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**ARISTOTLE, LAW AND JUSTICE:
THE TRAGIC HERO**

*Eric Engle*

**ABSTRACT**

Aristotle was the greatest scientist in western history. He established the scientific paradigm and the instruments thereof (materialism and logic). His work covered all the basic sciences: Astronomy, Botany, Logic, Mathematics, Meteorology, Philosophy, Psychology, Political Science, Rhetoric, and Zoology. Aristotle’s conception of justice pervades the law and heavily influences the Anglo-Saxon court system to this very day. Yet, the mark of a hero in Greek tragedy is his tragic flaw - the failing that makes the hero all too human. Aristotle was racist, sexist and homophobic. He believed that slavery was natural and good. He also thought that a woman’s place was in the home. Due to Aristotle’s influence, his tragic flaw has distorted western thought ever since its conception. In order to cure this disease we must understand its cause. This essay describes Aristotle’s theory of justice and law in order to show how pervasively he has influenced the common law. Once his impact is understood it will be possible to overcome his biases that still mark the world. We can and should reject the dark shadow of this great scientist whilst enjoying the greater and better part of his work.

**I. INTRODUCTION: TWO PROPOSITIONS**

1. Aristotle was racist, sexist, and homophobic and believed slavery was natural, inevitable and good.
2. Aristotle was the greatest scientist in human history.

Both propositions are true.

For good and ill, Aristotle’s thought permeates western thinking. This pervasive influence is both evident and hidden. While Aristotle was simply wrong on race, sex, and gender, he was right about most everything else he

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1. “Therefore ‘it is reasonable for Greeks to rule barbarians,’ say the poets, supposing that to be a barbarian and to be a slave are by nature the same thing.” 10 ARISTOTLE, THE POLITICS OF ARISTOTLE (Peter L. Phillips Simpson trans., The Univ. of N.C. Press 1997) (350 B.C.).
2. “[I]n discussing women, Aristotle leaves no doubt about their subordinate and domestic role. He states clearly that men are better fitted to command than women.” W.W. Fortenbaugh, Aristotle on Slaves and Women, in 2 ARTICLES ON ARISTOTLE 137 (Jonathon Barnes, Malcolm Schofield & Richard Sorabji eds., St. Martin’s Press 1977) [hereinafter Slaves and Women].
3. “It is manifest then that by nature some are free and others slaves and that service as a slave is for the latter both beneficial and good.” Aristotle, supra note 1, at 17.
wrote. Aristotle basically invented logic, a theory of rhetoric and wrote the first extant works on political science, psychology, botany, astronomy and meteorology. He was the first to systematically study the natural world scientifically and in detail, or at least the first whose works are (mostly) extant. Though others preceded Aristotle in individual fields, most of the pre-Socratic works are sadly fragmentary. Plato limited himself to drama and philosophy. His thought is not systematic. Surely, Aristotle built on earlier thinkers but sadly, excepting Plato, we only know of them indirectly and fragmentarily.

Due to his influence, the study of Aristotle remains relevant. How could one man be so wrong and so right at the same time? And how exactly does Aristotle influence the common law?

II. ARISTOTLE’S CONTRIBUTIONS TO LEGAL SCIENCE

A. Logic and Dialectical Reasoning

Aristotle was a materialist and thus his work was really the first empirical testable science. I regard Aristotle as a monist. Certainly, dualities appear in Aristotle’s thought but his materialism constrains such apparent dualism into some greater unified whole - apparent dualisms can be contained within monist thought because the apparent duality is part of a higher unity. To be exact, that happens through dialectical synthesis of competing oppositions. And Aristotle, like Heraclitus, was a dialectician. Aristotle is clearly a materialist, and that commits all dualities eventually to some greater unified whole - materialism implies monism.

Aristotle invented philosophical logic, the systematic study of right and wrong reasoning. Cicero believed law was logic in action. If law is logic in action then Aristotle dominates the law just on that basis. Of course, there is the alternative voluntarist thesis that law is nothing but an armed command, the “bad man” theory where the law relies upon “material consequences” of actions. But

5. That’s particularly true of Heraclitus whose work is only available in fragments. See generally, HERACLITUS, FRAGMENTS (Brooks Haxton trans., Viking Penguin 2001) (501 B.C.).
7. “True law is right reason in agreement with nature; it is of universal application, unchanging and everlasting ... And there will not be different laws at Rome and at Athens, or different laws now and in the future, but one eternal and unchangeable law will be valid for all nations and all times, and there will be one master and ruler, that is, God, over us all, for he is the author of this law, its promulgator, and its enforcing judge.” CICERO, DE RE PUBLICA DE LEGIBUS 211 (Clinton Walker Keyes trans., William Heinemann 1928) (51 B.C.).
8. Oliver Wendell Holmes, The Path of the Law, 110 HARV. L. REV. 991, 993 (1997) (Reprint of an “address delivered by Justice Holmes, of the Supreme Judicial Court of Massachusetts, at the
in that case criminals would also be law givers. Voluntarism leads straight to the
law of the jungle with no exit. Yet, as Aristotle noted, it is precisely the fact that
humans live in States that marks human society and separates it from other social
and specialized animals such as bees\(^9\) or wolves. Other animals are social. But
human society is the most complex. Poetically, Aristotle notes that he who lives
outside the state is either a brute beast or a god.\(^{10}\) Because humans are rational,
political (social) animals with the gift of speech\(^{11}\) we live in cities and not as
savages.\(^{12}\) Thus our laws are higher than those of a dagger wielding thief. This
is why Aristotle’s thinking is powerful: he reaches the correct result on most
questions of social science with one exception, the supposedly genetic nature of
inequality.

Logic wasn’t the only thing Aristotle invented or discovered. He also
invented botany, zoology, grammar and advanced existing knowledge in
astronomy. His taxonomies, the first ever really, are still the basis of much good
science. His philosophical logic, extended by the scholastics, is still the
linguistic representation of what is now also modeled using the mathematical
logic pioneered by Boole. Boole took Aristotle as his starting point - recasting
propositions of natural language into mathematical form. Boole’s calculus at
once clarifies certain issues and makes certain problems explicit. However,
Boole also obscures others, most notably, the paradox of material implication.
This paradox was clear in philosophical logic but is obscured by mathematical
logic. Boole’s ideas, building on Aristotle, are the basis of computer science
including logic theorem proving computer programs such as prolog.

Aristotle influences legal science first and most broadly through the idea of
logic and then by his influence on Cicero. Cicero correctly recognized that law
is living logic. We can also trace the idea of separation of powers to Aristotle.\(^{13}\)
Equity courts too find their roots in Aristotle.\(^{14}\) In Aristotle’s schema of justice
the idea of equity (\textit{aequitas}) plays a role as a “backstop” to ensure that the
deliberative legal reasoning, the formal content of words, remains within the
bounds of fairness.

\(^9\)ARISTOTLE, supra note 1, at 11.
\(^{10}\)“It is clear, then, that the city exists by nature and that it has priority over the individual.
For if no individual is self-sufficient when isolated, he will be like all other parts in relation to their
whole. But anyone who lacks the capacity to share in community, or has no need to because of his
self-sufficiency, is no part of the city and as a result is either a beast or a god.” ARISTOTLE, supra
note 1, at 11-12.
\(^{11}\)Id. at 11.
\(^{12}\)Id.
\(^{13}\)Obrien v. Jones, 999 P.2d 95, 111 (Cal. 2000) (tracing the origin of the doctrine of
separation of powers to Aristotle).
\(^{14}\)“This is in fact the nature of the equitable; it is a rectification of law where it fails through
generality.” Teamsters & Employers Welfare Trust of Ill. v. Gorman Bros. Ready Mix, 139 F.
Supp.2d 976, 978 (C.D. Ill. 2001). (citing ARISTOTLE, THE NICOMACHEAN ETHICS OF ARISTOTLE
172 (J.E.C. Weldon trans., Macmillan and Co., Ltd. 1930)(350 B.C.)).
Universal social truths are very rare. Social sciences are dominated by probabilistic and not by deductive reasoning. The understanding that there is both deductive reasoning which is true at all times and concurrently there is a probabilistic practical reasoning that is at most times is an explicit feature of Aristotelian thought. Both deductive and probabilistic reasoning are used by courts to this day. Aristotle clearly distinguishes between practical reasoning (phronesis), which includes probabilistic reasoning, and deductive reasoning. And this clarity influences the law where we see that probabilistic and deductive reasoning are used to compliment each other in pursuit of the just result.

