. Take, for example, procedures for eviction of a non-paying tenant.[17] For obvious practical reasons, an eviction proceeding cannot conform to the contours of a "civil action" in which the parties exchange pleadings, bicker about discovery for six months or more, and then attempt to try the case by motion.[18] Accordingly, the state legislatures have enacted or retained special statutory proceedings adapted to the needs of landlords for prompt eviction of non-paying tenants despite protestations in state civil procedure codes about there being only one allowable form of civil action.[19]

In light of this stubborn persistence of substance-specific civil procedure at the state level, despite the efficiency supposedly derived from the exorcism of substance from procedure in contemporary civil practice, one suspects that something other than fidelity to an abstract principle was driving the negative reaction to the discussion of substance-specific procedure during the 1980's and 1990's. It is apparent that the defenders of civil trans-substantivity did not fear the proposals for substance-specific reform in the abstract so much as the potential havoc that interested parties could wreak in the rule-making process if such reform were to occur in politically-charged contexts such as civil rights litigation.[20] Paul Carrington, the harshest critic, describes what he believes was really going on as follows:

> [N]umerous academics were proposing to make the Rules non-trans-substantive in the misguided belief that this would advance the ability of civil rights

17 *See* Randy G. Gerchick, *No Easy Way Out: Making the Summary Eviction Process a Fairer and More Efficient Alternative to Landlord Self-Help*, 41 UCLA L. REV. 759 (1994) (discussing summary eviction). For an attempt to argue around the existence of such substance-specific procedure, *see* Carrington, *supra* note 11, at 2079–80 ("There are, to be sure, rules specifically applicable to the representation of corporate shareholders, suits in admiralty, or proceedings in eminent domain. These rules do not apply to litigation between individuals disputing liability for an auto accident. Such special rules are exceptional in their limited application.") (footnotes omitted).

18 *See* Gerchick, *supra* note 17, at 764:

> Intending to provide landlords a more cost-effective means of removing problem tenants than would otherwise be available, most states have established summary eviction proceedings, which move the landlord's eviction lawsuit through the court system much faster than in most civil proceedings by (1) allowing litigation only of issues that are immediately relevant to determining which party retains the right to possession of the rental unit, (2) drastically reducing the time a tenant has to answer the complaint or conduct discovery, and (3) requiring the trial to take place within twenty days of the landlord's request for a trial date.

(footnote omitted).

19 *Id*.

20 *See*, *e.g*., Carrington, *supra* note 11, at 2074–75:

> Moreover, if the procedure rules were the result of a test of strength among political organizations, it is obvious, at least in our political system, that rules would generally favor those litigants with the greater resources, especially those identifiable 'repeat players' who have the larger stakes in procedure rules and hence the greater political energy.

(footnote omitted).

> plaintiffs to enforce their claims; I was obliged to resist that idea on the ground that it would have put the rulemaking process into the political cockpit.[21]

Whatever one makes of the arguments for and against trans-substantivity, the attempt by scholars like Carrington to draw a line in the sand against substance-specific reform has begun to fail at the federal level. There have been recent changes in the judicial application of purportedly trans-substantive procedural rules with a substance-specific component, primarily the erection of barriers against certain types of litigation in the form of heightened pleading standards—exactly the sort of unfortunate "political" outcome that scholars feared would arise if we opened the door to expressly substance-specific reform in the rule-making process.[22]

The example of the special statutory proceeding for eviction suggests that tailoring procedure to cases, even if "political," may be the only acceptable compromise in some instances.[23] While some might conceivably argue that a proceeding against a non-paying tenant should be procedurally "equal" to any other lawsuit, states have developed or maintained through the political process alternative procedural mechanisms.[24] The further evolution of substance-specific civil procedure is not necessarily evil and is likely inevitable. A model for approaching it can be found in state ancillary, non-exclusive "special statutory

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21 Paul Carrington, *Civil Procedure and Politics*, http://www.paulcarrington.com/Civil%20Procedure%20Politics.htm (last visited Aug. 30, 2008). An example of the type of substance-specific argument that Professor Carrington was objecting to can be found in Roy L. Brooks, *Critical Race Theory: A Proposed Structure and Application to Federal Pleading*, 11 HARV. BLACKLETTER L.J. 85, 105–12 (1994), in which the author argues that Rule 12 dismissals of civil rights claims are often the result of racial subordination and that no civil rights case should be subject to dismissal until after the parties have engaged in discovery. For a critique of Carrington's position, see Burbank, *supra* note 10, at 1935–36:

> Professor Carrington is alert to the costs of departing from the appearance of "political neutrality" but deaf to the costs of what Judge Weinstein calls "procedural subterfuge." Indeed, at times he appears to swallow his own propaganda, as when he portrays as a central feature of our legal system, upon which Congress "relies," the class action amendments in 1966, yet fails to acknowledge that the impact of those amendments on power relations was anticipated, if not intended, by his predecessor, Judge Kaplan.

(footnote omitted).

22 *See* Christopher M. Fairman, *The Myth of Notice Pleading*, 45 ARIZ. L. REV. 987, 1059–64 (2003) (discussing judicially created heightened pleading standards); Richard L. Marcus, *The Puzzling Persistence of Pleading Practice*, 76 TEX. L. REV. 1749 (1998) (same); Jeffrey A. Parness, Amy M. Leonetti & Austin W. Bartlett, *The Substantive Elements in the New Special Pleading Laws*, 78 NEB. L. REV. 412 (1999) (reviewing new substance-specific pleading standards relating to securities litigation, professional malpractice litigation, punitive damages claims, childhood sexual abuse claims and civil rights claims, and arguing that these amount to revision of the underlying substantive law, raising choice of law and separation of powers issues). For the law and economics argument in favor of such heightened pleading standards, see Keith N. Hylton, *When Should a Case Be Dismissed? The Economics of Pleading and Summary Judgment Standards* (Boston Univ. Sch. of Law Working Paper Series, Law and Economics Working Paper No. 06-06, 2006). *See also* Burbank, *supra* note 10, at 1929–41 (arguing in the 1980's that procedural uniformity has always been a sham).

23 *See* Tobias, *supra* note 10, at 1508 and throughout ("The preferable approach is to transcend trans-substantivity, to acknowledge candidly its limitations, and to recognize and meet forthrightly the compelling challenge of formulating procedures that will efficaciously treat civil litigation in the twenty-first century.").

24 Although the devil is, of course, in the details. *See* Gerchick, *supra* note 17, at 777–81.

proceedings." Rather than directly attempt substance-specific reform in the context of the fraught and contentious federal procedure reform process, where most of the players are heavily invested in complex cases and have little interest in or knowledge of the more routine cases, the expansion of ancillary procedures at the state level might provide a laboratory for experimentation with smaller cases that could ultimately be adopted at the federal level.[25]

Instead of the heightened pleading standards and other mechanisms proposed by those who would depart from the spirit and letter of the federal rules only when they deem it necessary to keep people out of the courthouse, the rules should provide for streamlined, tailored procedures in appropriate cases as an alternative to procedural rules tailored to meet the conflicting demands of litigants in the most complex, expensive, and discovery-intensive cases. By focusing on providing procedural alternatives, as opposed to defining all lawsuits by "type," substance-specific procedure reform might avoid the potential for boundary disputes among revived "forms of action" because the focus would be on what the pleading parties want, as opposed to what theory of action will most closely conform to the facts as developed in discovery.[26] Finally, a focus on providing procedural alternatives, as opposed to tailoring default rules to different types of cases, could help de-politicize the debate regarding substance-specific reform.

To clarify what critics of substance specificity fear, Part I of this article begins by discussing "substance-specific procedure" as it used to exist, using the example of the forms of action with respect to title to land. Part II examines a specific set of special statutory proceedings established in Georgia with respect to title actions, showing that the existence of these procedures has neither led to technical pleading requirements nor the other evils critics associate with non-trans-substantive procedure. Part III looks at the example of the action for accounting and discusses whether there exists a specific set of cases that might benefit from the revival of an ancient remedy—the judicially managed accounting—in the form of an ancillary substance-specific proceeding. Part IV discusses how revival of the original conception of accounting as a discovery-oriented remedy might relate to standing proposals for the reform of discovery practice in general.

25 *See* Mark C. Weber, *The Federal Civil Rules Amendments of 1993 and Complex Litigation: A Comment on Trans-substantivity and Special Rules for Large and Small Federal Cases*, 14 REV. LITIG. 113 (1994) (arguing that the Federal Rules are well-adapted to complex litigation for a variety of historical reasons and that substance specific reform should focus on streamlining "small" cases).

26 *Compare with* Carrington, *supra* note 11, at 2081 ("The teaching of [the Anglo-American tradition's] adverse experience is that complexity resulting from categorization of procedures in courts of general or broad subject matter jurisdiction produces wasteful disputes as to which set of procedural rules controls.").

I. TITLE ACTIONS AND THE PREHISTORY OF CONTEMPORARY PROCEDURE

To assist in developing an understanding of the debate regarding trans-substantivity, one should recall what "substance-specific" procedure looked like in the era prior to the evolution of trans-substantive procedure in the nineteenth century. One window into the world of writ pleading is the history of title actions in the common law—a history that was once a core aspect of the first-year legal curriculum but is increasingly forgotten as fewer civil procedure instructors feel the need to explain to their students that there once was more than one form of action.[27]

Note that the history retold here is not necessarily the history of title actions as it might be told by a contemporary historian based on contemporary research. Rather, it is the history of the forms of action respecting title to land as that story was known and told during the decades around the turn of the last century—during the era of procedural reform.[28]

The story, as told by Frederick Maitland in a series of lectures first published in 1909, begins with the writ of right, which read something like this:

> Breve de recto
>
> Rex K (a bishop, baron or other lord of manor) salutem. Praecipimus tibi quod sine dilatione plenum rectum teneas A de uno mesuagio cum pertinentiis in Trumpingtone quod clamat tenere de te per liberum servitium [unius denarii per annum] pro omni servitio, et quod X ei deforciat. Et nisi feceris, vicecomes de Cantabrigia faciat, ne amplius inde clamorem audiamus pro defectu recti.
>
> The King to K greeting. We command you that without delay you do full right to A of one messuage with the appurtenances in Trumpington which he claims to hold of you by free service of [so much] *per annum* for all service, of which X

27 *See* YEAZELL, supra note 12, at 372 ("Until a few decades ago the material in this section [discussing the forms of action] would have taken up almost all of a beginning civil procedure course."); *see also* Mary Brigid McManoman, *The History of the Civil Procedure Course: A Study In Evolving Pedagogy*, 30 ARIZ. ST. L.J. 397 (1998) (discussing the evolution of the contemporary civil procedure course).

28 For a discussion of the history of procedural reform in the early twentieth century, see Subrin, *How Equity Conquered*, *supra* note 12, at 943–75. Our version of the story of the forms of action at common law mainly derives from F.W. MAITLAND, THE FORMS OF ACTION AT COMMON LAW (A.H. Chaytor & W.J. Whittaker eds., Cambridge Univ. Press 1965) (1909). This focus reduces the relevance of the fact that traditional narrative relies on the explanatory framework represented by the term "feudalism;" a term largely abandoned by medievalists. *See* Elizabeth A.R. Brown, *The Tyranny of a Construct: Feudalism and Historians of Medieval Europe*, 79 AM. HIST. REV. 1063 (1974) (arguing against "feudalism" as a conceptual framework for understanding medieval society); SUSAN REYNOLDS, FIEFS AND VASSALS: THE MEDIEVAL EVIDENCE REINTERPRETED (1994) (same). However, it is worth noting that, despite a near consensus among historians against the utility of the traditional feudal pyramid as a lens through which to understand medieval texts, the idea persists in legal literature. *See, e.g.*, Mark A. Senn, *English Life and Law in the Time of the Black Death*, 38 REAL PROP. PROB. & TR. J. 507, 516 (2003) ("As a system of land ownership, [feudalism] is a pyramid with the king at the top beholden to no one, layers of lords in the middle beholden to their superiors, and serfs at the bottom beholden to everyone.").

> deforceth him. And unless you will do this, let the sheriff of Cambridge do it that we may hear no more clamour thereupon for want of right.[29]

There are a few things to note in this. First, the writ is addressed to the lord of the territory in which a property dispute has arisen, commanding that person to give justice to someone who claims to have a right to land "by free service" in that territory (i.e., a tenancy in land of some sort within the lord's larger territory).[30] Setting aside the vexed question of the manner in which a tenancy "by free service" might differ from what we would in present terms understand to be a fee simple estate,[31] the purpose of the writ is to initiate a process designed to identify who has the right to this property, whatever that "right" may consist of.[32] The second thing to note is that the King is assuming the authority to tell the territorial lord what to do about the claim, but the action is not initially in the King's court. It is to be initiated, rather, in the local courts controlled by "K," and the writ itself is simply a threat to intervene if the local lord's court does not resolve the matter.[33]

As Maitland tells the story, there also were writs of right directing the sheriff to take immediate action—originally used only in cases involving claims by or affecting the King's own direct tenants, which later came to be used as a vehicle for direct intervention in territorial disputes outside of the king's personal territory—leading to tension between the King and his barons:

> In saying that this simple writ . . . was only used when the demandant claimed to hold of the king as tenant in chief, we have been guilty of some inaccuracy. Glanville tells us that such a writ is issued when the king pleases; Henry II was not very careful of the interests of mesne lords and would send a [writ] to the sheriff when a Writ of Right addressed to the lord would have been more in harmony with feudal principles. But this was regarded as a tyrannical abuse and was struck at by a clause of the Great Charter.[34]

So, there is conflict here respecting jurisdiction, which shall be discussed further in a moment.

There were, Maitland explains, various problems associated with the writ from the outset. The first and perhaps most important was that the mode of trial was trial by combat.[35] The second problem was delay.[36] In addition to various customary mechanisms allowing the parties to delay

29 MAITLAND, *supra* note 28, at 82–83 (internal citations omitted).

30 *Id*. at 23.

31 *See* Joshua C. Tate, *Ownership and Possession in the Early Common Law*, 48 AM. J. LEGAL HIST. 280, 282–84 (criticizing Maitland's assumption of a rough equivalence between medieval concepts of "right" and "seisin" and contemporary notions of "ownership" and "possession"). *See generally* S.F.C. MILSOM, A NATURAL HISTORY OF THE COMMON LAW (2003).

32 MAITLAND, *supra* note 28, at 21–27.

33 *Id*. at 22–23.

34 *Id*. at 23.

35 *Id*. at 26.

36 *Id*. at 24.

trial—the most extreme being, apparently, a right to take to bed for a year and avoid the whole thing—the entire process depended at a certain basic level on individuals finding the time to represent themselves in a world without trial lawyers.[37] Accordingly, there was any number of excuses for non-appearance that would not be tolerated in today's regime of advocacy by representatives.[38]

As Maitland notes, new procedures arose to mitigate these problems that, not coincidentally, served the royal interest in consolidating legal authority in the King.[39] Indeed, this is Maitland's primary theme. The forms of action grew increasingly elaborate through discrete attempts to resolve difficulties with earlier writs, a process largely driven by the tension between centripetal and centrifugal forces acting on the distribution of authority in medieval society, leaving the substantive law to grow and develop "in the interstices of procedure."[40]

The initial development was the emergence of the "assizes" of Novel Disseisin, Mort d'Ancestor, Darrein Presentment, and Utrum.[41] These were procedures responding to specific land issues in which resort could be had to a royal court in the first instance, with trial by a deliberative body known as an "assize."[42] For our purposes, the latter two possessory assizes are worth ignoring because an understanding of them would require an unnecessary detour into the history of ecclesiastic land tenure and what was known as "advowson," the right of certain landholders to appoint persons to hold church office.[43] But Novel Dissein and Mort d'Ancestor are worth briefly considering.

Novel Disseisin was an assize available to a person claiming to have been unjustly dispossessed of "seisin," a concept reduced by Maitland and reducible for our purposes to meaning simply possession of the land pursuant to a *claim* of freehold title (as opposed to and distinct from an absolute right to the land equivalent to "ownership" in the contemporary sense).[44] In modern terms, this action would be somewhat analogous to an action for wrongful eviction, except that it was not an action between landlord and tenant as we would understand those terms, and no rights other than the right to immediate possession were determined in the action, with the only question being whether the "disseisor" unjustly deprived the plaintiff of possession.[45] Having lost, the disseisor could still dispossess

37 *Id*. at 25.

38 *Id*. at 24–25.

39 *Id*. at 25–26.

40 *Id*. at 1.

41 *Id*. at 27–33.

42 *Id*. at 34–35.

43 *But see* Tate, *supra* note 31, at 283–84 (arguing that the advowson writs have not received sufficient attention by scholars).

44 MAITLAND, *supra* note 28, at 27–29. *But see* Tate, *supra* note 31, at 295–99 (arguing against this alleged equivalence).

45 MAITLAND, *supra* note 28, at 27–28.

the plaintiff in an action on a writ of right.[46] The understanding that the case was solely about possession, as opposed to what we would think of as ownership, allowed the King to assert jurisdiction over the case despite the local lords' claim that the rights of their "tenants" should be decided in their local courts.[47]

The Assize Mort d'Ancestor was similarly conceived as a matter of possession rather than right.[48] In this form of action, an heir would attempt to show that his near ancestor died "seised" of the land and that someone had taken seisin in the property before the plaintiff was able to do so himself.[49] Once again, the action did not determine rights to the land in the same manner as the writs of right did, with the only question being who was entitled to immediate possession of the land.[50]

These new forms of action remained procedurally onerous, so litigants continued to seek alternatives.[51] In the next phase of procedural development, instead of expanding on the assizes, the procedures in land cases in the crown courts expanded by the development of a profusion of "Writs of Entry."[52] Like the assizes, these writs excused the royal assumption of jurisdiction over proprietary rights to land outside of the King's own property by limiting the action to a consideration of who had the right to seisin, without any determination as to who had the ultimate proprietary right to the land.[53] Unlike the assizes, however, the theory underlying the writs of entry was that one of a variety of possible specific and recent incidents (depending on the form of writ) justified a claim that the seisin of the one in possession was improper and an immediate demand that the possessor abandon the property.[54] By a proliferation of these forms of action, the royal courts blurred the "feudal" distinction between proprietary actions, which needed to be brought in the courts where the tenancy was located, and purely possessory actions, which could be brought in a more efficient manner in the royal courts.[55]

In the next phase of evolution, the pendulum shifted against the royal prerogative to expand the number of writs, with one exception opening up a whole new line of expansion into the realm of what we would today call tort law:

> The whole system stiffens. Men have learnt that a power to invent new remedies is a power to create new rights and duties, and it is no longer to be suffered that

46 *Id*. at 28.
47 *Id*. at 27.
48 *Id*. at 29–30.
49 *Id*. at 29.
50 *Id*. at 27–30.
51 *Id*. at 41–45.
52 *Id*. at 41–42.
53 *Id*. at 44.
54 *Id*. at 42.
55 *Id*. at 44. For a more recent discussion of these writs, see Joseph Biancalana, *The Origin and Early History of the Writs of Entry*, 25 LAW & HIST. REV. 513 (2007).

> the chancellor or the judges should wield this power. . . . But when we say that but little use was made of this Statute there is one great exception. It is regarded as the statutory warrant for the variation of the writs of trespass so as to suit special cases, until at length—about the end of the Middle Ages—lawyers perceive that they have a new form 'Trespass upon the special case' or 'Case.'[56]

Out of the law of trespass arose the action of ejectment, designed to protect from dispossession tenants in the contemporary sense (i.e., persons with a right to occupy the land for a term, as opposed to free tenants in fee).[57] Because the writs of right and entry and the assizes were subject to procedural delay and hyper-technical rules of pleading, plaintiffs developed a legal fiction to recover possession of land. They would lease the property to a straw man and, upon his ouster from the property, bring an action in the name of John Doe for trespass in ejectment.[58] This fiction became refined and elaborate and expanded to take up most real property litigation by the Tudor period:

> The development of this action is a long story and about such a matter it is hard to fix any dates—one cannot tell the exact moment at which a proceeding becomes fictitious—but I believe we may say that during the Tudor reigns the action of ejectment became the regular mode of recovering the possession of land.[59]

The "real actions" remained for their utility in special cases and eventually, albeit not until the nineteenth century in England, the action for ejectment was reformed to eliminate the element of legal fiction.[60] Moreover, in the intervening years, various forms of equity were also utilized to meet the demands of the unprovided-for case where a petitioner had possession but knew of a competing claim that cast doubt on his right to the land.[61]

In reasonably short form, such is the history of the development of the forms of action relating to title to land as it stood around the time of the procedural reforms that attempted to do away with all of this nonsense. And it makes a case for trans-substantive civil procedure, as each attempt to provide a substance-specific avenue for the pursuit of title actions falls in favor of a newer, faster, more flexible alternative. However, it is worth noting a number of things. To begin with, the "boundary disputes" that were arguably the fatal flaw in this system arose from specific conflicts over jurisdiction that required the pretext of distinct forms of action, not from any lack of understanding of the nature of the action or the remedy sought. The story is complicated, but its complexity was context dependent and was not the product of substance specificity itself. As Part II will demonstrate, this proliferation of writs was easily reformed during the

56 MAITLAND, *supra* note 28, at 51–52.
57 *Id*. at 57.
58 *Id*. at 58–59; *see also* WILLIAM BLACKSTONE, 2 COMMENTARIES *150–51.
59 MAITLAND, *supra* note 28, at 59.
60 *Id*. at 60–61.
61 *See*, *e.g*., *infra* notes 62–83 and accompanying text.

nineteenth century into two readily and rationally distinguishable forms of action—one at law for dispossessed claimants and the other in equity for parties in possession who wanted to remove a cloud on their title.[62] It is unclear whether the nineteenth century requirement to plead one or the other of these two fundamental forms of title action at the outset of a case caused a vast amount of unfair prejudice in the form of dismissals, as the critics of substance-specific procedure suggest.[63]

Finally, as any practitioner dealing with these matters can tell, the forms of action discussed by Maitland never entirely disappeared from the substantive law—they persist in the form of claims and remedies.[64] Procedure reform was just that—a reform of procedure—with the substantive law that was once so closely attached to procedure left unmoored as free-floating "causes of action."[65] A plaintiff in contemporary practice need only state a claim in simple terms, but ultimately must prove a set of defined elements and mold his or her case to those elements in a process no less restrictive than the old forms of action from which these "causes of action" derive.[66] The liberality of contemporary procedure derives not from elimination of category distinctions from the law but from the possibility of amendment and the elimination of demurrer practice.

II. CONTEMPORARY TITLE ACTIONS AND THE PERSISTENCE OF REFORM

As Maitland himself said: "The forms of action we have buried, but they still rule us from their graves."[67] The persistence of the forms of action in the substantive side of civil practice can be seen by taking a look at a recent ejectment case in Georgia.[68] Georgia is an interesting state to look at in studying the more recent evolution of the common law forms of

62 *See* discussion *infra* Part III.

63 As authority for their contention that common law pleading consisted in large part of "petty haggling over pointless distinctions," resulting in unfairness and a waste of judicial resources, the critics of substance-specific procedure tend to either cite to one another or simply assert the premise as self-evident. *See* David L. Shapiro, *Federal Rule 16: A Look at the Theory and Practice of Rulemaking*, 137 U. PA. L. REV. 1969, 1974 & n.12 (1989) (citing no authority); Carrington, *supra* note 11, at 2080 n.77 (citing to himself); Rubenstein, *supra* note 16, at 1885 n.77 (citing Carrington and Shapiro).

64 *See* Subrin, *How Equity Conquered*, *supra* note 12, at 915 ("[The] organized body of what is now commonly called substantive law evolved from the writs.").

65 *See id*. at 975–82 (discussing the attempt to purge the concept of a "cause of action" from the Federal Rules of Civil Procedure).

66 *See* Stephen N. Subrin, *Teaching Civil Procedure While You Watch It Disintegrate*, 59 BROOK. L. REV. 1155, 1177 (1993):

> No matter how we describe it, most civil litigation examines events and determines if they add up to believed facts which fit within the elements of a cause of action. I have written about how Clark and his cohorts eschewed the terms facts and cause of action. But that is the reality within which litigators have to work. . . . Many of the individual pieces of the litigation process—pleading, 12(b)(6), discovery, burdens of production and persuasion, relevancy issues, summary judgment, directed verdict, jury instructions, opening and closing arguments, one's sense of various methods of ADR—require a mastery of the concept of causes of action and their elements.

67 MAITLAND, *supra* note 28, at 2.

68 MVP Investment Co. v. North Fulton Express Oil, 639 S.E.2d 533 (Ga. Ct. App. 2006).

action in their reincarnation as substantive "causes" of action, divorced from the rigid procedural formulas of writ pleading practice, because Georgia was one of the first states to attempt codification of the substance of the common law, including the maxims of equity enacted as actual statutes.[69] With respect to land title actions, the original Georgia Code of 1863 contained a statutory provision for equitable action to quiet title in the form of what eventually came to be known as "conventional quia timet."[70] This was modeled after the traditional bill in equity seeking an injunction to prevent an anticipated future harmful act, "quia timet" being Latin for "because he fears."[71] The ordinary proceeding at common law for ejectment was similarly codified, albeit later, in the 1895 code.[72] Accordingly, on the one hand, ejectment was available in cases of dispossession. On the other hand, in cases involving a "cloud on title," in which the plaintiff was in possession but feared a challenge to title or possession due to the existence of, for example, a void deed, the action in equity was the appropriate avenue for seeking relief because ejectment did not provide an adequate remedy at law.[73]

In 1917, the Georgia General Assembly attempted to provide an alternative mechanism for establishing title to land in the Georgia Land Registration Act of 1917.[74] This Act allows a petitioner to obtain certification from the superior court of their title to the land by means of an in rem action, with notice to interested parties and adjoining landowners.[75] The action is noticed both by publication in newspapers and by physical posting on the property.[76] In practice, this procedure is seldom utilized, either because lawyers are more familiar with the older causes of action, which remain in place, or because they are suspicious of a procedure that

69 *See, e.g.*, GA. CODE ANN. § 23-1-6 (1982) ("Nature of equity—Follows the law"). For the history of Georgia's codification efforts, beginning in 1860–63, see R. Perry Sentell, Jr., *Codification and Consequences: The Georgian Motif*, 14 GA. L. REV. 737 (1980). Regarding codification, see generally Nathan M. Crystal, *Codification and the Rise of the Restatement Movement*, 54 WASH. L. REV. 239 (1979) and Lewis A. Grossman, *Langdell Upside-Down: The Anticlassical Jurisprudence of Anticodification*, 19 YALE J.L. & HUMAN. 149 (2007).

70 GA. CODE § 3153 (1863) (current version at GA. CODE ANN. §§ 23-3-40 to -44 (1982) (conventional quia timet)).

71 BLACK'S LAW DICTIONARY 1281 (8th ed. 2004); *see also* STORY, *supra* note 9, at ch. XXI (discussing the quia timet bill in traditional equity practice).

72 GA. CIV. CODE § 5004 (1895) (current version at GA. CODE ANN. §§ 44-11-1 to -15 (2002) (ejectment)).

73 *See* Newcomer v. Newcomer, 606 S.E.2d 238, 239 (Ga. 2004):

> The reason of this rule is that, where the defendant is in possession, the plaintiff has a remedy to test his title at law by bringing an action in ejectment, which is ordinarily deemed an adequate remedy, and in consequence there is no ground for the exercise of equitable jurisdiction, which is based upon the fact that, where the plaintiff is in possession, he can maintain no action at law to test his title.

(quoting Mentone Hotel & Realty Co. v. Taylor, 130 S.E. 527, 529 (Ga. 1925)).

74 Currently codified at GA. CODE ANN. §§ 44-2-60 to -84 (2008). *See* GEORGE PINDAR, GEORGIA REAL ESTATE LAW AND PROCEDURE WITH FORMS § 25-10 (Daniel F. Hinkel ed., 6th ed. 2004) (discussing the procedure).

75 PINDAR, *supra* note 73, § 25-10.

76 GA. CODE ANN. § 44-2-67 (2008).

requires broad notification of a weakness in their client's claim of title to outside parties and another set of records to keep track of in addition to deeds, certificates of registration that are physically issued to the owner as proof of title.[77]

In 1966, the Georgia General Assembly tried again to reform title litigation by passing the Quiet Title Act of 1966, this time creating a statutory proceeding called "quia timet against all the world."[78] This statutory proceeding allows any person claiming an estate in land, defined as "an estate of freehold present or future or any estate for years of which at least five years are unexpired," to bring an action to obtain a court order recognizing their rights in the property, regardless of whether they are in possession and regardless of whether they are able to identify a specific "cloud" on their asserted title.[79] The proceeding applies to boundary line disputes and disputes relating to easements.[80] The statutory scheme provides for appointment of a special master to determine who should receive notice and hear the title question.[81] Upon receipt and acceptance of the master's report, title is noted in the land records themselves and no separate certification issues.[82]

Viewed in light of its history, the purpose of this enactment was to create a convenient, omnibus special proceeding for all instances in which the central dispute is with respect to title to land, with its own pleading requirements and specific set of remedies.[83] However, the prior causes of action in ejectment and conventional quia timet were not repealed; indeed, the act expressly states that it is not intended as an exclusive remedy.[84] This raises the question, "why not?" One suspects that the real reason the legislature left the Georgia Code littered with increasingly overlapping remedies, where once there were distinct remedies for distinct purposes, was fear of unintended consequences that might deprive someone of a remedy.[85] This is the old view of the law as an organic thing, each part

77 PINDAR, *supra* note 73, § 25-10.

78 Currently codified at GA. CODE ANN. §§ 23-3-60 to -73 (1991). PINDAR, *supra* note 73, § 25-11.

79 GA. CODE ANN. § 23-3-61 (1982).

80 *See* Middleton v. Robinson, 244 S.E.2d 7 (Ga. 1978) (boundary lines); Wiggins v. S. Bell Tel. & Tel. Co., 266 S.E. 2d 148 (Ga. 1980) (easements).

81 GA. CODE ANN. §§ 23-3-63 to -66 (1982).

82 *Id*. § 23-3-67 (1982).

83 *See id*. § 23-3-60:

> The purpose of this part is to create a procedure for removing any cloud upon the title to land, including the equity of redemption by owners of land sold at tax sales, and for readily and conclusively establishing that certain named persons are the owners of all the interests in land defined by a decree entered in such proceeding, so that there shall be no occasion for land in this state to be unmarketable because of any uncertainty as to the owner of every interest therein.

84 *Id*. § 23-3-72 (1982).

85 *See* Ellen E. Sward, *Justification and Doctrinal Evolution*, 37 CONN. L. REV. 389, 418–20 (2004) (discussing fear of unintended consequences as a rationale for what the author calls "historical justification" of legal doctrine).

linked to the other in ways that are so complex that coherent, constructive reform is difficult if not entirely impossible.[86]

An example of why this attitude persists can be found in the case of *MVP Investment Co. v. North Fulton Express Oil*.[87] In *MVP*, the plaintiff, a land developer, alleged that an adjoining landowner had built an earth slope on the plaintiff's property in order to provide lateral support to the defendant's property.[88] The plaintiff brought the action in plain trespass, seeking damages, and the defendant moved to dismiss on the grounds that the four-year statute of limitations for actions to recover for trespass to realty had passed.[89] The plaintiff, apparently in response to the appearance of this defect in its case and not from any newfound interest in clarifying its title to the land, took advantage of Georgia's liberal amendment rules to amend its complaint to add a claim for ejectment, in essence recasting the claim as a title claim for which the period of limitation would derive from the adverse possession statute and not the statute respecting trespass to realty.[90] The Georgia court of appeals allowed this, holding that the plaintiff had a legitimate claim for ejectment.[91]

This was undoubtedly the correct decision in the narrow sense that the court correctly applied the cited precedents to the facts before it.[92] Conceptually, it is probably the correct outcome because, as the court argues, the dirt slope is certainly analogous to a structure erected by someone else and occupying the land, which would very clearly raise a title issue.[93] As soon as the court accepted the framing of the issue as being whether the dirt slope constituted a continuing occupation of the property authorizing ejectment, the court appears to have had no choice but to decide as it did.

On another level, however, the case is a bit troubling. At first blush, this case appears to support an argument for trans-substantivity and against

86 *See* David Luban, *Legal Traditionalism*, 43 STAN. L. REV. 1035, 1040 (1991) (describing suspicion of "rationalism" and "modernism" as "law's aboriginal grand tradition").

87 639 S.E.2d 533 (Ga. Ct. App. 2006).

88 *Id*. at 534.

89 *Id*.

90 *Id*.

91 *Id*. at 535.

92 *See id*. at 534–35 (citing Wachstein v. Christopher, 57 S.E. 511, 512–13 (Ga. 1907) (holding foundation occupying plaintiff's property subject to removal); Navajo Constr. v. Bringham, 608 S.E.2d 732, 734 (Ga. Ct. App. 2004) (holding a portion of a neighbor's house occupying plaintiff's property subject to removal); Dep't of Transp. v. Arnold, 530 S.E.2d 767, 771–72 (Ga. Ct. App. 2000) (holding that government's "slope easement" constituted a taking).

93 *See MVP*, 639 S.E.2d at 534:

> Georgia law allows an owner of real property to bring an ejectment action to remove an adjoining property owner who, either by inadvertence or with predatory intent, encroaches upon the property of his neighbor. The purpose of the action is to eject the defendant from possession of the disputed land. A land owner's entitlement to an action in ejectment stems from our deep-rooted belief that the owner of real property has the right to possess, use, enjoy, and dispose of it, and the corresponding right to exclude others from the use.

(internal citations and quotations omitted).

substance-specific procedure in that the plaintiff is protected by liberal modern pleading and amendment rules from any negative consequences arising from the fact that it chose initially to cast its complaint as an action for trespass, thus avoiding the alleged evil of punishing litigants for technical pleading defects.[94] On the other hand, it is difficult not to see the attempt to reconfigure this case as an ejectment action as something of a pretext, given that the plaintiff really wanted monetary damages for the reduction in value of their property and not a writ of possession and award of mesne profits (the remedy in an ejectment action).[95] Turning the case into a title action was clever lawyering, and no doubt a serious incentive to settlement by the defendant, but it is difficult to see this as being much different from the legal fictions of the writ-pleading era.[96]

For present purposes, however, it is enough to note that the existence of special, substance-specific statutory proceedings respecting title to land did nothing to prevent the plaintiff in *MVP* from saving its case by recasting it as a title action. Moreover, this would likely have still been the case even if the Georgia legislature had enacted the omnibus remedy to quiet title as the exclusive form of proceeding in title cases. Imagine that the Georgia General Assembly had established the "quia timet against all the world" remedy as the sole and exclusive means of trying title issues in Georgia. The critics of substance-specific reform argue or imply that substance-specific procedure will have the same perceived fundamental problems as existed under code pleading—endless arguments regarding the nature of the claim and dismissal of cases for pleading errors.[97] In this instance, however, there is no reason to assume that resort to an exclusive substance-specific procedural mechanism would necessarily have been unavailable by amendment under Georgia's liberal version of Rule 15, with relation back to preserve the claim against the statute of limitations.[98] The infamous arguments over technicalities in code pleading were more a product of demurrer practice than of substance specificity in the abstract.[99]

94 *See* John S. Beckerman, *Confronting Civil Discovery's Fatal Flaws*, 84 MINN. L. REV. 505, 513–15 (2000) (identifying the avoidance of "dispositions on the basis of technicalities of pleading" as a principal benefit of contemporary procedure).