B. Tort Law: Causality is Rooted in Aristotle’s Thought

Aristotle influences tort law heavily in the idea of varieties of causation. In tort law we see the idea of cause in fact and proximate cause. Aristotle discusses material, formal, efficient and final causality. Each of these concepts has a corresponding influence in the law. Final cause is teleology. The idea of teleological cause influences the law through the use of teleological interpretation. Material and formal cause are cause in fact. And proximate cause is efficient causality.

Teleological reasoning, the idea of final objectives of the law, is also a hallmark of Aristotelian thought. Teleology runs throughout the law. Laws always serve some purpose, and it is normal to argue that the law should be interpreted consistent with its purpose.

While Aristotle’s ideas on causality, equity and logic heavily influence the law, Aristotle’s greatest influence in the law is likely from his theory of justice which we now examine.

III. ARISTOTLE AND JUSTICE

Aristotle provides a particularly well developed definition of justice, one that goes well beyond Plato’s rudimentary efforts. For Plato, justice essentially boils down to each person in society holding their appropriate position. In other words, platonic justice is all about being in one’s caste.18 So when I criticize Aristotle for being sexist, racist and homophobic, it is with the contextual awareness that he was much less caste-oriented than Plato. Paradoxically,
however Aristotle was homophbic, whereas Plato was not. This shows that progress is not linear but cyclical, that human society takes two steps forward but one step back. Today we know that Plato was right about homosexual persons and that we ought to be tolerant of homosexuals, and that Aristotle was wrong in his idea of the “natural” slave. Yet, Aristotle was progressive relative to Plato because Aristotle was a materialist and a monist. But above all Aristotle was progressive because Aristotle did not believe people should be rigidly trapped within their castes as did Plato.

Aristotle divides the world into exact (natural) and inexact (human) sciences. Per Aristotle, politics are imprecise.19 Thus its elements at times belong to tekhnē20 (art, including the art of politics) where opinion reigns rather than in episteme (science, including political science)21 where one finds certainty. Insofar as the political is thus a subject of dialectical reasoning,22 I would like to criticize the ideas of Aristotle in order to improve our practice through the exchange, comparison and synthesis of ideas in relative opposition. That is dialectics.

A. Political Justice – A Relation

Aristotle distinguishes between acts which are either just or unjust, people who are just or unjust, and justice and injustice generally.24 But all these ideas are contextualized by the idea of a relationship between the citizens of the Polis (state) which is called political justice. The relation between citizens (their political role in The City) is not only ontologically central, it is also teleologically key,25 being the highest expression of human development and the finality of the Polis.26 For Aristotle, justice can only exist among equals – that

19. Aristotle, Nicomachean Ethics (Albert Keith Whitaker ed., Joe Sachs trans., Focus Publishing 2002) (350 B.C.) (stating that we should only search for the amount of precision that the subject allows).
21. Aristotle, supra note 19, at 104 (stating that episteme concerns “things that are simply by necessity are everlasting.”).
22. According to the commentator, logikos or dialektikos concerns the generalities, opinions, and thus is connected to tekhnē. By way of contrast, phusikos concerns itself with real facts which are certain and thus is linked to episteme. Aristotle, Éthique à Nicomaque 108 n.1 (J. Tricot trans., Librairie Philosophique J. Vrin 1959) (350 B.C.).
23. According to the commentator the objective of praxis is to work on one’s internal constitution. Aristotle, Éthique à Nicomaque 31 n.3, 32 n. 3 (J. Tricot trans., Librairie Philosophique J. Vrin 1959) (350 B.C.).
24. “And injustice is the opposite in relation to what is unjust.” Aristotle, supra note 19, at 91.
25. Id. at 91-92.
26. “The just is that which is susceptible to create or preserve in whole or in part the well being of the political community.” Aristotle, Éthique à Nicomaque 1129a 18-20 (J. Tricot trans., Librairie Philosophique J. Vrin 1959) (350 B.C.).
27. Aristotle, supra note 19, at 92.
is, among adult freemen. Aristotle divides the political justice (the relation of citizens among each other) into natural justice and legal justice, the former being universal geographically, the other being unique to each Polis. To determine this relation, one must describe the Polis, and analyse the Polis from its parts toward the whole.

1. Elements and Origins of the Polis

a) The Family

The family is the material cause of the Polis in the thought of Aristotle. The family is the “atom” of the Polis. The Polis grows from the individual to the family, from the family to the village, and from the village to the Polis. The character of the Polis as the inevitable means to live and the necessary means to live well indicates that it is prior to the individuals who constitute it.

b) The Individual & Dependence

Aristotle holds that the individual is not sufficient unto himself. The conclusion from this fact of interdependence with respect to reproduction, economy, and society is the inevitability of the Polis and of the political.

2. Inequality

Men also are, according to Aristotle, naturally and biologically unequal. This “natural” inequality creates a hierarchy according to abilities: male freemen, female freemen, male children of freemen, female children of freemen and slaves. Aristotle justifies this hierarchy as being for the benefit of all.
a) The Condition of Slaves

The fact that Aristotle is inegalitarian is seen most clearly in his analysis of slavery. The inequality which creates and justifies slavery is, for Aristotle, natural and biological. For all that, he hesitates to postulate a strict relationship between legal status and quality of the soul. Nevertheless, he concludes that the slave is a slave for he deserves to be a slave due to a combination of the nature of his body and his soul. In short, the slave is dehumanized and equated to an animal. For Aristotle the existence of a class of slaves seems to be seen as an economic necessity.

b) The Condition of Women

The fact that Aristotle is inegalitarian is also evident from his analysis of relations between men and women. Again, biological and natural inequality justifies the treatment of women as inferior to men.

3. Rationality

Despite inequalities in social relations and material interdependence, man has a true power – he is gifted with reason. Men seek to understand, to express themselves and to reach the finality of their development as people. It is this excellence which makes of man the most perfect of animals.
4. State of Nature

Aristotle’s logic regarding the origin of the state seems to me to be very powerful. The “state of nature,” a state of existence before the existence of states, is fiction. The anthropological evidence shows that “pre-political” societies are structured around extended families. It is also true that no man is self sufficient. Thus for Aristotle the state is “natural” in the sense that the state is the inevitable consequence of the human condition. But to call the state “natural” does not mean that there is a state of nature – a human condition outside of familial or state structures including pre-state structures. Likewise, to prove the necessary character of social organization does not prove that this society must necessarily be patriarchal or inegalitarian. Anthropologists have discovered that matriarchal societies also existed. Although Aristotle is right as to the origin and inevitability of the Polis, I disagree with his idea that the state must also inevitably be inegalitarian and patriarchal.56

5. The Ends of the Polis

a) The Good

In the thought of Aristotle, objects are defined as moving (kinesis) towards their own ends (telos). This finality is the nature of the object.57 The ends of the State58 are “the good.”59

b) Autarchy

For Aristotle, the whole is more perfect than its parts.60 Aristotle is a wholist. Although the parts of the Polis – individuals61 and families62 – are not autarchic regarding their development, the state seen as a whole is complete and self sufficient.63 Thus this autarchy, being perfect, is a part of the good toward which political life in the state directs us.

B. Typology of Justice According to Aristotle

Aristotle begins his fifth book of Ethics with a definition of justice. He affirms that justice is a polysemic term64 and thus he chooses to begin with a

57. ARISTOTLE, supra note 1, at 11.
58. Id. at 8.
59. ARISTOTLE, supra note 19, at 1.
60. ARISTOTLE, supra note 1, at 11.
61. Id. at 12.
62. Id. at 11.
63. ARISTOTLE, supra note 19, at 10.
64. Id. at 80.
definition of the converse.\textsuperscript{65} If one recognizes the injust, perhaps one can understand the just by seeing it as the opposite of the injust. The injust man is an outlaw,\textsuperscript{66} unfair and greedy\textsuperscript{67} and in the end suffering from a type of ignorance.\textsuperscript{68} Thus the just is the exact opposite of these traits\textsuperscript{69} – the lawful.\textsuperscript{70} Aristotle implies that the just and the injust are opposites and mutually exclusive.\textsuperscript{71}

We have already explained the nature of political justice as being the means and ends of the whole and that political justice is divided into natural justice and positive law. Positive justice is itself further divided again in two parts: universal and particular justice.