95 GA. CODE ANN. §§ 44-11-7 (mesne profits), -14 (writ of possession) (2002).

96 Notoriously and ironically associated with the action in ejectment. *See supra* note 58 and accompanying text.

97 *See supra* note 16 and accompanying text.

98 *See* GA. CODE ANN. § 9-11-15 (2006); *see also id*. § 9-11-81:

> [The Georgia Civil Practice Act] shall apply to all special statutory proceedings except to the extent that specific rules of practice and procedure in conflict herewith are expressly prescribed by the law; but, in any event, the provisions of [the Georgia Civil Practice Act] governing the sufficiency of pleadings, defenses, amendments, counterclaims, cross-claims, third-party practice, joinder of parties and causes, making parties, discovery and depositions, interpleader, intervention, evidence, motions, summary judgment, relief from judgments, and the effect of judgments shall apply to all such proceedings.

99 *See* Hill v. Lariscy, 165 S.E.2d 315, 316–17 (Ga. Ct. App. 1968) (explaining the difference between the demurrer and the motion to dismiss for failure to state a claim); Martin v. Approved Bancredit Corp., 163 S.E.2d 885, 886 (Ga. 1968) (same); *see also* Burbank, *supra* note 10, at 1940 ("No one I know is suggesting a return to the forms of action or a wholesale rejection of trans-substantive

Moreover, if anything is clear from *MVP*, it is that boundary disputes among conceptual categories of cases persist, despite trans-substantive procedures, due to the persistence of category distinctions in the substantive law.[100]

In any event, the "quia timet against all the world" remedy, enacted in the form of a non-exclusive proceeding, shows that substance-specific reform need not be in the form of exclusive categories of proceeding, but can instead appear in the form of procedural alternatives. In sum, a broad range of substance-specific procedural mechanisms exist at the state level in the form of remedy-specific special statutory proceedings, and this reality does not necessarily lead to trial by technicality.

III. ACCOUNTING AND THE HISTORY OF EQUITY JURISPRUDENCE

Let us turn now to a proposal for a more innovative procedural reform premised on the accounting remedy scenario discussed in the introduction. The equitable accounting remedy needs to be understood in terms of its historical origins as a remedy with a procedural focus—a mechanism for providing a specific form of discovery to litigants able to avail themselves of equity, discovery that was not available in the ordinary course of civil practice at the time.[101] A return to the remedial understanding of discovery on which this form of proceeding was premised provides the basis for a useful procedural alternative in fiduciary cases. As discussed in the next section, it even suggests a way around the fraught political and ideological difficulties at the heart of the current debate regarding discovery reform.

There was a procedure for accounting at law in common law pleading practice, which developed in response to the problem of assessing unliquidated damages against manorial bailiffs, for example, who collected rents and managed property on behalf of a landlord.[102] Over time, however, equity courts proved to be a more flexible and efficient venue for accounting actions, in part because of the availability of more effective enforcement mechanisms.[103] This remedy in equity was initially limited to cases involving the "special grounds of equity" such as accident, mistake or fraud.[104] But it quickly expanded to include other cases because it fulfilled a legitimate and substantial need for this type of discovery in aid of restitution in cases of unjust enrichment by fiduciaries.[105]

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procedure.").

100 These distinctions not only persist but have continued to evolve. *See*, *e.g.*, Thomas C. Grey, *Accidental Torts*, 54 VAND. L. REV. 1225 (2001) (discussing category distinctions in general and describing the evolution of Justice Holmes' understanding of torts as a category organized around the negligence principle).

101 *See* STORY, *supra* note 9, at §§ 436–45; *see also* Eichengrun, *supra* note 2, at 463–67 (discussing the history of the accounting remedy).

102 Eichengrun, *supra* note 2, at 464.

103 *Id*. at 466.

104 STORY, *supra* note 9, §§ 437–40.

105 *Id*.

Accounting remained part of the more or less unique province of equity until 1848, when New York adopted David Dudley Field's "Field Code" and began the still unfinished process of banishing the distinction between law and equity.[106] "Code practice" was adopted in a number of other jurisdictions and was an inspiration for the adoption of the merger of law and equity in the Federal Rules of Civil Procedure.[107] This in turn inspired its universal adoption at the state level and, along with it, liberal, trans-substantive discovery rules.[108] With minor variations from one jurisdiction to the next, every American jurisdiction now allows extremely liberal discovery in civil practice without regard to whether the case is one that traditionally would have been brought in law or equity.[109] And, with a few peculiar exceptions of little or no real consequence, the states purport to have abolished entirely the concept of exclusive jurisdiction over equity cases in special courts of equity.[110]

The truth about the merger of law and equity from the standpoint of practitioners "on the ground," however, is a good deal more complicated. To begin with, "equitable remedies and defenses" persist as distinct creatures with distinct rules, both substantive and procedural.[111] Moreover, equity continues to have an impact on jurisdiction, despite the creation of courts of "general" jurisdiction.[112]

106 *See* Subrin, *How Equity Conquered*, *supra* note 12, at 931–40 (discussing the merger of law and equity in the Field Code).

107 *Id*. at 943–82.

108 *Id*. Note, however, that Subrin is very critical of the view that the Field Code was "a parent of" the Federal Rules, because he wants to emphasize the ways in which the Code continued common law pleading. *See id*. at 931–40.

109 *See* 4 STATE OF NEW JERSEY CONSTITUTIONAL CONVENTION OF 1947, COMM. ON THE JUDICIARY 611 (Comm. Record 1947) ("In final result, New Jersey, Arkansas, Mississippi and Delaware remained the only states which still have an independent Court of Chancery with a separate body of judges administering equity exclusively."). Of these four states, Arkansas eliminated its Chancery courts in 2001. *See* Thomas O. Main, *Traditional Equity and Contemporary Procedure*, 78 WASH. L. REV. 429, 496 n.409 (2003).

110 New Jersey still has a Chancery division of its superior court, which serves a purpose similar to the Delaware Court of Chancery in providing judges with special expertise in business matters. Main, *supra* note 109, at 496 n.409. The other states that have retained the nomenclature of distinct courts, such as Mississippi and Tennessee, have so far departed from the original distinction between law courts and equity courts that the use of the word "Chancery" to describe these courts is an anachronism with little if any contemporary meaning. *Id*.

111 *See* DOBBS, *supra* note 1, §§ 2.1–2.6.

112 In Georgia, for example, the constitution of the state provides for direct appeal of "equity cases" to the Supreme Court of Georgia. *See* GA. CONST. art. VI § 6, ¶ III ("Unless otherwise provided by law, the Supreme Court shall have appellate jurisdiction of . . . [a]ll equity cases."). That court has responded to the resulting burden by narrowing its understanding of "equity cases" to such an extent as to essentially eliminate its jurisdiction over cases involving equitable remedies and defenses, taking the transparently self-serving position that the cases that come before them involving injunctions and so forth are really determined by legal issues and the role of equity is secondary. *See* Redfearn v. Huntcliff Homes Ass'n, 524 S.E.2d 464, 465–67 (Ga. 1999). However, the distinction remains, haunting sleep and sowing confusion. *See*, *e.g*., Viola E. Buford Family Ltd. P'ship v. Britt, 642 S.E.2d 383, 384 n.1 (Ga. Ct. App. 2007) ("We note that the Supreme Court has determined that this equity case does not fall within its jurisdiction."). Similarly, distinctions between law and equity continue to limit the jurisdiction of probate courts and other special statutory courts in Georgia, leading to the strange result that it is now possible to obtain an order in probate court directing the fiduciary of a decedent's

One example of the confusion arising from the persistence of equity in both substance and procedure is the remedy of equitable accounting. As traditionally understood, this remedy has been difficult to reconcile with contemporary discovery rules that allow a party to obtain any financial information from a fiduciary without making a showing of entitlement other than the allegations in the good faith pleading.[113] In response to this confusion, Professor Joel Eichengrun proposed "remedying the remedy."[114] Witnessing the accounting remedy's loss of most of its utility and meaning under contemporary procedure rules, Professor Eichengrun called for the remedy to be re-conceived around what he viewed as its sole remaining core of utility—the fact that it provides for an award of profits where a party has unjustly benefited from the use of a trust fund.[115] Indeed, Professor Eichengrun called for opening this narrower remedy up to litigants outside of the fiduciary realm.[116]

There are, however, problems with this approach. To begin with, the core of the accounting remedy as reconceived by Professor Eichengrun—the fact that it provides an avenue for obtaining an award of profits—is neither unique nor sufficiently free-standing to justify retaining the concept of accounting as an independent remedy. The remedial benefits of "accounting for profits" identified by Professor Eichengrun should be available to a litigant through the ordinary avenues of the law of restitution and unjust enrichment.[117] Moreover, in light of the availability of

estate to act in a certain way if, and only if, you promise not to call it an "injunction." *See* Patterson v. Ellerbee, 603 S.E.2d 308, 311 (Ga. Ct. App. 2004) (Barnes, J., dissenting) (recognizing Georgia's constitutional grant of exclusive equity jurisdiction to the superior courts); GA. CODE ANN. § 15-9-127 (2005) ("Probate courts . . . shall have concurrent jurisdiction with superior courts with regard to the proceedings for . . . [d]eclaratory judgments involving fiduciaries."); *id*. § 15-9-120 (limiting applicability of the article to counties with population in excess of 96,000); *id*. § 9-4-4 (defining the scope of the declaratory judgment as including orders "direct[ing] the executor, administrator, or trustee to do or abstain from doing any particular act in his fiduciary capacity").

113 *See, e.g*., Thompson v. Coughlin, 997 P.2d 191, 196 (Or. 2000) (finding that plaintiff's access to discovery obviated the need for an accounting and that the parties were, accordingly, entitled to a jury trial).

114 *See* Eichengrun, *supra* note 2.

115 *See id*. at 485:

> The true accounting yields a restitutionary award of a defendant's profits; the "accounting" to settle complex or mutual accounts functionally grants a non-jury trial; and a now obsolete remedy also called an "accounting" compelled discovery in cases of disputed accounts. . . . Finally, a theoretical consideration of the accounting suggests that the remedy be expanded to include the situation where a non-fiduciary has profited from the wrongful use of another's property.

116 *See id*.

117 *See* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 43 (Tentative Draft No. 4, 2005) (awarding restitution in cases of breach of fiduciary duty); James Steven Rogers, *Restitution for Wrongs and the Restatement (Third) of the Law of Restitution and Unjust Enrichment*, 42 WAKE FOREST L. REV. 55 (2007) (describing much of the terminology associated with restitutionary remedies as "gibberish" arising from the traditional conception of restitution as "parasitic" on other substantive law and asserting as the core remedial premise of the law of restitution the principle that "a party who unjustifiably enriches himself at the expense of another owes a duty to pay a sum of money that will disgorge the enrichment"). *But see* DOBBS, *supra* note 1, § 4.3(5) (following Eichengrun in identifying accounting for profits as a conceptually distinct restitutionary remedy).

discovery and, in complex cases, auditors, the procedurally distinct aspects of the accounting remedy—for example, the shifting of the burden of proof to the defendant with respect to set-offs and the availability of non-jury trials—seem less than compelling as reasons to retain the remedy as a distinct conceptual entity.[118] Furthermore, the burden-shifting advanced by Professor Eichengrun as a primary advantage of the accounting remedy is not necessarily limited to accounting cases.[119]

Another reason Professor Eichengrun's proposal has failed to attract adherents may be that lawyers, by training, fear semantic confusion much less than they fear the possibility of rights being left without a remedy. Accordingly, there may be a tendency to allow remedies to linger past their "sell by" date.[120] Still, the continuing existence of accounting as a separate statutory remedy may generate confusion among lawyers who are not legal historians. Confusion costs clients money.

It could be, however, that some of this confusion derives from the fact that, from the practitioner's standpoint, an accounting may be all that one wants, at least initially. Imagine an attorney with a trust client who came into her office concerned about a trustee's refusal to provide information, but with no clear evidence of foul play. In the author's own experience, private fiduciaries often withhold information, not necessarily because they have committed some offense, but because they either do not like to be second-guessed by their beneficiary, they do not like to admit that their accounts are not neatly in order, or they simply do not want to go to the trouble of complying with a request for information about the trust. Nevertheless, if a fiduciary refuses to surrender documents, the lawyer ultimately is forced to bring a breach of duty claim in order to get discovery.[121]

Of course, it is possible in a fiduciary case simply to bring a suit for accounting. But this makes little sense, both because the remedy as traditionally conceived has been more or less emptied of meaning by contemporary discovery rules,[122] and also because the rules as currently

118 For a discussion of these procedural aspects, see Eichengrun, *supra* note 2, at 477–81.

119 *See, e.g.*, Cochran v. Ogletree, 536 S.E.2d 194, 196–97 (Ga. Ct. App. 2000) (holding burden of proof placed on defendant to establish set-off in case of unjust enrichment for "money had and received").

120 *See* Schwab v. Philip Morris USA, 449 F. Supp. 2d 992, 1020 (E.D.N.Y. 2006) ("[I]t is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded.") (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803)); *see also* GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 123–24 (1982) (describing and justifying the inherent conservatism of attorneys as a "retentionist bias").

121 Some states have experimented with allowing pre-litigation discovery. *See, e.g.*, OHIO R. CIV. P. 34(D). However, pre-litigation discovery is allowable under the Federal Rules only in the form of a deposition, and only where the court finds that a pre-litigation deposition is necessary to "prevent a failure or delay of justice." FED. R. CIV. P. 27. Moreover, even those states allowing pre-litigation discovery of documents require a finding of necessity and do not sanction pre-litigation discovery as a mechanism for ascertaining whether a claim exists. *See* OHIO R. CIV. P. 34(D)(3)(b) (West Supp. 2007) (requiring a finding that the plaintiff is "otherwise unable to bring the contemplated action").

122 For an example of the practical consequences of discovery stripping equitable accounting of its

designed favor bringing claims together and may punish people for failing to bring related claims.[123] So, the default option becomes a suit for breach of trust *and* an accounting.

The plaintiff's attorney can console herself with the fact that failure to account to a beneficiary is itself a breach of fiduciary duty and may also be sufficient to support a good-faith claim of breach of fiduciary duty by mismanagement of funds or under some other theory.[124] However, there are two problems with this approach on the practical (as opposed to the conceptual) level. First, any efficiency which may derive from requiring litigants to bring all of their claims together may be lost when it results in bringing the entire mechanism of a civil action to bear on disputes that may only be a simple failure of communication. Second, the claim that a fiduciary's failure to comply with pre-litigation demands for documents is itself a basis for a *damages* claim of breach of fiduciary duty, however conceptually neat it may appear on the surface, is something of a legal fiction with a real cost in terms of public perceptions of the litigation process as plaintiffs are forced to bring a hypothetical claim in order to find out whether they have a stronger one.

Accordingly, although the accounting remedy as viewed through the lens of substantive reform is a relic that could be simply done away with, its persistence suggests the possibility of procedural reform such as an alternative discovery process conceived in remedial terms. Imagine a special statutory proceeding for accounting in which certain plaintiffs with a basis for entitlement to an accounting could come forth in a separate action and demand a formal, judicially managed accounting of the fund. The defendant would either dispute the entitlement or produce an accounting, with the assistance of a neutral, court-appointed auditor where appropriate. Upon acceptance of the accounting by the court as sufficient and complete, the parties would then have an opportunity to request additional discovery and exchange a demand for relief and response. Such demand could be premised on any available legal theory and "tried" in an evidentiary hearing before the court, sitting without a jury. Or the plaintiff could file a new civil action in common form without fear of res judicata except as to the issues actually decided in the accounting case.

original purpose, see *Thompson v*. *Coughlin*, 997 P.2d 191, 196 (Or. 2000) (finding that discovery had allowed the plaintiff to establish an amount certain for damages, thus obviating the need for an accounting in equity, with the consequence that the case could proceed at law subject to a jury trial demand).

123 *See*, *e*.*g*., RESTATEMENT (SECOND) OF JUDGMENTS § 24 (1982):

> When a valid and final judgment rendered in an action extinguishes the plaintiff's claim . . . , the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose.

124 GEORGE T. BOGERT, TRUSTS § 141 (6th ed. 1987) ("Duty to Furnish Information to the Beneficiary"). This duty, though broad, is subject to a reasonableness limitation. *Id*.

The benefit of this procedure is that it would allow the plaintiff to come forward and demand what she actually wants—access to the books to determine whether she has a claim—without having to premise this access on vague and poorly substantiated claims. Moreover, it would tailor discovery to the circumstances by focusing the initial stage of discovery on obtaining an audit of the funds in question, or the equivalent. Once that is established, the parties could pursue any trial preparation discovery that they needed, such as the deposition of experts, with a court-approved audit in hand. From a defendant's point of view, it would allow litigants to engage in a fishing expedition only after an initial showing of entitlement, such as an affidavit establishing a right to the accounting.

This procedure could be limited to the cases in which an equitable accounting has traditionally been available: trust cases, partnership disputes, financial litigation involving complex, mutual accounts, et cetera. Indeed, given the continuing availability of ordinary discovery to litigants willing and able to state a good faith claim of breach of fiduciary duty, this procedure may seldom be used. On the other hand, the remedial understanding of discovery on which this proposal is premised might turn out to have a wider application. The next part takes a broader look at discovery and its origins in equity procedure.

IV. REVIVING THE BILL OF DISCOVERY

The debate regarding substance-specific reform of civil procedure began with a general discussion about the pitfalls of trans-substantive procedure's attempt to capture all of the nuances of civil practice in one conception of the civil action.[125] However, the discussion quickly evolved into a more nuanced argument regarding the influence of equity procedure on rules reform, focusing on modern discovery practice.[126] At least one commentator, Stephen Subrin, identified this "conquest" of equity over common law procedure as the source of pretty much everything that is wrong with contemporary civil litigation, from delay of outcomes to the death of the trial, with the primary evil being liberal discovery rules.[127] As an alternative, Subrin called for "selective substance-specific procedure" reform through the establishment of default discovery limits specific to broad substantive categories of lawsuits,[128] such as products liability or professional negligence.

125 *See* Cover, *supra* note 10, at 732–33:

> It is by no means intuitively apparent that the procedural needs of a complex antitrust action, a simple automobile negligence case, a hard-fought school integration suit, and an environmental class action to restrain the building of a pipeline are sufficiently identical to be usefully encompassed in a single set of rules which makes virtually no distinctions among such cases in terms of available process.

126 *See* Subrin, *How Equity Conquered*, *supra* note 12, at 919, 1001.

127 *Id*. at 910–12, 983.

128 *See* Subrin, *Fudge Points*, *supra* note 10, at 28.

In assessing this argument, we should begin by discussing what is meant by "equity jurisprudence." The classic tale of the origins of equity jurisprudence is that it arose to ameliorate injustices arising from too strict an application of common law rules, most notably procedural rules. This is a conception of equity's origins with its roots in Aristotle's discussion, in *Nichomacean Ethics*, of "epieikeia" as a force moderating the strict demands of the law, "a rectification of legal justice."[129] As recounted recently by Thomas Main, the story goes something like this:

> The Chancellor unrolled a vast body of legal principle that we know as "equity" to offer relief in those cases where, because of the technicality of procedure, defective methods of proof, and other shortcomings in the common law, there was no "plain, adequate and complete" remedy otherwise available. . . . Intervention was premised on the notion that justice incorporated the moral sense of the community, existing as a function not only of a community's technical rules, but also of "magisterial good sense, unhampered by rule."[130]

In this conception, flexibility and common sense are identified as the essential aspects of equity. However, much of the history of equity jurisprudence as it was actually practiced has been identified as a fall from grace—an abandonment of these principles by judges facing temptation in the form of precedent and rule-making and finding themselves unable to resist.[131]

It is interesting to note that earlier historians of equity jurisprudence were quite critical of this explanation, viewing it as an origins myth that tells us more about the ideological justifications for equity than it does about the actual circumstances of its origins.[132] For example, Joseph Story essentially rejects the notion that equity arose as a general corrective action against the rigidity in the classical common law, arguing instead that equity arose from the need for specific, unprovided-for remedies:

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129 5 ARISTOTLE, THE NICHOMACHEAN ETHICS Ch. 10 (J.A.K. Thomson trans., Penguin Books further rev. ed. 2004) (1953).

130 Thomas O. Main, *Traditional Equity and Contemporary Procedure*, 78 WASH. L. REV. 429, 441–42 (2003).

131 *See, e.g.*, PETER CHARLES HOFFER, THE LAW'S CONSCIENCE: EQUITABLE CONSTITUTIONALISM IN AMERICA, 11–18 (1990); *see also* Fiona R. Burns, *The Court of Chancery in the 19th Century: A Paradox of Decline and Expansion*, 21 U. QUEENSLAND L.J. 198 (2001) (arguing against this view in part, noting that the nineteenth-century Court of Chancery in England was in some ways increasingly burdened by the transition from a discretionary to a precedential model of jurisprudence but nonetheless managed to create new substantive equitable doctrines such as breach of confidence and the equitable covenant).

132 *See, e.g.*, WILLIAM BLACKSTONE, 3 COMMENTARIES *429–30 (2002):

> EQUITY then, in it's [sic] true and genuine meaning, is the [s]oul and [s]pirit of all law: *po[s]itive* law is con[s]trued, and *rational* law is made, by it. In this, equity is [s]ynonymous to ju[s]tice; in that, to the true [s]en[s]e and [s]ound interpretation of the rule. But the very terms of a court of *equity* and a court of *law*, as contra[s]ted to each other, are apt to confound and mi[s]lead us: as if the one judged without equity, and the other was not bound by any law. Whereas every definition or illu[s]tration to be met with, which now draws a line between the two juri[s]dictions, by [s]etting law and equity in oppo[s]ition to each other, will be found either totally erroneous, or erroneous to a certain degree.

> Many persons, and especially foreigners, have often expressed surprise that distinct courts should in England and America be established for the administration of equity, instead of the whole administration of municipal justice being confided to one and the same class of courts without any discrimination between law and equity. But this surprise is founded almost wholly upon an erroneous view of the nature of Equity Jurisprudence. It arises from confounding the general sense of equity, which is equivalent to universal or natural justice, *ex æquo et bono*, with its technical sense, which is descriptive of the exercise of jurisdiction over peculiar rights and remedies.[133]

In other words, taking his lead from Blackstone, Story argued for a view of equity jurisdiction as a simple function of certain remedies being allowed in one set of courts as distinct from others, due to circumstances unique to the Anglo-American history, and not as an attempt to embody abstract principles about the administration of justice.[134]

It is impossible to read Story's account without catching a whiff of special pleading since he provides ample evidence, from sources both ancient and contemporary to him, that the association of "equity" in the legal sense with "equity" in the philosophical sense is more than just the result of confusion among classically educated foreigners.[135] Still, it is useful to understand that equity has sometimes been viewed as something best defined not in the abstract, but in a more particular sense as a collection of remedies. For the present purpose, it is worth noting that this is how equity jurisprudence was defined by perhaps the most influential treatise author of the period when the merger of law and equity began in this country with the adoption of the Field Code.[136]

In Story's version of the history of equity, the key factor behind the origin and expansion of equity was not the availability of in personam

133 STORY, *supra* note 9, at 26–31 (internal citations omitted).

134 *See id*. at 20 ("Equity Jurisprudence may therefore properly be said to be that portion of remedial justice which is exclusively administered by a Court of Equity"); *see also id*. at 11 ("'It is said' [Blackstone] remarks 'that it is the business of a Court of Equity in England to abate the rigor of the common law. But no such power is contended for." (quoting WILLIAM BLACKSTONE, 3 COMMENTARIES 430)). Note that some commentators have been highly critical of Blackstone's conception of equity. *See, e.g*., 1 JOHN NORTON POMEROY, A TREATISE ON EQUITY JURISPRUDENCE, § 54 (Spencer W. Symons ed., 5th ed. 1941) ("This is one example among many of Blackstone's utter inability to comprehend the real spirit and workings of the English law."); *see also* Sir W. S. Holdsworth, *Blackstone's Treatment of Equity*, 43 HARV. L. REV. 1 (1929).

135 *See* STORY, *supra* note 9, at 1–22. Story's special pleading here is in defense of his organic conception of the law as the product of a specific, complex history—a fundamentally conservative vision of the law that led him to be critical of the contemporary codification movement. *See* GERALD T. DUNNE, JUSTICE JOSEPH STORY AND THE RISE OF THE SUPREME COURT 315–18 (2d prtg. 1970); JAMES MCCLELLAN, JOSEPH STORY AND THE AMERICAN CONSTITUTION: A STUDY IN POLITICAL AND LEGAL THOUGHT 89–98 (1971).

136 Main acknowledges this definition but ultimately rejects it as being, among other things, "circular." Thomas O. Main, *ADR: The New Equity*, 74 U. CIN. L. REV. 329, 345–46 (2005). Main sees a bright prospect for ADR taking on what he conceives to be equity's traditional role of providing a flexible alternative to litigation. *See id*. at 344–53 (discussing the history of equity and citing numerous nineteenth and early-twentieth century sources on the subject). For a contrary view, see Jacqueline M. Nolan-Haley, *The Merger of Law and Mediation: Lessons from Equity Jurisprudence and Roscoe Pound*, 6 CARDOZO J. CONFLICT RESOL. 57 (2004).

relief in the form of the injunction to compel conduct outside of the litigation itself—the primary factor in many more contemporary accounts of equity's history[137]—but the special power of the equity courts to compel discovery.[138] "Indeed," he argues, "every bill in equity may be said to be in some sense a bill of discovery, since it asks for the personal oath of the defendant, to purge himself in regard to the transactions stated in the bill."[139] This liberal approach to discovery was the inspiration for the approach taken in the Federal Rules of Civil Procedure when they made their debut in 1938.[140] It is also broadly understood that liberal discovery has always had a dark side, with critics of expanded discovery procedure identifying discovery, as opposed to increased formalism, as the source of the infamous delays and backlogged dockets associated with Chancery practice in nineteenth-century England.[141] The fundamental problem is described in Dickens' famous description of Chancery court, which makes reference to the evolution of formalism in the adoption of equity precedent—a common theme of contemporary critics[142]—but focuses primarily on delay and expense:

> On such an afternoon, some score of members of the High Court of Chancery bar ought to be—as here they are—mistily engaged in one of the ten thousand stages of an endless cause, tripping one another up on slippery precedents, groping knee-deep in technicalities, running their goat-hair and horse-hair warded heads against walls of words, and making a pretence of equity with serious faces, as players might. On such an afternoon, the various solicitors in the cause, some two or three of whom have inherited it from their fathers, who made a fortune by it, ought to be—as are they not?—ranged in a line, in a long matted well (but you might look in vain for Truth at the bottom of it), between the registrar's red table and the silk gowns, with bills, cross-bills, answers, rejoinders, injunctions, affidavits, issues, references to masters, masters' reports, mountains of costly nonsense, piled before them.[143]

In a series of articles beginning in 1987, Professor Subrin elaborated on this dark side of equity procedure, finding the origin of contemporary procedure in equity to be the source of most, if not all, of the problems that contemporary critics perceive in the Federal Rules and its state counterparts—most notably, the delay and expense associated with unlimited, largely unsupervised discovery practice.[144] As an alternative, Professor Subrin proposed a partial retreat from the trans-substantive

137 *See, e.g.*, HOFFER, *supra* note 127, at 12–19 (identifying the origins of equity jurisprudence as arising from conflict surrounding the special authority of the Chancery courts to exercise the royal prerogative to compel attendance and enjoin conduct).

138 *See* STORY, *supra* note 9, at 22–23.

139 *Id*.

140 Subrin, *How Equity Conquered*, *supra* note 12, at 943–75.

141 *See id*. at 977–84; *see also id*. at 1001 ("As Dickens and others had known for centuries, equity procedure is slow and cumbersome, and has a high potential for arbitrariness.").

142 For a discussion of the role of precedent in the decline of Chancery practice, see Burns, *supra* note 127.

143 CHARLES DICKENS, BLEAK HOUSE 2 (Oxford Univ. Press 1998) (1853).

144 Subrin, *Fudge Points*, *supra* note 10, at 29–37.

premise of the Federal Rules in the form of default, substance-specific discovery limits to be established by consensus among stakeholders in the various fields of litigation that are the "most discovery-prone."[145] Most cases, he argued, have very little need for discovery, and practitioners would likely be willing to exchange most of their current discovery entitlement for fixed trial dates at the outset of litigation.[146] Those cases that do require more extensive discovery should have it but would benefit from default rules limiting discovery to those documents and depositions identified by stakeholders as necessary to the specific type of case, with discovery outside of those limits available only with leave of court.[147]

Subrin's conception of "substance" differs markedly from what most people would anticipate because he is not really talking about substance in the sense of specific claims or causes of action, but in the sense of "types" of lawsuits, broadly conceived.[148] However, many critics renounced this proposal as if it called for a return to the common law pleading practice, arguing that this approach would encourage boundary disputes regarding classification of cases and punish litigants for technical pleading errors.[149] Moreover, the call for stakeholder consensus has been identified by Subrin's critics as potentially more naive than the assumption of attorney cooperation in discovery on which the current rules are premised.[150]

A different approach, which might be more palatable to some, would be to allow a partial return to the older understanding of managed discovery as a type of remedy—a substantive end rather than simply a procedural means to other ends—the attractions of which were explored in the previous part. However, a remedy-focused reform of discovery might be significantly different, and in some ways actually more traditional, than the subject-matter specific discovery limits proposed by Subrin. Instead, it would involve the creation of an alternative procedural creature modeled on the traditional bill of discovery.

Creating an alternative managed discovery procedure premised on an understanding that managed discovery is something substantively different from ordinary discovery might avoid some of the criticisms leveled at

145 *Id*. at 47–49.

146 *Id*. at 45–48.

147 *Id*. at 47–49.

148 *Id*. at 48 (identifying "categories of cases, such as, products liability, antitrust, securities fraud, section 1983, employment discrimination, and malpractice" as appropriate targets for substance-specific procedural reform).

149 *See, e.g*., Carrington, *supra* note 11; Geoffrey C. Hazard, Jr., *Discovery Vices and Trans-Substantive Virtues in the Federal Rules of Civil Procedure*, 137 U. PA. L. REV. 2237, 2238–47 (1989); Richard L. Marcus, *Of Babies and Bathwater: The Prospects for Procedural Progress*, 59 BROOK. L. REV. 761, 822–25 (1993).

150 *See* Jeffrey W. Stempel, *Ulysses Tied to the Generic Whipping Post: The Continuing Odyssey of Discovery "Reform*,*"* 64 LAW & CONTEMP. PROBS. 197, 237 (2001) ("It may be too difficult to effect set rules in cases such as discrimination or product liability, where the affected parties fear the distributional consequences of presumptive limits on or entitlements to discovery."). For a discussion of the flaws in the assumptions underlying attorney cooperation in discovery, see John S. Beckerman, *Confronting Civil Discovery's Fatal Flaws*, 84 MINN. L. REV. 505, 512–16 (2000).

Subrin's approach to substance as a process of identifying and attempting to create default rules for various "types" of litigation. The approach would be "substance-specific" in that it recognizes some forms of procedure as more appropriate to some types of cases than others, without requiring rule-makers or judges to decide what those types are. Instead, litigants would be encouraged to decide what they want. The approach is also substance-specific in that it understands discovery management as something that litigants want as a substantive end in itself. Approaching reform in this way might avoid, at least in part, the criticism that (a) substance-specific procedure creates fertile ground for boundary disputes; (b) it necessarily politicizes the reform process; and (c) it punishes litigants for simple pleading errors. A flexible approach substituting the concept of remedial managed discovery might also encourage a movement away from current defense-oriented approaches to discovery reform, which create barriers to entry and penalties for perceived "abuse."[151]

What would remedial discovery look like? Again, remedial discovery would be managed discovery. Unlike the ordinary discovery motion, which is essentially a plea for judicial intervention in a process intended to be conducted by the parties, remedial discovery would involve a petition for the appointment of a special master, not just to resolve specific disputes, but to take an active role in developing a discovery plan for the parties that is more than just a series of deadlines. This would ensure that the case not only moves forward, but that it moves forward with appropriately tailored discovery.

Of course, this is by no means the first call for management of discovery by special masters appointed to take the ever-increasing burden of case management. What makes this proposal somewhat different is the recognition of the "managed case" as a potentially distinct procedural entity with its own rules. This may sound like a fantasy, given stretched judicial resources and the futility of so many efforts to increase judicial management of discovery.[152] A number of things are worth noting, however. For one thing, instead of attempting to increase case management in every case, litigants would be permitted to choose more intrusive and potentially limiting case management as an alternative manner of proceeding. They would gain something that many practitioners want in exchange for giving up some control over the process. This would be very different from simply referring all discovery disputes to a discovery master. Instead, it could co-exist with the current system as an alternative for cases where one or more of the parties recognize a genuine need for

151 *See* Stempel, *supra* note 146; *see also* Beckerman, *supra* note 146, at 517–18 (identifying problems associated with the expectation of cooperative discovery within the context of our adversarial litigation culture). *But see* Rubenstein, *supra* note 16, at 1884–92 (arguing that adversarial litigation systems have a special need for procedural equality).

152 *See* Stempel, *supra* note 146, at 241–45 (advocating for full-time discovery masters in the federal system but recognizing the forces that might limit their effectiveness).

case management. Moreover, the parties need not have access to the special master of right. The court could serve as gatekeeper, and would likely retain the power to sanction for genuine discovery abuse.

This procedure might also co-exist with the thin discovery option proposed by Professor Subrin, where litigants agree to strict discovery limits in exchange for a fast track to trial. This proposal recognizes the reality that sometimes what the parties want is their day in court, and they may be willing to give up their ordinary, broadly-defined discovery entitlement to get it. Again, this is substance-specific procedure in the broad sense of giving the parties access to procedural alternatives that they think are better suited to their case, without requiring them to establish entitlement by showing that their case conforms to any particular theory of action, inspired by the recognition that discovery can be viewed as something that people do or do not want in its own right.

The presence of these alternative approaches to discovery might lead to a transformation of ordinary motion practice respecting discovery by encouraging judges to view discovery motions less as a plea for case management and more as a motion for sanctions, which currently are seldom imposed in discovery disputes. In other words, creating the possibility of discovery management by a special master would encourage, but not necessarily require, judges to reconceive their role in ordinary discovery motion practice, primarily policing against abusive practices rather than resolving disputes about whether discovery requests are appropriately tailored to the claims. This approach would create alternatives without reconfiguring civil practice in its entirety. Although some will object to limits on discovery, it is important to note that limits are already being imposed in the federal system and in forms that are much less benign than a discovery plan imposed by a special master.[153]

CONCLUSION

The existence of categories of litigation that are politically charged, with clearly defined classes of litigants standing to "win" or "lose" in the reform process, need not lead to the conclusion that any departure from the trans-substantive premise of the rules would inevitably lead to favoritism in the rule-making process. If we look at substance-specific procedure reform outside of the "political cockpit," we find that it is already happening, and is not necessarily frightening. Instead of containerizing reform in politically contested categories, non-exclusive procedural alternatives modeled after the special statutory procedures that already exist in state law can provide a way to tailor procedure to the needs of litigants without the risks associated with wholesale substance-specific reform.

153 *See* Stempel, *supra* note 146 (discussing recent attempts to reform civil discovery to remedy perceived abuses).

"Dirty Pretty Things" and the Law: Curing the Organ Shortage & Health Care Crises in America*

*Jennifer M. Smith***

There is an organ shortage crisis in the world, especially for kidneys and livers, resulting in approximately 6,000 deaths annually in the United States alone. There is also a health care crisis in the United States, with roughly sixteen percent of the population uninsured, resulting in approximately 18,000 deaths annually. In 1984, the National Organ Transplant Act ("NOTA") banned the acquisition of human organs in exchange for valuable consideration, primarily to prevent the exploitation of poor people—those who are most likely to sell their organs.

Transplant professionals are increasingly pushing to legalize the outright sale of human organs from living donors. This movement is gaining momentum and is likely to garner the necessary support of policymakers to amend NOTA to allow the exchange of human organs for valuable consideration. If such exchange is permitted, this Article posits that living organ donors should be able to receive only non-cash consideration in exchange for their organs—specifically, life-long, comprehensive health care. This would minimize the health care crisis in the United States and continue to prevent the exploitation of poor Americans. This proposal would also effectively reduce the number of deaths in the United States due to the organ shortage while simultaneously reducing the number of deaths caused by the lack of adequate health care. To advance such a proposal, NOTA must be amended to allow for an exchange of human organs for the valuable consideration of life-long, comprehensive health care.

* This title is taken from the 2002 film, DIRTY PRETTY THINGS (Miramax & BBC Films), which is about the black market in human organs. *See* BBC Films, Dirty Pretty Things, http://www.bbc.co.uk/bbcfilms/catalogue/dirtyprettythings.shtml.

** Formerly partner and department chair of the South Florida Health Law Group of Holland & Knight LLP, and federal judicial law clerk to the Honorable Joseph W. Hatchett, U.S. Court of Appeals for the Eleventh Circuit. Currently, Associate Professor of Law, Florida Agricultural & Mechanical University College of Law. J.D., University of Miami School of Law; B.S., Hampton University. Professor Smith expresses sincere gratitude for the research grant provided by Florida A&M University; the thoughtful guidance provided by Professor Patricia Broussard, Professor Gwendolyn Majette, Professor Mitchell Crusto, Nathanial Friends, Esq., Dr. Wallace Rudolph and Dr. Jon Wesley; and the research assistance provided by Karen Skyers, FAMU College of Law student.

> My real problem is poverty—I shouldn't have to sell my kidney to save my daughter's life.[1]

INTRODUCTION

Recently, medical, legal, and economic scholars, as well as transplant physicians and policymakers, have been reviewing the wisdom of the passage of the 1984 National Organ Transplant Act ("NOTA"),[2] which makes it illegal to acquire human organs for valuable consideration.[3] This is because there is an international human organ shortage that is significantly impacting Americans.[4] In the quarter of a century since the enactment of NOTA, there has been a paradigm shift in how organ sales are viewed by Americans. The sale of human organs, once viewed as repugnant to most Americans,[5] is becoming increasingly more acceptable.[6] More scholars, physicians and policymakers are encouraging the development of a commercial market for human organs from living donors.[7]

At the same time, the United States has a health care crisis.[8] A significant percentage of Americans are uninsured,[9] which has a negative impact on the economy.[10] In addition, the death rate of Americans

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1 Scott Carney, *Inside 'Kidneyville': Rani's Story*, WIRED, May 8, 2007, http://www.wired.com/print/medtech/health/news/2007/05/india_transplants_rani (quoting a poor woman living in a refugee camp in Chennai, India who sold her kidney for quick cash to pay for her daughter's necessary medical treatment).

2 42 U.S.C. §§ 273–274g (2000).

3 *Id*. § 274e.

4 *See* The International Association for Organ Donation, Understanding: Statistics/Facts, http://iaod.org/understanding-organ-donation.htm (last visited Oct. 23, 2008) [hereinafter IAOD].

5 *See* TASK FORCE ON ORGAN TRANSPLANTATION, ORGAN TRANSPLANTATION: ISSUES AND RECOMMENDATIONS 96 (1986) (concluding that "society's moral values militate against regarding the body as a commodity.").

6 David H. Howard, *Producing Organ Donors*, 21 J. ECON PERSP. 25, 34 (2007) (noting that a change is on the horizon to pay donors and their families for organs).

7 *See, e.g*., BARRY R. SCHALLER, UNDERSTANDING BIOETHICS AND THE LAW: THE PROMISES AND PERILS OF THE BRAVE NEW WORLD OF BIOTECHNOLOGY 125–26 (2008); ROBERT M. VEATCH, TRANSPLANTATION ETHICS 151–58 (2000); Rupert Jarvis, *Join the Club: A Modest Proposal to Increase Availability of Donor Organs*, *in* THE ETHICS OF ORGAN TRANSPLANTS 183 (Arthur L. Caplan & Daniel H. Coelho eds., 1998); P.J. Morris & R.A. Sells, *Paying for Organs from Living Donors*, *in* THE ETHICS OF ORGAN TRANSPLANTS, *supra*, at 229–30; J. Radcliffe-Richards, et al., *The Case for Allowing Kidney Sales*, *in* THE ETHICS OF ORGAN TRANSPLANTS, *supra*, at 224–28; Julia D. Mahoney, *Should we Adopt a Market Strategy to Organ Donation?*, *in* 7 THE ETHICS OF ORGAN TRANSPLANTATION 65–88 (Wayne Shelton & John Balint eds., 2001); Gloria J. Banks, *Legal & Ethical Safeguards: Protection of Society's Most Vulnerable Participants in a Commercialized Organ Transplantation System*, 21 AM. J.L. & MED. 45, 79–81 (1995); EA Friedman & AL Friedman, *Payment for Donor Kidneys: Pros and Cons*, 69 KIDNEY INT'L 960, 962 (2006); Richard Schwindt & Aidan R. Vining, *Proposal for a Future Delivery Market for Transplant Organs*, 11 J. HEALTH POL. POL'Y & L. 483 (1987).

8 Maxwell J. Mehlman, *"Medicover": A Proposal for National Health Insurance*, 17 HEALTH MATRIX 1, 2–6 (2007) (finding that the state of our health care system is one of the United States' gravest crises).

9 Ross D. Silverman, *Access to Care: Who Pays for Health Care for the Uninsured and Underinsured?*, 29 J. LEGAL MED. 1, 1–5 (2008).

10 *Id*. at 4 (quoting The Institute of Medicine report, estimating that the aggregate, annual cost to

resulting from inadequate medical care due to a lack of health insurance is about three times as great as the death rate due to an inadequate supply of available organs.[11]

This Article proffers a solution that addresses both the organ shortage and the lack of adequate health care for millions of Americans. This Article does not propose that Americans should rush out and sell their body parts to receive health care. Instead, the proposed solution will protect those Americans who choose to participate in the transplantation system as organ donors in a manner that is beneficial to them, while addressing the larger issue of the lack of health care for those who are uninsured.

Part I of this Article discusses the background of organ transplantation. Part II provides the historical development of organ transplantation legislation in the United States and abroad. Part III sets out the current state of the health care system in the United States. Part IV proposes the necessary legislative changes to solve both the organ shortage and national health care crises.

Because numerous lives are at stake, Americans should not stop considering the possible solutions until we have exhausted all reasonable avenues to overcome both the organ shortage and the national health care crises. The challenge is to provide a legally regulated alternative to curtail abuse of our foreign neighbors,[12] whose laws regarding organ transplantation do not afford their citizens adequate protection from the international trafficking of their body parts.[13] We must also avoid

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the United States for diminished health and reduced life spans of Americans who do not have health insurance is between $65 billion to $130 billion); KAREN DAVIS ET AL., THE COMMONWEALTH FUND, HEALTH AND PRODUCTIVITY AMONG U.S. WORKERS 4 (Aug. 2005), *available at* http://www.commonwealthfund.org/usr_doc/856_Davis_hlt_productivity_USworkers.pdf (reporting an economic loss of $260 billion in 2003); Mark Earnest & Dayna Bowen Matthew, *A Property Right to Medical Care*, 29 J. LEGAL MED. 65, 75 (2008) ("Individuals with access to health care . . . form a citizenry equipped to contribute to society's resources as laborers, consumers, creators, and managers, thereby benefiting the entire community.").

11 *Compare* FAMILIES USA, PUB. NO. 07-108, WRONG DIRECTION: ONE OUT OF THREE AMERICANS ARE UNINSURED 17 (2007), *available at* http://familiesusa.org/assets/pdfs/wrong-direction.pdf [hereinafter FAMILIES USA] (reporting that 18,000 deaths can be attributed to a lack of health insurance), *and Health Care Affordability and the Uninsured: Hearing on the Instability of Health Coverage Before the Subcomm. on Health, H. Comm. on Ways & Means*, 110th Cong. 5 (2008) [hereinafter *Health Care Affordability and the Uninsured*] (testimony of Diane Rowland, Executive Vice President, The Henry J. Kaiser Family Foundation, reporting an estimated 22,000 deaths linked to a lack of health insurance), *available at* http://www.kff.org/uninsured/upload/7767.pdf., *with* Louis J. Sirico, Jr., *A Primer on Organ Donation*, 17 J.L. & HEALTH 1, 1 (2002–03) (stating that 5,644 people died while waiting for an organ in 2002), *and* IAOD, *supra* note 4 ("Because of the lack of available donors in this country, 4,066 kidney patients, 1,605 liver patients, 358 heart patients and 250 lung patients died in 2006 while waiting for life-saving organ transplants.").

12 *See* AP Monaco, *Rewards for Organ Donation: The Time Has Come*, 69 KIDNEY INT'L 955–56 (2006) (finding that the number of Americans who have obtained organs from the international black market has grown).

13 *See* DAVID PRICE, LEGAL AND ETHICAL ASPECTS OF ORGAN TRANSPLANTATION 369 (Cambridge Univ. Press 2000) ("Patients will travel where they can to receive necessary treatment unavailable in their country of residence."); Sunny Woan, Comment, *Buy Me a Pound of Flesh: China's Sale of Death Row Organs on the Black Market and What Americans Can Learn from it*, 47

implementing a system in which we abuse our own citizens, whose lack of financial stability makes them vulnerable to impairing their own health in the name of a few instant bucks.[14] If we are to implement a system that allows organ sales from live donors, it must include clear safeguards and complete protections for those donors' continued health and access to health care—that is, life-long, comprehensive health care, which includes preventive care.[15]

I. BACKGROUND

In 2006, approximately 6,000 people died while waiting for a life-saving organ transplant;[16] most of them were waiting for a kidney or liver.[17] That same year, over 18,000 people died as a result of inadequate health care due to a lack of adequate health insurance.[18]

For decades, scholars have written countless articles and books on organ donation and transplantation, analyzing the moral, medical, legal and ethical issues surrounding the lack of an adequate organ supply in the United States and abroad.[19] The shortage is not due to a lack of organs, but a lack of willing organ donors.[20] Although advances in medical technology have increased the success rates of transplants,[21] there are many fears associated with organ donation. For example, many potential organ donors assume that doctors will not exhaust every avenue to save a potential donor's life, so they can harvest the organs needed to save the lives of

SANTA CLARA L. REV. 413, 426 (2007) ("Americans increasingly turn to the international marketplace due to legal obstacles preventing access to organ markets on the domestic front.") (citing Michael Finkel, *Complications*, N.Y. TIMES, May 27, 2001, at 26).

14 Robert D. Truog, *The Ethics of Organ Donation by Living Donors*, 353 N. ENGL. J. MED 444 (2005) (noting that transplant physicians "must risk the life of a healthy person to save or improve the life of a patient.").

15 SARA R. COLLINS ET AL., THE COMMONWEALTH FUND, GAPS IN HEALTH INSURANCE: AN ALL AMERICAN PROBLEM: FINDINGS FROM THE COMMONWEALTH FUND BIENNIAL HEALTH INSURANCE SURVEY 11 (2006), *available at* http://www.commonwealthfund.org/usr_doc/Collins_gapshltins_920.pdf ("For many people with comprehensive insurance coverage, preventive care tests and screens like mammograms, colonoscopies, pap spears, and blood workups for cholesterol are part of their health care routine, performed annually or once every few years and requiring little out-of-pocket expense.").

16 *See* Donate Life Today: Statistics, http://www.donatelifetoday.com/content/understanding-donation/statistics [hereinafter Donate Life] (last visited Sept. 24, 2008) ("An average of 18 people die each day from the lack of available organs for transplant.").

17 *See* IAOD, *supra* note 4 (reporting that 4,066 people died waiting on a kidney and 1,605 people died waiting on a liver in 2006).

18 FAMILIES USA, *supra* note 11.

19 *See*, *e.g.*, sources cited *supra* note 7 and accompanying text; *see also* Alexandra Glazier & Scott Sasjack, *Should it be Illicit to Solicit? A Legal Analysis of Policy Options to Regulate Solicitation of Organs for Transplant*, 17 HEALTH MATRIX 63 (2007).

20 William Potts, *Increasing the Supply of Transplant Organs by way of Financial Incentives*, 31 MONASH U. L. REV. 212, 214–15 (2005) (finding that there is an abundance of organs that are not being utilized for transplants); Donny J. Perales, Comment, *Rethinking the Prohibition of Death Row Prisoners as Organ Donors: A Possible Lifeline to those on Organ Donor Waiting Lists*, 34 ST. MARY'S L.J. 687, 690 (2003) ("Commentators argue that this country does not have an organ shortage; it has a problem recovering organs.").

21 SCHALLER, *supra* note 7, at 107–08.

others.[22] This may seem outlandish, but a transplant surgeon was recently criminally charged with hastening a patient's death to harvest his organs.[23] Thus, notwithstanding significant medical advances, there has not been a viable solution to the organ shortage crisis in the United States or abroad.

In addition to the organ shortage crisis, the United States has a national health care crisis.[24] Because of rising health care costs, under- and unemployment, and diminishing employer-sponsored plans, the number of uninsured Americans has rapidly increased in the past several years,[25] causing a significant, negative impact on the United States economy because of sickness and premature death.[26]

Notwithstanding both the organ shortage and health care crises, wealthy Americans have always had access to human organs.[27] They often travel abroad to buy human organs,[28] coined "transplant tourism."[29] They also have health insurance and access to the most advanced health care.[30] It is the low- to moderate-income citizens, and increasingly middle- and upper-income citizens, who often lack health insurance and access to medical care.[31]

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22 MayoClinic.com, Organ Donation: Don't Let these 10 Myths Confuse You, http://www.mayoclinic.com/health/organ-donation/FL00077 (last visited Oct. 23, 2008).

23 Steve Chawkins, *Transplant Surgeon Faces Trial on Abuse Charge*, L.A. TIMES, March 20, 2008, at B4, *available at* http://articles.latimes.com/2008/mar/20/local/me-transplant20. The transplant surgeon was acquitted, but transplant professionals feared that a conviction in this case would exacerbate the national shortage of human organs because people would be dissuaded from agreeing to become organ donors. *Id*.; Steve Chawkins, *Transplant Surgeon Acquitted*, L.A. TIMES, Dec. 19, 2008, at B3, *available at* http://www.latimes.com/news/local/la-me-transplant19-2008dec19,0,2074223.story.

24 *See* Mehlman, *supra* note 8.

25 CTR. ON BUDGET AND POLICY PRIORITIES, THE NUMBER OF UNINSURED AMERICANS IS AT AN ALL TIME HIGH 1–3 (2006), *available at* http://www.cbpp.org/8-29-06health.pdf (reporting the increase in uninsured Americans). Although the number of uninsured had declined in 2007, sharp increases in unemployment during the current economic downturn have reversed this trend. *Compare* Ian Urbina, *A Decline in Uninsured is Reported for 2007*, N.Y. TIMES, Aug. 26, 2008, at A14, *available at* http://www.nytimes.com/2008/08/27/washington/27census.html (reporting from a Census Bureau report finding that the number of uninsured Americans decreased by more than one million after having increased steadily for the past six years) *with* Mary Beth Lehman, *4 Million Americans Lost Health Insurance Since Recession Began*, PORTLAND BUS. J., Feb. 20, 2009, http://www.bizjournals.com/portland/stories/2009/02/16/daily42.html (reporting that an "estimated 4 million Americans have lost their health insurance since the recession began, and as many as 14,000 people could be losing their health coverage every day").

26 *See* discussion *infra* Part III.B.

27 *See* Glazier & Sasjack, *supra* note 19, at 63 (noting that a recipient received a liver after advertising through emails, the Internet, and by launching an extensive media campaign); Sirico, Jr., *supra* note 11, at 6 (noting that individuals who can afford to do so often travel to foreign countries to purchase organs).

28 Kathleen Maclay, *UC Berkeley Anthropology Professor Working on Organs Trafficking*, U.C. BERKELEY NEWS, April 30, 2004, http://berkeley.edu/news/media/releases/2004/04/30_organs.shtml (last visited Oct. 23, 2008); Sirico, Jr., *supra* note 11, at 6; Woan, *supra* note 13.

29 Maclay, *supra* note 28.

30 *See* Liz Kowalczyk, *Health Service Firms Pamper Rich Patients*, BOSTON SUNDAY GLOBE, Feb. 4. 2001, at A1, *available at* http://www.commondreams.org/headlines01/0204-01.htm (reporting the opinion of health policy specialists that, because wealthy people have always purchased better health care services, the rich tend to be healthier than average citizens).

31 Silverman, *supra* note 9, at 2 ("Increasingly, being uninsured or underinsured has become a concern for those with moderate and higher incomes."). *See generally* KATHERINE SWARTZ,

This Article was inspired by a newspaper publication, *Now for Sale on eBay —Your Kidney?*[32] It discussed a recent scholarly article, *Introducing Incentives in the Market for Live and Cadaveric Organ Donations*, written by two economists, Professors Becker and Elias.[33] Their article argued that "monetary incentives could increase the supply of organs for transplant sufficiently to eliminate the large queues in the organ market, and it would do so while increasing the overall cost of transplant surgery by no more than about 12 percent."[34] Although others have written about monetary incentives to increase the supply of *cadavers*, Becker and Elias stress using monetary incentives to encourage more *live* donations.[35]

With the growing number of people dying due to a lack of available organs, scholars, physicians and policymakers are searching for a cure to the organ shortage. One such cure is to offer financial incentives to live donors.[36] One major problem with offering a monetary incentive for human organs from live donors is the possibility of the rich exploiting the poor.[37] This is especially true as America is rapidly moving from a grave economic downturn to potentially one of its worst recessions since the 1980s.[38] Indeed, the purpose of NOTA was to prevent such exploitation.[39] However, with the organ shortage and the resulting high number of deaths,

REINSURING HEALTH: WHY MORE MIDDLE-CLASS PEOPLE ARE UNINSURED AND WHAT GOVERNMENT CAN DO (2006).

32 Robyn Shelton, *Now for Sale on eBay—Your Kidney?*, ORLANDO SENTINEL, Dec. 18, 2007, at E4.

33 *Id*. (discussing Gary S. Becker & Julio Jorge Elías, *Introducing Incentives in the Market for Live and Cadaveric Organ Donations*, 21 J. ECON. PERSP. 3 (2007)).

34 Becker & Elias, *supra* note 33, at 3.

35 *Id*. (emphasis added).

36 *See, e.g*., Howard, *supra* note 6, at 34 ("The idea of offering large cash payments to living donors who are unknown to the recipient is gaining political support, but this support is insufficient to consider payment a politically feasible alternative at this time."); Arthur J. Matas, *A Gift of Life Deserves Compensation: How to Increase Living Kidney Donation with Realistic Incentives*, *in* POL'Y ANALYSIS 18–19 (Cato Inst., Policy Analysis Series No. 604, Nov. 7, 2007), *available at* http://www.cato.org/pubs/pas/pa-604.pdf (asserting that establishing a system to compensate organ donors would be better than maintaining the status quo as transplant patients continue to die).

37 *See* Curtis E. Harris & Stephen P. Alcorn, *To Solve a Deadly Shortage: Economic Incentives for Human Organ Donation*, 16 ISSUES L. & MED. 213, 231 (2001) (noting the concern that poor people may find organ donation as a solution to their economic problems); Kishore D. Phadke and Urmila Anandh, *Ethics of Paid Organ Donation,* 17 PEDIATRIC NEPHROLOGY 309, 310 (2002) ("It is usually the poor who donate and poverty is perhaps the most significant factor in making a person vulnerable to coercion.") (endnote omitted).

38 Steven Greenhouse, *Will the Safety Net Catch Economy's Casualties?*, N.Y. TIMES, NOV. 16, 2008, at WK3, *available at* http://www.nytimes.com/2008/11/16/weekinreview/16greenhouse.html ("Economists rarely agree on anything, but a great many do agree on one unfortunate matter these days: the current economic downturn is likely to develop into the worst recession since the downturn of 1981–82.").

39 Robert Berman, *Lethal Legislation*, 6 KENNEDY SCH. REV. 13, 13 (2005), *available at* http://www.hods.org/pdf/ksr_volVI2005.pdf ("NOTA was enacted, in part, to protect poor people from being exploited."); Monaco, *supra* note 12, at 956 ("[NOTA] was designed to protect the poor and disenfranchised from potentially dangerous and unhealthy exploitation by unscrupulous middlemen and avaricious brokers.").

scholars and others have begun to minimize the concerns surrounding the exploitation and coercion of the poor.[40]

But is an outright payment of cash, which leaves poor people open to exploitation and potential compromise of their own health, the solution? Or, is it possible to meld both national crises—the organ shortage and lack of health care—and come to a concurrent solution that does not bring with it all the ills associated with an outright sale of human organs? This Article proffers a solution to the organ shortage problem, while simultaneously addressing the health care crisis in the United States.

Because of the dire problems related to the organ shortage, there is growing acceptance of trial programs involving cash payment for organs.[41] As Professors Becker and Elias assert, financial incentives will increase the organ supply.[42] This is true, but opponents assert "that the line between selling organs and actually selling people is a rather fine one and that, as in sex trafficking, the marketplace is one in which coercion and exploitation may be unavoidable."[43]

To date, Americans have frowned upon the outright exchange of cash for organs because of the many ills associated with the purchase of body parts, especially the abuse that would fall primarily on the financially unstable.[44] If this country reverses its current ban on the sale of organs, the potential for exploiting the poor remains great. Yet, offering cash for organs is becoming more of a possibility every day.

Irrespective of whether organs come from living or cadaveric donors, there is no disagreement that there is an organ shortage crisis in the United

40 *See, e.g.*, Becker & Elias, *supra* note 33, at 21 ("Should poor individuals be deprived of revenue that could be highly useful to them, especially when their organs might save the lives of persons who desperately need to replace their defective organs?"); Berman, *supra* note 39, at 13 ("NOTA deprives poor people the right to sell their kidneys in an effort to 'protect' them from their own 'poor judgment.'"); Eugene Volokh, *Medical Self-Defense, Prohibited Experimental Therapies, and Payment for Organs*, 120 HARV. L. REV. 1813, 1841–43 (2007) ("[T]he risk [in organ donation] is modest. . . . But the risks surely do not justify the current ban").

41 *See* Todd Zwillich, *Cash Payments for Organs*, UNITED PRESS INT'L, Apr. 21, 2006, http://www.marsdaily.com/reports/Cash_Payments_For_Organs.html (last visited Oct. 26, 2008) (reporting that Robert Veatch, who opposed cash payment for organs for decades because of the potential to exploit poor people, is now calling for experimentation with such a policy because so many people are dying as a result of the organ shortage).

42 Becker & Elias, *supra* note 33, at 21.

43 Larry Rohter, *Tracking the Sale of a Kidney On a Path of Poverty and Hope*, N.Y. TIMES, May 23, 2004, at N1, *available at* http://query.nytimes.com/gst/fullpage.html?res=9C0CE0DD163EF930A15756C0A9629C8B63&sec=health&spon=&pagewanted=1 (internal quotations omitted).

44 *See* MARK J. CHERRY, KIDNEY FOR SALE BY OWNER: HUMAN ORGANS, TRANSPLANTATION, AND THE MARKET 76 (Georgetown Univ. Press 2005) (stating that a social concern with commercialization is that "cash payments will attract primarily poor and low-income segments of the population, including racial minorities, who will disproportionately bear the health care complications of being vendors, as well as being increasingly subjected to exploitation."); Laura Meckler, *Kidney Shortage Inspires a Radical Idea: Organ Sales*, WALL ST. J., Nov. 13, 2007, at D1, *available at* http://online.wsj.com/public/article_print/SB119490273908090431.html (reporting that Francis Delmonico, a transplant surgeon, fears that organ sales "would attract the poor, vulnerable and unhealthy"); Zwillich, *supra* note 41.

States and abroad. As a result, thousands of people die annually, often waiting for a non-essential organ—an organ that a living donor can spare—such as a kidney or a piece of a liver, while the transplant waiting lists continue to swell.[45] But what is a feasible and ethical answer to this crisis? This Article seeks to address how we can reduce the number of deaths due to the organ shortage.

This Article focuses mainly on the living donor market, as opposed to the cadaveric market, because living donors are subject to the greatest amount of coercion, fraud, and abuse.[46] Additionally, the best organs come from live donors.[47] Further, because of the large number of annual living donor transplants, legal and regulatory focus on living donations has increased, as have the medical technologies in this area.[48] Finally, a focus on the living donor market is important because some scholars argue that "compensation for living donation has the potential to provide all of the needed kidneys."[49]

If organ sales are permitted, the supply of human organs from living donors will come largely from the poorer segments of our society.[50] Although some scholars argue that this concern is overly and needlessly paternalistic,[51] poor people are often exploited in the United States and

45 *See* Donate Life, *supra* note 16.

46 Troy R. Jensen, Note, *Organ Procurement: Various Legal Systems and Their Effectiveness*, 22 HOUS. J. INT'L L. 555, 557 (2000) (noting that many countries have passed laws to protect the exploited and curb human rights abuses resulting from the demand of desperate organ recipients, and that several European countries signed a treaty to protect living donors (citing Council of Europe, Convention on Human Rights and Biomedicine and Explanatory Report, Apr. 4, 1997, 36 I.L.M. 817 (1997)). *But see* Becker & Elias, *supra* note 33, at 4 (suggesting that in some respects live donations are subject to less corruption and abuse than cadaveric organs).

47 PRICE, *supra* note 13, at 219; Alvin E. Roth, Tayfun Sönmez, & M. Utku Ünver, *Kidney Exchange*, Q. J. ECONOMICS, May 2004, at 457, 459.

48 Alexandra K. Glazier & Glenn Krinsky, *Hot Topics in Organ Donation and Transplant*, American Health Lawyers Association, Legal Issues Affecting Academic Medical Centers and Other Teaching Institutions Conference 15 (2008) (reporting that forty-four percent of all organ transplants come from living donors and that 6000 living donor transplants occur every year).

49 ABC News Internet Ventures, *Organ Transplant Expert Answers Our Viewers Questions about Kidney Sales*, Nov. 22, 2007, http://abcnews.go.com/WN/Story?id=3902508&page=1 (last visited Oct. 25, 2008).

50 *See* Sirico, *supra* note 11, at 6 (reporting that a survey in India of illegal kidney sales showed that most sellers lived below the poverty line); Erica Teagarden, *Human Trafficking: Legal Issues in Presumed Consent Laws*, 30 N.C. J. INT'L L. & COM. REG. 685, 686 (2005) (noting that poverty in third world countries often leads poor people to sell their body parts); Kishore D. Phadke & Urmila Anandh, *Ethics of Paid Organ Donation*, 17 PEDIATRIC NEPHROLOGY 309, 310 (2002) ("It is usually the poor who donate and poverty is perhaps the most significant factor in making a person vulnerable to coercion.") (endnote omitted); Becker & Elias, *supra* note 33, at 21 (noting the probability that "the healthy poor and middle classes would actually provide most of the organs for live transplants under a market incentive system."); CHERRY, *supra* note 44, at 8–9.

51 *See* William Barnett II et al., *A Free Market in Kidneys: Efficient and Equitable*, 5 INDEP. REV. 373, 379–80 (2001), *available at* http://www.independent.org/pdf/tir/tir_05_3_barnett.pdf ("The current prohibition is paternalistic, and as such it is dehumanizing. Adults, because they are poor, are treated as though they are incapable of making decisions in their own best interest."); Monaco, *supra* note 12, at 957 (noting that government efforts to reward organ donors may be viewed as implementing a policy that directly exploits the poor); Volokh, *supra* note 40, at 1842–43 (noting that if an organ provider believed that money was worth the small health risk, the government's interest in protecting him against

abroad. If the United States is to harvest the organs of living persons, it must ensure that these persons have access to affordable, lifelong, comprehensive health care—as differentiated from health insurance, which often leaves those underinsured with unwieldy medical bills due to co-payments, deductibles and other costs that insurance will not cover and their incomes cannot support.[52]

II. HISTORICAL DEVELOPMENT OF LEGISLATION

A. Birth of the National Organ Transplantation Act

Beginning in the eighteenth century, researchers began experimenting with organ transplantation on humans and animals.[53] By the mid-twentieth century, doctors were performing successful transplants.[54] In 1954 and 1967, the first successful kidney transplant and liver transplant, respectively, were performed in the United States—the first of their kind in the world.[55] Medical advances in the prevention and treatment of organ rejection led to more successful transplants and an increase in demand.[56] Knowing that organ transplantation was possible, legislators began enacting laws to govern transplants and distribution.[57] Although several states had already passed organ donation laws before federal legislation was enacted, the National Conference of Commissioners on Uniform State Laws ("NCCUSL") drafted the Uniform Anatomical Gift Act ("UAGA")[58] in 1968 to regulate organ donation among states.[59] By 1973, every state had bought into the UAGA and adopted some version thereof.[60]

In 1983, Dr. H. Barry Jacobs attempted to form a company that would purchase kidneys from healthy, but very poor citizens of Third World countries and sell them to wealthy American recipients.[61] Specifically, his proposal included creating the International Kidney Exchange, in which an indigent Third World resident would set a price for a kidney, which Jacobs

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the temptation should not trump the recipient's medical self-defense right) (citing Russell Korobkin, *Buying and Selling Human Tissues for Stem Cell Research*, 49 ARIZ. L. REV. 45 (2007)).

52 Timothy Stoltzfus Jost, *Access to Health Care: Is Self-Help the Answer?*, 29 J. LEGAL MED. 23, 25 (2008) ("Americans are also underinsured—that is, they have insurance but their insurance is inadequate to cover their health care needs.").

53 The Organ Procurement and Transplantation Network, About Transplantation: History, http://www.optn.org/about/transplantation/history.asp (last visited Oct. 25, 2008).

54 *Id*.

55 *Id*.

56 *See* Perales, *supra* note 20, at 688–89 (commenting that medical strides in organ transplantation have increased survival rates for organ recipients).

57 *See* Steve P. Calandrillo, *Cash for Kidneys? Utilizing Incentives to End America's Organ Shortage*, 13 GEO. MASON L. REV. 69, 77–78 (2004).

58 UNIF. ANATOMICAL GIFT ACT §§ 1–11, 8A U.L.A. 94 (1968).

59 Bethany J. Spielman, *Acquiring and Allocating Human Organs for Transplant: U.S. Law*, *in* LEGAL PERSPECTIVES IN BIOETHICS 143, 146 (Ana S. Iltis et al. eds., 2008).

60 Henry Hansmann, *The Economics and Ethics of Markets for Human Organs*, 14 J. HEALTH POL. POL'Y & L. 57, 58 (1989).

61 Banks, *supra* note 7, at 72; Calandrillo, *supra* note 57, at 79; Samuel Gorovitz, *Is Law the Prescription that Can Cure Medicine?*, 11 J. L. & HEALTH 1, 9 (1996–97).

would then sell and collect a brokerage fee.[62] Americans were outraged by his proposal;[63] yet wealthy Americans did, and still do, engage in this "transplant tourism".[64] As a result, Congress passed NOTA in 1984,[65] which banned the sale of human organs.[66]

B. The National Organ Transplantation Act of 1984

NOTA prohibits the acquisition of human organs for valuable consideration,[67] and states in pertinent part:

> (a) Prohibition. It shall be unlawful for any person to knowingly acquire, receive, or otherwise transfer any human organ for valuable consideration for use in human transplantation if the transfer affects interstate commerce.
>
> (b) Penalties. Any person who violates subsection (a) of this section shall be fined not more than $50,000 or imprisoned not more than five years, or both.
>
> (c) Definitions. For purposes of subsection (a) of this section:
>
> (1) The term "human organ" means the human (including fetal) kidney, liver, heart, lung, pancreas, bone marrow, cornea, eye, bone, and skin or any subpart thereof and any other human organ (or any subpart thereof, including that derived from a fetus) specified by the Secretary of Health and Human Services by regulation.
>
> (2) The term "valuable consideration" does not include the reasonable payments associated with the removal, transportation, implantation, processing, preservation, quality control, and storage of a human organ or the expenses of travel, housing, and lost wages incurred by the donor of a human organ in connection with the donation of the organ.
>
> (3) The term "interstate commerce" has the meaning prescribed for it by section 321(b) of title 21.[68]

Thus, NOTA makes it a crime to sell human organs.[69] However, NOTA governs only interstate commerce, so it is only violated if an organ sale crosses state lines.[70] Because the states have jurisdiction over organ donation within their boundaries, they needed to enact their own laws to prevent intrastate organ sales.[71] Thus, the NCCUSL amended the UAGA in 1987 to specifically ban the sale of human organs within the individual

62 *See* Shelby E. Robinson, *Organs for Sale? An Analysis of Proposed Systems for Compensating Organ Providers*, 70 U. COLO. L. REV. 1019, 1036 (1999).