1. The Just Man, Justice, and Just Acts

a) The Just Man

Aristotle distinguishes between just acts, just men, and justice.\textsuperscript{72} According to Aristotle the just man obeys the laws. This kind of justice, lawfulness, appears to be seen by Aristotle as a necessary but insufficient condition for the other types of justice.

b) Universal Justice (The Lawful)

Universal justice is that which encompasses just acts.\textsuperscript{73} It is in the same type of relation with just acts as the whole is to its parts.

c) Just Acts: Justice in the Particular (Fairness)

The type of justice which concerns the character of acts (rather than of men) is called justice in the particulars (particular justice). Particular justice is divided once again into two sub-parts: distributive justice and corrective justice.

2. Distributive Justice (“Geometric” Justice)

Distributive justice is concerned with the transactions between the \textit{Polis} and individuals. In modern terms it is called “public law.” The question answered by distributive justice is which standards shall be used\textsuperscript{74} to determine the

\textsuperscript{65} Id. at 79.
\textsuperscript{66} Id. at 80.
\textsuperscript{67} Id.
\textsuperscript{68} Id. at 38.
\textsuperscript{69} \textit{Aristotle, supra} note 19, at 80.
\textsuperscript{70} Id.
\textsuperscript{71} The logic of Aristotle is generally binary.
\textsuperscript{72} \textit{Aristotle, supra} note 19, at 90.
\textsuperscript{73} Id. at 82-83.
\textsuperscript{74} Id. at 83 (describing legal forms found in contractual and tort law in Aristotle’s schemata).
distribution as a geometrical and proportional relation (ratio) of public goods.

3. Corrective Justice (Arithmetic Justice)

Corrective Justice is concerned with the transactions of private individuals with each other. In modern civilianist terms it is “private law.” Corrective justice is determinant of just relations after the initial constitutive distribution of public goods. Private corrective transactions are again divided into two subparts: voluntary transactions (i.e., contract law) and involuntary transactions (torts and crimes). Involuntary transactions in turn are either hidden or violent (and possibly both). Corrective justice is analogical to an arithmetic relation. Corrective justice assures maintenance of the status quo ante despite whatever material transformation. Again, one sees the idea of particular justice as an intermediate virtue between values which are either too large or too small and as addressing certain acts rather than certain men. Particular justice is very important to the state for it guaranties business and social stability, despite economic inequality.

C. Critique of the Aristotelian Theory of Justice

1. What Are the Sources of Inequality?

One has seen that, according to Aristotle, the inequalities of virtues are the result of natural and biological differences including racial differences. Nevertheless, his determinism is not absolute (as would be the case in an oligarchy) and does not exclude the possibility of other influences causing inequalities of abilities and rewards. Inequality is also the result of education (or lack thereof) and of morale choices.

75. Id. at 84.
76. Id.
77. Id.
78. ARISTOTLE, supra note 19, at 85-86.
79. Id. at 86.
80. Id. at 85-86.
81. Id. at 86.
82. Id.
83. “What is equal is the mean between the greater and the less.” ARISTOTLE, supra note 19, at 86.
84. Id.
85. Id. at 88.
86. Id. at 88-89.
87. “It is normal that the Greeks command the barbarians.” ARISTOTLE, supra note 1, at 10.
88. “We are predisposed by nature, but we do not become good or bad by nature.” ARISTOTLE, supra note 19, at 28.
89. Id. at 23-24.
90. Id. at 91.
I do not contest that different persons have different capacities. But I am much less of a biological determinist than Aristotle and much more of an egalitarian as to the results which should follow from unequal abilities. Essentially Aristotle and I disagree on the measure of distributive justice. Aristotle favors excellence as the measure for distributive justice whereas I tend more toward equality as the best measure for distributive justice. This is because Aristotle asserted inequalities are essentially the result of genetic inheritance and moral choice. Whereas, I think they are the result of pecuniary inheritance and moral choice.

2. What Are the Consequences of Inequality?

a) Limitation of the Development of Individuals

The first injustice which results from Aristotle’s presumption of natural (genetic) inequality is that it limits the teleological development of citizens of the Polis. The slave born a slave can never become more than a slave. This limitation expresses itself in patriarchy and the caste system. This caste system links the just and the good not in the sense of correspondence, but in the sense of causality.

b) Limitation of the Development of the Polis

The second injustice, which results from the supposedly natural inequality postulated by Aristotle, is the limited development of the city itself. If one takes the contrary postulate, that inequality is not genetic, then one reaches a different conclusion. The abilities of persons born to wealth are no longer genetic, but rather due to luck of birth. Then the self-justifying character of the system of inequality becomes evident as viciously circular. Material inequality creates unequal capacities which justify the material inequality. The logical consequence is dynastic rule and plutocracy. The problem is that such a system limits the development of the city and stunts healthy internal criticism - channeling reform into rebellion. This leads to stagnation, as observed in the Mandarin system of feudal China or in the Satraps of India. Alternatively, dynastic rule leads to social collapse as was witnessed in the Roman empire. “Natural” slaves have no interest to defend the system which enslaves them.

c) Economic Inequality

When Aristotle speaks of the determinant choice of a measure for distributive justice, he proposes excellence, birth, and citizenship. Material inequalities are the result of social inequality. These inequalities are fair according to Aristotle because such inequalities are a matter of differing capacities and virtues of different individuals.
To justify this proportional inequality Aristotle must make the presumption that different types of labor have a different value according to the quality of the laborer. For example, an hour of the labor of a physician would have more worth than that of a farmer.\textsuperscript{91} For Aristotle these inequalities are of a natural character either due to merit or birth.

However this inequality is contestable. If the end of the city is survival and the maintenance of the good life for its citizens then the city guaranties the survival of its citizens. Thus the just state guaranties a certain minimum and maximum of income in order to prevent concentrations of power and oligarchy. The economic value of labor should be a function of the time invested in production. Thus in principle all labor time ought to be of relatively equal value. This is especially true when one recalls that manual labor is hard and dangerous risking the health and life of the worker. Few physicians are maimed or killed at work whereas some farmers and more than a few miners are.

\textit{D. Global Elements of Justice: Volition and Equity}

The two final elements of the Aristotelian conception of justice are volition and equity. I call these global elements because they are “omnipresent” in the consideration of justice.

1. The Relation between Volition and Culpability: Aristotle’s Influence on the Concept of Culpability in the Common Law

Involuntary acts cannot be evaluated as either just or unjust.\textsuperscript{92} Thus one can act in an unfair way without however being an unfair person.\textsuperscript{93} Aristotle thus erects four levels of responsibility:

\begin{itemize}
  \item[(1)] Negligence without Fault (in the law also known as mere or ordinary negligence);
  \item[(2)] Culpable Negligence (in the law known as gross negligence);
  \item[(3)] Intent without forethought (intending the act, but not the consequences); and
  \item[(4)] Malice aforethought.\textsuperscript{94}
\end{itemize}

These distinctions are found in the law to this day.

There is a problem with this schema: the mind of another is not truly knowable. We can only observe objective actions. Aristotle and the law seek to sanction based on mental state. The law can determine subjective mental states only by looking for objective evidence of subjective mental states. Thus the law addresses acts as the objective evidence of subjective mental states.

\textsuperscript{91} ARISTOTLE, \textit{supra} note 19, at 88-89.
\textsuperscript{92} \textit{Id.} at 94.
\textsuperscript{93} “An act of injustice differs from what is unjust.” \textit{Id.}
\textsuperscript{94} \textit{Id.} at 95.
Aristotle also influenced the law of diminished responsibility, the idea that the mentally retarded or insane ought not to be held to the same standard as persons of sound mind.

2. Equity

According to Aristotle, the unjust man suffers from the vice of greed, taking more than his fair share. The just man has the opposite tendency and errs on the side of taking a bit less than his fair share, especially when in doubt. A similar characteristic is found at the level of the city – equity. The end of equity is to correct the errors of the positive law which result from strict legalism. Equity also serves to apply the will of the legislator in situations which were unforeseeable. The judge in equity places himself in the position of the legislator asking what the legislator would do had it known the facts in this case. Equity serves to render the positive law more flexible and is the final guarantor of substantive justice. Of course the equity courts in the common law are a direct result of Aristotelian thought.

3. Criticisms of Aristotle

We have examined all the forms of justice described by Aristotle to obtain the idea that the just is the summation of all virtues, the intermediate term between opposing vices and the means for obtaining the virtue of the good. In spite of the fact that this appears ambiguous and circular, justice being both an ends and the means to an end, the distinctions between just acts, just persons, just states and justice explain how the just is the means to the end of justice. My critique of Aristotle’s idea of justice is not regarding his typology which I find persuasive and which clearly influences the law to this day. Rather we select different measures for distributive justice because we have differing positions on those inequalities of ability that Aristotle regards as natural (i.e., biological and genetic).