63 Meckler, *supra* note 44.

64 *See supra* notes 28–29 and accompanying text.

65 Spielman, *supra* note 59, at 146.

66 42 U.S.C. § 274e (2000).

67 *Id*.

68 *Id*.

69 Spielman, *supra* note 59, at 146.

70 *See id*.

71 TIMOTHY STOLTZFUS JOST, READINGS IN COMPARATIVE HEALTH LAW & BIOETHICS 93 (2d ed. 2007).

states.[72] Although the 1968 version of the UAGA was adopted by all of the states, less than half of the states have adopted the 1987 amendment.[73]

C. The Aftermath of the National Organ Transplantation Act

Because of NOTA, people in the United States cannot sell their body parts.[74] Some critics argue that this prohibition is a direct cause of the current organ shortage crisis and the numerous resulting deaths.[75] Others argue that offering monetary incentives to organ donors would increase the availability of organs in the United States.[76] Some blame the crisis on the legal system altogether.[77] Certainly, the law plays a major role in organ transplantation. However, the law is a shield to prevent grave abuses and coercion of potential organ donors—it is not the cause of the organ shortage.[78]

Proponents of organ sales assert that society does not object when people work in dangerous forms of employment for monetary compensation (such as militia, firefighters, miners and policemen); therefore, they suggest that donating an organ should not be considered any more dangerous than those careers.[79] Proponents also assert that allowing organ sales would end the international black market in human organs, which operates unregulated, with the majority of the profits going to brokers, rather than the poor people selling their organs.[80]

Still others believe that, from a philosophical point of view, it may be a misplaced sense of paternalism that is the driving force behind America's objection to the sale of organs by the poor.[81] Although other less invasive means to assist the poor exist, there are millions of citizens who might welcome an opportunity to alleviate their poverty by selling an organ.[82] Opponents counter, however, that monetary incentives will not alleviate

72 *See* UNIF. ANATOMICAL GIFT ACT § 10(a), 8A U.L.A. 62 (2003).

73 Harris & Alcorn, *supra* note 37, at 222.

74 42 U.S.C. § 274e (2000).

75 *See* Charles C. Dunham IV, *"Body Property": Challenging the Ethical Barriers in Organ Transplantation to Protect Individual Autonomy*, 17 ANNALS HEALTH L. 39, 45 (2008).

76 Harris & Alcorn, *supra* note 37, at 230 ("Proponents of a live donor market are convinced that even more donors would step forward if given a certain kind of nudge: that is, an economic incentive.").

77 Potts, *supra* note 20, at 31 ("For a number of scholars, it is axiomatic that 'the legal system itself is the cause of the organ shortage and of all the ensuing and unnecessary deaths'.") (quoting Walter Block et al., *Human Organ Transplantation: Economic & Legal Issues*, 3 QUINNIPIAC HEALTH L.J. 87, 106 (1999–2000)).

78 *See* Monaco, *supra* note 12, at 956.

79 Becker & Elias, *supra* note 33, at 21 (noting that payment for organs and payment to military personnel both result in "commodification" of the body, and concluding that "our workplace lets many workers take on jobs that involve higher pay as compensation for some physical risk.").

80 Clare Nullis-Kapp, *Organ Trafficking and Transplantation Pose New Challenges*, 82 BULL. WORLD HEALTH ORG. 715 (2004), *available at* http://www.who.int/bulletin/volumes/82/9/infocus.pdf.

81 *See supra* note 51.

82 Barnett II et al., *supra* note 51, at 380; Becker & Elias, *supra* note 33, at 21 ("Should poor individuals be deprived of revenue that could be highly useful to them, especially when their organs might save the lives of persons who desperately need to replace their defective organs?").

poverty, and there are better ways to help the poor if there is truly an interest in doing so.[83]

Moreover, proponents assert that a thriving legal market for blood, semen, human eggs, and surrogate wombs already exists.[84] Thus, extending markets to include non-essential solid organs such as kidneys and pieces of liver is analogous to these other markets.[85] But, there is also continuous debate as to the degree of risk involved in organ transplantation.[86] It is clear that there is at least some risk involved in the intrusion into a healthy person's body to remove an organ.[87]

Because of the lack of available donors in this country, approximately eighteen people die every day while waiting for an organ or tissue transplant.[88] Currently, there are approximately 100,000 people on the national waiting list for organs.[89] Every thirteen minutes, another person is added to the list.[90] With the number of waitlist recipients swelling, the distressed who need an organ are seeking desperate measures, and people are willing to sell their organs for a high price.[91] Due to the ease of international access via the internet, public awareness of the proposed sale of organs has increased.[92] In 1999, "eBay reported nearly a dozen kidneys were listed for sale, with one having a price of $10 million."[93]

With the prohibition of organ sales in almost every international region, a black market in living donor kidneys has developed.[94] The organ

83 Phadke & Anandh, *supra* note 37, at 310 ("[T]there are better ways to address poverty issues, which include providing fresh drinking water, adequate sewage facilities, and immunization programs.").

84 Harris & Alcorn, *supra* note 37, at 229–30.

85 *Id*.

86 PRICE, *supra* note 13, at 220–21.

87 *Id*. at 220 ("There are inevitably short-term risks of both mortality and morbidity attaching to all organ removal procedures."); Robert S. Gaston, *Is it Safe to Donate a Kidney?*, 11 TRANSPLANT CHRONS. 8 (2003), *available at* http://www.kidney.org/transplantation/transAction/pdf/tc_su03.pdf; R. S. Gaston et al., *Limiting Financial Disincentives in Live Organ Donation: A Rational Solution to the Kidney Shortage*, 6 AM. J. TRANSPLANTATION 2548, 2550 (2006) ("[U]nder current policy in the United States, donor interests remain unprotected relative to current Western standards: risk cannot be quantitated (particularly among ethnic minorities) and [living donors] are not adequately shielded from financial and health consequences associated with nephrectomy.") (endnote omitted); Patricia L. Adams et al., *The Nondirected Live-Kidney Donor: Ethical Considerations and Practice Guidelines*, 74 TRANSPLANTATION 582, 588 (2002) (recommending that educational materials on living donor transplants "state the risk of complications and death associated with live-kidney donation.").

88 Donate Life, *supra* note 16.

89 United Network for Organ Sharing: Organ Donation and Transplantation, http://www.unos.org [hereinafter UNOS] (last visited Sept. 25, 2008) (updating the number of waiting list candidates daily).

90 Donate Life, *supra* note 16.

91 *See* Nullis-Kapp, *supra* note 80, at 715.

92 Truog, *supra* note 14, at 446 ("The solicitation of organs over the Internet is probably here to stay, but it will require higher standards of responsibility and accountability than are currently in place.").

93 *Human Kidney Offered on Internet Auction Site eBay; $5.7 Million Bid*, TRANSPLANT NEWS, Sept. 13, 1999, at 4, *available at* http://www.allbusiness.com/health-care-social-assistance/ambulatory-health-services/304660-1.html.

94 *See* NICHOLAS L. TILNEY, TRANSPLANT: FROM MYTH TO REALITY 263–74 (2003); Friedman

shortage is considered to have the greatest impact in the United States,[95] and Americans are increasingly purchasing organs in the black market and returning to the United States for the transplant or post-operative care.[96] Although there are no reliable statistics on organ trafficking, it is believed to be on the upswing.[97]

But how do we increase the organ supply in the United States without exploiting our poor citizens or traveling abroad to foreign regions and exploiting their poor citizens? Because of the extreme levels of poverty in some regions, Americans and others have procured organs from living donors in many Third World countries with no real long-term benefit bestowed upon the donor.

D. Organ Donation Laws Abroad

The organ shortage is an international crisis. Other countries have the same problem as the United States—the demand for organs exceeds the supply. The international consensus with respect to organ donation is that human organs should not be sold. In 1991, the World Health Organization ("WHO") issued guidelines to avoid the coercion or exploitation of organ donors.[98] The United States and 191 other countries endorsed the guidelines, which were not binding and have been largely ignored.[99] A few years ago, WHO officially acknowledged the ethical and safety risks of organ transplants and the need "to take measures to protect the poorest and vulnerable groups from transplant tourism."[100] Nevertheless, selling organs is a big business in many countries.

& Friedman, *supra* note 7, at 961 ("Our current non-system promotes a kidney black market available only to the wealthy who bear the total expense for what may be inadequately screened, suboptimally matched organs inserted by unregulated (inferior?) surgeons."); Monaco, *supra* note 12, at 956; Brian Handwerk, *Organ Shortage Fuels Illicit Trade in Human Parts*, NAT'L GEOGRAPHIC ULTIMATE EXPLORER, Jan. 16, 2004, http://news.nationalgeographic.com/news/2004/01/0116_040116_EXPL organtraffic.html (last visited Sept. 24, 2008).

95 *See* Potts, *supra* note 20, at 214.

96 Finkel, *supra* note 13, at 30; Michele Goodwin, *Altruism's Limits: Law, Capacity, and Organ Commodification*, 56 RUTGERS L. REV. 305, 328–29 (2004) (finding that "desperate Americans in greater numbers seek life-saving transplantations outside of the United States from death row inmates and others in India, China, and Brazil, and follow-up care from their local doctors and hospitals."); Monaco, *supra* note 12, at 956 ("The number of American patients who use these organ black markets has grown; the presence of such patients seeking post-transplantation care is now commonplace in most American programs."); Craig S. Smith, *Quandry in U.S. Over Use of Organs of Chinese Inmates*, N.Y. TIMES, Nov. 11, 2001, at A1 ("Kidneys, livers, corneas and other body parts from [Chinese] prisoners are being transplanted into American citizens or permanent residents who otherwise would have to wait years for organs. Many of the patients come back to the United States for follow-up care, which Medicaid or other government programs pay for.").

97 Nullis-Kapp, *supra* note 80, at 715.

98 Rohter, *supra* note 43.

99 *Id.*

100 57th World Health Assembly, 8th plen. mtg. at 56–58, Res. WHA57.18 (May 22, 2004), *available at* http://www.who.int/ethics/en/A57_R18-en.pdf (internal quotations omitted).

Poorer regions are particularly a target for the black market.[101] This is largely because of the extreme poverty and the resulting desperation, long waiting lists, and the fact that higher quality organs coming from living donors.[102] As shown below, these countries often have no legislation on human organ sales, and any legislation that does exist is either not enforced or fails to protect the country's poor citizens.

In the Philippines, for example, kidneys may be legally purchased on the open market.[103] Medical teams enter poor neighborhoods to obtain blood and tissue samples for testing, and store the results for later matching when a recipient arrives for a transplant.[104] Although proponents of this system argue that it is a matter of "free choice," opponents contend that the empirical evidence shows that those who sold their kidneys often later complain of pain and disabilities, but cannot afford to be treated by a physician.[105] Apparently, most Filipinos who sold their kidneys did so to pay off high interest debt, leaving them unable to afford health care.[106] Not long ago, a religious group urged the Philippine government to impose stricter standards because of the lucrative illegal trade that has grown in the Philippines.[107] More recently, the Philippine government banned most organ transplants to foreigners, but human rights groups assert that the legislation must be even tougher to protect the country's poor.[108]

In Egypt, where half of the population is in poverty and there are no laws regulating organ sales, the poor are selling their organs to pay off debts to avoid jail and for other less compelling reasons, such as "to buy an apartment to get married."[109] Although some in the Egyptian parliament—the ruling Democratic party—have been working for over a decade to pass laws to ban organ sales and to stop the black market that draws foreign patients from across the world, there has been no success.[110] This is largely due to disagreement between physicians who believe in harvesting organs from brain dead patients, and Islamic clerics who regard it as a forbidden

101 JOST, *supra* note 71, at 90 ("Most alleged organ sales involve sellers from developing nations."); Friedman & Friedman, *supra* note 7, at 961 (reporting an estimate that "thousands of illegal transplants occur every year" purchased by patients from the United States, Japan, Italy, the Persian Gulf states, Israel, and Canada, and sold by "donor nations" such as India, Pakistan, South Africa, Romania, Turkey, Peru and Mexico) (internal quotations omitted).

102 PRICE, *supra* note 13, at 217–19 (acknowledging the benefits of living donor transplantation as compared to cadaveric transplantation); Teagarden, *supra* note 50, at 686–87 (noting that poverty is so oppressive, the resulting desperation leads to selling body parts).

103 Teagarden, *supra* note 50, at 691.

104 *Id*. at 691–92.

105 *Id*. at 692.

106 *Id*.

107 *Philippine Bishops Urge Halt to Organ Trafficking*, REUTERS, Jan. 28, 2008, http://www.reuters.com/article/latestCrisis/idUSMAN101053 (last visited Oct. 21, 2008).

108 Philippines Ban Organ Transplant to Foreigners, http://www.medindia.net/news/Philippines-Ban-Organ-Transplant-to-Foreigners-36152-1.htm (May 1, 2008).

109 Jeffrey Fleishman & Noha El-Hannawy, *When the Body Becomes an ATM*, L.A. TIMES, March 13, 2008, at A1, *available at* http://articles.latimes.com/2008/mar/13/world/fg-organs13.

110 *Id*.

religious practice.[111] But there is no legislation to punish those participating in organ sales that violate Islamic law.[112]

In Thailand, there are two health care systems—one for the rich and one for the poor.[113] The hospitals that treat the rich generally do not accept poor patients because they cannot pay their bills; but these facilities will treat the poor upon the condition that, if they die, their families will donate their organs to the hospital.[114] Not surprisingly, investigations revealed evidence that these hospitals had been harvesting the organs of poor patients who were not yet dead.[115] Nevertheless, physicians and hospital administrators in Thailand are still allowed to broker their own deals in the organ donation arena.[116]

In India, the illegal sale of body parts is growing, despite a government ban that became effective in 1994.[117] An investigation revealed that a significant number of the poorest people in India continue to sell their organs to pay off debt or to buy food.[118] The recipients are often individuals from Western countries.[119] Recently, a kidney ring was exposed in India, in which several doctors, nurses, paramedics, private hospitals, pathology clinics and diagnostic centers were determined to have performed 400 to 500 illegal kidney transplants in the past decade.[120] Many of the donors were day laborers who were initially promised work and were later duped or threatened at gunpoint to undergo the operation.[121] Other donors were bicycle rickshaw drivers and poor farmers who were persuaded to sell their kidneys in violation of the law.[122]

Pakistan's media has dubbed the country a "kidney bazaar" because of the large number of kidney sales resulting from extreme poverty.[123] While the recipient of a kidney likely pays between $6,000 and $12,000, the donor may net about $2,500 (often less than half that).[124] A senior official at a transplant clinic in Pakistan reported that kidney donors need constant check-ups to keep their blood pressure and sugar under control, but donors

111 *Id*.

112 *Id*.

113 Teagarden, *supra* note 50, at 689.

114 *Id*.

115 *Id*. at 689–90.

116 *Id*. at 690.

117 *Indians Selling Human Organs*, BBC NEWS, Oct. 15, 2002, http://news.bbc.co.uk/2/hi/health/2331341.stm; Scott Carney, *Indians Buy Organs with Impunity*, WIRED, Feb. 8, 2007, http://www.wired.com/medtech/health/news/2007/02/72675.

118 *Indians Selling Human Organs*, *supra* note 117.

119 *Id*.

120 Amelia Gentleman, *Kidney Theft Ring Preys on India's Poorest Laborers*, N.Y. TIMES, Jan. 30, 2008, at A3, *available at* http://www.nytimes.com/2008/01/30/world/asia/30kidney.html.

121 *Id*.

122 *Id*.

123 Sadaqat Jan, *Poor Pakistanis Donate Kidneys for Money*, WASH. POST, Nov. 12, 2006, http://www.washingtonpost.com/wp-dyn/content/article/2006/11/12/AR2006111200375.html (last visited Oct. 21, 2008).

124 *Id*.

report that they do not get follow-up care and often suffer with poor health.[125] As a result of the transplant surgery, they cannot walk, run, or work, and sometimes the money earned from selling the kidney was not enough to pay off the full debt that prompted the sale in the first place.[126]

In 2006, China enacted legislation that banned the sale of human organs.[127] The new law does not allow foreigners visiting on a tourist visas to receive organ transplants.[128] Prior to this new law, China allowed the sale of executed prisoners' organs to foreigners, oftentimes wealthy Americans.[129] China's government officials—some who profited greatly from these underground organ sales—initially denied the existence of a black market organ trade, but finally acknowledged it prior to the new law being passed.[130]

Living donor transplant legislation around the world generally includes provisions too broad or too vague to be of any real help.[131] For example, in Romania, Portugal and Germany, the laws provide that there must not be any serious effects upon the donor's health, although they vary in the degree allowed.[132] The law in Greece provides that there must not be "any manifest serious risk to the life or health of the donor."[133] Although kidney donation has been deemed a relatively safe procedure for the donor (perhaps dependent upon the facilities and the medical teams), there may be some risk of serious harm, thereby making these legislative enactments useless if applied literally—even a completely healthy donor would be precluded from donating a kidney under these provisions.[134]

The organ shortage problem is complicated by the fact that many poorer nations do not have comprehensive national health care programs. While this is somewhat understandable in non-industrialized countries, Americans are suffering daily as the United States remains the only industrialized country that does not have a comprehensive national health

125 *Id*.

126 *Id*.

127 Woan, *supra* note 13, at 421; Associated Press, *China Bans Sales of Human Transplant Organs*, MSNBC, March 28, 2006, http://www.msnbc.msn.com/id/12050522.

128 Edward Cody, *China Tightens Restrictions on Transplants*, WASH. POST, Jul 4, 2007, at A12, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2007/07/03/AR2007070300640.html.

129 Woan, *supra* note 13, at 415, 421 (citing Craig G. Smith, *On Death Row, China's Source of Transplants*, N.Y. TIMES, Oct. 18, 2001, at A1); Vanessa Hua, *Patients Seeking Transplants Turn to China: Rights Activists Fear Organs are Taken from Executed Prisoners*, S.F. CHRON., April 17, 2006, at A1, *available at* http://www.sfgate.com/cgi-bin/article.cgi?file=/c/a/2006/04/17/MNGHAIA5B51.DTL.

130 Woan, *supra* note 13, at 415, 421; Whitney Hinkle, Note, *Giving Until It Hurts: Prisoners are Not the Answer to the National Organ Shortage*, 35 IND. L. REV. 593, 597–98 (2002); *Organ Sales 'Thriving' in China*, BBC NEWS, Sept. 27, 2006, http://news.bbc.co.uk/2/hi/asia-pacific/5386720.stm.

131 PRICE, *supra* note 13, at 247.

132 *Id*.

133 *Id*.

134 *Id*. at 247–48.

care system.[135] This impacts the organ shortage crisis and must be examined to fully understand how the two crises intersect and whether there is a potential concurrent solution.

III. HEALTH CARE IN THE UNITED STATES

A. An American Crisis

Public surveys show that "health care is currently the top domestic concern for Americans."[136] Indeed, in this past election, both national presidential candidates had health care as a part of their campaign agenda.[137] This concern regarding health care is principally due to the significant numbers of Americans who are uninsured.[138]

The number of uninsured Americans has reached peak levels.[139] This increase is attributed to rising "health insurance premiums, a changing labor market, and underfunded health care safety net programs" such as Medicaid and the Children's Health Insurance Program.[140] The United States has approximately forty-seven million uninsured citizens, which means that about sixteen percent of the population lacks health insurance.[141] Many uninsured individuals have incomes below $25,000,[142] and every racial and ethnic group is impacted.[143] The higher a person's income, the more likely he or she will have health insurance.[144] Notwithstanding the aforementioned $25,000 figure, studies are showing that "more moderate- and middle-income earners and their families are also [at risk of not having insurance coverage]."[145]

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135 Mehlman, *supra* note 8, at 3.

136 FAMILIES USA, *supra* note 11, at 1.

137 *See, e.g.*, Obama for America, Health Care, http://www.barackobama.com/issues/healthcare (last visited Sept. 23, 2008); McCain-Palin 2008, Straight Talk on Health Care Reform: A "Call to Action", http://www.johnmccain.com/Informing/Issues/ (follow "Health Care" hyperlink) (last visited Sept. 23, 2008); *see also* Christie L. Hager, *Massachusetts Health Reform: A Model of Shared Responsibility*, 29 J. LEGAL MED 11, 11 (2008) ("As the 2008 Presidential campaign season progresses, health reform has become firmly placed on the agendas of candidates of both parties.").

138 FAMILIES USA, *supra* note 11, at 1.

139 *See* CTR. ON BUDGET POLICY & PRIORITIES, *supra* note 25, at 1; *see also* Lawrence E. Singer, *Leveraging Tax-Exempt Status of Hospitals*, 29 J. LEGAL MED 41, 42 (2008) (stating that "by 2013 some 56 million Americans will be without coverage."). Although a decrease in the number of uninsured was reported for 2007 due to an increase in government-sponsored programs, experts noted that the report "did not take into account the economic downturn that began late last year, and therefore it probably presents a rosier picture than the current economic reality." Urbina, *supra* note 25.

140 FAMILIES USA, *supra* note 11, at 11, 14.

141 CTR. ON BUDGET AND POLICY PRIORITIES, *supra* note 25, at 1 (reporting that there were 46.6 million uninsured in 2005 up from 45.3 million in 2004); CARMEN DENAVAS-WALT ET AL., U.S. DEP'T OF COMMERCE, INCOME, POVERTY AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2006, 18 (2007), *available at* http://www.census.gov/prod/2007pubs/p60-233.pdf (reporting forty-seven million uninsured in 2006, which is 15.8% of the population).

142 CTR. ON BUDGET & POLICY PRIORITIES, *supra* note 25, at 2 (noting that a lack of health insurance is most common amongst those with incomes less than $25,000).

143 FAMILIES USA, *supra* note 11, at 9.

144 DENAVAS-WALT, *supra* note 141, at 9.

145 COLLINS ET AL., *supra* note 15, at 1; *see also* Silverman, *supra* note 9, at 2 (reporting from the

As a result of being uninsured, adults often forego needed medical care or preventive care.[146] The uninsured may go without medical care because they fear medical debt.[147] Unfortunately, when they finally do obtain medical help, they do not get the benefit of the discounts negotiated by insurance companies; therefore, they are left with significant medical bills.[148] They often have to sacrifice basic needs such as food, rent, or heat, to pay medical bills.[149] More than half of uninsured adults are forced to forgo needed medical care and, as a result, are twice as likely to have poor health than those with private insurance.[150] Further, uninsured Americans with chronic conditions, such as diabetes, cancer, or heart disease, have difficulty in managing the condition because they lack health insurance.[151]

In addition to those who are uninsured, there are sixteen million Americans who are underinsured in light of large out-of-pocket expenses relative to their salaries.[152] Even those with health insurance are often subject to large deductibles and co-payments, and unwieldy medical bills.[153] Unlike other countries, health insurance in the United States is often tied to employment.[154] Rising health care costs as well as employers shifting more health care costs to employees have increased the out-of-pocket expenses for employees, thus leaving even moderate-income families with a significant financial strain.[155] Employers are not required to provide health care benefits for their retired workers, but many do so voluntarily.[156] Without these voluntary health benefits packages, many

U.S. Census Bureau that "more than 28% of the uninsured live in families with annual incomes above $50,000" and that 73% (1.6 million) of the 2.2 million Americans who became uninsured between 2005 and 2006 were from middle- and upper-income families).

146 COLLINS ET AL., *supra* note 15, at 9.

147 *Health Care Affordability and the Uninsured*, *supra* note 11, at 5.

148 *Id*. at 5–7.

149 COLLINS ET AL., *supra* note 15, at 7.

150 *Id*. at 9.

151 Mehlman, *supra* note 8, at 3.

152 *Id*. at 2–3; *see also* Jost, *supra* note 52, at 25 (defining "underinsurance" as "having to spend more than 10% of household income on health care costs").

153 COLLINS, *supra* note 15, at 5 (reporting that the majority of adults who had medical debt problems had insurance when the bill was incurred); Jost, *supra* note 52, at 25 (further noting that uninsured persons with a good safety-net system may have better access to health care than underinsured persons).

154 Jost, *supra* note 52, at 26 (noting that "employment-based health insurance has served as the primary source of health care coverage for working age Americans"); Mehlman, *supra* note 8, at 2 ("Fewer employers, the source of health insurance for most Americans, are offering it to their employees.").

155 *Health Care Affordability and the Uninsured*, *supra* note 11, at 7 (reporting that health insurance policies do not cover 100% of the costs and those who are insured face deductibles, co-payments, cost-sharing for medical services and additional monies to receive health care outside of the plan's network); MICHELLE M. DOTY ET AL., THE COMMONWEALTH FUND, SEEING RED: AMERICANS DRIVEN INTO DEBT BY MEDICAL BILLS 1 (Aug. 2005), *available at* http://www.commonwealthfund.org/usr_doc/837_Doty_seeing_red_medical_debt.pdf?section=4039 (stating that medical debt accounts for about half of personal bankruptcies).

156 Associated Press, Supreme Court Allows Employers to Coordinate Retiree Benefits with Medicare (March 24, 2008), http://www.law.com/jsp/article.jsp?id=1206357948199.

retirees who are ineligible for Medicare due to being under age sixty-five would not have any health insurance.[157]

Recently, the United States Supreme Court declined to review, and thus affirmed, a federal policy that allows employers to reduce or eliminate health insurance expenses for retired workers who reach age sixty-five and qualify for Medicare.[158] In *AARP v. EEOC*, the American Association of Retired Persons ("AARP"), an advocacy group, brought an action under the Age Discrimination in Employment Act ("ADEA"), alleging that an Equal Employment Opportunity Commission ("EEOC") proposed regulation would allow employers to decrease health care benefits to retirees when they reach the age of sixty-five, at which time they become eligible for Medicare.[159] The EEOC argued that this regulation would encourage employers to provide increased health care benefits to those who most need it—those who are not eligible for Medicare because they are under age sixty-five.[160] Because of rising health care costs, many employers had ceased paying for health benefits for retirees of all ages because it is not required by law.[161] For this reason, labor unions and many companies celebrated the decision because they believe it will encourage employers to coordinate retiree benefits with Medicare and thus maintain health care benefits for their retirees.[162] Allowing employers to reduce or eliminate health care benefits for those eligible for Medicare will allow employers to significantly reduce their costs and presumably provide greater access to health care for retirees under age sixty-five, who are age-barred from Medicare.[163]

A likely assumption is that those without health insurance are non-working families. But the reality is that those without health insurance are largely from working families,[164] demonstrating that lack of health insurance is a crisis of national proportions.

157 Jost, *supra* note 52, at 29 ("Employers also have cut back dramatically on retiree coverage, eliminating what was for many Americans over the age of 65 a vital supplement to public coverage and for many retired Americans under the age of 65 their sole means of insurance coverage.").

158 AARP v. EEOC, 383 F. Supp. 2d 705 (E.D. Pa. 2005), *motion for relief from judgment granted*, 390 F. Supp. 2d 437 (E.D. Pa. 2005), *aff'd on other grounds*, 489 F.3d 558 (3d Cir. 2007), *cert. denied*, 128 S. Ct. 1733 (2008).

159 *Id.* at 706.

160 *Id.*

161 David G. Savage, *Justices Allow Cuts to Retiree Benefits*, L.A. TIMES, March 25, 2008, at A8, *available at* http://articles.latimes.com/2008/mar/25/nation/na-scotus25.

162 *Id.*

163 Anne Kimbol, *Medicare and Retiree Benefits—The Impact of AARP v. EEOC*, HEALTH L. PERSP., Apr. 7, 2008, http://www.law.uh.edu/healthlaw/perspectives/2008/(AK) AARP.pdf (last visited Dec. 23, 2008).

164 FAMILIES USA, *supra* note 11, at 1 (reporting that "four out of five Americans who were uninsured during the 2006–2007 period were in working families.").

B. The National Importance of Health Care

America's health care crisis has morphed from an individual concern to a societal concern. We collectively pay the costs of not insuring all of our citizens.[165] Lack of adequate health care due to the absence of health insurance is the sixth leading cause of death, preceding HIV/AIDS and diabetes.[166] Indeed, not having health insurance has been linked to "increased morbidity and mortality, decreased access to all health care services, lower use of preventive care, delays in seeking out necessary care, and an increased rate of hospitalization for exacerbation of problems that could have been simply managed on an outpatient basis[,]" as well as "developmental and educational deficits for children, reductions in workforce productivity, and significant familial and community stresses."[167] Not surprisingly, uninsured hospital patients are more likely to die than insured patients.[168] Uninsured citizens have less access to health care than those with insurance.[169] Even if uninsured adults receive preventive care and a chronic condition is diagnosed, there is usually not adequate follow-up care.[170] Moreover, by the time uninsured adults reach age sixty-five and are able to qualify for Medicare, they require more care than their counterparts who have had insurance.[171] In addition, uninsured citizens use the emergency room as their primary source of care.[172] This places a heavy burden on medical facilities because uninsured persons receive billions in care where the provider is not paid.[173] The uninsured receive about $100 billion in health care services annually for diseases that could have been treated more efficiently had there been an earlier diagnosis.[174]

Clearly, critical economic and policy implications are attached to uninsured citizens. The United States has lost hundreds of billions of

165 Silverman, *supra* note 9, at 4 (finding that *all* Americans pay for the health care of the uninsured and underinsured through "increased charges for our own care, increased taxes to subsidize appropriations made to health care providers for delivering uncompensated care, and increased burdens such as overcrowded emergency departments and ambulance diversions.").

166 FAMILIES USA, *supra* note 11, at 17.

167 Silverman, *supra* note 9, at 2.

168 AMERICAN COLLEGE OF PHYSICIANS-AMERICAN SOCIETY OF INTERNAL MEDICINE, NO HEALTH INSURANCE? IT'S ENOUGH TO MAKE YOU SICK (Philadelphia: American College of Physicians-American Society of Internal Medicine, Nov. 1999); *see also* Judy Feder, *Federal Action is Required*, U.S. NEWS & WORLD REP., 6 (Feb. 2009) (reporting that "[t]he uninsured live sicker and die younger than people with coverage").

169 FAMILIES USA, *supra* note 11, at 16.

170 *Id*.

171 *Id*. at 17.

172 *See generally* KAISER COMMISSION ON MEDICAID AND THE UNINSURED, THE UNINSURED AND THEIR ACCESS TO HEALTH CARE (Kaiser Family Found., Oct. 2006).

173 *See* FAMILIES USA, PAYING A PREMIUM: THE INCREASED COST OF CARE FOR THE UNINSURED 13 (June 2005), *available at* https://www.policyarchive.org/bitstream/handle/10207/6261/Paying_a_Premium_rev_July_13731e.pdf.

174 *See* INSTITUTE OF MEDICINE, HIDDEN COSTS, VALUES LOST: UNINSURANCE IN AMERICA 3 (June 2003), *available at* http://www.iom.edu/Object.File/Master/12/327/Uninsured5FINAL.pdf (reporting $99 billion spent for uninsured Americans).

dollars in economic output because employees are unable to work, take off for sick days, or perform in a subpar manner due to illness.[175] The United States cannot afford to ignore its uninsured citizens or the lack of affordable access to health care for all Americans.

IV. PROPOSAL

The organ shortage and national health care crises should not be viewed solely as a problem for poor Americans, but for *all* Americans. The country cannot afford to exploit the poor by harvesting their organs for cash—they are already the most vulnerable in society and the least able to obtain follow up medical care. Likewise, the United States cannot afford to ignore those who are uninsured or underinsured. But is there a possible compromise? The promise of life-long comprehensive health care in exchange for organ donation is a potential solution that will ensure that organ donors will not be exploited to their detriment. Ensuring that all Americans have health care is on the national agenda, and numerous scholars have proposed various cures to the organ shortage crisis. Thus, the importance of both is not exaggerated, and combining the two may be warranted.

A. Other Proposals

There are many proposed solutions to the organ shortage crisis. Some scholars have recommended broadening the educational awareness of the importance of organ donation, as well as making it easier for individuals to donate their organs.[176] While both of these suggestions are necessary, they alone are insufficient. Others have proposed conscription—simply taking organs of the dead without requiring any consent by the deceased or their family members.[177] Obviously, this solution has some constitutional, religious, and ethical objections,[178] and it ignores the fact that living donors not only provide higher quality organs,[179] but they contribute over one-fourth of the total number of organs transplanted.[180] Still others have recommended presumed consent, which is the choice in many European countries.[181] It provides that every person is presumed to be an organ donor, unless they declare a contrary intention.[182] This opt-out approach is

175 *See supra* notes 9–10 and accompanying text.

176 *See* Amitai Etzioni, *Organ Donation: A Communitarian Approach*, 13 KENNEDY INST. ETHICS J. 1, 8–9 (2003); Brian Vastag, *Need for Donor Organs Spurs Thought and Action*, 287 JAMA 2491, 2492 (2002).

177 John Harris, *Organ Procurement: Dead Interests, Living Needs*, 29 J. INST. MED. ETHICS 130, 131 (2003); H.E. Emson, *It is Immoral to Require Consent for Cadaver Organ Donation*, 29 J. INST. MED. ETHICS 125, 126–27 (2003).

178 *See* Bernard T. Kwitowski, *Learning From Each Other: Combining Strategies to End the Organ Shortage,* 9 J. MED. & L. 141, 155–56, 156 n.66 (2005).

179 *See supra* note 47 and accompanying text.

180 *See supra* note 48.

181 Teagarden, *supra* note 50, at 721–26.

182 Council on Ethical and Judicial Affairs, American Medical Association, *Strategies for*

tricky at best because it puts the onus on individuals to undo being an organ donor rather than allowing them to choose to be an organ donor. Presumed consent is distinguished from mandated choice, in which an individual must *choose* whether to be an organ donor.[183] Another proposal involves a multi-strategy approach, combining several of the prior recommendations to provide a newly-formed procurement system.[184] While these solutions may be helpful, they fail to provide an incentive for the donors.

Scholars have also proposed various financial incentives. These include tax benefits to encourage living and cadaveric donations,[185] providing payments to donors in exchange for consent to harvest their organs at death,[186] discounted drivers' license fees when registering as a donor to obtain their driver's license,[187] reimbursement of medical care and burial expenses,[188] and health insurance.[189]

One transplant surgeon, Dr. Arthur Matas, has suggested that "[t]he best way to increase the supply of kidneys without drastically changing the existing allocation system is to legalize a regulated system of compensation for living kidney donors," but maintain existing prohibitions on private sales.[190] "Such a system could be established using the infrastructure already in place for evaluating deceased donors and allocating their organs. The only change required to ease and probably even solve the organ shortage is some form of payment for donors," which makes sense because all other participants in the transplantation process (e.g. doctors, coordinators, hospitals and recipients) receive a financial benefit, except for the donors.[191] Also, Americans would not be permitted to harvest the organs from Third World countries.[192] Compensation for donors may include a one-time fixed payment, long-term health insurance, college tuition, tax breaks, or a combination thereof.[193] As explained earlier, there

Cadaveric Organ Procurement: Mandated Choice and Presumed Consent, 272 JAMA 809, 810 (1994).

183 *Id*. at 809.

184 Kwitowski, *supra* note 178, at 156.

185 Calandrillo, *supra* note 57, at 111.

186 Lloyd R. Cohen, *Increasing the Supply of Transplant Organs: The Virtues of a Futures Market*, 58 GEO. WASH. L. REV. 1 (1989); PRICE, *supra* note 13, at 372.

187 Calandrillo, *supra* note 57, at 113.

188 *Id*. at 115.

189 Richard Knox, *Should We Legalize the Market for Human Organs?*, NAT'L PUB. RADIO, May 21, 2008, http://www.npr.org/templates/story/story.php?storyId=90632108 (last visited Oct. 21, 2008) (quoting Amy Friedman who recommended lifelong health insurance, life insurance, and monetary compensation for living organ donors).

190 *See* Matas, *supra* note 36, at 1, 4–5; Meckler, *supra* note 44 (reporting that, for living donors, Dr. Matas proposes a regulated market only for kidneys, because transplants of other organs, such as livers and lungs, have a greater potential for complications to donors).

191 Matas, *supra* note 36, at 1.

192 *Id*. at 17.

193 *Id*. at 4 (citing Gaston et al,, *supra* note 87, at 2551 (recommending life insurance, health insurance for long-term medical care, reasonable reimbursement for travel and lost wages, and a tax deduction or nontaxable lump sum)).

is great cause for concern with outright payment of money as an incentive for donors.[194] But considering a non-cash incentive seems sensible.

B. Proposed Legislation

The United States presently has an altruistic system, simply relying upon voluntary or goodwill donors.[195] This system has not been effective in supplying all of the organs needed in the United States, but it has protected poor Americans from exploitation. Financial incentives are usually sufficient to get people to do things they may not otherwise do, such as donating an organ, but payment for organs is not the cure. In seeking organ donors, one must ask what is it that potential donors lack? What is it that many Americans are lacking? What is it that shows up on most presidential national agenda?[196] The answer is a comprehensive national health care program—Americans want affordable health care.

Under our current organ donation system, everyone wins except for the donors and their families. Organ donations provide hospitals, doctors and transplant coordinators with thousands of dollars for *each* organ donated.[197] Why not allow living donors to donate a kidney or a piece of their liver in exchange for life-long, comprehensive health care? This would include preventive care and certainly any costs associated with the transplant procedure—that is, long-term health care (at no cost to the donor) as distinguished from health insurance.

Even those with health insurance are often left with significant medical debt because premiums, deductibles and co-payments are not affordable.[198] Studies show that sixty-two percent of those with medical debt incurred the debt at the time they had health insurance.[199] Providing health insurance to organ donors who are still unable to pay other health plan fees would result in a meaningless return. Providing the actual service of health care would confer a meaningful benefit upon the organ donor, as opposed to health insurance which, as it stands now, is generally unaffordable.

194 *See supra* note 44 and accompanying text. Professors Becker and Elias have proposed valuing a kidney from a living donor at $15,200 and a liver at $37,600. Becker & Elias, *supra* note 33, at 11, 13*; see also* Robert M. Veatch, *Why Liberals Should Accept Financial Incentives for Organ Procurement*, 13 KENNEDY INST. ETHICS J. 19, 27 (2003) ("Something seems wrong when some people would perceive an offer to sell a kidney for $5000 as irresistibly powerful while others would not be moved in the slightest.").

195 *See* CHERRY, *supra* note 44, at 4–5.

196 *See supra* note 137.

197 Calandrillo, *supra* note 57, at 115 (citing Peter S. Young, *Moving to Compensate Families in the Human-Organ Market*, N.Y. Times, July 8, 1994, at B7).

198 *See supra* note 155 and accompanying text; *see also* Michelle Andrews, *How Health Bills Strain Budgets*, U.S. NEWS & WORLD REP., Feb. 2009, at 21 ("The debate over healthcare affordability often focuses on monthly premiums, but it's the relentless, never-ending drain from copayments, deductibles, and other out-of-pocket expenses not covered by health insurance that often gets people into trouble.").

199 COLLINS ET AL., *supra* note 15, at viii.

Because of the current language in NOTA, however, even giving an organ in return for health care would be considered transferring a human organ for valuable consideration. Thus, to move forward with this recommendation, a change in the United States' current organ transplant legislation is needed. Hopefully, the states will follow the federal government's lead.

NOTA is presently comprised of several sections relating to organ transplants. The section most pertinent to this Article is the section titled "Prohibition of Organ Purchases."[200] The language should be amended to exclude health care services from the definition of "valuable consideration":

> (2) The term "valuable consideration" does not include the reasonable payments associated with the removal, transportation, implantation, processing, preservation, quality control, and storage of a human organ; the expenses of travel, housing, and lost wages incurred by the donor of a human organ in connection with the donation of the organ; *or life-long comprehensive and preventive health care for the donor of a human organ*.

1. Pros in Favor of Recommendation

The benefits of this recommendation are significant to the donor, the recipient and the government. Providing health care to organ donors will reduce the organ shortage, as well as the number of Americans without health care, while discouraging black market transactions. Further, it will ensure that the donor will benefit from the transaction,[201] as well as the government via substantial health care savings.[202] It will also continue to prevent the further exploitation of the poor.[203] This proposal may also incentivize moderate-income earners to become organ donors because they too find health care inaccessible and unaffordable.[204] This will result in a healthier population of organ donors, which is needed for successful transplants. This incentive may also encourage those who have health insurance to become organ donors if they cannot afford the health insurance plan fees, further increasing the healthy pool of donors.

Some transplant professionals believe that an organ sales market may actually decrease the current organ supply, because potential donors may

200 *See* discussion *supra* Part II.B.

201 *See* Teagarden, *supra* note 50, at 691–92 (noting the resulting health problems and continuing financial difficulties suffered by donors in the Philippines).

202 *See supra* notes 9–10, 175 and accompanying text; *see also* Michelle Andrews, *The State of America's Health*, U.S. NEWS & WORLD REP., Feb. 2009, at 10 ("The United States spent more than $2 trillion on healthcare in 2007. It accounts for a whopping 16 percent of our gross domestic product, and that's projected to rise to 20 percent by 2017. Much of this healthcare spending can be tied to preventable health problems."); Gaston**,** *supra* note 87, at 2550 ("The financial benefits of a successful kidney transplant are enormous, to both recipient and society.").

203 *See* Monaco, *supra* note 12, at 956 (discussing NOTA's protection of the poor from exploitation in black market organ sales).

204 *See supra* notes 31 & 145 and accompanying text.

not want to donate an organ if they can get compensation for it.[205] Although there is the possibility of a diminished supply of organs if there is an organ sales market where donors receive a one-time cash payment, it seems that this would be less of a possibility if there is instead an exchange for lifetime health care.

This recommendation would also allow those who are traditionally uneducated about health issues to have increased access to information through their health care professionals. This would potentially reduce some of the chronic diseases in the United States.[206] Increasing the number of Americans with health care would also reduce the number of sick citizens and cause less of a strain on America's economy due to sick workers and shorter life spans for workers who previously did not have health care.[207]

Additionally, this proposal can significantly impact the organ shortage. However, it may only make a dent in the forty seven million uninsured and sixteen million underinsured Americans, because the number of those lacking adequate health care greatly outweighs the number of those who need kidney or liver transplants. Nevertheless, it is a progressive move in the healing of both crises.

This recommendation would also ensure that access to organs is not dominated by wealthy Americans. Instead of providing a menial payout of $15,000 to $37,000—as proposed by Professors Becker and Elias—to a poor person to pay off debt in exchange for an organ and little access to follow up care; it will provide a meaningful, long-term return to the donor. Finally, the organ donors get a benefit.

2. Cons Against Recommendation

Offering life-long comprehensive health care for organs has many benefits, but it also has pitfalls. The cost of health care is very high and "health care is big business."[208] This is primarily why so many Americans lack health insurance. Providing long-term comprehensive health care may not be considered a "fair" trade-off for donating an organ. Based upon the amount of money that has been spent procuring human organs, the figures advanced by Professors Becker and Elias seem low.[209] But if we consider that the market price for organs is much higher than $15,000 or $37,000,[210]

205 *See, e.g.*, Knox, *supra* note 189 (citing Professor David Rothman, who noted that blood donation rates were higher in England where the sale of blood was not allowed, than in the United States where blood sales were permitted).

206 Andrews, *supra* note 202, at 9 ("Overall, caring for people with chronic medical conditions, many of them preventable, accounts for about 75 percent of medical spending nationwide.").

207 *See* discussion *supra* Part III.B.

208 Singer, *supra* note 139, at 41.

209 *See supra* note 194.

210 *See* Handwerk, *supra* note 94 ("Recipients may have paid as much as $100,000 for their ill-gotten organs."). *But see* Berman, *supra* note 39, at 13 (finding that kidneys would sell for approximately $3,000 rather than $100,000 under a regulated free market).

the proposal seems more sensible. Further, providing preventive health care will surely result in future health care savings for the United States.[211]

Finally, how will this solution be implemented; who will pay for it; and who will provide the health care? The shortest answer is the federal government in coordination with health care providers. As mentioned earlier, the United States spends billions in health care annually to care for uninsured Americans with diseases in advanced stages and has lost billions in economic input as a result of uninsured Americans. Thus, the funds are already being spent.[212] This proposal assumes that there would not need to be an infusion of new funds, but rather a shift of funds already being spent. From a cost-benefit perspective, this proposal makes sense.[213] Further, the number of potential organ donors could be limited by a designated monetary amount or a designated number of potential donors. Lastly, the United Network for Organ Sharing ("UNOS")[214]—a private corporation created by NOTA that operates the Organ Procurement and Transplantation Network ("OPTN")[215]—presumably would continue to be instrumental in the regulation of organ transplantation.

CONCLUSION

Overturning NOTA to legalize the purchase and sale of human organs for human transplantation will fail our most vulnerable citizens—the poor. Contrary to the opinions of some transplant professionals, protection of the poor is not a needless paternalistic concern.[216] Yet, legalizing the purchase and sale of human organs is becoming more of a possibility every day. Instead of overturning NOTA, Congress should combine the aforementioned legislative change to NOTA to allow for an exchange of an organ in return for life-long, comprehensive health care with some of the other proposals mentioned above, such as raising awareness,[217] education and increased access to donating.[218] This will increase the number of living organ donors, protect their post-transplant health, and assist with

211 *See supra* note 202 and accompanying text.

212 Joan Indiana Rigdon, *Universal Health Care?*, WASH. LAWYER, July/Aug. 2008, at 22, 24:

> There is no question that our current health care system is remarkably inefficient. The United States government spends a greater percentage of its gross domestic product (GDP) on health care than any other industrialized nation, yet – unlike other industrialized nations who insure all of their citizens – 16 percent of our population is uninsured.

213 *See generally* Richard A. Posner, *Cost-Benefit Analysis: Definition, Justification, and Comment on Conference Papers*, 29 J. LEGAL STUD. 1153, 1153–54 (2000).

214 *See* UNOS, *supra* note 89.

215 CHERRY, *supra* note 44, at 109.

216 See *supra* note 51.

217 Spielman, *supra* note 59, at 150–51; *see also* Jennifer M. Krueger, *Life Coming Bravely Out of Death: Organ Donation Legislation Across European Countries*, 18 WIS. INT'L L.J. 321, 321–22 (2000) (citing REG GREEN, THE NICHOLAS EFFECT: A BOY'S GIFT TO THE WORLD (1999), and describing how the number of organ donor cards quadrupled within days of Nicholas' death, which resulted in saving seven lives).

218 *See* discussion *supra* Part IV.A.

preventable health problems. It will also encourage a healthier and wealthier class of donors, because it is not just the poor who are without health care—the groups of uninsured and underinsured Americans increasingly include middle- to upper-income people.[219] There are some promising proposals being advanced regarding health care plans and recommendations to overcome the barrier caused by high premiums for those who cannot afford them.[220] Rising health care costs have pushed many into debt.[221] But this non-cash incentive would increase the number of living organ donors who would receive life-long, comprehensive health care while not forcing people who are trying to pay for their health care into medical debt, thus encouraging healthier Americans and a healthier America—a benefit for all.

219 *See supra* note 31 and accompanying text.

220 *See, e.g.*, Mehlman, *supra* note 8, at 1–2 (detailing a proposed national health insurance program).

221 Feder, *supra* note 168 ("In 2007, 57 million Americans had problems paying medical bills. At the most extreme, health expenses are a factor in half of all personal bankruptcies, with nearly half of people in foreclosure naming such costs as a cause."); Bob Herbert, *Caught in the Credit Card Vise*, N.Y. TIMES, Sept. 22, 2003, at A17 ("Men and women struggling with such structural problems as job displacement, declining real wages and rising housing and health care costs have been relying on their credit cards as a way of warding off complete disaster.").

Ensuring a Right of Access to the Courts for Bias Crime Victims: A Section 5 Defense of the Matthew Shepard Act

Jordan Blair Woods[*]

Congress recently invoked its power under the Commerce Clause to pass the Local Law Enforcement Hate Crimes Prevention Act of 2007 (The Matthew Shepard Act). On December 6, 2007, Congressional Democrats dropped the Matthew Shepard Act from the U.S. Department of Defense authorization bill. With Democrats now in control of Congress and the election of President Barack Obama, there is renewed hope that the Matthew Shepard Act will be passed and enacted during a subsequent session.

Section 5 of the Fourteenth Amendment gives Congress the authority to enforce the substantive provisions of the Fourteenth Amendment through federal legislation. Although Congress invoked its commerce power to pass the Matthew Shepard Act, it did not invoke its enforcement power under Section 5 of the Fourteenth Amendment. This Article provides the first comprehensive defense of the Matthew Shepard Act under Section 5 of the Fourteenth Amendment. I contend that Congress has the authority to adopt the Matthew Shepard Act by invoking its Section 5 enforcement power and that Section 5 is a stronger constitutional basis to adopt the Act than the Commerce Clause.

In Tennessee v. Lane*, the U.S. Supreme Court affirmed Congress' authority to invoke its Section 5 enforcement power in order to ensure that individuals with disabilities have equal access to the courts. Similarly, I argue that the Matthew Shepard Act is a valid enactment of Congress' Section 5 enforcement power in order to ensure a right of access to the courts for bias crime victims targeted because of sexual orientation, gender identity, gender, and disability. I contend that discrimination and resource constraints prevent these groups of bias crime victims from reporting their crimes to the police, influence police officers not to categorize or investigate their crimes as bias crimes, and prevent prosecutors from prosecuting their crimes as bias crimes. The Matthew Shepard Act is a*

[*] J.D. Candidate, UCLA School of Law, 2009; A.B., Harvard College, 2006. Thanks to Professor Douglas NeJaime for his guidance, feedback, and encouragement. I also greatly appreciate the suggestions and edits of Becky Moskowitz, Rakhi Patel, and Laura Wirth. Finally, thanks to the board and staff of *Chapman Law Review* for their hard work and careful review.

critical piece of legislation because it provides a federal remedy when state and local laws exclude or inadequately address bias crimes on the basis of sexual orientation, gender identity, gender, and disability. The Matthew Shepard Act also allocates federal resources to ensure that resource constraints will not prevent state and local governments from investigating and prosecuting bias crimes.

INTRODUCTION

Despite numerous unsuccessful attempts to expand federal bias crime legislation,[1] Congress recently invoked its power under the Commerce Clause[2] to pass the Local Law Enforcement Hate Crimes Prevention Act of 2007 (The Matthew Shepard Act).[3] The Matthew Shepard Act expands the definition of federal bias crimes to include actual and perceived sexual orientation, gender identity, gender, and disability as protected characteristics.[4] Under certain conditions, the Act also provides federal assistance to state and local authorities in investigating and prosecuting bias crimes even if the victims were not engaged in federally protected activities when the crimes occurred.[5]

On December 6, 2007, Congressional Democrats dropped the Matthew Shepard Act from the U.S. Department of Defense authorization bill.[6] Proponents of the Act described the decision as a "major disappointment to Congressional advocates of the bias crimes expansion and to civil rights activists who believed that the new Democrat-led Congress provided the best opportunity for approving changes sought since 1998."[7] Immediately after the Matthew Shepard Act was dropped from the

1 A summary of the unsuccessful attempts to expand federal bias crime legislation is provided *infra* Part I.D.

2 U.S. CONST. art. I., § 8, cl. 3 ("Congress shall have power . . . to regulate Commerce with foreign Nations, and among several States, and with the Indian Tribes.").

3 H.R. REP. NO. 110-113, at 14 (2007).

4 The Local Law Enforcement Hate Crimes Prevention Act of 2007, H.R. 1592, 110th Cong. § 6 (2007) (proposing changes to 18 U.S.C. § 249(a)(2)); Matthew Shepard Local Law Enforcement Hate Crimes Prevention Act of 2007, S. 1105, 110th Cong. § 7 (2007) (same).

5 H.R. 1592 at § 6 (proposing changes to § 249(b)); S. 1105 at § 7 (same). Currently, federal bias crime legislation only allows the federal government to become involved in the investigation and prosecution of bias crimes if the victims were engaged in certain federally protected activities when the crimes were committed. 18 U.S.C. § 245 (2000). These federally protected activities are: (1) applying or enrolling for admission to a public school or college; (2) participating in benefit or service programs and facilities administered by state and local governments; (3) applying for private or state employment; (4) serving in a jury; (5) traveling in or using a facility of interstate commerce or common carrier; and (6) using a public accommodation or place of exhibition or entertainment, including hotels, motels, restaurants, lunchrooms, bars, gas stations, theaters, concert halls, sports arenas, or stadiums. *Id*.

6 Carl Hulse, *Congressional Maneuvering Dooms Hate Crime Measure*, N.Y. TIMES, Dec. 7, 2007, at A26, *available at* http://www.nytimes.com/2007/12/07/washington/07hate.html (last visited Nov. 9, 2008). After the Senate passed the Matthew Shepard Act, it went to conference where the U.S. House of Representatives and U.S. Senate versions of the bill needed to be harmonized for a final vote. *See id*.

7 *Id*.

defense authorization legislation, House Speaker Nancy Pelosi affirmed publicly that she was "strongly committed" to the Act.[8] With Democrats now in control of Congress and the election of President Barack Obama, there is renewed hope that the Matthew Shepard Act will be passed and enacted during the next four years.[9]

In criticizing the Matthew Shepard Act, scholars and politicians have argued that the Act is an improper exercise of Congress' commerce power after *United States v. Morrison*.[10] In *Morrison*, the U.S. Supreme Court invalidated a provision of the Violence Against Women Act (VAWA)[11] which provided a federal civil remedy to victims of gender-motivated violence.[12] To justify enacting VAWA, Congress invoked its powers under the Commerce Clause and Section 5 of the Fourteenth Amendment.[13] The *Morrison* Court held that VAWA's civil remedy was an improper exercise of both Congress' commerce and Section 5 enforcement powers.[14]

Since the Matthew Shepard Act contains a provision providing for the federal punishment of bias crimes motivated by gender, it is unclear

8 *Measure Aimed at Crimes Against Gays Dropped*, L.A. TIMES, Dec. 7, 2007, at A30, *available at* http://articles.latimes.com/2007/dec/07/nation/na-hatecrimes7.

9 President Barack Obama was an original cosponsor of the Matthew Shepard Act and is an avid supporter of federal bias crime legislation. While he was a Senator for the state of Illinois, Obama released a public statement criticizing Congress' decision to drop the Act from the defense authorization bill. *See Obama Statement on House-Senate Failure to Strengthen Hate Crimes Laws, Guarantee Equality*, Dec. 6, 2007, http://web.archive.org/web/20080109103124/obama.senate.gov/press/071206-obama_statement_106/print.php (last visited Jan. 20, 2009).

10 529 U.S. 598 (2000); *see* John S. Baker, *United States v. Morrison and Other Arguments Against Federal "Hate Crime" Legislation*, 80 B.U. L. REV. 1191, 1217–19 (2000); Christopher Chorba, *The Danger of Federalizing Hate Crimes: Congressional Misconceptions and the Unintended Consequences of the Hate Crimes Prevention Act*, 87 VA. L. REV. 319, 355–56 (2001); Alexander Dombrowsky, Comment, *Whether the Constitutionality of the Violence Against Women Act Will Further Federal Protection from Sexual Orientation Crimes*, 54 U. MIAMI L. REV. 587, 588 (2000); Dan Hasenstab, Comment, *Is Hate A Form of Commerce? The Questionable Constitutionality of Federal "Hate Crime" Legislation*, 45 ST. LOUIS U. L.J. 973, 1016 (2001); Anthony E. Varona & Kevin Layton, *Anchoring Justice: The Constitutionality of the Local Law Enforcement Enhancement Act in United States v. Morrison's Shifting Seas*, 12 STAN. L. & POL'Y REV. 9 (2001). Before *Morrison*, scholars also criticized previous attempts to expand federal bias crime legislation to include sexual orientation, gender, and disability as an improper exercise of Congress' commerce power. *See*, *e.g.*, *Combating Hate Crimes: Promoting a Responsive and Responsible Role for the Federal Government: Hearing on S. 622 Before the Senate Comm. on the Judiciary*, 106th Cong. 49 (1999) (statement of Akhil Reed Amar); *see also Hate Crimes Prevention Act of 1998, Testimony on H.R. 3081 Before the House Comm. on the Judiciary*, 105th Cong. (1998) (testimony of John C. Harrison).

11 *Morrison*, 529 U.S. at 613–15 (invalidating 42 U.S.C. § 13981). Section 13981 provided:

> A person (including a person who acts under color of any statute, ordinance, regulation, custom, or usage of any State) who commits a crime of violence motivated by gender and thus deprives another of the right declared in subsection (b) of this section shall be liable to the party injured, in an action for the recovery of compensatory and punitive damages, injunctive and declaratory relief, and such other relief, and such other relief as a court may deep appropriate.

12 *Morrison*, 529 U.S. at 601–02.

13 *Id.* at 607. Section 5 of the Fourteenth Amendment gives Congress the power to enforce, through legislation, the substantive provisions of the Fourteenth Amendment. Section 5 of the Fourteenth Amendment reads: "The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, § 5.

14 *Morrison*, 529 U.S. at 627.

whether the Act can be sustained as a valid exercise of Congress' commerce and Section 5 enforcement powers after *Morrison*.[15] This uncertainty is further complicated by the fact that Congress invoked its Section 5 enforcement power to adopt VAWA,[16] but only invoked its commerce power to adopt the Matthew Shepard Act.[17]

This Article provides the first comprehensive defense of the Matthew Shepard Act under Section 5 of the Fourteenth Amendment. By distinguishing the Matthew Shepard Act from VAWA, I not only argue that Congress has the authority to adopt the Act by invoking its Section 5 enforcement power, but I also argue that Section 5 is a stronger constitutional basis to adopt the Act than the Commerce Clause.[18] Therefore, when reconsidering the Act in subsequent sessions, Congress should specifically invoke its Section 5 enforcement power.

Advocating a Section 5 defense of the Matthew Shepard Act may seem peculiar in light of the Supreme Court's recent restrictive Section 5 jurisprudential approach.[19] During the 1960s, the Court granted Congress increasing deference to pass laws by invoking its Section 5 enforcement power.[20] This approach lasted until 1997, when the Court in *City of Boerne*

15 *See supra* note 10 and accompanying text.

16 *Morrison*, 529 U.S. at 619–27 (discussing Congress' reliance upon Section 5 enforcement power to adopt VAWA's federal civil remedy and the history of the Section 5 enforcement power).

17 *See supra* note 3.

18 I contend that *Morrison* changes the relative strengths of these two justifications, and after *Morrison* Section 5 is a stronger constitutional justification for the expansion of federal bias crime legislation than the Commerce Clause. When legislation to expand federal bias crime laws was first introduced during the 1990s, some scholars, including Cass R. Sunstein, identified the Commerce Clause and Section 5 of the Fourteenth Amendment as permissible grounds to enact such legislation, but argued that the Commerce Clause was the stronger of the two foundations. *See*, *e.g.*, *Combating Hate Crimes: Promoting a Responsive and Responsible Role for the Federal Government: Hearing on S. 622 Before the Senate Comm. on the Judiciary*, 105th Cong. 106 (1998) (statement of Cass Sunstein). Sunstein gave his testimony on this issue to the Committee on the Judiciary prior to the Supreme Court's decision in *Morrison*. According to Sunstein:

> The first—and most secure—possibility is that the commerce clause could be used, with appropriate findings, to support this assertion of national power. It is obvious that private violence may well interfere with interstate movement of both people and goods. The current findings are quite good in this regard.

Id.

19 Some scholars believe that the Court's recent Section 5 approach warrants criticism. This Article does not provide such critique. Rather, I accept this approach for descriptive purposes and attempt to develop progressive constitutional arguments within a framework that seems resistant to them. For a few critiques of the Court's recent Section 5 approach see David Cole, *The Value of Seeing Things Differently: Boerne v. Flores and Congressional Enforcement of the Bill of Rights*, 1997 SUP. CT. REV. 31; Douglas Laycock, *Conceptual Gulfs in City of Boerne v. Flores*, 39 WM. & MARY L. REV. 743 (1998); Michael A. McConnell, *Institutions and Interpretation: A Critique of City of Boerne v. Flores*, 111 HARV. L. REV. 153 (1997); Robert C. Post & Reva B. Siegal, *Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power*, 78 IND. L.J. 1 (2003).

20 William D. Araiza, *The Section 5 Power and the Rational Basis Standard of Equal Protection*, 79 TUL. L. REV. 519, 520–21 (2005) ("Nearly forty years ago, the seminal cases of South Carolina v. Katzenbach and Katzenbach v. Morgan granted Congress broad authority to enforce the Reconstruction Amendments . . . ."); Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943, 1945 (2003).

v. *Flores*[21] cut back this vast deference.[22] After *City of Boerne*, the Court has struck down Section 5 legislation in four cases, illustrating that *City of Boerne* ushered a new era of Section 5 jurisprudence.[23]

Even though this current climate is hostile to Section 5 legislation, *Tennessee v*. *Lane*[24] affirmed Congress' authority to invoke its Section 5 enforcement power to enact Title II of the Americans with Disabilities Act (ADA)—ensuring equal access to the courts for individuals with disabilities.[25] Based on this legitimate goal of ensuring equal access to the judiciary, I argue that the Matthew Shepard Act is a valid enactment of Congress' Section 5 power. I contend that discrimination and resource constraints in the U.S. law enforcement and judicial systems prevent bias crime victims targeted because of sexual orientation, gender identity, gender, and disability from having equal access to the courts. More specifically, these factors influence bias crime victims not to report bias crimes to the police, cause police officers not to categorize or to investigate their crimes as bias crimes, and prevent prosecutors from prosecuting their crimes as bias crimes. The Matthew Shepard Act is a critical piece of legislation because it provides a federal remedy when state and local laws exclude or inadequately address bias crimes on the basis of sexual orientation, gender identity, gender, and disability. The Act also allocates federal resources to ensure that resource constraints will not prevent state and local governments from investigating and prosecuting bias crimes.

Part I provides background on existing federal and state bias crime laws and unsuccessful attempts to expand federal bias crime law protections. Part II summarizes the pertinent provisions and congressional findings of the Matthew Shepard Act. Part III explains why the Matthew

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21 521 U.S. 507 (1997).

22 *See* William D. Araiza, *ENDA before it Starts: Section 5 of the Fourteenth Amendment and the Availability of Damages Awards to Gay State Employees Under the Proposed Employment Non-Discrimination Act*, 22 B.C. THIRD WORLD L.J. 1, 11 (2002) ("Starting with *City of Boerne*, the Court began to cut back on the deference it had previously given to Congress' decisions to use its Section 5 power."); Araiza, *supra* note 20, at 521 ("More recently, since 1997, the United States Supreme Court has made cutbacks on Congress' power under Section 5 of the Fourteenth Amendment, an important part of its states-rights agenda, striking down parts of four statutes as exceeding Section 5's grant of authority to Congress."). As stated by Post & Siegal:

> The Rehnquist Court has increasingly come to regard Section 5 legislation as challenging the Court's ultimate authority to interpret the Fourteenth Amendment. In a series of cases that began with *City of Boerne v*. *Flores* in 1997 . . . the Court has imposed ever more restrictive conditions on Congress' ability to exercise its Section 5 power.

Post & Siegal, *supra* note 19, at 2.

23 *See* Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627 (1999); Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000); United States v. Morrison, 529 U.S. 598 (2000); and Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356 (2001).

24 541 U.S. 509 (2004).

25 *See id*. at 533–34. It is important to note that some scholars interpret *Tennessee v*. *Lane* and *Nevada Department of Human Resources v*. *Hibbs*, 538 U.S. 721 (2003), another case in which the Court upheld Congress' ability to invoke its Section 5 enforcement power, as a "loosening of the stringent review the Court had previously applied to Section 5 legislation." William D. Araiza, *The Section 5 Power After Tennessee v*. *Lane*, 32 PEPP. L. REV. 39, 83–84 (2004).

Shepard Act is susceptible to attack as an invalid exercise of Congress' commerce power after *Morrison*. I do not dispute that arguments exist for sustaining the Matthew Shepard Act under the Commerce Clause,[26] nor do I argue that Congress' reliance upon its commerce power to enact the Act is normatively wrong. Rather, my argument is predominately descriptive and demonstrates why this reliance is potentially suspect under the Court's current jurisprudence. Consequently, Congress should refrain from relying exclusively upon its commerce power to enact the Matthew Shepard Act.

Part IV shifts the discussion to Section 5 of the Fourteenth Amendment. This Part provides my own interpretation of the Supreme Court's current Section 5 jurisprudential approach and provides a synthesis explaining the current requirements that Congress must meet to enact legislation through its Section 5 enforcement power. Part V applies this synthesis to defend the Matthew Shepard Act as a valid exercise of Congress' Section 5 enforcement power. Consequently, I propose that to strengthen constitutional support for Matthew Shepard Act, Congress should invoke its Section 5 enforcement power when it reintroduces the bill in a subsequent session.

I. BACKGROUND ON BIAS CRIME LAW

For contextual purposes, this Part provides an overview of existing bias crime law in the United States. Part I.A discusses 18 U.S.C. section 245, the first piece of federal bias crime legislation passed in 1968. Part I.B provides background on more recent federal bias crime legislation that was proposed and enacted during the 1990s. Part I.C provides an overview of existing state bias crime laws and their inadequacies. Part I.D discusses the unsuccessful attempts to expand federal bias crime law prior to the Matthew Shepard Act.

A. Early Federal Bias Crime Laws

It was not until the second half of the twentieth century that legislation was created to specifically address the problem of bias crimes. In 1968, Congress passed 18 U.S.C. section 245, the first piece of federal bias crime legislation.[27] This statute grants federal officers the authority to investigate and to prosecute crimes motivated by race, religion, color, and national origin—four characteristics commonly targeted by white supremacist organizations, such as the Ku Klux Klan.[28] Section 245 also permits the federal government to investigate and to prosecute bias crimes if the victims were engaged in certain federally protected activities when the

26 In fact, I have put forth one possible argument in Jordan Blair Woods, *Reconceptualizing Anti-LGBT Hate Crimes as Burdening Expression and Association: A Case for Expanding Federal Hate Crime Legislation to Include Gender Identity and Sexual Orientation*, 6 J. HATE STUDIES 81, 97–101 (2008).

27 18 U.S.C. § 245 (2000).

28 *Id*. § 245(b).

crimes occurred. These activities include using public accommodations, traveling across state lines, and applying for employment.[29]

Widespread violence aimed at preventing racial and ethnic minorities from exercising their civil rights prompted Congress to enact Section 245.[30] The legislative history indicates that racially-motivated violence had often gone unpunished and deterred American citizens from freely exercising their constitutional and statutory rights.[31] In explaining the need for the bill, the Senate Committee on the Judiciary posited that many local and state law enforcement agencies were unable or simply unwilling to address violence intended to prevent racial minorities from exercising their civil rights.[32] The Committee also explained that it was the obligation of the federal government to address criminal acts that burdened affirmative federal rights.[33]

B. Federal Bias Crime Laws Enacted After 18 U.S.C. section 245

The Hate Crime Statistics Act of 1990[34] (HCSA) was the first piece of federal bias crime legislation enacted after 18 U.S.C. section 245. HCSA mandates the Attorney General to gather data about bias crimes on the basis of race, religion, sexual orientation, and religion.[35] The bill also requires the Attorney General to "establish guidelines for the collection of

29 *Id*. See *supra* note 5 for a list of the federally protected activities included under 18 U.S.C. § 245.

30 18 U.S.C. § 245 emerged from three waves of hate-motivated violence that served to prevent racial and ethnic minorities from exercising their constitutional and federal statutory rights during the Reconstruction Era, World War I, and the 1960s Civil Rights Movement respectively. During the Reconstruction Era, many local law enforcement agencies in the South refused to prosecute whites who committed crimes against African Americans. JAMES B. JACOBS & KIMBERLY POTTER, HATE CRIMES: CRIMINAL LAW & IDENTITY POLITICS 36 (1998). Many local law enforcement and government officials also directly inhibited newly freed slaves from exercising their constitutional rights under the Thirteenth, Fourteenth, and Fifteenth Amendments. *Id*. An immigration surge during World War I inspired a second wave of hate-motivated violence. Richard T. Schaefer, *The Ku Klux Klan: Continuity and Change*, 32 PHYLON 143, 147–49 (1971). White supremacist organizations not only targeted African Americans, but also violently attacked Catholics, Jews, and new immigrants. Brian Levin, *The Vindication of Hate Violence Victims Via Criminal and Civil Adjudications*, 1 J. HATE STUD. 133, 142 (2002). The 1960s Civil Rights Movement inspired a third wave of racial and ethnic violence. Many demonstrators were subjected to violence for openly advocating equal civil rights. *Id*. at 143 ("With the advent of the Civil Rights Era in the 1950s and 1960s white supremacists increasingly turned to violence to prevent blacks from exercising the newly protected rights granted to them by the Courts and the legislatures.").