Regardless, whether one accepts or rejects Aristotle’s views on natural, biological and genetic inequality, one sees in political science (law) a master science. This master science determines the allocation of goods and what other

96. ARISTOTLE, supra note 19, at 80.
97. “A decent person is inclined to take less than others.” Id. at 97.
98. Id. at 98.
99. Id. at 99-100.
100. Id. at 99-100.
101. “In justice all virtue is together in one.” Id. at 81.
102. ARISTOTLE, supra note 19, at 29.
103. ARISTOTLE, supra note1, at 9 (discussing royal and political power).
sciences are explore and developed and to what degree. But when one accepts Aristotle’s genetic and biological view of natural inequality, the master science also becomes the science of masters, for political science determines the relations of members of the master class (master race) to each other, as well as the relations between the master class (master race) and the slave class (the subhuman Untermenschen). Although Aristotle sought to distinguish and refine the different forms of mastery, such distinction does not change the essence of the relation of superior (master) and subordinate (woman/slave). Women, children and slaves are seen as being naturally (biologically or genetically) unequal to (white) males. Women, children and slaves, according to Aristotle lack the deliberative capacity to command which is the excellence of freemen. This hierarchical and patriarchal vision is dehumanizing and limits the ability of the Polis and its members to grow and attain their full capacities. Thus this idea must be extirpated in order for Aristotle’s ends to be obtained. Aristotle’s thought is ninety percent correct but fatally flawed by essentially racist and misogynist presumptions.

There are other criticisms of Aristotle. Aristotle does not seem to address the pre-Socratic debate as to whether the fundamental nature of the universe is conflicted (which was Heraclitus’ line) or whether apparent conflicts are part of a greater harmony (which was Pythagoras’ line). The idea of adversarial conflict leading to truth, one key point of common law reasoning, can be traced in theory to Heraclitus. Aristotle seems silent on this point. With greatest reluctance I take Heraclitus’ view. I simply see conflict as pervasive in nature whether between predator and prey or between competing ideas, persons or nations, though I wish it were all really harmonious as Pythagoras believes. Indeed the capitalist economic system is built on the premise that competition - a healthy form of conflict - leads to the best products and the best prices.

And this brings up the question of the marketplace. This is perhaps where I have the greatest problems with Aristotle. Aristotle wrote on the science of getting and keeping a fortune (chremastics). How did Aristotle recommend one acquire wealth? Surprisingly, not through slave ownership. Though Aristotle was a slaver and thought slavery was a natural, inevitable and good thing, it was not the foundation of his advice to those who would get wealth! Rather, Aristotle recommended monopolistic commodity speculation as the route to wealth. Aristotle saw monopoly, not economic competition, as a key to individual wealth. True, one can argue that monopoly is good because of economies of

104. ARISTOTLE, supra note 19, at 1-2.
105. ARISTOTLE, supra note 1, at 84.
106. Id. at 8-9.
scale; monopolistic production may obtain cheaper good for consumers in the short run. However, in the long run, when there is no threat of competition the monopolistic producer has every incentive to raise prices to obtain the highest profit possible. A deep discussion of the advantages and problems of monopoly seems absent in Aristotle’s economic thought.

The much greater problem is simply that Aristotle was racist, sexist and homophobic. He was Helleno-centric and thought the Greek civilization the highest and best. This may have been true but the reasons for this excellence were fairly certainly seen by Aristotle as genetic. Even if Aristotle did not think that racial superiority was genetic, he was perfectly clear that genetic factors determine that some people are, by nature, slavish and others are, by nature, rulers. Some are born to serve and others to rule, according to Aristotle. Racism is that thought of individual excellence due to birth cast onto groups. And it’s simply untrue. For starters, the ruling classes have been out-bred by the ruled classes for centuries if not millennia. Furthermore, close inbreeding among the ruling classes leads to genetic defects of the brain or blood such as hemophilia. Finally, Aristotle is forced to recognize that some persons are not natural slaves but enslaved as a result of war. Again however Aristotle seems to have no problem with the institution of slavery, whether the slave is one by nature or by capture.

Gender and sex relations in the thought of Aristotle are also clearly problematic. Aristotle definitely believed women are by nature subordinate to and subjects of men. Unfortunately, Aristotle does not seem to elucidate his hierarchy with perfect clarity. Such an elucidation shows it to be untenable or confused. This is likely Aristotle’s hierarchy within the Hellenes:

- Adult male freemen,
- Adult female freemen,
- Adult male slaves,
- Adult female slaves,
- Children of Freemen,
- Children of Slaves.

And this is the same sort of social hierarchization that plagues social and political discourse in the United States today. For an example of the sort of confused thinking it leads to, try to answer the following. Within the hierarchical racist or capitalist view, who is higher in the social hierarchy, a poor white woman or a wealthy black man? This sort of question is disgusting and a very real part of social discourse. When one understands that all people are of about equal talents and basically have the same hopes, fears, needs and desires, then the idea of hierarchy itself becomes disgusting.

VI. ARISTOTLE AND FOUCAULT

109. ARISTOTLE, supra note 1, at 18.
Aristotle’s continuing relevance can be seen by looking at the influence he had on Michael Foucault. Though he of course influenced Cicero and Aquinas and so many others, Foucault is the most recent, best example of Aristotle’s continuing relevance.

Aristotle has had a pervasive influence on the structure of law, more so even than Cicero. It is for precisely this reason that we are compelled to the records of his lycaeum. Just as Foucault’s lectures at the College de France were gathered by students into notebooks, so too were the lectures of the Lycaeum recorded, most probably by Aristotle’s son, Nicaeus forming the corpus of his works that we enjoy to this day. The parallels between Aristotle and Foucault show that the former clearly influenced the latter.

Stylistic similarities between Foucault and Aristotle are striking. So too are methodological similarities. Aristotle proposed the first real taxonomy of sciences, including the human sciences. Foucault, though limiting his work to the human sciences, was also working on the taxonomy of knowledge. Aristotle’s focused on man and nature and their relation to each other, whereas Foucault focused on the relation between the body and knowledge, the relation between power-knowledge and body-knowledge. Aristotle in contrast was looking at the world of nature to understand the nature of Man.

Foucault’s delimitation of the field of inquiry is perfectly understandable. Natural science, though working from the basic foundations of Aristotelian thought and the atomists, has advanced incredibly in two thousand years and grown correspondingly complex. One-time theoretical debates over whether matter and energy are convertible are now empirically solved. Human sciences too have advanced – economics has become empirical and scientific, for example. But progress in human sciences has not been as great as progress in natural sciences. Thus, both Aristotle and Foucault worked on the unsolved problems of their times and did so by thinking of ideas and things in structures. Foucault considered himself to be a post-structuralist. But he worked from the starting point of the structure of knowledge to critique the implications of structuring knowledge. Aristotle built hierarchies and taxonomies. Foucault studied structure and hierarchy to deconstruct them. Aristotle and Foucault are each other’s mirror image, one looking outward the other inward, one looking to create power, the other to defuse it, yet their discursive writing styles and method are so similar – despite being separated by two thousand years.

Post-structuralists like Foucault have influenced the law somewhat, notably through the critical legal studies movement which seeks to deconstruct discourses about power to elucidate the power relations that shape those

110. *See Michel Foucault, Language, Counter-Memory, Practice* 199-217 (Donald F. Bouchard ed., Donald F. Bouchard & Sherry Simon trans., Cornell Univ. Press 1977) (discussing the interrelation of knowledge and power, often in tandem with the work of Gilles Deleuze).

discourses. However, Aristotle had a much greater influence on the law: essentially the post-structuralists are trying to deconstruct the hierarchies of knowledge and power that Aristotle described. By exposing Aristotle’s thoughts on justice and pointing out some of his influence on law I hope to help critical scholars work more effectively. We must study Aristotle because no one else has influenced the structure of law and of social science so much. Moreover, we must look at Aristotle because his racist, sexist and homophobic thought should be extirpated from the law in the interest of justice.

CONCLUSION

I more or less take a post-structuralist approach to Aristotle: I seek to expose how his thought is structured by his views on gender, race and sex to create self-justifying hierarchies of power. At the same time, I wish to expose the concepts deployed through these vectors of power. This separation allows us to salvage Aristotle’s ideas on logic, justice and causality which pervade the law. Thus, rather than being trapped in disembodied Platonic dualism, sterile positivism or powerless post-modernism, critical scholars obtain conceptual instruments used to wield state power. Rather than rejecting Aristotle outright, I try to resituate his discourse within the terms of equality. If Aristotle’s ideas can be cured of pervasive racism, sexism and homophobia then they can become useful.
TWO SIDES OF THE SAME COIN:  
THE MEMORY OF THE HOLOCAUST AT WAR WITH A SURVIVOR

Kristen Messer

I. INTRODUCTION

Most of the world would agree that a museum dedicated to telling the story of those who suffered at the hands of the Nazis is a noble endeavor that should be supported. Most of the world would also agree that Holocaust survivors should be granted every opportunity to have the wrongs committed against them corrected. But what happens when these groups conflict, and Holocaust survivor and Holocaust museum are left pointing fingers and placing blame on one another?

This paper examines the conflict between the Auschwitz-Birkenau State Museum in Poland and one of the camp’s former detainees, Holocaust survivor Dina Babbitt, over seven paintings of Roma detainees at Auschwitz. The second section explores the background of the conflict and some of the public opinion expressed in favor of Ms. Babbitt. The third section outlines the legal arguments made by the Museum and Ms. Babbitt’s responses to these arguments. Finally, the fourth section proposes several solutions to the dispute.

II. BACKGROUND

Dina Gottliebova Babbitt arrived at the infamous Auschwitz death camp in southern Poland in 1943. A year earlier, when her mother’s name appeared on a list of Czechoslovakians headed for the Theresienstadt concentration camp, Dina had begged Nazi officials to allow her to accompany her mother on this terrible journey. Fierce devotion to her mother and quick thinking is what ultimately saved the lives of both Dina and her mother.

When Dina was approached by Dr. Josef Mengele, the notorious Auschwitz doctor who ran horrific experiments on prisoners, to help him document his experiments through painting, the twenty-one-year-old girl said she would paint on the condition of sparing her mother’s life. Dr. Mengele wanted to document

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5. Id. See also, Grossman, supra note 1.
the "degenerate racial characteristics" of the gypsies, or Roma, at Auschwitz; however, his own photographs "lacked the proper colors." Dina used watercolors to paint a series of portraits of both Gypsy prisoners and Nazi guards' family members, signing each at the insistence of Dr. Mengele. Dina continued painting for the doctor until the Soviets liberated Auschwitz in 1945. During her imprisonment, Dina created eleven Roma portraits, seven of which are at the center of an international dispute.

The paintings were saved by prisoners who had been abandoned at the camp when the Nazis fled. The State Museum at Auschwitz-Birkenau bought six portraits from a survivor in 1963, with the seventh purchased in 1977 from another Holocaust survivor. In 1973, after the Museum discovered Dina's signature on the portraits, it sent her notification of their findings. Dina, who was living as an illustrator in California, packed her bags and traveled to Poland, believing she would return home with her paintings. However, when she arrived at the museum, she was informed that the paintings belonged to the museum and she could not take them back to the United States.

Dina Babbitt has spent the past thirty years trying to recover her portraits. Her pleas have reached the ears of artists, lawyers, and statesmen on both sides of the Atlantic Ocean. Yet the paintings remain in Poland, hanging in a part of

6. All Things Considered: Auschwitz Prisoner Fights to Recover Her Paintings (National Public Radio broadcast Nov. 30, 2006) ("Nowadays we would call them [gypsy prisoners] Roma").
7. Id.
8. Id. ("Dina made nine watercolors for Mengele").
9. Caille Millner, Editorial, The Art of Stealing, S.F. CHRON., Oct. 24, 2006, at B6. Dr. Mengele became angry with Dina when he noticed how good-looking all of her subjects were, and "he was trying to prove the inferiority of the race." Id.
10. Grossman, supra note 1. See also Larry Gordon, Art or a Part of History?, L.A. TIMES, Nov. 29, 2006, at A1 ("Mengele told her to sign the paintings").
11. Id.
14. See id.
15. Id.
17. Id.
18. Id. See also Friess, supra note 12. But see Museum’s Position, supra note 13 (disputing this version of events, claiming that during Mrs. Babbitt’s 1973 visit she merely requested photographs of the original portraits).
19. Grossman, supra note 1 ("Ever since discovering in 1973 that they were there, Babbitt has tried to get them back"). See also Millner, supra note 9 ("This remarkable situation . . . has been at impasse for three decades").
21. Id.
the museum that once served as prison barracks to the people whose images fill the canvases.\(^{22}\)

Ms. Babbitt has received a significant amount of support from the world community, including the United States Congress.\(^{23}\) In 2002, Nevada Congresswoman Shelley Berkley, who represents Ms. Babbitt’s daughter, a resident of Las Vegas,\(^{24}\) sponsored a nonbinding resolution that Congress adopted.\(^{25}\) The resolution directed the State Department to work toward securing the paintings for Ms. Babbitt.\(^{26}\) While some discussions between the two governments occurred in the intervening years, it is not clear to what extent any progress has been made.\(^{27}\) However, “the State Department’s special envoy for Holocaust issues,” J. Christian Kennedy, did raise the issue last October while on an official visit to Poland.\(^{28}\) Mr. Kennedy explained that he framed the issue as “a humanitarian effort,” but he could not comment on the “Polish response.”\(^{29}\)

In addition to support from the United States government, Ms. Babbitt’s cause has been taken up by lawyers,\(^{30}\) museum directors, artists,\(^{31}\) and international Jewish organizations.\(^{32}\) These groups have all tried various attempts to put pressure on the Polish government to release the paintings to Ms. Babbitt, but to no avail.\(^{33}\)

III. LEGAL ARGUMENTS

This case is fraught with a multitude of legal arguments from both parties. The Museum has entrenched itself in a variety of arguments that may or may not hold up in courtrooms in American and Poland.\(^{34}\) But running through every argument is the core mission of the museum, to commemorate the more than one million people who died at the hands of their Nazi captors in Auschwitz and

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24. Friess, supra note 12 (“Mrs. Babbitt’s daughter lives in Las Vegas”).
27. Cf. id. See also Gordon, supra note 10.
29. Id.
30. Lawyers Want Artwork Returned to Survivor, supra note 20.
31. Grossman, supra note 1 (noting petitions have been signed by over 400 museum directors and artists, including the former executive director of the United States Holocaust Memorial Museum in Washington, D.C.).
32. Id. (indicating the David S. Wyman Institute for Holocaust Studies organized the museum and artist petitions). See also Millner, supra note 9 (“Rafael Medoff, director of the David S. Wyman Institute in Washington, D.C., helped organize a petition signed by more than 450 comic-book artists to urge the museum to return Babbitt’s paintings”).
33. Lawyers Want Artwork Returned to Survivor, supra note 20. See also Grossman, supra note 1; Friess, supra note 12.
34. See Millner, supra note 9 (“The Auschwitz museum must know that none of their legal parsings could hold up in a court of law, if Babitt decides to pursue a case, as I hope she does”).
Birkenau.\textsuperscript{35} Under mandate from the Polish government, the Museum manages the two sites, which together form the “most significant memorial site of the Shoah.”\textsuperscript{36} It is the immense importance of the site that complicates the dispute between the parties.

\section{Commissioned Art}

Many of the Museum’s arguments have been outlined in a statement posted on the museum website.\textsuperscript{37} One such argument focuses on the premise that the paintings fall under the principle of work for hire, or commissioned artwork.\textsuperscript{38} Under this principle, it is the patron, not the artist who holds the property rights in the work.\textsuperscript{39} Thus, the Museum purports that Dr. Mengele, the commissioner of the portraits, would be the only individual who would legally have a claim.\textsuperscript{40} According to the Museum, the paintings were made for Dr. Mengele and Dina Babbitt “has never owned these watercolors.”\textsuperscript{41}

On a somewhat contradictory note, the Museum contends that the portraits are not actually artwork at all, but “documentary work done strictly for survival.”\textsuperscript{42} The museum’s deputy director wrote to one journalist, “we do not regard these [portraits] as personal artistic creations but as documentary work done under direct orders from Dr. Mengele and carried out by the artist to ensure her survival.”\textsuperscript{43} In its statement, the Museum actually distinguishes between works produced on the orders of Nazi officials and works illegally created at the risk of the artist’s life.\textsuperscript{44} Presumably, the works in the first category do not have the element of creativity allegedly required to make them artistic pieces. These items, such as identification cards, signs, and Dina Babbitt’s artwork, are the

\textsuperscript{35} DELEGATION STATEMENTS: POLAND, WASHINGTON CONFERENCE ON HOLOCAUST-ERA 307, 317 (Feb. 19, 1999), http://www.fcit.usf.edu/HOLOCAUST/resource/assets/heac3.pdf. See also Déborah Dwork & Robert Jan van Pelt, \textit{The Politics of a Strategy for Auschwitz-Birkenau}, 20 CARDOZO L. REV. 687, 687 (1998) (indicating that in these camps, “960,000 Jews, 74,000 Poles, 21,000 Roma and Sinti, 15,000 Soviet prisoners of war, and 12,000 other gentile prisoners” were slaughtered).