31 S. REP. NO. 90-721, 3–4 (1967).

32 *Id*. at 4.

33 *Id*. at 4–5 ("Federal legislation against racial violence is not required solely because of the sometimes inadequate workings of State or local criminal processes. Too often in recent years, racial violence has been used to deny affirmative Federal rights; this action reflects a purpose to flout the clearly expressed will of the Congress . . . Such lawless acts are distinctly Federal crimes and it is, therefore, appropriate that responsibility for vindication of the rights infringed should be committed to the Federal courts.").

34 Hate Crimes Statistics Act, Pub. L. No. 101-275, 104 Stat. 140 (1990) (codified at 28 U.S.C. § 534 (2000)). Congress reauthorized HCSA in 1996. Church Arson Prevention Act of 1996, Pub. L. No. 104-155, § 7, 110 Stat. 1392, 1394 (1996) (codified at 28 U.S.C. § 534).

35 Hate Crimes Statistics Act, Pub. L. No. 101-275, 104 Stat. 140 (1990).

such data including the necessary evidence and criteria . . . for a finding of manifest prejudice."[36] Since its enactment, the U.S. Federal Bureau of Investigation (FBI) has gathered and published bias crime statistics every year since 1992.[37] Although scholars embrace Congress' intentions for passing HCSA, some have highlighted the need for more sophisticated and comprehensive bias crime statistical gathering methods than those required by HSCA.[38]

In 1994, Congress also enacted the Hate Crimes Sentencing Enhancement Act[39] (HCSEA). HCSEA requires the United States Sentencing Commission to increase the penalties for crimes committed on the basis of actual or perceived race, color, religion, national origin, ethnicity, gender, disability or sexual orientation.[40] HCSEA only applies to cases tried in federal courts where federal jurisdiction is proper.[41] This jurisdictional requirement has raised difficulties because 18 U.S.C. section 245 only encompasses groups targeted on the basis of race, religion, color, and national origin; it does not grant jurisdiction for the federal government to prosecute crimes motivated by a victim's sexual orientation, gender identity, gender, or disability.[42] Therefore, HCSEA has not been applied meaningfully to bias crime victims targeted on the basis of these characteristics.

C. Enacted State Bias Crime Legislation

In the 1980s, state legislatures responded to bias-motivated violence by enacting penalty-enhancement statutes, which increase the punishment of criminal offenses if they are motivated by bias.[43] California was the first

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36 *Id*.

37 The FBI's bias crime statistics reports from 1995 to 2007 are available online. *See* FBI.gov - Civil Rights - Hate Crime, *Hate Crime Statistics*, http://www.fbi.gov/hq/cid/civilrights/hate.htm.

38 Jeanine C. Cogan, *Hate Crime as a Crime Category Worthy of Policy Attention*, 46 AM. BEHAV. SCI. 173, 174 (2002):

> Although this law was highly important in that it helped recognize hate crimes as a phenomenon that needs federal attention, to date, it has been imperfect in providing meaningful data. This is partly because police agencies were not required to report hate crime data for their jurisdictions but rather did so voluntarily. As a result, many police departments did not offer any hate crime data for the first few years.

For another critical analysis of bias crime statistical methods and findings by the FBI see William B. Rubenstein, *The Real Story of U.S. Hate Crimes Statistics: An Empirical Analysis*, 78 TUL. L. REV. 1213 (2004).

39 Hate Crime Sentencing Enhancement Act of 1994 of the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 280003, 108 Stat. 1796, 2096 (1994). In 1995, the United States Sentencing Commission enacted a three-level sentencing guideline for hate crimes. *See* 28 U.S.C. § 994 (2000).

40 Hate Crime Sentencing Enhancement Act of 1994 of the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 280003(a), 108 Stat. 1796, 2096 (1994).

41 Andrew M. Gilbert & Eric D. Marchand, *Splitting the Atom or Splitting Hairs—The Hate Crimes Prevention Act of 1999,* 30 ST. MARY'S L.J. 931, 958 (1999).

42 *Id*. (noting that this limitation forces prosecutors to obtain federal jurisdiction in other manners); *id*. at 978–79.

43 JACOBS & POTTER, *supra* note 30, at 42. Characteristics included in bias crime penalty-

state to criminalize bias-motivated intimidation and violence.[44] Besides enhancing the punishment for bias crimes, many state laws also allocate resources to collect bias crime data and to train law enforcement personnel to properly handle bias-motivated violence.[45] Today, nearly every state has a bias crime law that either enhances the punishment for bias crimes or allocates resources to gather and release bias crime statistics.[46]

As of April 2008, eleven states and the District of Columbia include both sexual orientation and gender identity in their bias crime laws.[47] Twenty states include only sexual orientation in their bias crime laws.[48] Of the states that have bias crime laws, fourteen states do not include either sexual orientation or gender identity as protected characteristics.[49] Twenty-six states and the District of Columbia include gender in their bias crime laws.[50] Thirty states and the District of Columbia include disability.[51]

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enhancement statutes vary among states and localities. For a comprehensive list of characteristics included in state statutes, see Anti-Defamation League, State Hate Crimes Statutory Provisions, http://www.adl.org/learn/hate_crimes_laws/map_frameset.html. *See also* Cogan, *supra* note 38, at 174 (describing how hate crimes became institutionalized as a legal category during the 1980s). It is also important to note that states do not agree on the meaning of "bias" for when applying bias crime penalty enhancements. While some states require bias crimes to be motivated by actual group animus, other states only require that perpetrators intentionally select their victims on the basis of particular protected characteristics, regardless of whether this intentional selection was motivated by group animus. For an overview of the different models of bias crime legislation see generally, Jordan Blair Woods, Comment, *Taking the "Hate" Out of Hate Crimes: Applying Unfair Advantage Theory to Justify the Enhanced Punishment of Opportunistic Bias Crimes*, 56 UCLA L. REV. 489, 495–501 (2008).

44 Cogan, *supra* note 38, at 173.

45 *Id*. at 176; *see also* Anti-Defamation League, State Hate Crime Statutory Provisions, http://www.adl.org/learn/hate_crimes_laws/map_frameset.html, for a current list of states that allocate resources for data collection and training for law enforcement personnel.

46 *See* PartnersAgainstHate.org, Hate Crime Laws Around the Country, http://www.partnersagainsthate.org/hate_response_database/laws.html.

47 The states that include sexual orientation and gender identity in their bias crime laws are California, Colorado, Connecticut, Hawaii, Maryland, Minnesota, Missouri, New Jersey, New Mexico, Oregon, and Vermont. Nat'l Gay and Lesbian Task Force, Hate Crime Laws Map, http://www.thetaskforce.org/reports_and_research/hate_crimes_laws.

48 The states that include only sexual orientation in their bias crime laws are Arizona, Delaware, Florida, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Nebraska, Nevada, New Hampshire, New York, Rhode Island, Tennessee, Texas, Washington, Wisconsin. *Id*. Indiana and Michigan's bias crime data collection laws include sexual orientation, but their bias crime penalty-enhancement statutes do not. *Id*.

49 The states that have bias crime laws that exclude either sexual orientation or gender identity are Alabama, Alaska, Idaho, Mississippi, Montana, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, South Dakota, Utah, Virginia, and West Virginia. *Id*. Utah's bias crime law addresses only offenses committed with the intent to "intimidate or terrorize" and with the intent to interfere with a state, federal, or constitutional right. *Id*.

50 The states that include gender in their bias crime laws are Alaska, Arizona, California, Connecticut, Hawaii, Illinois, Iowa, Louisiana, Maine, Michigan, Minnesota, Mississippi, Missouri, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Rhode Island, Tennessee, Texas, Vermont, Washington, and West Virginia. Anti-Defamation League, State Hate Crime Statutory Provisions, http://www.adl.org/99hatecrime/state_hate_crime_laws.pdf (last visited Sept. 2, 2008).

51 The states that include disability in their bias crime laws are Alabama, Alaska, Arizona, California, Colorado, Connecticut, Delaware, Florida, Hawaii, Illinois, Iowa, Kansas, Louisiana, Maine, Massachusetts, Minnesota, Missouri, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, Oklahoma, Rhode Island, Tennessee, Texas, Vermont, Washington, and Wisconsin. *Id*.

Since many states do not have bias crime laws that include sexual orientation, gender identity, gender, or disability as protected characteristics, this exclusion invariably leaves many victims unable to prosecute their crimes as bias crimes. This was exemplified by the highly publicized murder of Matthew Shepard, a twenty-one-year-old gay college student who was murdered in an antigay bias crime in Wyoming, a state that does not have bias crime legislation.[52] However, even in states with bias crime laws that include these characteristics, many state and local enforcement agencies do not have the resources to investigate and prosecute bias crimes.[53] Moreover, many state and local prosecutors and investigators are deterred from categorizing crimes as bias crimes because bias crimes have a high evidentiary showing and require substantial resources to investigate and to prosecute.[54] Finally, regardless of the inclusiveness of bias crime laws, discriminatory stereotypes and beliefs against bias crime victims may prevent state and local authorities from categorizing a crime as a bias crime.[55] For these reasons, advocates argue that expanding federal bias crime law to include sexual orientation, gender identity, gender, and disability is necessary to rectify the current inadequacies of existing state bias crime legislation.

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52 After the brutal murder of Matthew Shepard, advocates focused on the need for federal bias crime legislation in light of the fact that Wyoming was one of the states that did not have a bias crimes law. *See* Senators Robert Torricelli, Edward Kennedy, Barbara Boxer, and Ron Wyden, Editorial, *Why America Needs Federal Legislation Against Hate Crimes*, AUSTIN AM.-STATESMAN, Oct. 26, 1998, at A11; *see also* Cogan, *supra* note 38, at 176 ("Over the years, it became clear that certain hate crimes were not properly addressed by local police agencies, and the federal government had no authority to intervene."). For a description of how a federal bias crime law would affect state jurisdiction in prosecuting bias crimes, see HUMAN RIGHTS CAMPAIGN, QUESTIONS AND ANSWERS: THE LOCAL LAW ENFORCEMENT HATE CRIMES PREVENTION ACT, 4, http://www.matthewshepard.org/site/DocServer/HRC-LLEHCPA-FAQ1-17-07.pdf?docID=463.

53 *See*, *e.g.*, Elizabeth A. Boyd et al., *"Motivated by Hatred or Prejudice": Categorization of Hate-motivated Crimes in Two Police Divisions*, 30 LAW & SOC'Y REV. 819, 826 (1996) ("Many officers reported concerns that their time would soon be overwhelmed by persons complaining of 'trivial' crimes, compromising their ability to respond promptly to more 'serious' crimes.") (commenting on officers' responses to a new policy requiring police officers to investigate and classify bias crimes); James J. Nolan & Yoshio Akiyama, *An Analysis of Factors that Affect Law Enforcement Participation in Hate Crime Reporting*, 15 J. CONTEMPORARY CRIM. JUST. 111, 119–20 (1999) (finding that resource allocation is a common factor influencing whether law enforcement reports bias crimes).

54 *See*, *e.g.*, Karen Franklin, *Good Intentions: The Enforcement of Hate Crime Penalty-Enhancement Statutes*, 46 AM. BEHAV. SCIENTIST 154, 157 (2002) ("One of the major constraints faced by district attorneys—and one that it is sometimes hard for the lay public to understand—is the inherent difficulty in proving hatred or bias as a primary motivation.").

55 *See id*. at 156 ("Three other studies support the notion that local implementation of hate crime laws is highly variable and contingent on numerous subjective factors, including the attitudes, beliefs, and practices of individual officers, the perceived tractability of the problem, police funding and training, and public opposition to hate crime policies."); *see also* Boyd et al., *supra* note 53, at 826 ("Departmental response to the new policy was mixed at best, reflecting not only some officers' dislike of new orders requiring additional paperwork . . . but also a commonly held view on the legitimacy of hate crimes as a special crime category and of the social significance of hate crimes in general."); Beverly A. McPhail & Diana M. DiNitto, *Prosecutorial Perspectives on Gender-Bias Hate Crimes*, 11 VIOLENCE AGAINST WOMEN 1162, 1176 (2005) ("Some prosecutors' opposition to the gender category may be because of their overall skeptical view of the utility of hate crime legislation, which might influence their view of the gender component.").

D. Unsuccessful Attempts to Expand Federal Bias Crime Law Prior to the Matthew Shepard Act

From 1997 to 1999, congressional representatives attempted to expand the scope of federal bias crime legislation by introducing the Hate Crimes Prevention Act (HCPA).[56] HCPA amended the federal criminal code to punish bias crimes committed on the basis of gender, sexual orientation, or disability.[57] The Act also authorized appropriations to increase the number of personnel to prevent and to respond to bias crimes that interfered with federally protected activities under 18 U.S.C. section 245.[58] Although the House of Representatives and the Senate eventually passed the HCPA, it was later dropped from the Department of Defense appropriations bill in the Senate Conference Committee at the request of Republican leaders and was thus never enacted.[59]

Congressional representatives later attempted to expand federal bias crime legislation to include sexual orientation, gender, and disability by introducing the Local Law Enforcement Enhancement Act (LLEEA) of 2000[60] and the Local Law Enforcement Hate Crime Prevention Acts (LLEHCPA) of 2001[61] and 2004.[62] While the LLEEA and LLEHCPA expanded the federal government's authority to become involved in the investigation and prosecution of bias crimes, each required the federal state and local government to evaluate the propriety of federal involvement.[63] Despite these limiting conditions, these pieces of legislation never passed in Congress.

Representatives again tried to expand federal bias crime legislation with the Local Law Enforcement Hate Crimes Prevention Act (LLEHCPA) of 2005, which also included gender identity as a protected characteristic in the House of Representative's version of the bill.[64] The LLEHCPA imposed the same limiting conditions upon the federal government initial involvement in bias crime investigations and prosecutions as the LLEEA of

56 Hate Crimes Prevention Act of 1997, H.R. 3081, 105th Cong. (1997); Hate Crimes Prevention Act of 1998, S. 1529, 105th Cong. (1998); Hate Crimes Prevention Act of 1999, S. 622, 106th Cong. (1999); Hate Crimes Prevention Act of 1999, H.R. 1082, 106th Cong. (1999).

57 Hate Crimes Prevention Act of 1999, H.R. 1082, 106th Cong. (1999).

58 *Id*. § 6(b).

59 *See* Hasenstab, *supra* note 10, at 975.

60 Local Law Enforcement Enhancement Act of 2000, H.R. 4205, 106th Cong. § 1507(a) (2000). The Hate Crimes Prevention Act of 1999 (S. 622) was renamed the Local Law Enforcement Act as an amendment to a Department of Defense authorization bill. *See generally* 146 Cong. Rec. S10072–73 (daily ed. Oct. 6, 2000) (Senator Leahy discussing the deletion of the Act in conference committee).

61 Local Law Enforcement Hate Crimes Prevention Act of 2001, H.R. 1343, 107th Cong. (2001).

62 Local Law Enforcement Hate Crimes Prevention Act of 2004, H.R. 4204, 108th Cong. (2004).

63 *Id*.; *see also* H.R. 4204 § 249(a)(2), H.R. 1343 § 249(b)(2).

64 Local Law Enforcement Hate Crimes Prevention Act of 2005, H.R. 2662, 109th Cong. § 2 (2005) (protecting gender identity). The Senate's version of the bill did not include gender identity. *See* Local Law Enforcement Enhancement Act of 2005, S. 1145, 109th Cong. § 2 (2005) (protecting sexual orientation but not gender identity).

2000 and the LLEHCPA of 2001 and 2004.[65] Although the House of Representatives successfully passed the LLEHCPA of 2005, the Senate never voted on the bill after it was introduced.[66]

II. THE LOCAL LAW ENFORCEMENT HATE CRIMES PREVENTION ACT OF 2007 (THE MATTHEW SHEPARD ACT)

Recently, the U.S. House of Representatives and the U.S. Senate passed the Matthew Shepard Act,[67] which was the latest attempt by Congress to expand federal bias crimes legislation.[68] This Part provides an overview of the Matthew Shepard Act. Part II.A summarizes the pertinent provisions of the Act. Part II.B summarizes Congress' constitutional findings supporting the legislation.

A. Statutory Provisions

The Matthew Shepard Act expands federal bias crime law to include actual or perceived sexual orientation, gender, gender identity, or disability of the victim.[69] Similar to the previous unsuccessful initiatives to expand federal bias crime legislation, the Matthew Shepard Act provides financial and personnel assistance to state and local governments to investigate and to prosecute bias crimes.[70] Moreover, the bill expands the federal government's authority to prosecute bias crimes to include bias crimes even when the victims are not engaging in federally protected activities.[71]

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65 H.R. 2662; S. 1145.

66 The Whip Pack, *Bill Text and Background for the Week of April 30, 2007*, http://democraticwhip.house.gov/whip_pack/2007/04/30/whip_pack.pdf (last visited Dec. 8, 2007):

> On September 14, 2005, the House of Representatives passed H.R. 2662, the Local Law Enforcement Hate Crimes Prevention Act of 2005 by a vote of 223 to 199. The bill was passed as an amendment, offered by Representative John Conyers to H.R. 3132, the Children's Safety Act of 2005, which would have strengthened the monitoring of, and increase the penalties for child sex offenders. Although Senator Kennedy had introduced a comparable proposal in the Senate (S. 1145), no further legislative action occurred in 109th Congress.

67 The Local Law Enforcement Hate Crimes Prevention Act of 2007, H.R. 1592, 110th Cong. § 6 (2007) (proposing changes to 18 U.S.C. § 249(a)(2)); Matthew Shepard Local Law Enforcement Hate Crimes Prevention Act of 2007, S. 1105, 110th Cong. § 7 (2007) (same).

68 On May 3, 2007, the U.S. House of Representatives passed the Local Law Enforcement Hate Crimes Prevention Act of 2007 ("Matthew Shepard Act"), H.R. 1592, 110th Cong. (2007) by a vote of 237 to 180. *See* Derrick C. Jackson, Opinion, *Optimism in the Hate Crimes Debate*, BOSTON GLOBE, May 26, 2007, at 11A. On September 27, 2007, the U.S. Senate passed its version of the Local Law Enforcement Hate Crimes Prevention Act of 2007, S. 1105, by a 60 to 39 majority. *See* The Matthew Shepard Foundation, *Matthew Shepard Foundation Applauds U.S. Senate Today for Passing Hate Crimes Legislation*, http://www.matthewshepard.org/site/PageServer?pagename=Press_Media_Senate_Passage_MSA.

69 Local Law Enforcement Hate Crimes Prevention Act of 2007, H.R. 1592, 110th Cong. § 6 (2007) (proposing changes to 18 U.S.C. § 249(a)(2)); Matthew Shepard Local Law Enforcement Hate Crimes Prevention Act of 2007, S. 1105, 110th Cong. § 4(1)(C) (2007) (same).

70 H.R. 1592, § 4–5 (referring to S. Comm. after being received from H., May 7, 2007); S. 1105, § 5–6.

71 H.R. 1592, § 6; S. 1105, § 7.

The Matthew Shepard Act also contains numerous conditions that limit the federal government's ability to become involved in the investigation and prosecution of bias crimes. First, federal officers must have "reasonable cause to believe that the actual or perceived race, color, religion, national origin, gender, sexual orientation, gender identity, or disability"[72] of the victim was "a motivating factor underlying"[73] the offense. Second, federal officers are required to consult with state or local law officials regarding the specific bias crime to determine whether the federal government's involvement is desirable and appropriate. The federal government may only become involved if: (1) "the State [or local government] does not have jurisdiction or does not intend to exercise jurisdiction;" (2) "the State has requested that the Federal Government assume jurisdiction;" (3) "the State does not object to the Federal Government assuming jurisdiction;" or (4) "the verdict or sentence obtained pursuant to State charges" was insufficient to eradicate the federal government's interest in eradicating bias-motivated violence.[74] These limitations address federalism concerns and ensure that "[s]tate and local authorities currently investigate and prosecute the overwhelming majority of hate crimes and will continue to do so."[75]

B. Congressional Findings

Upon enacting the Violence Against Women Act (VAWA) for victims of gender-motivated violence, Congress invoked its powers under both the Commerce Clause and Section 5 of the Fourteenth Amendment.[76] To support invoking its Section 5 power, Congress presented extensive evidence documenting the disadvantages that victims of gender-motivated violence face in law enforcement and judicial systems due to discriminatory stereotypes.[77] Despite recognizing that current limitations of federal bias crime law have similarly "led to acquittals in several of the cases in which the Department of Justice has determined a need to assert federal jurisdiction,"[78] Congress invoked only its power under the Commerce Clause to enact the Matthew Shepard Act.[79] It did not invoke its Section 5 enforcement power.

Consequently, an overwhelming majority of the Act's congressional findings focus on how bias crimes affect interstate commerce.[80] For example, Congress noted that bias crimes impede the movement of targeted

72 H.R. 1592, § 6 (proposing changes to 18 U.S.C. § 249(b)(1)); S. 1105, § 7 (same).

73 H.R. 1592, § 6 (proposing changes to 18 U.S.C. § 249(b)(1)); S. 1105, § 7 (same).

74 H.R. 1592, § 6 (proposing changes to 18 U.S.C. § 249(b)(2)); S. 1105, § 7 (same).

75 H.R. REP. NO. 110-113, at 7 (2007).

76 S. REP. NO. 102-197, at 52 (1991) ("Congress' power to enact title III is firmly based in the Commerce Clause and section 5 of the 14th amendment [sic].").

77 *Id*. at 41–44.

78 H.R. REP. NO. 110-113, at 6 (2007).

79 *Id*. at 14–15.

80 *See generally id*.

groups and even force them to move across state lines to escape being subjected to violence.[81] Congress also concluded that perpetrators move across state lines to commit bias crimes and use channels, facilities, and instrumentalities of interstate commerce to commit such violence.[82] Moreover, "[m]embers of targeted groups are prevented from purchasing goods and services, obtaining or sustaining employment, or participating in other commercial activit[ies]."[83] Since Congress did not invoke its Section 5 power to enact the Matthew Shepard Act, none of the Act's constitutional findings are intentionally tailored to support invoking this enforcement power. As demonstrated in Part V *infra*, however, some of the Matthew Shepard Act's congressional findings support the notion that the Act is a valid piece of Section 5 legislation.

III. THE MATTHEW SHEPARD ACT UNDER THE COMMERCE CLAUSE AFTER *MORRISON*

Article I, Section 8 of the U.S. Constitution provides that "Congress shall have the Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[84] The Supreme Court's view on the scope of Congress' commerce power has changed over time,[85] and Congress has invoked its commerce power to adopt a wide range of federal legislation from criminal to environmental laws.[86] In *Gibbons v. Ogden*[87], the Court initially took an expansive approach to

81 *Id*. at 2.

82 *Id*.

83 *Id*.

84 U.S. CONST. art I, § 8.

85 See LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW §§5-4 to 5-8, at 305–17 (Foundation Press 2d ed. 1988) (explaining the changing perspectives of the Supreme Court towards Congress' commerce power).

86 Rosalie Berger Levinson, *Will the New Federalism Be the Legacy of the Rehnquist Court?*, 40 VAL. U. L. REV. 589, 592 (2006):

> [M]any civil rights laws, including some criminal provisions, were enacted under the theory that Congress' Commerce Clause power was plenary. Laws prohibiting race discrimination in public accommodations, restaurants, and hotels, as well as laws prohibiting race, gender, and religious discrimination by private employers were enacted under the theory that discrimination adversely affects interstate commerce and thus may be proscribed.

See also Theodore R. Posner & Timothy M. Reif, *Homage to a Bull Moose: Applying Lessons of History to Meet the Challenges of Globalization*, 24 FORDHAM INT'L L.J. 481, 500 (2000):

> The Court's new, expansive interpretation of the Commerce Clause enabled Congress to enact laws in areas that, under the Court's previous approach, would have been ruled well beyond Congress's reach, including civil rights laws, labor laws, environmental laws, and criminal laws. Challenges to these new exercises of power, most notably in the civil rights area, generally were defeated.

87 22 U.S. 1 (1824); Scott E. Gant, *Judicial Supremacy and Nonjudicial Interpretation of the Constitution*, 24 HASTINGS CONST. L.Q. 359, 415 (1997) ("In *Ogden* the Court accepted the notion Congress should enjoy far-reaching power under the Commerce Clause—that Congress could legislate regarding all commerce which concerns more than one state, and that its power would be plenary, limited only by the Constitution's affirmative prohibitions on the exercise of federal power."); *see also* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 246 (Aspen 3d Ed. 2006).

define the scope Congress' commerce power. However, between 1887 and 1937, the Court adopted a much narrower view of Congress' commerce power.[88] From 1937 to 1995, the Court revisited its expansive approach to Congress' commerce power by applying a very lenient rational basis test to assess the constitutionality of federal legislation passed under the Commerce Clause.[89]

In 1995, the Court decided *United States v. Lopez*[90] and fundamentally changed its Commerce Clause jurisprudence.[91] *Lopez* invalidated the Gun-Free School Zones Act[92] of 1990 and substantially restricted the amount of activity that Congress could regulate under its commerce power. In its analysis, the Court articulated three categories of activities that Congress could regulate under its commerce power. First, Congress could "regulate the use of the channels of interstate commerce."[93] Second, Congress could legislate "to regulato [sic] and protect the instrumentalities of interstate commerce."[94] Third, Congress could legislate to "regulate those activities having a substantial relation to interstate commerce."[95] The Court invalidated the Gun-Free School Zones Act by concluding that the presence of a gun near a school did not involve a channel or instrumentality of interstate commerce,[96] nor did it substantially affect interstate commerce.[97]

In *United States v. Morrison*,[98] the Court placed further restrictions on the third category of activities that Congress could regulate under *Lopez*[99] and addressed whether a federal civil remedy for victims of gender-motivated violence under the Violence Against Women Act (VAWA) was constitutional.[100] The plaintiff argued that violence against women had a substantial effect on the U.S. national economy.[101] The *Morrison* Court considered three factors to determine whether Congress could enact the federal civil remedy on the grounds that gender-motivated violence

88 *See* CHEMERINSKY, *supra* note 87, at 247–48; *see also* ERWIN CHEMERINSKY, INTERPRETING THE CONSTITUTION 131–32 (Praeger 1987).

89 *See* Bradford C. Mank, *Can Congress Regulate Intrastate Endangered Species Under the Commerce Clause? The Split in the Circuits Over Whether the Regulated Activity is Private Commercial Development or the Taking of Protected Species*, 69 BROOK. L. REV. 923, 923 & n.3 (2004).

90 514 U.S. 549 (1995).

91 *See generally* Alan T. Dickey, *United States v. Lopez: The Supreme Court Reasserts the Commerce Clause as a Limit on the Powers of Congress*, 70 TUL. L. REV. 1207 (1996).

92 The Gun-Free School Zones Act of 1990 made it a federal offense "for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone." 18 U.S.C. § 922(q)(1)(A) (Supp. IV. 1992).

93 *Lopez*, 514 U.S. at 558.

94 *Id*.

95 *Id*. at 558–59.

96 *Id*. at 559.

97 *Id*. at 567.

98 529 U.S. 598 (2000).

99 The petitioners in *Morrison* did not contend that the Violence Against Women Act regulated a channel or instrumentality of interstate commerce. *Morrison*, 529 U.S. at 609.

100 42 U.S.C. § 13981 (1994).

101 *Morrison*, 529 U.S. at 598.

substantially affected interstate commerce. First, the Court considered whether the activity was economic in nature.[102] The Court held that "[g]ender-motivated crimes of violence are not, in any sense of the phrase, economic activity."[103] Second, the Court considered whether the text of the statute contained a jurisdictional element establishing that the statute was enacted in pursuance of Congress' power to regulate interstate commerce.[104] The federal civil remedy contained no such jurisdictional element. Consequently, the Court viewed the provision as granting Congress too much authority to regulate criminal activity, which is traditionally regulated by the states.[105] Third, the Court considered whether Congress presented findings indicating that gender-motivated violence had a substantial effect on interstate commerce.[106] Congress presented congressional findings that gender-motivated violence costs the American economy billions of dollars a year and is a substantial constraint to freedom of travel by women throughout the country.[107] Although the Court agreed Congress' findings were more than extensive, it held that "the existence of congressional findings is not sufficient, by itself, to sustain the constitutionality of Commerce Clause legislation,"[108] and rejected the federal government's authority to regulate noneconomic violent criminal conduct based on its cumulative effects on interstate commerce.[109] The Court maintained that to rule otherwise would eliminate boundaries between truly local and federal affairs.[110]

Since the Matthew Shepard Act contains a provision providing for the federal punishment of crimes motivated by gender, scholars argue that it is an unconstitutional exercise of Congress' commerce power after *Morrison*.[111] If legally challenged, it is highly unlikely that the Court will conclude that the Matthew Shepard Act regulates channels or instrumentalities of interstate commerce. While the Act targets activity that involves channels and instrumentalities of interstate commerce, it does not regulate those channels or instrumentalities themselves.[112] Therefore, if the Act is legally challenged, the Court will likely focus on the third category of activity under *Lopez* and assess whether bias crimes motivated by sexual orientation, gender identity, gender, and disability substantially affect interstate commerce. The three-factor *Morrison* framework will likely

102 *Id*. at 610.
103 *Id*. at 613.
104 *Id*.
105 *Id*.
106 *Id*. at 614.
107 *See* H.R. REP. NO. 103-711, at 385 (1994) (Conf. Rep.) *reprinted in 1994* U.S.C.C.A.N. 1803, 1853; S. REP. NO. 103-138, at 41 (1990); S. REP. NO. 101-545, at 33 (1990).
108 *Morrison*, 529 U.S. at 614.
109 *Id*. at 617.
110 *Id*. at 617–18.
111 *See supra* note 10 and accompanying text.
112 *See* Hasenstab, *supra* note 10, at 1006–07.

guide its analysis.[113]

First, the Court will assess whether the activity targeted by the Matthew Shepard Act is economic in nature. In *Morrison*, the Court stated:

> Gender-motivated crimes of violence are not, in any sense of the phrase, economic activity. While we need not adopt a categorical rule against aggregating the effects of any noneconomic activity in order to decide these cases, thus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature.[114]

Thus, it is unlikely that the Court may conclude that bias crimes motivated by sexual orientation, gender identity, gender, and disability are economic in nature given that it previously rejected in *Morrison* that gender-motivated crimes are economic activities. Furthermore, since the Court was hesitant to create new law on this issue in *Morrison*,[115] it is also unlikely to change its position on whether Congress has the authority to regulate noneconomic activity under the Commerce Clause.

Second, the Court may consider whether the text of the Matthew Shepard Act contains a jurisdictional element establishing that the bill was passed in pursuance of Congress' power to regulate interstate commerce.[116] Unlike the civil remedy of the VAWA, the Matthew Shepard Act contains jurisdictional elements establishing a nexus between interstate commerce and bias crimes on the basis of sexual orientation, gender identity, gender, and disability. The Act contains jurisdictional elements that reference crossing state lines; using a channel, facility, or instrument of interstate commerce; using a weapon that has traveled in interstate commerce; interfering with commercial or other economic activity; and otherwise affecting interstate or foreign commerce.[117] Therefore, the jurisdictional element is likely to weigh in favor of upholding the Matthew Shepard Act. Although the *Morrison* Court stated that "a jurisdictional element may establish that the enactment is in pursuance of Congress's regulation of interstate commerce,"[118] it did not conclude that the presence of a jurisdictional element is legally dispositive.

Third, the Court may consider the adequacy of the Matthew Shepard Act's congressional findings. In passing the Act, Congress presented findings establishing that bias crimes substantially affect interstate

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113 *Id*. at 1007; *see also* Varona & Layton, *supra* note 10, at 12–14 (evaluating the constitutionality of the Local Law Enforcement Act of 2000 in light of *Morrison*).

114 *Morrison*, 529 U.S. at 613.

115 *Id*. at 615–16.

116 Some scholars emphasize this factor to defend previous attempts to expand federal bias crime law to include sexual orientation, gender identity, gender, and disability. *See*, *e.g*., Varona & Layton, *supra* note 113, at 12–14.

117 Local Law Enforcement Hate Crimes Prevention Act of 2007, H.R. 1592, 110th Cong. § 7(a) (2007) (proposing changes to 18 U.S.C. § 249(a)(2)(B)); Matthew Shepard Local Law Enforcement Hate Crimes Prevention Act of 2007, S. 1105, 110th Cong. § 7(a) (2007) (same).

118 *Morrison*, 529 U.S. at 612.

commerce.[119] Congress highlighted that bias crimes impede the movement of targeted groups and force members of such groups to move across state lines to avoid being subjected to bias crimes.[120] Congress also found that bias crimes prevent members of targeted groups from "purchasing goods and services, obtaining or sustaining employment, or participating in other commercial activity."[121] Moreover, perpetrators move across state lines, use articles that have traveled in interstate commerce, and use channels, facilities, and instrumentalities of interstate commerce to commit bias crimes.[122] But even if the Court concludes that these findings are adequate, *Morrison* affirms that a valid exercise of Congress' commerce power cannot be exclusively grounded by congressional findings.[123]

In summary, of the three factors considered by the *Morrison* Court, the second and the third factors will most likely weigh in favor of the Matthew Shepard Act. The *Morrison* Court, however, did not adopt a balancing test that gives equal weight to each of the three factors. Despite agreeing with the adequacy of the congressional findings, the Court rejected the federal government's authority to regulate noneconomic violent criminal conduct based on its cumulative effects on interstate commerce.[124] Instead, it gave priority to the first of the three factors when determining whether an activity substantially affected interstate commerce. Consequently, even if the Court concludes that the Matthew Shepard Act contains sufficient jurisdictional hooks and congressional findings, the Act can still be invalidated as unconstitutional under *Morrison*. There also is no indication that the Court will change its position to adopt a rule permitting Congress to regulate noneconomic activity, when in the aggregate, it substantially affects interstate commerce. As such, Congress' position that it has the authority to expand federal bias crime legislation based on its commerce power is constitutionally suspect under existing jurisprudence. For that reason, Congress should not rely exclusively on its commerce power when reintroducing the Matthew Shepard Act in subsequent sessions.