\textsuperscript{36} Dwork & Jan van Pelt, \textit{supra} note 35, at 687.

\textsuperscript{37} \textit{Museum’s Position}, \textit{supra} note 13.

\textsuperscript{38} Grossman, \textit{supra} note 1. See also Millner, \textit{supra} note 9 (“They’ve [the Museum] offered the argument that the paintings are not art, but documentary work done strictly for survival, and under coercion”); Friess, \textit{supra} note 12 (“We [the Museum] do not regard these as personal artistic creations but as documentary work done under direct orders from Dr. Mengele and carried out by the artist to ensure her survival”).

\textsuperscript{39} Grossman, \textit{supra} note 1.

\textsuperscript{40} Id. A museum official wrote to Dina Babbitt, informing her that Dr. Mengele “wasn’t likely to exercise” this right. Id.

\textsuperscript{41} Millner, \textit{supra} note 9.

\textsuperscript{42} Id. This is Caille Millner’s phrasing of the museum’s argument.

\textsuperscript{43} Friess, \textit{supra} note 12 (citing e-mail from Teresa Swiebocka, Deputy Director, Auschwitz museum).

\textsuperscript{44} \textit{Museum’s Position}, \textit{supra} note 13.
same as the work product of any job. In the Museum’s eyes, the element of coercion reinforces the lack of personal creativity, removing any personal rights that Dina Babbitt could claim in her works.

Dina’s response to these arguments is that the watercolors represent so much more than mere documentary work produced as part of a job. The paintings are a significant part of her life, representing the courage and will to survive, witnessing the beauty around her. She did not merely follow the instructions of Dr. Mengele when she painted her subjects. The subject painted with a blue scarf, Celine, had just lost a baby and could not hold down her food for long. Dina used their sessions to illicitly sneak food to Celine, purposefully extending the time it took her to paint the portrait. Thus she argues that the paintings were not just created according to Dr. Mengele’s terms, but were deeply personal outlets for rebellion.

The artist also argues that the Museum’s copyright concessions to her represent an acknowledgment that she has property rights in the works. The Museum regularly informs Ms. Babbitt about the status of the artwork, seeking permission from her “whenever the works are to be reproduced or published.”

While it is difficult to evaluate these arguments with the limited amount of information available about Polish law, any discussion about property rights must start with Poland. First of all, Poland has not enacted the property restitution laws of other Western countries. Polish law only deals with restitution for communal religious property, not for private individuals who lost property. A 2006 International Religious Freedom Report, published by the

45. See id.
46. See id.
47. Grossman, supra note 1. See also All Things Considered, supra note 6 (“Dina Babbitt says they [the paintings] are an integral part of her life”).
48. See Friess, supra note 12 (‘‘[Dina’s] soul is in them, and without these paintings I wouldn’t be alive, my children and grandchildren wouldn’t be alive’’ and ‘‘[b]ut to Dina, this is her life’’). See also Fields-Meyer, supra note 2 (“this is a piece of myself”).
49. Fields-Meyer, supra note 2 (“He told me to paint exactly what I saw . . . But I also painted what was going on inside them”).
50. All Things Considered, supra note 6.
51. Id. See also Gordon, supra note 10.
52. Cf. Fields-Meyer, supra note 2 (“He told me to paint exactly what I saw . . . But I also painted what was going on inside them”); Gordon, supra note 10 (“Babbitt dragged out the work for a week, double the usual time, to slip Celine rare pieces of white bread”).
53. See Friess, supra note 12 (“To Mrs. Babbitt, this is an acknowledgment that the museum recognizes that the works belong to her”). See also Millner, supra note 9 (“They’ve claimed that because the paintings were created under coercion, that Babbitt doesn’t have ‘ownership’ – she only has ‘copyright’”).
54. Friess, supra note 12.
55. Hegstad, supra note 25.
United States Department of State, found that the Polish government has made
great strides in compensating religious communities who lost property under
either Nazi or Communist rule, providing for the return of churches,
“synagogues, cemeteries, and community headquarters, as well as buildings that
were used for other religious, educational, or charitable activities.”
The Polish government has made efforts to work with international Jewish groups “to
address property claims . . . stemming from Nazi . . . confiscations and
persecutions.” However, these efforts do not encompass private property
claims, which have not yet been addressed by the Polish government, despite a
restitution bill that was introduced into parliament in July 2005, but never voted
on. Even if Poland did have property restitution for private citizens, Polish
legislation restricts the rights of those living outside of Poland to claim
property.

Putting aside the restrictions of Polish law without embarking on a
discussion of conflict of laws and jurisdiction, the Museum’s argument rests
heavily upon work-for-hire principles. In most Western nations, the
commissioner of artwork holds the physical property rights to the art, while the
artist is the copyright owner, a right which does not transfer to the chattel
owner. The U.S. Supreme Court’s discussion of commissioned artwork in
Community for Creative Non-Violence v. Reid excludes most commissioned
artwork from work-for-hire status. Additionally, most fine artists do not work
under employment conditions equivalent to those of work for hire, such as
employee benefits and having the employer provide the tools. While it might

58. Id.
61. Grossman, supra note 1. See also Millner, supra note 9 (“They’ve [the Museum] offered
the argument that the paintings are not art, but documentary work done strictly for survival, and
under coercion”); Friess, supra note 12 (“We [the Museum] do not regard these as personal artistic
creations but as documentary work done under direct orders from Dr. Mengele and carried out by
the artist to ensure her survival”).
would convey the copyright to the commissioning party upon the artist’s delivery of the
commissioned work. Independently of this presumption, the commission party might also be
deemed the copyright owner by virtue of having commission the work’s creation”).
64. Cf. id. at 752-53.
65. Id.
be argued that the tools to paint the portraits were provided by Dr. Mengele, it would be extremely irresponsible to equate the prisoners at the death camps with employees. The Museum’s work-for-hire theory is contradictory to its actions acknowledging Ms. Babbitt as holding the copyright to the works, as copyrights are held by the chattel owner when the work has been produced for hire.

B. Depletion of the Collection

One of the Museum’s most persuasive arguments involves the supposed precedent that would be set by returning the portraits to Dina Babbitt. If the Museum were to return Ms. Babbitt’s paintings, it would have to return every work claimed by the rightful owner or his heirs. In a 2001 letter to Nevada Congresswoman Shelley Berkley, Polish Ambassador to the United States, Przemyslaw Grudzinski, wrote, “[n]early every item left or contributed to the museum . . . could be claimed by a rightful owner as personal property.” The Museum asserts that prisoners often signed the documents, works of art, and handicrafts they were asked to create, giving examples such as the technical camp building plans, photographs taken by prisoners for camp identification purposes, and even the iron gate at the entrance to Auschwitz, exclaiming the camp motto, “Arbeit macht frei,” or “Work brings liberation.” What would be left of the museum if all of these items were claimed and removed from the museum?

While it may be argued that this question is only hypothetical and most survivors and their heirs would have no interest in obtaining the building plans or identification photos they helped create, the Auschwitz-Birkenau Museum is

66. See All Things Considered, supra note 6 (“And Mr. Mengele sent for two more chairs. So one chair was my easel . . . and one chair for me to sit on. And I got my pad and paints, watercolors”).

67. See Friess, supra note 12 (“To Mrs. Babbitt, this is an acknowledgment that the museum recognizes that the works belong to her”). See also Millner, supra note 9 (“They’ve claimed that because the paintings were created under coercion, that Babbitt doesn’t have ‘ownership’ – she only has ‘copyright’”).

68. Community for Creative Non-Violence, 490 U.S. at 737.

69. Museum’s Position, supra note 13. See also Friess, supra note 12 (“it [the Museum] is unwilling to give up just a portion of the works for fear of setting a precedent under which other survivors could claim additional artifacts on display”); Grossman, supra note 1 (“You can understand their [the paintings’] meaning to Dina but also to the museum . . . It’s essential to have actual artifacts of the Holocaust to preserve the memory of the horrors”).

70. Friess, supra note 12.


72. Id. (asking the “theoretical question” of “what will happen if other former prisoners . . . start coming here and claiming back . . . works of art, pictures . . .” and “Only here, in Oswiecim, they do serve the science, history and hundreds of thousands of pilgrims visiting this place every year”). See also Millner, supra note 9 (“Because so many museums have disputed artifacts, they all fear an ‘avalanche’ of requests and accusations that could dismantle their collections”).
currently involved in a legal battle over a suitcase from its collection. In early 2005, the Museum agreed to lend part of its collection to a permanent exhibit on French Jews during World War II in Paris. Soon after, an exhibit visitor, Mr. Michel Lévi-Leleu, discovered his father’s name on one of the suitcases loaned from the museum. Mr. Lévi-Leleu immediately begged the Foundation not to return the suitcase to Poland, saying, “I didn’t want it to repeat the journey that it had already made to Auschwitz.” The Foundation asked the Museum to allow the suitcase to remain in Paris on a “long-term” loan, in order to “persuade the family” not to demand restitution.

The governing body of the museum, the twenty-five member International Auschwitz Council, agreed to extend the suitcase loan until January 2006. However, a month before the expiration of the loan, Mr. Lévi-Leleu “obtained a court order preventing [the suitcase’s] return to Poland” while a French court evaluated his claims. He asserted, “I wanted it to stay here, not to put it in a cupboard at home, out of everyone’s sight, but so it could be shown to everyone in Paris.” Despite the assurances that the suitcase would remain on display for the world to see, the Auschwitz-Birkenau Museum, which had never been sued before, was furious. The suitcase incident would seem to be evidence of just the type of drain on the Museum’s collection that is feared.

C. Preserving Truth and the Universal Museum

The Museum’s underlying fear is that the artifacts will become “ordinary objects for private use,” instead of remaining in the place where they will have the biggest impact on the world’s view of the Holocaust. Former Museum Director, Jerzy Wroblewski, insists that

[...]

73. Gordon, supra note 10 (“And in France last year, a man noticed his father’s suitcase in a Holocaust exhibition and now wants Auschwitz, which lent it for display, to give it up”).
74. Alan Riding, The Fight Over a Suitcase and the Memories it Carries, N.Y. TIMES, Sep. 16, 2006, at B9. The loan was made to the Foundation for the Remembrance of the Shoah, which agreed to return the items by June 30, 2005. Id.
75. Id. His father, Pierre Lévi, had taken the family into hiding when the Nazis invaded Paris. They changed their name to “Leleu” and his father found work in a far-away town. After returning from a visit to his family, Pierre was captured by Nazi soldiers and sent to Auschwitz. Id.
76. Id.
77. Id.
78. Id.
79. Id. The court is expected to make a ruling sometime this year, but no ruling was evident as of the writing of this paper.
80. Riding, supra note 74.
81. Id.
82. Millner, supra note 9.
visitors as when they are seen on the grounds of the former camp. It is here that they shout loudest.84

The Museum argues that the paintings are rare artifacts and important evidence of the Nazi genocide85 in an era in which Holocaust denial is becoming louder and more prevalent.86 While at the camp, the paintings speak “with a totally different voice than in any other place,” 87 serving “documentary and educational functions . . . about the murder of thousands of” people.88

This argument parallels a controversial declaration about the role of the modern museum, adopted by almost forty major international museums.89 The universal museum has a unique role in a world shaped by colonialism, imperialism, and barbarism.90 The heritage of one country is also the history of another country.91 For this reason, many cultural artifacts belong to the world, not to individual countries.92 Drafted in response to the political pressure placed upon Great Britain to return the infamous Elgin Marbles, the Declaration asserted that ownership rights of cultural artifacts should reflect the “values that existed at the time of [their] acquisition.”93

Under this view, cultural property, which is any item that is significant to the “archeology, prehistory, history, literature, art or science”94 of a religious or secular group, exemplifies the “cultural internationalism” of all mankind, not just one nation or group.95 This does not mean that illegal exportation and theft are acceptable, but that objects acquired under different historical circumstances should “be viewed from the perspective of the time period during which they were acquired.”96

The arguments of the Declaration have been met with skepticism and international criticism.97 These critics believe that the Declaration is an attempt

84. Jagninski, supra note 83.
86. Cf. Fields-Meyer, supra note 2. See also Riding, supra note 74 (indicating that over time, it has become essential to “preserve physical remnants of the death camp to safeguard the memory of the genocide”).
88. Friess, supra note 12.
90. Cf. id.
91. Cf. id.
92. See id. (“museums serve not just the citizens of one nation but the people of every nation”).
94. Id. at 317.
95. Id. at 320.
96. Id. at 325.
97. Id. at 326, 332-34.
to shift the world’s attention away from the push towards “repatriation of cultural” artifacts to the services that museums can provide to their visitors.\(^\text{98}\)

The Declaration offers little insight into how repatriation claims should be treated, instead highlighting the “important role [that] museums play in society.”\(^\text{99}\) Additionally, critics argue that the position of looking at past acquisitions through the historical lens under which they occurred is not in keeping with current societal trends of taking responsibility for historical injustices and abuses.\(^\text{100}\) While the world is attempting to make amends for past wrongs, these museums are attempting to protect artifacts in their collection by appealing to historical excuses.\(^\text{101}\)

The Museum at Auschwitz-Birkenau asserts a similar argument: the paintings are of special importance to the world, not just to Ms. Babbitt.\(^\text{102}\) They are some of the relatively few objects that document the plight of the Gypsies at the hands of the Nazis.\(^\text{103}\) The Museum asserts that even the Roma people who survived and their descendants “share [the] viewpoint that the portraits should remain in [Auschwitz].”\(^\text{104}\) The Auschwitz-Birkenau State Museum is guided by the dictates of its state-sanctioned mission to collect evidence of Nazi crimes, and everything that remains from the concentration camps “belongs to all people and is the evidence of crimes committed here.”\(^\text{105}\) Expanding on this logic, an American supporter of the Museum fervently argued that the paintings have a far more significant “role to play if they remain on display at [the Museum] . . . . Ultimately, artworks belong to all of humanity. It would be a sacrilege for these unique historical documents to slip back into private ownership, where they would be reduced to mere commodity.”\(^\text{106}\)

In response to these arguments, Ms. Babbitt argues that the mission of the Museum is not to provide an “artistic experience,” but an “educational experience.”\(^\text{107}\) It is immaterial whether the actual portraits remain hanging in the museum in Poland, or whether they are replaced by replicas, documenting the extent of the Nazi’s brutality.\(^\text{108}\) In fact, the paintings do not all hang in the museum, they rotate through the exhibit dedicated to the Gypsy experience at the

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98. Id. at 326.
100. Id. at 332.
101. Cf. id. at 331-34.
102. See Museum’s Position, supra note 13.
103. Arendt, supra note 85.
105. Id.
107. See Millner, supra note 9.
108. Id.
Thus the portraits are not always displayed for the world to see and take note of.110

Additionally, Ms. Babbitt asserts that she wants the portraits to hang in America, a free country, rather than in Poland, which continues to hold “her freedom hostage.”111 Under this logic, the Museum would be able to have reproductions of the portraits112 to show the world how the Nazis tried to document their superiority, and the real paintings would be in a museum for the whole world to see and experience.

D. Moral Implications

The above legal arguments are complicated by moral arguments on both sides of the dispute. A former historian at the Research Institute for the United States Holocaust Memorial in Washington, D.C., Sybil Milton, argues that it is really a matter of choosing between two moral stances.113 On the one hand, Ms. Babbitt, the original artist, seeks to have her own work returned, while on the other hand, the paintings exist at all due to the conservation work of Poland.114

While this argument brings up the moral dilemma at the core of this dispute, it does not touch on the complexity of issues that the Museum will face. A Holocaust claim requires museums to balance “legal, ethical, and financial considerations” against public opinion.115 Normally, “institutional guidelines highlight the ethics involved in general deaccession decisions,” but with Holocaust art, ethics move to “the forefront of the issue.”116 Thus, in a situation where both parties have deep-rooted connections to the Holocaust, the moral and ethical issues are multiplied.