IV. THE SUPREME COURT'S CURRENT SECTION 5 JURISPRUDENCE

Section 5 of the Fourteenth Amendment grants Congress the power to enforce the substantive provisions of the Fourteenth Amendment.[125] The Court's approach to Section 5 has been a matter of constant evolution. In the early years of the Fourteenth Amendment, the Court was skeptical of

119 H.R. REP. NO. 110-113, at 2 (2007).
120 *Id*.
121 *Id*.
122 *Id*.
123 *Morrison*, 529 U.S. at 614.
124 *Id*. at 617.
125 U.S. CONST. amend. XIV, § 5.

Congress' Section 5 enforcement power.[126] However, during the 1960s the Court granted Congress more deference to pass Section 5 legislation due to the aftermath of the New Deal.[127] This deferential approach lasted until 1997, when the Court revoked this deference in *City of Boerne v. Flores*.[128] Part IV.A provides a brief summary of *City of Boerne* and the constitutional principles that originate from it. Part IV.B focuses on the Section 5 cases after *City of Boerne* and provides a synthesis of what Congress must prove in order to invoke its Section 5 enforcement power under the current Section 5 jurisprudence.

A. City of Boerne v. Flores

City of Boerne v. Flores[129] is the foundational case in the Supreme Court's current Section 5 jurisprudence. In *City of Boerne*, the Court held that Congress exceeded the scope of its enforcement power under Section 5 of the Fourteenth Amendment when it enacted the Religious Freedom Restoration Act (RFRA).[130] RFRA allowed Congress to invalidate any law that imposed a substantial burden on religious practice unless it was justified by a compelling interest and was the least restrictive means of accomplishing that interest.[131]

The Court agreed that under Section 5, Congress had the ability to enforce the constitutional right of free exercise of religion.[132] However, the Court held that Congress only has the right to "enforce" the law in a remedial sense;[133] it cannot substantively change the law.[134] The Court acknowledged that the line between a remedial and substantive change is not clear.[135] Therefore, to discern remedial and substantive changes, the Court adopted the "congruence and proportionality" test.[136] Under this test, "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."[137] The Court

126 Post & Siegel, *supra* note 20, at 1945 ("In the early years of the Fourteenth Amendment the Court was quite hostile to Section 5 power, fearing that it might 'authorize Congress to create a code of municipal law for the regulation of private rights' that would displace "the domain of State legislation.") (quoting The Civil Rights Cases, 109 U.S. 3, 11 (1883)).

127 *Id*.

128 521 U.S. 507 (1997); *id*. at 536*; see also* Araiza, *supra* note 23, at 11 ("Starting with *City of Boerne*, the Court began to cut back on the deference it had previously given to Congress' decisions to use its Section 5 power.").

129 521 U.S. 507 (1997).

130 *Id*. at 536.

131 Religious Freedom Restoration Act (RFRA) of 1993, Pub. L. No. 103-141, 1993 U.S.C.C.A.N. (107 Stat.) 1488, *invalidated by* City of Boerne v. Flores, 521 U.S. 507 (1997).

132 *City of Boerne*, 521 U.S. at 519 ("We agree with respondent, of course, that Congress can enact legislation under § 5 enforcing the constitutional right to free exercise of religion.").

133 *Id*.

134 *Id*. ("Congress does not enforce a constitutional right by changing what the right is. It has been given the power 'to enforce,' not the power to determine what constitutes a constitutional violation.").

135 *Id*. at 519–20.

136 *Id*. at 520.

137 *Id*.

concluded that legislation is substantive in operation and effect without such a connection.[138]

In applying the congruence and proportionality test to strike down RFRA, the Court considered three factors. First, the Court evaluated RFRA's legislative record, finding that the "legislative record lack[ed] examples of modern instances of generally applicable laws passed because of religious bigotry."[139] The Court thus concluded that in passing RFRA, Congress seemed to be concerned with the incidental burdens that state laws had upon the exercise of religious freedom, and not whether the laws were enforced because of animus.[140]

Second, the Court looked to the scope of RFRA and found it to be too sweeping.[141] The Court distinguished the scope of RFRA from voting rights legislation upheld under Section 5 in *South Carolina v. Katzenbach*.[142] Unlike RFRA, the statutory provisions at issue in *Katzenbach* were confined to those regions of the country where voting discrimination was the most flagrant and affected a discrete case of laws—state voting laws.[143] Moreover, the Court held that to reduce the possibility of overbreadth and to ensure that the reach of the voting rights legislation was limited to those cases in which constitutional violations were the most likely, *Katzenbach* terminated voting legislation "at the behest of States and political subdivisions in which the danger of substantial voting discrimination has not materialized during the preceding five years."[144] RFRA did not contain this limitation.

Finally, the Court looked to the costs of RFRA. The Court emphasized that RFRA imposed a heavy litigation burden and curtailed the states' traditional regulatory powers.[145] The Court concluded that these costs were too great and "far exceed[ed] any pattern or practice of unconstitutional conduct under the Free Exercise Clause."[146]

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138 *Id*.

139 *Id*. at 530

140 *Id*. at 531.

141 *Id*. at 532 (citations omitted):

> RFRA is not so confined. Sweeping coverage ensures its intrusion at every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter. RFRA's restrictions apply to every agency and official of the Federal, State, and local Governments. RFRA applies to all federal and state law, statutory or otherwise, whether adopted before or after its enactment. RFRA has no termination date or termination mechanism. Any law is subject to challenge at any time by any individual who alleges a substantial burden on his or her free exercise of religion.

142 383 U.S. 301, 315–16 (1966).

143 *City of Boerne*, 521 U.S. at 532–33.

144 *Id*. at 533 (citations omitted).

145 *Id*. at 534–35 ("[RFRA] is a reality of the modern regulatory state that numerous state laws, such as the zoning regulations at issue here, impose a substantial burden on a large class of individuals. . . . [T]he Act imposes in every case a least restrictive means requirement . . . that was not used pre-*Smith* jurisprudence . . . .").

146 *Id*. at 534.

B. Section 5 Cases after *City of Boerne*

Since *City of Boerne*, the Supreme Court has decided six cases addressing whether an enacted federal statute was a valid exercise of Congress' Section 5 enforcement power.[147] In every case, the Court has applied the congruence and proportionality test and has generally performed a two-step analysis. First, the Court has identified whether a constitutional rights violation existed. Second, the Court has assessed the scope of the federal statute. The Court has deemed federal legislation as a valid exercise of Congress' Section 5 power only when the scope of the legislation was tailored specifically to rectify an existing constitutional rights violation.[148]

1. Identifying the Constitutional Rights Violation

In identifying a pattern of constitutional rights violations, the Court has considered two factors: (1) the level of scrutiny that a group classification or right receives[149] and (2) the adequacy of the congressional findings supporting the existence of a constitutional rights violation.[150]

i. Standard of Review

Generally, the Court has concluded that the higher the level of scrutiny that a group classification or a right receives, the easier it is for Congress to identify a pattern of constitutional rights violations by means of congressional findings.[151] For instance, in *Kimel v. Florida Board of*

147 These six cases are *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 527 U.S. 627 (1999); *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000); *United States v. Morrison*, 529 U.S. 598 (2000); *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001); *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721 (2003); *Tennessee v. Lane*, 541 U.S. 509 (2004).

148 *See Hibbs*, 538 U.S. at 739–40 (upholding the Family and Medical Leave Act of 1993 (FLMA) as valid Section 5 legislation); *Lane*, 541 U.S. at 530–31 (upholding Title II of the Americans with Disabilities Act (ADA) as valid Section 5 legislation).

149 *Kimel*, 528 U.S. at 83 (applying rational basis review for age classifications); *Garrett*, 531 U.S. at 367–68 (applying rational basis review for disability classifications); *Hibbs*, 538 U.S. at 735–36 (applying intermediate scrutiny for gender classifications); *Lane*, 541 U.S. at 522–23 (applying heightened scrutiny for burdening the right of access to the courts).

150 *City of Boerne*, 521 U.S. at 530–32; *Florida Prepaid*, 527 U.S. at 640; *Garrett*, 531 U.S. at 374; *Morrison*, 529 U.S. at 626–27.

151 The Court has contextualized congressional findings in terms of the level of scrutiny that a group classification or right receives. *See*, *e.g.*, *Kimel*, 528 U.S. at 86 ("Judged against the backdrop of our equal protection jurisprudence, it is clear that the ADEA is so out of proportion to a supposed remedial or preventative object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior." (quoting *City of Boerne*, 521 U.S. at 532) (internal quotations omitted)); *Garrett*, 531 U.S. at 365 ("The first step in applying these now familiar principles is to identify with some precision the scope of the constitutional right at issue. Here, that inquiry requires us to examine the limitations § 1 of the Fourteenth Amendment places upon States' treatment of the disabled."); *Hibbs*, 538 U.S. at 736 ("Because the standard for demonstrating the constitutionality of a gender-based classification is more difficult to meet than our rational-basis test . . . it was easier for Congress to show a pattern of state constitutional violations."); *Lane*, 541 U.S. at 522–23 ("Title II . . . also seeks to enforce a variety of other basic constitutional guarantees, infringements of which are subject to more searching judicial review.").

Regents,[152] the Court evaluated whether Congress exceeded the scope of its Section 5 enforcement power by enacting the Age Discrimination in Employment Act of 1967 (ADEA).[153] The Court noted that unlike race or gender, "[o]lder persons . . . have not been subjected to a history of purposeful unequal treatment."[154] Nor does "old age . . . define a discrete and insular minority because all persons, if they live out their normal life spans, will experience it."[155] Thus, for equal protection purposes, the Court believed that all age classifications are "presumptively rational"[156] unless Congress could establish that age discrimination is not supported by a rational basis.[157] Since Congress could not meet this burden, the Court held that the ADEA's enactment was an unconstitutional exercise of Congress' Section 5 enforcement power.[158] In *Board of Trustees of the University of Alabama v. Garrett*,[159] the Court engaged in a similar equal protection analysis to invalidate portions of the Americans with Disabilities Act (ADA).[160]

Conversely, in *Nevada Department of Human Resources v. Hibbs*,[161] the Supreme Court held that Congress did not exceed the scope of its Section 5 enforcement power when it gave a private right of action for individuals to seek equitable relief and money damages against any state or federal employer who restrains their rights under the Family and Medical Leave Act of 1993 (FLMA).[162] The Court distinguished the case from *Garrett* and *Kimel* by arguing that discrimination based on gender, unlike disability, is subject to a heightened standard of review under the Fourteenth Amendment.[163] The Court stated explicitly that "[b]ecause the

152 528 U.S. 62, 91 (2000).

153 *Id*. at 86. The ADEA made it unlawful for an employer, including the state, to "fail or refuse to hire or discharge any individual or otherwise discriminate against any individual . . . because of such individual's age." 29 U.S.C. § 623(a)(1).

154 *Kimel*, 528 U.S. at 83 (internal citations omitted).

155 *Id*.

156 *Id*. at 84.

157 *Id*. at 83 ("States may discriminate on the basis of age without offending the Fourteenth Amendment if the age classification in question is rationally related to a legitimate state interest.").

158 *Id*. at 86.

159 531 U.S. 356 (2001).

160 Title I of the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12111-12117 (2000) (allowing state employees to recover money damages if the state failed to comply with the ADA by not making reasonable accommodations for employers with disabilities); *see also Garrett*, 531 U.S. at 367–68. As in *Kimel*, before applying the congruence and proportionality test, the Court revisited precedent affirming that states are not required to make special accommodations for individuals with disabilities under the Fourteenth Amendment if the failure to provide accommodations was supported by a rational basis. *Garrett*, 531 U.S. at 367. The Court then assessed the legislative history in the context of this equal protection analysis to determine whether the legislative history of the ADA supported a pattern of unconstitutional employment discrimination by the states against individuals with disabilities. *Id*.

161 538 U.S. 721, 734–35 (2003).

162 29 U.S.C. § 2612(a)(1)(C) (entitling employees to take up to twelve work weeks of unpaid leave annually for any set of reasons, including the onset of a serious health condition in an employee's spouse, child, or parent.); *see also Hibbs*, 538 U.S. at 728 n.2 (noting Congress intended for the FLMA to protect the right of employees to be free from gender-based discrimination in the workplace and viewed the responsibility of caretaking to disproportionately burden women).

163 *Hibbs*, 538 U.S. at 735–36.

standard for demonstrating the constitutionality of a gender-based classification is more difficult to meet than our rational-basis test . . . it was easier for Congress to show a pattern of state constitutional violations."[164]

Similarly, in *Tennessee v. Lane*,[165] the Supreme Court held that Congress did not exceed the scope of its Section 5 enforcement power when it enacted Title II of the Americans with Disabilities Act (ADA).[166] The specific question presented to the Court was limited to whether Congress could invoke its Section 5 enforcement power to ensure the rights of access to the courts.[167] Congress posited that many individuals with disabilities in states throughout the country were being excluded from courthouses and court proceedings by reason of their disabilities.[168] The Court believed that heightened scrutiny applied because Title II not only served to redress irrational disability discrimination, but also to enforce "a variety of other basic constitutional guarantees, infringements of which are subject to more searching judicial review."[169]

Thus, Section 5 cases after *City of Boerne* reveal that Congress' burden to identify by congressional findings a pattern of constitutional rights violations is lessened when a group classification or a burdened right receives heightened scrutiny.

ii. Congressional Findings

In *City of Boerne*, the Court concluded that the congressional findings of RFRA were inadequate to identify a constitutional rights violation because they lacked examples demonstrating that states had violated free exercise of religion rights.[170] In *Florida Prepaid Postsecondary Education Expense Board v. College Savings*[171]—the first Section 5 decision after *City of Boerne*—the Court employed an even higher threshold requiring Congress not only to identify examples of unconstitutional behavior, but also to identify a pattern of constitutional rights infringements by the

164 *Id*. at 736. To satisfy rational basis review, Congress must only show that a group classification or burdening of a right is rationally related to a legitimate state interest. *Kimel*, 528 U.S. at 83. However, to satisfy intermediate scrutiny—the standard of review applied to gender classifications—Congress must show that the classification serves important governmental objectives and is substantially related to the achievement of those objectives. *Hibbs*, 538 U.S. at 736.

165 541 U.S. 509, 533–34 (2004).

166 Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12131–65 (providing that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity").

167 *Lane*, 541 U.S. at 530–31.

168 *Id*. at 527.

169 *Id*. at 522–23.

170 City of Boerne v. Flores, 521 U.S. 507, 530 (1997) ("RFRA's legislative record lacks examples of modern instances of generally applicable laws passed because of religious bigotry. The history of persecution in this country detailed in the hearings mentions no episodes occurring in the past 40 years.").

171 527 U.S. 627 (1999).

states.[172] In cases after *Florida Prepaid*, the Court has required Congress to establish a pattern of constitutional rights violations, making it a basic requirement of the Court's current Section 5 framework.[173]

The Court has not provided further explicit guidance on what Congress must show in order to establish a pattern of constitutional rights violations. However, a few points from Section 5 decisions after *Florida Prepaid* are instructive. In *Board of Trustees of the University of Alabama v. Garrett*,[174] the Court concluded that Congress did not meet its burden to establish a pattern of unconstitutional employment discrimination by the states against the disabled upon enacting 42 U.S.C. sections 12111–17 of Title I of the American Disabilities Act (ADA).[175] The Court held that with the exceptions of a few examples involving state behavior, Congress only proffered general evidence that people with disabilities have been discriminated against and socially ostracized.[176] Therefore, after *Garrett*, findings of general discrimination not tailored to the alleged state misbehavior are insufficient to establish a pattern of unconstitutional state discrimination.

Furthermore, after *United States v. Morrison*[177], constitutional findings demonstrating a pattern of constitutional rights violations will not necessarily render an invocation of Congress' enforcement power valid. In *Morrison*, the Supreme Court held that Congress exceeded the scope of its Section 5 enforcement power by enacting VAWA.[178] Congress found that gender stereotypes "often result in insufficient investigation and prosecution of gender-motivated crime, inappropriate focus on the behavior and credibility of the victims of that crime, and unacceptably lenient punishments for those who are actually convicted of gender-motivated violence."[179] Despite the sufficiency of the findings, the Court invalided the law because it was too sweeping.[180] Therefore, *Morrison* highlights that extensive congressional findings are not necessarily sufficient to prove

172 In light of this higher threshold, the congressional findings in *Florida Prepaid* were inadequate to identify a pattern of constitutional rights violations by the states. *Id*. at 640 ("The House Report acknowledged that many states comply with patent law and could provide only two examples of patent infringement suits against the States. . . . The Federal Circuit in its opinion identified only eight patent-infringement suits prosecuted against the States in the 110 years between 1880 and 1990.") (internal citations omitted).

173 *See* Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 89 (2000) ("Congress never identified any pattern of age discrimination by the States, much less any discrimination whatsoever that rose to the level of constitutional violation."); Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356, 368 (2001) ('Once we have determined the metes and bounds of the constitutional right in question, we examine whether Congress identified a history and pattern of unconstitutional employment discrimination by the States against the disabled.").

174 531 U.S. 356 (2001).

175 *Id*. at 374.

176 *Id*. at 369.

177 529 U.S. 598 (2000).

178 *Id*. at 627.

179 *Id*.

180 *Id*. at 626–27.

that an exercise of Congress' Section 5 power is valid.

2. Assessing the Scope of the Federal Statute

Regardless of whether congressional findings support a pattern of constitutional rights violations, the federal statute must not be too sweeping. Although not firmly established in precedent, the Court seems to balance the following three factors to determine whether a federal statute is tailored proportionally to redress a pattern of constitutional rights violations: (1) the extent to which the law is limited to situations involving unconstitutional behavior;[181] (2) whether state remedies are adequate and present throughout the states;[182] and (3) whether the law targets the behavior of government or private actors.[183]

i. The Federal Statute's Focus on Unconstitutional Behavior

In evaluating whether a federal statute is tailored specifically to redress unconstitutional behavior, the Court has considered the following: (1) the specific question presented for review;[184] (2) whether the statute's application is limited to geographic areas where unconstitutional behavior is known or likely to occur;[185] and (3) whether the federal statute's application is limited to a range of activity where unconstitutional behavior is known or likely to occur.[186]

The Court's holding in *Tennessee v. Lane*,[187] the last Section 5 case to be decided by the Court, supports the notion that when a federal statute targets an activity, the Court may frame its assessment of the statute's scope to the specific question presented for judicial review. In *Lane*, the petitioner urged the Court to examine the broad range of Title II's applications and argued that it was not tailored to serve its objectives because it applied not only to public education and voting-booth access, but also to seating at state-owned hockey rinks.[188] The Court rejected that it had to evaluate Title II's wide variety of applications when the specific question presented for review only dealt with whether the Act was an appropriate exercise of Congress' Section 5 enforcement power to remedy the inaccessibility of judicial services for individuals with disabilities.[189]

181 *See Fla. Prepaid*, 527 U.S. at 646–47; *Morrison*, 529 U.S. at 626–27; *Garrett*, 531 U.S. at 372; Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 733–34 (2003); Tenn. v. Lane, 541 U.S. 509, 530–31 (2004).

182 *Florida Prepaid*, 527 U.S. at 644; *Kimel*, 528 U.S. at 91–92; *Garrett*, 531 U.S. at 374 n.9; *Hibbs*, 538 U.S. at 733–34.

183 United States v. Harris, 106 U.S. 629, 637 (1883); *Civil Rights Cases*, 109 U.S. 3, 21 (1883); *Morrison*, 529 U.S. at 626–27.

184 *See Lane*, 541 U.S. at 530–31.

185 *Florida Prepaid*, 527 U.S. at 646–47; *Morrison*, 529 U.S. at 626–27.

186 *Garrett*, 531 U.S. at 372; *Hibbs*, 538 U.S. at 733–34.

187 541 U.S. 509 (2004).

188 *Id.* at 530.

189 *Id.* at 530–31.

To determine whether a federal statute is limited to addressing unconstitutional behavior, the Court has also considered whether the statute's application is limited to geographic areas where unconstitutional behavior is known or likely to occur. In *Florida Prepaid*, the Court found that the coverage of the Patent Remedy Act was too sweeping because it made all states amenable to suit for any type of patent infringement for an infinite duration.[190] Moreover, Congress did nothing to limit the Act's scope to cases involving constitutional violations nor did it limit its application to states where there were high incidences of unconstitutional patent violations.[191] Similarly, in *Morrison*, the Court held that VAWA's federal civil remedy was too sweeping because it applied uniformly to all states throughout the nation even though the congressional findings did not indicate that the problem of discrimination against victims of gender-motivated violence occurred in all or even most states.[192] The *Morrison* Court distinguished the case from *Katzenbach v. Morgan*[193] and *South Carolina v. Katzenbach*,[194] two Section 5 cases prior to *City of Boerne* in which the federal "remedy was directed only to those States in which Congress found that there had been discrimination."[195] Therefore, the Court favors federal remedies that make geographic differentiations among states where constitutional rights violations are the most likely to occur or are most pervasive.

The Court has also evaluated whether a federal statute's application is limited to an area of activity where unconstitutional behavior is known or likely to occur. For instance, the *Garrett* Court concluded that the scope of Title I of the ADA was too sweeping because it forced state employers to make reasonable accommodations in situations where it was reasonable for them to conserve scarce resources by hiring employees who were able to use the existing nonaccommodating facilities.[196] Consequently, the statute forced state employers to provide reasonable accommodations despite the fact that disability classifications passed rational basis review.[197] Conversely, in *Hibbs*, the Court upheld the provision of the FMLA because it did not apply broadly to every aspect of a state employer's operations.[198]

190 *Florida Prepaid*, 527 U.S. at 646–47:

> Despite subjecting States to this expansive liability, Congress did nothing to limit the coverage of the Act to cases involving arguable constitutional violations, such as where a State refuses to offer any state-court remedy for patent owners whose patents it had infringed. Nor did it make any attempt to confine the reach of the Act by limiting the remedy to certain types of infringement, such as nonnegligent infringement or infringement authorized pursuant to state policy; or providing for suits only against States with questionable remedies or a high incidence of infringement.

191 *Id*.

192 United States v. Morrison, 529 U.S. 598, 626–27 (2000).

193 384 U.S. 641 (1966).

194 383 U.S. 301 (1966).

195 *Morrison*, 529 U.S. at 626–27.

196 Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356, 372 (2001).

197 *Id*. at 366.

198 Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 738 (2003).

Rather, the provision was narrowly targeted "at the faultline between work and family"[199] which was the precise area where "sex-based overgeneralization has been and remains strongest."[200]

ii. Adequacy of State Remedies

To determine whether a federal statute is too sweeping, the Court has also considered the adequacy of existing state remedies to address the identified pattern of constitutional violations. In *Florida Prepaid*, the Court rejected Congress' rationale for enacting the Patent Remedy Act because expert testimony only established that the available state remedies were less convenient than the federal remedies, not that the state remedies were constitutionally inadequate.[201] Moreover, in *Kimel*, the Court found that the ADEA was unnecessary because state employees were protected by state age discrimination statutes and could recover damages from their state employers in almost every state.[202] Similarly, in *Garrett*, the Court highlighted that state laws existed to provide employed persons with disabilities an avenue of relief.[203] However, in *Hibbs*, the Court upheld the disputed provision of the FLMA after concluding that state law remedies were inadequate to address the identified pattern of constitutional rights violations.[204] The *Hibbs* Court particularly emphasized the state remedies' exclusiveness and their lack of coverage.[205]

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199 *Id*. at 738.

200 *Id*.

201 Fla. Prepaid Postsecondary Educ. Bd. v. College Sav. Bank, 527 U.S. 627, 644 (1999):

> The primary point made by these witnesses . . . was not that state remedies were constitutionally inadequate, but rather that they were less convenient than federal remedies, and might undermine the uniformity of patent law. . . . Congress itself said nothing about the existence or adequacy of state remedies in the statute or in the Senate Report, and made only a few fleeting references to state remedies in the House Report, essentially repeating the testimony of the witnesses.

202 Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 91–92 (2000) ("State employees are protected by state age discrimination statutes, and may recover money damages from their state employers, in almost every State of the Union. Those avenues of relief remain available today, just as they were before this decision.").

203 Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356, 374 n.9 (2001) ("[S]tate laws protecting the rights of persons with disabilities in employment and other aspects of life provide independent avenues of redress.").

204 Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 733–34 (2003).

205 *Id*. The *Hibbs* Court reasoned:

> Furthermore, the dissent's statement that some States "had adopted some form of family-care leave" before the FMLA's enactment . . . glosses over important shortcomings of some state policies. First, seven States had childcare leave provisions that applied to women only. Indeed, Massachusetts required that notice of its leave provisions be posted only in "establishment[s] in which females are employed." These laws reinforced the very stereotypes that Congress sought to remedy through the FMLA. Second, 12 States provided their employees no family leave, beyond an initial childbirth or adoption, to care for a seriously ill child or family member. Third, many States provided no statutorily guaranteed right to family leave, offering instead only voluntary or discretionary leave programs. Three States left the amount of leave time primarily in employers' hands. Congress could reasonably conclude that such discretionary family-leave programs would do little to combat the stereotypes about the roles of male and female employees that

iii. Targeting Government versus Private Behavior

Finally, the Court has considered whether a federal statute targets government or private conduct when assessing the statute's scope. Federal statutes that target private behavior exclusively are too sweeping under existing doctrine. For instance, in *Morrison*, the Court invalidated VAWA's federal civil remedy because it was aimed at private individuals who committed the criminal acts, not the discrimination by state officials that the Court agreed violated the Fourteenth Amendment.[206] To invalidate VAWA's federal civil remedy, the Court revisited *United States v. Harris*[207] and the *Civil Rights Cases*,[208] early Section 5 cases prior to *City of Boerne*, in which the Court invalidated federal laws on the grounds that they were directed exclusively against the actions of private persons.[209]

V. THE SECTION 5 CONSTITUTIONAL DEFENSE OF THE MATTHEW SHEPARD ACT

This Part demonstrates that Congress has the constitutional authority under Section 5 of the Fourteenth Amendment to enact the Matthew Shepard Act. In *Tennessee v. Lane*, the Supreme Court affirmed Congress' authority to invoke its Section 5 enforcement power to pass federal legislation ensuring equal access to the courts for individuals with disabilities.[210] Based on this principle, I posit that it is legitimate for Congress to invoke its Section 5 power to expand federal bias crime legislation in order to ensure equal access to the courts for bias crime victims targeted because of sexual orientation, gender identity, gender, and disability. Therefore, Congress should invoke its Section 5 enforcement power when reintroducing the Act in subsequent sessions.

> Congress sought to eliminate. Finally, four States provided leave only through administrative regulations or personnel policies, which Congress could reasonably conclude offered significantly less firm protection than a federal law. Against the above backdrop of limited state leave policies, no matter how generous petitioners' own may have been . . . Congress was justified in enacting the FMLA as remedial legislation." (internal citations omitted).

Id.

206 United States v. Morrison, 529 U.S. 598, 626 (2000) ("Section 13981 is not aimed at proscribing discrimination by officials which the Fourteenth Amendment might not itself proscribe; it is directed not at any State or state actor, but at individuals who have committed criminal acts motivated by gender bias.").

207 106 U.S. 629 (1883). The *Morrison* Court stated:

> In *Harris*, the Court considered a challenge to § 2 of the Civil Rights Act of 1871. . . . We concluded that this law exceeded Congress' § 5 power because the law was directed exclusively against the action of private persons, without reference to the laws of the State, or their administration by her officers.

Morrison, 529 U.S. at 621 (quoting *Harris*, 106 U.S. at 640) (quotations omitted).

208 109 U.S. 3 (1883). The *Morrison* Court noted that "[w]e reached a similar conclusion in the *Civil Rights Cases*. . . . [W]e held that the public accommodation provisions of the Civil Rights Act of 1875, which applied to purely private conduct, were beyond the scope of the § 5 enforcement power." *Morrison*, 529 U.S. at 621.

209 *Morrison*, 529 U.S. at 621–22.

210 541 U.S. 509, 533–34 (2004).

Part V.A focuses on the pattern of constitutional rights violations and posits that discriminatory stereotypes, resource constraints, and social skepticism of bias crime laws prevent bias crimes on the basis of sexual orientation, gender identity, gender, and disability from being investigated and prosecuted adequately. These factors consistently prevent bias crime cases from reaching the courts, and thus inhibit bias crime victims from receiving compensation for their crimes and permit bias crime perpetrators to get away with their crimes. Part V.B shows that the Court should not consider the Matthew Shepard Act as too sweeping because multiple provisions of the Act limit its scope to address situations where bias crime victims' rights of access to the courts are being deprived.

A. The Pattern of Constitutional Rights Violations: Unequal Access to Courts

In *Kimel, Garrett*, *Hibbs*, and *Lane*, the Supreme Court affirmed that the standard of review attached to a classification or right influences the amount of findings that Congress must present to show a pattern of constitutional rights violations.[211] My Section 5 argument is based on the standard of review attached to the right of access to the courts, as opposed to the level of scrutiny afforded to sexual orientation, gender identity, gender, and disability classifications.[212] In *Lane*, the Court held that a right of access to the courts is a "basic constitutional guarantee"[213] and is afforded "more searching judicial review"[214] when infringed. Therefore, when evaluating whether a pattern of constitutional rights violations exists, the Court should give greater deference to congressional findings establishing that the right of access to the courts is burdened.

The following analysis demonstrates that if Congress invokes its Section 5 enforcement power to enact the Matthew Shepard Act, then it will be able to present extensive congressional findings demonstrating that bias crime victims targeted because of sexual orientation, gender identity, gender, and disability are deprived of their rights of access to the courts. Discriminatory stereotypes, resource constraints, and social skepticism

211 *See supra* note 151 and accompanying text.

212 Currently, sexual orientation, gender identity, and disability classifications only receive rational basis review. *See* Romer v. Evans, 517 U.S. 620, 635 (1996) (concluding that a Colorado constitutional amendment that banned sexual orientation antidiscrimination laws within the state failed rational basis review); Erik K. Ludwig, *Protecting Laws Designed to Remedy Anti-Gay Discrimination from Equal Protection Challenges: The Desirability of Rational Basis Scrutiny*, 8 U. PA. J. CONST. L. 513, 538 n. 145 (2006) (concluding that "[d]espite the fact that gender identity would arguably constitute sex and therefore make it a quasi-suspect classification subject to intermediate scrutiny, the courts that have considered transsexuality have applied rational basis review."); City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 450 (1985) (applying rational basis review to invalidate a municipality's denial of a permit to a home for people with mental disabilities). The standard of review for gender classifications is intermediate scrutiny. *See* United States v. Virginia, 518 U.S. 515, 532–33 (1996).

213 Tennessee v. Lane, 541 U.S. 509, 522 (2004).

214 *Id*. at 522-23.

towards bias crime laws prevent bias crimes on the basis of sexual orientation, gender identity, gender, and disability from being adequately addressed. These factors prevent bias crime victims from reporting their crimes to the police, prevent police officers from classifying and reporting these crimes to prosecutors as bias crimes, and prevent prosecutors from prosecuting these crimes as bias crimes. Therefore, Congress will be able to satisfy its initial burden to identify a pattern of constitutional rights violations under the Court's current Section 5 jurisprudence.

1. Fear to Report Bias Crimes

Before police officers can become involved in a bias crime investigation, the victim must report the crime. Bias crimes are severely underreported.[215] One significant factor affecting underreporting is victims' fears that police officers will be unresponsive to the incident because they are biased against the groups to which they belong.[216]

Fears of police insensitivity are especially pertinent in cases involving bias crimes motivated by sexual orientation, gender identity, gender, and disability. The most frequently cited reason among victims of anti-LGBT violence is fear that reporting the incident will result in secondary victimization by the police.[217] Discriminatory stereotypes also prevent victims of gender-motivated violence from reporting bias crimes to the police.[218] Upon passing the Violence Against Women Act (VAWA), the Senate reported that "any person would think twice before reporting and prosecuting a crime if the police responded by demanding a polygraph exam, the prosecutor suggested that the victim had not complained promptly enough . . . and the judge announced to the jury at the end of the trial that the victim's testimony under oath should be viewed with suspicion."[219] Disability bias crimes are also severely underreported. Researchers posit that one reason influencing underreporting is a

215 Rubenstein, *supra* note 38, at 1219 ("There are a variety of reasons that hate crime victims might not report."); Cogan, *supra* note 38 at 179 ("[S]ocial science research shows that hate crimes are less likely to be reported to the police than random crimes."); FREDERICK M. LAWRENCE, PUNISHING HATE: BIAS CRIMES UNDER AMERICAN LAW 23 (Harvard Univ. Press 1999) (noting that many victims fail to report hate crimes "due to factors such as [the victim's entrenched] distrust of the police, language barriers, the fear of retaliation by the offender, and the fear of courting exposure").

216 *See*, *e.g.*, Steven Bennett Weisburd & Brian Levin, *"On the Basis of Sex": Recognizing Gender-Based Bias Crimes*, 5 STAN. L. & POL'Y REV. 21, 26 (1994) (finding that reasons for failing to report bias crimes include shame, fear, distrust, embarrassment, belief that authorities are unsympathetic, and fear of "secondary trauma" from the legal system); *see also* Anthony S. Winer, *Hate Crimes, Homosexuals, and the Constitution*, 29 HARV. C.R.-C.L.L. L. REV. 387, 413–14 (1994) (citing as one reason why gays and lesbians are hesitant to report hate crimes is the resulting stigma that would result from exposing their sexual orientations).

217 Nolan & Akiyama, *supra* note 53 at 114; *see also* Winer, *supra* note 216, at 413–14 (positing that one reason why gays and lesbians are reluctant to report bias crimes is the stigma that would result from exposing their sexual orientations).

218 Weisburd & Levin, *supra* note 216, at 26 (listing the reasons for failing to report bias crimes as include shame, fear, distrust, embarrassment, the belief that authorities are unsympathetic, and fear of further victimization).

219 S. REP. NO. 103-138, at 44–45 (1993).

widespread perception among individuals with disabilities that reporting their crimes will be useless.[220] This perception is perpetuated by the fact that only one case has been successfully prosecuted as a disability bias crime in the United States.[221]

The Matthew Shepard Act will not eliminate all of the factors that cause bias crimes to be underreported. It is even possible that the Matthew Shepard Act will not influence victims to report their crimes. However, the Act has the potential to make two substantial improvements. First, the Matthew Shepard Act provides local and state authorities with financial and personnel assistance to help train officers to sensitively respond to all bias crime victims, and especially victims targeted because of sexual orientation, gender identity, gender, and disability.[222] Greater sensitivity training may increase the likelihood that bias crime victims will feel comfortable reporting their crimes. Second, the Matthew Shepard Act contains a provision allowing the federal government to become involved in bias crime investigations and prosecutions if "the verdict or sentence obtained pursuant to State charges left demonstratively unvindicated the Federal interest in eradicating bias-motivated violence."[223] Although state and local governments will continue to investigate and prosecute the majority of bias crimes under the Matthew Shepard Act,[224] this provision may increase the likelihood that bias crime victims will report their crimes

220 Daniel D. Sorensen, *Invisible Victims,* Aug. 9, 2002, http://www.aspires-relationships.com/the_invisible_victims.pdf:

> [T]here is evidence that crimes against people with substantial disabilities are often not reported (result in a crime report). . . . I estimate that less than 4.5% of serious crimes committed against people with disabilities in California have been reported compared to 44% for the general population. This is based on an analysis of California's Adult Protective System data compared to National Crime Victimization Survey data.

See also Press Release, Univ. of Cal. Berkeley, Kathleen Maclay, Flawed FBI reporting system undercounts disability hate crimes, (Dec. 18, 2002), *available at* http://www.berkeley.edu/news/media/releases/2002/12/18_crimes.html (last visited Sept. 4, 2008) ("It's no surprise that hate crimes are underreported, but the disparity between reporting disability hate crimes and other crimes is staggering.") (quoting Jack Glaser, Assistant Professor, Univ. of Cal. Berkeley Goldman School of Pub. Pol'y).

221 Mark Sherry, *Don't Ask, Tell or Respond: Silent Acceptance of Disability Hate Crimes*, Jan. 8, 2003, http://dawn.thot.net/disability_hate_crimes.html. According to the article:

> There is a notoriously low rate of prosecution and conviction for hate crimes. In fact, only one disability hate crime has ever been successfully prosecuted. . . . . On January 30, 1999, Eric Krochmaluk, a cognitively disabled man from Middletown NJ [sic], was kidnapped, choked, beaten, burned with cigarettes, taped to a chair, his eyebrows were shaved, and he was then abandoned in a forest. Eight people were subsequently indicted for this hate crime; the first prosecution of a disability hate crime in America.

222 Local Law Enforcement Hate Crimes Prevention Act of 2007, H.R. 1592, 110th Cong. §§ 3(b), 4, 5 (2007); Matthew Shepard Local Law Enforcement Hate Crimes Prevention Act of 2007, S. 1105, 110th Cong. §§ 4(b), 5, 6 (2007). A detailed analysis of the insensitivity that bias crime victims experience from law enforcement officials and prosecutors is provided in Part III(A)(ii)–(iii).

223 H.R. 1592, 110th Cong. § 6 (2007) (proposing amendments to 18 U.S.C. § 249(b)(2)(D)); S. 1105, 110th Cong. § 7 (2007) (same).

224 H.R. REP. 110-113, at 7 (2007) ("It is important to emphasize that State and local authorities currently investigate and prosecute the overwhelming majority of hate crimes and will continue to do so under this legislation.").

because unresponsive state and local enforcement actions and judicial decisions will not go unchecked.

2. Failure to Classify Crimes as Bias Crimes

The mere existence of state and local bias crime laws does not ensure that the laws will be adequately implemented. Enforcement officers play important roles in responding to bias crime incidents because they control evidence collection and initially interact with victims, witnesses, and perpetrators.[225] Enforcement officers are also responsible for referring bias crime cases to prosecutors.[226] Even in California, the first state to enact a state bias crime law,[227] police officials refer substantially fewer bias crime cases to prosecutors than are reported. In 2006, only 363 bias crimes were referred to prosecutors out of 1,306 total reported bias crimes in California.[228] The ratio of cases referred to prosecutors by police officials to the number of reported bias crimes in California was similar from 2000 through 2005.[229] Researchers have broadly concluded that the implementation of bias crime laws depend on subjective factors, such as "the attitudes, beliefs, and practices of individual officers, the perceived tractability of the problem, police funding and training, and public opposition to hate crime policies."[230]

Personal skepticism towards bias crimes is one factor that has influenced enforcement officers not to classify crimes as bias crimes. Many officers refuse to classify crimes as bias crimes because they do not believe that bias crimes deserve special treatment.[231] Researchers have also found that police officers will not classify less violent crimes, such as simple assault or intimidation, as bias crimes because they believe that the incidents "can become so high-profile that they would have preferred not to

225 AM. PROSECUTOR'S RESEARCH INST., A LOCAL PROSECUTOR'S GUIDE FOR RESPONDING TO HATE CRIMES 15 (2000), *available at* http://www.ndaa.org/pdf/hate_crimes.pdf (last checked Sept. 2, 2008) ("Local law enforcement agencies play a critical role in responses to hate crimes. As the responding agency to allegations of bias-motivated crimes, their officers and victim/witness personnel can document overt signs of hate motivation and set the tone with victims and witness that can impact their cooperation.").

226 Franklin, *supra* note 54, at 155 ("In terms of effective enforcement, probably the most important decisions are those made at the outset by investigating officers, who decide whether to categorize a crime as bias driven."). *See generally* Nolan & Akiyama, *supra* note 53.

227 Cogan, *supra* note 38, at 173.

228 Cal. Dep't Just., Hate Crime in California, 14 (2006), *available at* http://ag.ca.gov/cjsc/publications/hatecrimes/hc06/preface06.pdf.

229 *See*, *generally*, Publications, California Department of Justice - Criminal Justice Statistics Center, HATE CRIMES IN CALIFORNIA, *available at* http://ag.ca.gov/cjsc/pubs.php#hate (collecting reports from 1995 through 2007).

230 Franklin, *supra* note 54, at 156.

231 Boyd et al., *supra* note 53, at 827 ("A few officers expressed the belief that hate crimes should not be considered crimes at all. They are just 'human nature' or the normal expression of hostility among people living in crowded conditions."); Nolan & Akiyama, *supra* note 53, at 114 ("Other officers have indicated that they personally do not believe that it is appropriate to treat hate crimes as something special.").

have made such a distinction."[232] Many officers have reported that they would be overwhelmed by "trivial" complaints if less serious crimes were classified as bias crimes, which would compromise their ability to respond to more "serious" crimes.[233] These attitudes have led to only a narrow subset of bias crimes to be pursued as bias crimes, perpetuating the erroneous belief that bias crimes occur infrequently.[234]

Resource constraints have also influenced enforcement officers to avoid classifying and reporting crimes as bias crimes. Bias crimes are incredibly burdensome to investigate[235] because of the high evidentiary burden to prove a bias motive.[236] These investigative difficulties cause officers to only investigate underlying crimes, such as assault or murder, but not the parallel bias crimes. Moreover, many enforcement agencies that claim to have special units focusing on bias crime investigations do not provide officers with specialized training.[237] Consequently, police officers may lack the skills to recognize that a particular crime is a bias crime. Ambiguities may also arise during investigations that make it difficult for officers to discern whether crimes are bias crimes.[238] For example, evidence of provocation might complicate whether a crime should be classified as a bias crime.[239]

Public opposition to bias crime laws also deters police officers from classifying or reporting a crime as a bias crime.[240] Community norms

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232 Nolan & Akiyama, *supra* note 53, at 114.

233 Boyd et al., *supra* note 53, at 826.

234 *Id*. at 827.

235 *Combating Hate Crimes: Promoting a Responsive and Responsible Role for the Federal Government: Hearing on S. 622 Before the Senate Comm. on the Judiciary*, 106th Cong. 44 (1999) (statement of Burt Neuborne) (acknowledging that inadequate local resources can "make it difficult, if not impossible, to deploy the substantial resources needed to investigate, arrest and prosecute a serious hate crime.").

236 Boyd et al., *supra* note 53, at 839:

> On several occasions, the detective expressed reluctance to file cases with the city attorney (CA) or the district attorney (DA) unless the case was "a good one." . . . [T]he detective indicated that he considered filing ambiguous or questionable cases a "waste of time" because of the CA/DA's orientation to them. Thus, his emphasis on the more "visible" characteristics of motive may reflect his desire to file only cases which he believes stand a chance of success in the courts.

See also Nolan & Akiyama, *supra* note 53, at 114 ("[S]ome law enforcement agencies have attributed their lack of participation [in federal hate crime data collection efforts] to insufficient resources.").

237 Franklin, *supra* note 54, at 156.

238 Boyd et al., *supra* note 53, at 831 ("[A] hate crime, by virtue of its definition . . . places additional interpretive "burdens" on the investigating detective: Its special definitional character, centered on the motive of the perpetrator, seemingly requires the detective to assume an active role in determining the perpetrator's motive for acting.").

239 Susan E. Martin, "*A Cross-Burning is Not Just An Arson": Police Social Construction of Hate Crimes in Baltimore County*." 33 CRIMINOLOGY 303, 320 (1995).

240 Franklin, *supra* note 54, at 155 (positing that local politics is one factor that influences local law enforcement's decision to categorize bias crimes); *id*. at 156 (positing that "public opposition to hate crime policies" is one factor which influences the local implementation of hate crime laws); Nolan & Akiyama, *supra* note 53, at 115 (noting that the factors that encourage participation in local law enforcement bias crime reporting include social forces within the local law enforcement organization—resources, policies, and organizational culture—and forces outside the organization including the

against bias crime laws can influence witnesses of bias crimes to refuse to come forward.[241] Moreover, public opposition can influence police officers not to investigate the case as thoroughly, or can entirely prevent officers from investigating incidents as bias crime cases.

Police officers' personal skepticism, discrimination, resource constraints, and public opposition to bias crime laws has especially affected state and local enforcement agencies' treatments of crimes motivated by sexual orientation, gender identity, gender, and disability. Lesbian, gay, bisexual, and transgender (LGBT) bias crime victims often avoid reporting their crimes to the police in fear of secondary victimization by homophobic officers.[242] Some LGBT victims are able to obtain additional support from LGBT nonprofit organizations to help them interact with police personnel though the investigation process.[243] However, these organizations provide limited support and are often located only in urban areas[244] that have reputations for being better culturally equipped to respond sensitively to anti-LGBT bias crime incidents.

In passing the Violence Against Women Act (VAWA), Congress presented numerous findings supporting that discriminatory stereotypes against victims of gender-motivated violence affect the investigations of gender-motivated crimes.[245] Congress noted that police may refuse to take reports, and even if reports are filed, only 40 percent of those cases will result in an arrest.[246] Moreover, police officers often question victims' credibility. The police officers may require women to

> have physical injuries; to tell a consistent story; to be willing to take a lie detector test, to not have waited for more than 48 hours before reporting the incident, to not have engaged in premarital or extramarital sex, to have had no

political climate, local laws, or social norms.

241 Sherry, *supra* note 221:

> Community resistance may mean that witnesses are not prepared to provide supportive evidence and the case cannot be substantiated. The literature on racist and anti-gay hate crimes is replete with examples of community resistance to police investigations. . . Where communities support the victimization process, witnesses can refuse to come forward and can sabotage the investigative process.

242 *See supra* note 217 and accompanying text.

243 For example, Gay & Lesbian Advocates & Defenders, the main LGBT legal advocacy organization in New England, has a legal infoline that provides legal assistance to victims of anti-LGBT violence or harassment. Gay & Lesbian Advocates & Defenders, Glad's Legal Infoline- *How Can We Help?*, http://www.glad.org/infoline (last visited Sept. 2, 2008).

244 For example, the Los Angeles Gay & Lesbian Center's Anti-Violence project provides support to LGBT bias crime victims to report a bias crime or obtain victim assistance. L.A. Gay & Lesbian Center, Services and Programs, Hate Crime Victim Assistance, http://www.lagaycenter.org/site/PageServer?pagename=Anti_Violence_Project (last visited Sept. 2, 2008). Other examples of urban anti-violence projects include the New York City Gay & Lesbian Anti-Violence Project, http://www.avp.org/avpmenu.htm (last visited Sept. 2, 2008) and Chicago's Anti-Violence Project, http://www.centeronhalsted.org/prog_av.html (last visited Sept. 2, 2008).

245 *See generally* S. REP. NO. 103-138, at 44–47 (1993).

246 *Id*. at 42.

> previous social contact with her assailant, and not to have reached the location of the rape voluntarily.[247]

If the officers find the victims to be incredible, their crimes will not be investigated or reported as bias crimes.

Although more research needs to be performed, it is also possible that police officers are not categorizing gender-motivated bias crimes as bias crimes given the relatively new status of gender as a protected category in bias crime law. Studies show that prosecutors are insufficiently informed about gender bias crimes and often attribute violence against women to motivations other than bias.[248] If these perceptions are held by prosecutors, then it is highly probable that they are also held by enforcement officers who investigate bias crimes.

Unique difficulties also arise during the investigations of disability bias crimes. Many police officers underreport and fail to investigate disability bias crimes because they believe that people with disabilities are attacked because of vulnerability, which these officers view as different from bias. Many police officers also lack special training to interact sensitively and adequately with disability bias crime victims.[249] Moreover, the communicative and cognitive difficulties of many disability bias crime victims have perpetuated the unfounded assumption among enforcement agencies that disability bias crime victims are categorically incompetent witnesses.[250] Finally, inconsistent definitions of "disability" may also affect whether police officers classify and report crimes to prosecutors as disability bias crimes.[251]

The Matthew Shepard Act can substantially eliminate state and local failures to classify and to investigate bias crimes because of resource constraints. Currently, the federal government is authorized to become involved in the investigation of bias crimes only if the victims were engaged in federally protected activities when the crimes occurred.[252] The Matthew Shepard Act changes this requirement and permits the federal government to provide financial and personnel assistance to state and local

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247 *Id*. at 45–46.

248 McPhail & DiNitto, *supra* note 55, at 1162.

249 Ryken Grattet & Valerie Jenness, *Examining the Boundaries of Hate Crime Law: Disabilities and the "Dilemma of Difference,"* 91 J. CRIM. L. & CRIMINOLOGY, 653, 678 (2001) ("[P]olice training publications and curriculum at federal, state, and local level tend to discuss disability-based hate crime only infrequently, if at all. . . . [D]isability-based hate crime remains largely invisible to front-line law enforcers, who tend to focus mostly on race, religion, sexual orientation, and nationality."); Sherry, *supra* note 221 ("Not all impairments are visible, and the officers investigating an incidents may not have high levels of disability awareness, so they may not be able to recognise [sic] certain invisible impairments and may not fully investigate some possible cases of disability discrimination."); Sorensen, *supra* note 220, at 5.

250 Sorensen, *supra* note 220, at 5.

251 Sherry, *supra* note 221 (acknowledging that "because of the fact that there is no consistency in the definitions of disability used, the reporting of disability may be inconsistent.").

252 18 U.S.C. § 245 (2000). For a list of the six federally protected activities see text accompanying *supra* note 5.

authorities regardless of whether the victim was engaged in a federally protected activity.[253] The Act also allows for the federal government to become involved in bias crime investigations if state or local authorities consent or seek the federal government's aid to investigate bias crimes because of resource constraints.[254] Finally, the Act authorizes the allocation of funds to award grants to state and local governments to institute programs designed to combat bias crimes, including programs designed to train officers in identifying, investigating, and preventing bias crimes.[255]

It is less clear whether the Matthew Shepard Act will have a substantial affect on state and local officers' personal skepticism towards bias crimes. But the Act is a step in the right direction. By allocating funds and personnel to help train state and local authorities to identify, investigate, and prevent bias crimes,[256] the Act may counteract officers' misconceptions and complete ignorance of bias crimes and their effects. Moreover, the Act's provision permitting the federal government to become involved if state and local charges clearly fail to satisfy the federal government's interest in eradicating bias-motivated violence makes it possible for bias crime victims to obtain legal compensation despite local and state authorities' personal biases.[257]

3. Failure to Prosecute Bias Crimes

Even when victims report bias crimes, and enforcement officers investigate and refer the crimes to prosecutors, many prosecutors decide not to prosecute them as bias crimes. One reason influencing prosecutors' decisions is the high evidentiary burden to prove a bias motive.[258] Evidentiary ambiguities also prevent prosecutors from prosecuting crimes as bias crimes. For instance, if the only evidence to prove bias motive is a racist, homophobic, or sexist epithet, then the prosecutor may conclude or believe that a jury or judge will conclude that the incident was motivated by reasons other than bias towards the victim because of race, sexual orientation, gender identity, or gender.[259] Evidentiary ambiguities and the high burden to prove a bias motive especially deter prosecutors from prosecuting bias crimes given the pressure imposed upon them to lighten their heavy case loads.[260] Although more research needs to be done, some

253 Local Law Enforcement Hate Crimes Prevention Act of 2007, H.R. 1592, 110th Cong. § 4(a) (2007); Matthew Shepard Local Law Enforcement Hate Crimes Prevention Act, S. 1105, 110th Cong. § 4(a) (2007).

254 H.R. 1592, § 6 (proposing changes to 18 U.S.C. 249(b)(2)(B)); S. 1105, § 7 (same).

255 H.R. 1592, § 4(a); S. 1105, § 5(a).

256 *See* H.R. 1592, § 4(a); S. 1105, § 5(a).

257 H.R. 1592, § 6 (proposing changes to 18 U.S.C. § 249(b)(2)(D); S. 1105, § 7 (same).

258 Franklin, *supra* note 54, at 157 ("One of the major constraints faced by district attorneys . . .is the inherent difficulty in proving hatred or bias as a primary motivation.").

259 *Id*.

260 Boyd et al., *supra* note 53, at 839:

> On several occasions, the detective expressed reluctance to file cases with the city attorney

researchers have found that prosecutors' personal skepticism towards bias crime laws may also influence their decisions not to prosecute bias crimes.[261]

To date, no study has comprehensively addressed the factors that influence prosecutors not to charge crimes motivated by sexual orientation or gender identity as bias crimes in the United States. More research needs to be performed on this issue. In passing the Violence Against Women Act (VAWA), however, Congress presented significant findings supporting the idea that prosecutors' victim-blaming attitudes and credibility doubts often result in the inadequate prosecution of gender-motivated bias crimes.[262] Congress also noted that "[j]udges and juries expect more corroboration in sexual assault cases than in other cases of a similar class even when there is no such legal requirement."[263] This high burden may deter prosecutors from prosecuting a crime as a gender-motivated bias crime. Finally, studies indicate that prosecutors are insufficiently informed about gender-motivated bias crimes and often attribute violence against women to motivations of power and control rather than bias.[264] These misconceptions affect whether prosecutors view gender-motivated crimes as bias crimes.

Disability bias crime prosecutions are disproportionately low. Even though an average of approximately seventy-three disability bias crimes were reported to the FBI from 2004 through 2006,[265] only one case in history has successfully been tried as a disability bias crime.[266] Possible explanations for this disparity include prosecutors' views that disability bias crime victims are targeted because of their vulnerability and not because of bias.[267] Moreover, unwarranted assumptions that disability bias

> (CA) or the district attorney (DA) unless the case was "a good one." . . . [T]he detective indicated that he considered filing ambiguous or questionable cases a "waste of time" because of the CA/DAs' orientation to them. Thus, his emphasis on the more "visible" characteristics of motive may reflect his desire to file only cases which he believes stand a chance of success in the courts. *Id*.

261 For an example of how personal perspectives influence prosecutors' decisions to prosecute gender-motivated crimes as bias crimes, see generally McPhail & DiNitto, *supra* note 55.

262 S. REP. NO. 103-138, at 44–47 (1993).

263 *Id*. at 45.

264 McPhail & DiNitto, *supra* note 55, at 1172.

265 In 2004, seventy-one disability bias crimes were reported to the FBI. U.S. DEP'T OF JUSTICE, FED. BUREAU OF INVESTIGATION: HATE CRIME STATISTICS 2004, http://www.fbi.gov/ucr/hc2004/section1.htm (last visited Aug. 20, 2008). In 2005, fifty-three disability bias crimes were reported to the FBI. U.S. DEP'T OF JUSTICE, FED. BUREAU OF INVESTIGATION: HATE CRIME STATISTICS 2005, http://www.fbi.gov/ucr/hc2005/incidentsoffenses.htm (last visited Aug. 20, 2008). In 2006, ninety-four disability bias crimes were reported to the FBI. U.S. DEP'T OF JUSTICE, FED. BUREAU OF INVESTIGATION: HATE CRIME STATISTICS 2006, http://www.fbi.gov/ucr/hc2006/incidents.html (last visited Aug. 20, 2008).

266 *See supra* note 221 and accompanying text.

267 Sherry, *supra* note 221, at 15 (citing that one of the reasons that influences prosecutors' decisions not to prosecute disability bias crimes as bias crimes is the mislabeling of disability bias crimes as abuse).

crime victims are categorically incompetent witnesses may also affect prosecutors' decision to prosecute disability bias crimes.[268]

Although the Matthew Shepard Act will not eliminate state and local prosecutorial biases, it is a substantial improvement from the status quo. First, the Act provides for a grant program to train state and local officials to prosecute bias crimes.[269] The Act also permits states and local prosecutors to seek or consent to the federal government's prosecutorial assistance when burdened by resource constraints.[270] Moreover, the Act's provision permitting the federal government to become involved if state and local charges clearly do not satisfy the Federal interest in eradicating bias-motivated violence makes it possible for bias crime victims to obtain legal compensation in extreme cases, despite state and local prosecutors' personal biases.[271]

B. The Limited Scope of the Matthew Shepard Act

To be considered valid Section 5 legislation, *Morrison* affirms that a federal law must not be too sweeping in scope, even if congressional findings establish an existing of a pattern of constitutional rights violations.[272] Part IV.B.2 presented three factors that the Court balances to evaluate whether a law is too sweeping.[273] First, the Court evaluates the extent to which the law is limited to situations involving unconstitutional behavior. Second, the Court evaluates whether state remedies are adequate and present throughout the States. Third, the Court evaluates whether the law targets the actions of states or private actors. These factors guide the following analysis, which establishes that the Matthew Shepard Act is not too sweeping and is thus a valid piece of Section 5 legislation.

1. The Matthew Shepard Act's Limited Focus on Unconstitutional Behavior

Unlike the sweeping laws at issue in *Florida Prepaid* and *Morrison*, the Matthew Shepard Act focuses on addressing resource limitations and discriminatory biases that unjustly prevent bias crime victims targeted because of sexual orientation, gender identity, gender, and disability from having access to the courts.[274] Section 4 of the Act allows the federal government to aid state and local governments in investigating and prosecuting bias crimes when local and state governments specifically

268 Sorensen, *supra* note 220, at 5.

269 Local Law Enforcement Hate Crimes Prevention Act of 2007, H.R. 1592, 110th Cong. § 3(b) (2007); Matthew Shepard Local Law Enforcement Hate Crimes Prevention Act of 2007, S. 1105, 110th Cong. § 4(b) (2007).

270 H.R. 1592, § 6 (proposing changes to 18 U.S.C. § 249(b)(2)(B)–(C)); S. 1105, § 7 (same).

271 H.R. 1592, § 6 (proposing changes to 249(b)(2)(D)); S. 1105, § 7 (same).

272 United States v. Morrison, 529 U.S. 598, 614 (2000).

273 *See* discussion *supra* Part V.B.2.

274 The textual citations in this section refer to the Senate's version of the Matthew Shepard Act, and are accompanied by a parallel citation to the House's version of the Act.

request assistance.[275] Section 4 also allocates federal funds for state and local governments to compensate for the extraordinary expenses associated with the investigation and prosecution of bias crimes.[276] Moreover, Section 6 authorizes the federal government to grant additional personnel to assist state and local governments to investigate and to prosecute bias crimes.[277] Because these provisions merely provide assistance when requested by state and local governments, they do not substantively change state or local law guarantees and are thus not invalid under the Supreme Court's current Section 5 framework.

Section 249 of the Matthew Shepard Act is more constitutionally suspect. This section expands the protected characteristics of federal bias crime legislation to include sexual orientation, gender identity, gender, and disability.[278] Section 249 also amends 18 U.S.C. section 245 by allowing the federal government to become involved in bias crime investigations and prosecutions even if the victims are not engaged in federally protected activities at the time of the incidents.[279]

Congressional representatives opposing the Matthew Shepard Act argue that the bill does not adequately target unconstitutional behavior because it "open[s] the door to criminal investigations of an offender's thoughts and beliefs about his or her victims."[280] These dissenting statements are rooted in the belief that punishing bias crimes is inconsistent with First Amendment principles. This view ignores the Court's holding in *Wisconsin v. Mitchell*,[281] which affirmed that bias crime penalty-enhancement statutes are consistent with the First Amendment because these statutes target conduct and not expression.[282]

Congressional representatives also argue that the Matthew Shepard Act "raises significant federalism concerns"[283] because the law "criminalizes acts that have long been regulated primarily by the states."[284] More specifically, they posit that the Act is too sweeping because it opens the floodgates to allow the federal government to become involved in all bias crime investigations and prosecutions. These federalism concerns are also invalid. Section 249(b) contains a "certification requirement" that substantially limits the scope of cases that the federal government is permitted to investigate or to prosecute.[285] Before the federal government

275 H.R. 1592, § 3; S. 1105, § 4.
276 H.R. 1592, § 3; S. 1105, § 4.
277 H.R. 1592, § 5; S. 1105, § 6.
278 H.R. 1592, § 6 (proposing changes to 18 U.S.C. § 249(a)(2)); S. 1105, § 7 (same).
279 H.R. 1592, § 6 (proposing changes to 18 U.S.C. § 249(a)(2)); S. 1105, § 7 (same).
280 H.R. REP. NO. 110-113, at 39 (2007).
281 Wisconsin v. Mitchell, 508 U.S. 476 (1993).
282 *Id*. at 484 ("a physical assault is not by any stretch of the imagination expressive conduct protected by the First Amendment.").
283 H.R. REP. NO. 110-113, at 41 (2007).
284 *Id*.
285 H.R. 1592, § 6 (proposing changes to 18 U.S.C. § 249(b)), S. 1105, § 7 (same).

may become involved, it must have "reasonable cause to believe that the actual or perceived race, color, religion, national origin, gender, sexual orientation, gender identity, or disability of any person was a motivating factor underlying the alleged conduct of the defendant."[286] A certified individual from the federal government must then consult with a state or local law enforcement official to determine whether the federal government's involvement is warranted.[287] The federal government may only become involved if (1) "the State does not have jurisdiction or does not intend to exercise jurisdiction;" (2) "the State has requested that the Federal Government assume jurisdiction;" (3) "the State does not object to the Federal Government assuming jurisdiction;" or (4) "the verdict or sentence obtained pursuant to State charges" did not sufficiently address the federal interest in preventing bias-motivated violence.[288]

These four criteria are narrowly tailored to the scenarios where bias crime victims would be deprived of their right of access to the courts if the federal government was unable to become involved in bias crime investigations and prosecutions. In fact, upon passing the Matthew Shepard Act, the House of Representatives explicitly conceded that "[s]tate and local authorities currently investigate and prosecute the overwhelming majority of [bias] crimes and will continue to do so under this legislation."[289] Like the legislation narrowly targeted "at the faultline between work and family" in *Hibbs*,[290] the Matthew Shepard Act should not be deemed as too sweeping for targeting constitutional behavior.

2. The Inadequacy of State Bias Crime Laws

In *Kimel*[291] and *Garrett*,[292] the Court held that the enacted federal laws were too sweeping because state remedies were adequate and present throughout the states to address state unconstitutional behavior. Conversely, in *Hibbs*,[293] the Court held that the inadequacy and lack of state remedies supported the notion that federal law was necessary, and thus not overly sweeping.

Virtually every state has some form of bias crime law.[294] Critics of the Matthew Shepard Act have highlighted that the existence of state bias laws renders the bill unnecessary. For instance, Congressional dissenters of the Act noted that "[h]ate-crime laws are unnecessary: [T]he underlying offense is already fully and aggressively prosecuted in almost all

286 H.R. 1592, § 6 (proposing changes to 18 U.S.C. § 249(b)(1)); S. 1105, § 7 (same).
287 H.R. 1592, § 6 (proposing changes to 18 U.S.C. § 249(b)(2)); S. 1105, § 7 (same).
288 H.R. 1592, § 6 (proposing changes to 18 U.S.C. § 249(b)(2)); S. 1105, § 7 (same).
289 H.R. REP. NO. 110-113, at 7 (2007).
290 Nev. Dep't Human Res. v. Hibbs, 538 U.S. 721, 738–39 (2003). This is the precise area where state unconstitutional behavior "has been and remains [the] strongest." *Id*. at 738.
291 Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000).
292 Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356 (2001).
293 *Hibbs*, 538 U.S. 721 (2003).
294 *See supra* note 46 and accompanying text.

[s]tates."[295] The dissenters further contended that there was "zero evidence that States are not fully prosecuting violent crimes involving hate."[296] In light of the Court's current Section 5 framework, critics could posit that the existence of state bias crime laws in all states supports that the Matthew Shepard Act is too sweeping.

However, these dissenters focus on the overall number of state bias crime laws without considering the differences in the groups that are afforded protection under these laws. The Matthew Shepard Act specifically amends and expands federal bias crime law to include sexual orientation, gender identity, gender, and disability. Many states do not include these characteristics in their bias crime laws.[297] Consequently, many bias crime victims who are targeted on the basis of sexual orientation, gender identity, gender, or disability cannot receive compensation, nor can their perpetrators be punished for committing bias crimes. Therefore, the inadequacy of state laws to protect against bias crimes motivated specifically by sexual orientation, gender identity, gender, and disability demonstrates that the Matthew Shepard Act is necessary and not overly sweeping.

3. The Matthew Shepard Act's Focus on State Action

In *Morrison*, the Court invalidated the civil remedy provision of the VAWA because it targeted the behavior of private rather than state actors.[298] Given that the Matthew Shepard Act provides for the increased punishment of bias crime perpetrators, and does not exclusively punish states and localities for failing to investigate and prosecute bias crimes, legislative opponents of the Matthew Shepard Act contend that the Act is an invalid exercise of Congress' Section 5 enforcement power.[299]

However, unlike the civil remedy of VAWA, Sections 4 through 6 of the Matthew Shepard Act focus on assisting states and localities to investigate and prosecute bias crimes only when they seek the federal government's assistance.[300] The purpose of these provisions is to aid states and localities, not to punish private behavior. Therefore, these provisions are not invalid under *Morrison* for targeting private behavior.

The only portion of the Matthew Shepard Act that is constitutionally suspect for targeting private behavior is Section 249, which expands the

295 H.R. REP. NO. 110-113, at 45 (2007).

296 *Id*. (internal quotations omitted).

297 *See supra* notes 47-51 and accompanying text.

298 United States v. Morrison, 529 U.S. 598, 626 (2000).

299 The Local Law Enforcement Hate Crimes Prevention Act of 2007, H.R. 1592, 110th Cong. § 6 (2007) (proposing changes to 18 U.S.C. § 249(a)(2)) (dissenting views) ("The 14th amendment prohibits the States from denying equal protection of the law, due process or the privileges and immunities of U.S. citizenship…[The Fourteenth Amendment] extends only to state action and do[es] not encompass the actions of private persons. Hate Crimes by private persons are outside the scope of these amendments.").

300 H.R. 1592, § 3–5; S. 1105, § 3–5.

federal government's authority to become involved in investigating and prosecuting bias crimes motivated by sexual orientation, gender identity, gender, or disability regardless of whether the victims were engaged in a federally protected activity at the time of the crime.[301] Section 249 specifically punishes individuals for committing bias crimes, not state and local authorities for failing to investigate or to prosecute bias crimes.[302] Therefore, bias crime law proponents may have difficulty establishing that Section 249 does not impermissibly target private behavior.

However, a close reading of *Morrison* highlights an important distinction between Section 249 and VAWA's civil remedy. In *Morrison*, Congress did not limit the civil provision's application to areas of behavior or localities where state unconstitutional behavior was at issue.[303] The provision allowed the federal government to become involved regardless of whether a particular state was adequately punishing gender-motivated violence.[304] The Court infered from the broad scope of the provision that "it [was] directed not at any State or state actor, but at individuals who have committed criminal acts motivated by gender bias."[305]

In contrast, the Matthew Shepard Act's proposed changes to the punishments in Section 249(a) can only be imposed when the "certification requirement" of Section 249(b) is met.[306] In its congressional findings, the House of Representatives stated explicitly that the Matthew Shepard Act should only be applied "[i]n limited circumstances . . . for example, where the State does not have an appropriate statute, or otherwise declines to investigate or prosecute; where the State requests that the Federal Government assume jurisdiction; or where actions by State and local law enforcement officials leave demonstratively unvindicated the Federal interest in eradicating bias-motivated violence."[307] Therefore, when Sections 249(a) and (b) are read in conjunction, the expanded punishments in Section 249(a) should not be interpreted as targeting the criminal acts of private individuals. Rather, these punishments target the unconstitutional behaviors of states and localities that prevent bias crime victims from having equal access to the courts.

CONCLUSION

Congressional Democrats' recent move to drop the Matthew Shepard Act from the Department of Defense authorization bill was unfortunate. But with Democrats now in control of Congress and the election of President Barack Obama, there is renewed hope that the Matthew Shepard

301 H.R. 1592, § 6 (proposing changes to 18 U.S.C § 249); S. 1105, § 7 (same).
302 H.R. 1592, § 6 (proposing changes to 18 U.S.C § 249); S. 1105, § 7 (same).
303 *Morrison*, 529 U.S. at 626–27 (2000).
304 *Id*.
305 *Id*. at 626.
306 H.R. 1592, § 6 (proposing changes to 18 U.S.C. § 249(b)); S. 1105, § 7 (same).
307 H.R. REP. NO. 110-113, at 7 (2007).

Act will be enacted during the next four years. The enactment of the Matthew Shepard Act will be a historic point in the bias crime law movement, but this important piece of legislation will not go unchallenged.

The Matthew Shepard Act's previous congressional defeat gives Congress a new opportunity to explore and to put forth alternative constitutional justifications for the Act when it is introduced in a subsequent session. Congress must take advantage of this opportunity in order to prevent the Matthew Shepard Act from being defeated legally. In this Article, I have advocated that one alternative constitutional justification for the Matthew Shepard Act is Section 5 of the Fourteenth Amendment. Bias crime victims who are targeted on the basis of sexual orientation, gender identity, gender, and disability face unique difficulties in law enforcement and judicial systems that prevent them from having access to the courts. Congress recognized similar difficulties for victims of gender-motivated violence when it exercised its Section 5 enforcement power to enact VAWA's federal civil remedy, and the Supreme Court has recognized that ensuring equal access to the courts is a legitimate goal of Section 5 legislation. Therefore, in addition to its commerce power, I urge Congress to expand its current constitutional justification for the Matthew Shepard Act by invoking its Section 5 enforcement power under the Fourteenth Amendment.