Some scholars and political officials have argued that legal constraints should not apply to Holocaust issues at all. “[T]o truly assist claimants in recovering their art objects, the discussion needs to be taken out of an

110. Cf. id.
111. Hegstad, supra note 25.
112. All Things Considered, supra note 6 (“You know, so I’m all for them being reproduced as much as possible”). See also Millner, supra note 9 (“There’s no reason why they can’t hang reproductions”).
114. Id. (author cites Cembalist again, Apel cite works here as well if needed)
116. Id.
exclusively legal context and elevated to a moral and political level.”\footnote{117} When speaking to the delegates at the 1998 Washington Conference on Holocaust –Era Assets, noted politician and Holocaust scholar, Stuart Eizenstat, stated:

> We can begin by recognizing this as a moral matter – we should not apply the ordinary rules designed for commercial transactions of societies that operate under the rule of law to people whose property and very lives were taken by one of the most profoundly illegal regimes the world has ever known.\footnote{118}

What the Nazi’s forced Dina Babbitt to do is comprehensible only as a reflection of the lawlessness under which the regime operated. Mr. Eizenstat’s argument highlights the fact that Ms. Babbitt’s claims to the artwork should not be resolved though Polish or American laws about property restitution and work-for-hire status, but should reflect the international spirit of goodwill and remembrance.

\section*{V. POSSIBLE SOLUTIONS}

It is with this spirit that politicians and scholars from around the world have come together to establish certain guidelines for dealing with restitution of Nazi-looted artifacts.\footnote{119} The most prominent example of this was the 1998 Washington Conference, organized for the purpose of creating certain principles to guide participating countries in “the restitution of Holocaust-era art.”\footnote{120}

The Washington Conference Principles, to which both the United States and Poland were signatories, establish several points that are applicable to finding an equitable solution to the portrait dispute.\footnote{121} First, the owners of artwork “should be encouraged to come forward and make known their claims to art that was confiscated by the Nazis and not subsequently restituted.”\footnote{122} Second, “steps should be taken expeditiously to achieve a just and fair solution . . . .”\footnote{123} Finally,
“[n]ations are encouraged to develop national processes to implement these principles, particularly as they relate to alternative dispute resolution mechanisms for resolving ownership issues.”

The Parliamentary Assembly of the Council of Europe unanimously passed a resolution (Resolution 1205) echoing these sentiments, calling for the restitution of Holocaust property. Relevant points include, first, “[s]ubsequent expropriation and nationalization of Jewish cultural property, whether looted or not, by communist regimes was illegal, as was similar action in countries occupied by the Soviet Union.” Second, “restitution of such looted cultural property to its original owners . . . is a significant way of enabling the reconstitution of the place of Jewish culture in Europe . . . .” Finally, “[b]odies in receipt of government funds which find themselves holding looted Jewish cultural property should return it.” Poland was one of the forty-one nations which approved this resolution.

This resolution and the Washington Conference Principles, while not legally binding on signatory nations, outline a helpful framework for addressing Holocaust-era art reparations. Both documents have the overarching theme of seeing property returned to its original owners, while Resolution 1205 treats this as an important means of redressing an even greater wrong, the rooting out of the Jewish nation from Europe. Additionally, both documents encourage creative and equitable resolutions to art reparation conflicts, with the Washington Conference Principles specifically recommending “alternative dispute resolution mechanisms for resolving ownership issues.”

Without addressing the likelihood of a legal victory in Polish courts, Ms. Babbitt might be able to take her claims to the European Court of Human Rights (ECHR), which enforces the human rights outlined in the Council of Europe’s protocols from the European Convention for the Protection of Human Rights and Fundamental Freedoms, ratified in 1993. Poland subsequently ratified these

124. Id.
126. Id. at ¶ 3.
127. Id. at ¶ 8.
128. Id. at ¶ 12.
129. See id. (the “forty-one nations [including Poland] unanimously passed Resolution 1205”)
130. See Washington Conference Principles, supra note 122.
131. EUR. PARL. ASS. RES. 1205, supra note 126.
protocols, which hold that all people have the right to “peaceful enjoyment of [their] property” and should not be deprived of this property. One hurdle for Ms. Babbitt to surpass is that the EHRC must have jurisdiction over her claim. In order to have jurisdiction, not only must her claim fall within the areas covered by the protocols, but she must also have exhausted all “domestic remedies.” Ms. Babbitt could argue that she is a victim of one of the “High Contracting Parties to the rights set forth in the Convention or protocols thereto,” and that Polish law currently has “no domestic laws for property restitution” and that there is even legislation restricting the ability of foreigners to claim property. With standing and jurisdiction established, Ms. Babbitt would have a chance at having her claims heard in a court of law that has authority over Poland.

However, there is no guarantee that there would be any successful resolution in a case before the ECHR. It is at this point where the guidelines of the Washington Conference Principles and Resolution 1205 are supportive in developing an acceptable resolution to the dispute over the paintings. Several individuals have already attempted mediation, including Rabbi Andrew Baker, a member of both the American Jewish Committee and the advisory committee for the Museum at Auschwitz-Birkenau, and Stuart Eizenstat in his role as “State Department undersecretary during the Clinton administration.” Yet these mediations have been unsuccessful.

One proposed solution has been the loan of the paintings to Ms. Babbitt for her lifetime, after which the paintings would return to the Museum in Poland. However, Ms. Babbitt indicated that she would never agree to an arrangement that refused to acknowledge her ownership rights in the paintings. Along these lines, another solution would be for Ms. Babbitt to loan the paintings to the Museum, with assurances that she retained ownership and the paintings would eventually be returned to her, an idea that she would “be open to.” However,
it is unlikely that the Museum, with its fierce belief in its property rights in the artwork, would ever agree to such an idea.

Looking towards non-legal solutions, Mr. Eizenstat highlighted an example of creativity in the resolution of an art dispute between the family who had lost the Degas painting, “Landscape with Smokestack,” and the good-faith purchaser for value who had no knowledge of its dark provenance.149 “Both were in a position to wage a legal battle that could have gone on for years.” Instead, they negotiated a “partial payment for the family and [a] donation of the [painting] to the Art Institute of Chicago,” where it was on public display with labels acknowledging both parties.150 “Art claims do not have to be winner-take-all propositions, which produce prolonged struggles in the courts, and drain the resources of both parties.” This example provides a significant model for what a resolution in this case might look like.

Realizing the possibility of a stalemate during Mr. Eizenstat’s negotiations, an attorney for Ms. Babbitt suggested that the artwork be divided, with three or four portraits returning to the United States and the rest remaining in Poland under the Museum’s control.151 It is not public record why this suggestion was not taken, but it would seem to satisfy the claims of both parties. Ms. Babbitt wants to retain something that is deeply connected to her life story.152 In remarks to a journalist, she explained, “[e]verything that was taken away from us. . . . And now, finally, something is found that I created, that belongs to me.”153 To have even a portion of her artwork returned could fill this void in her life.154 For the Museum’s part, its overarching goal is to document and educate the world about the cruelty of the Nazis, lest the world forget the death of millions of people.155 As President Bill Clinton remarked at the opening of the United States Holocaust Memorial Museum:

This museum is not for the dead alone, nor even for the survivors who have been so beautifully represented; it is perhaps most of all for those of us who were not there at all, to learn the lessons, to deepen our knowledge.

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149. Eizenstat, Principles on Nazi-Confiscated Art, supra note 118.
150. Id.
151. Id.
152. Id.
154. Friess, supra note 12 (“But to Dina, this is her life”). See also Fields-Meyer, supra note 2 (“This is a piece of myself”); Gordon, supra note 10 (“They are . . . a part of me”); Grossman, supra note 1 (“they’re [Dina’s memories] emotionally bound in those Gypsy portraits . . . . [T]hey are totems of a pivotal moment in her life”); All Things Considered, supra note 6 (“Dina Babbitt says they are an integral part of her life”).
155. Friess, supra note 12.
156. Gordon, supra note 10 (“Babbitt . . . now might consider [a compromise] permanently giving her several of the works of her choosing”). See Grossman, supra note 1 (“If I had them back, maybe I could sleep . . . I could sleep again”).
memories and our humanity, and to transmit those lessons from
generation to generation.\textsuperscript{158}

These powerful words form the basis of the desires of the Auschwitz-Birkenau State Museum. The retention of half of the original artwork would satisfy these aims by providing evidence of Dina Babbitt, the Roma people, and what they experienced at the hands of the Nazis.

\textbf{VI. CONCLUSION}

No one is arguing that Dina Babbitt does not have a legal and moral right to her artwork. No one is arguing that the Auschwitz-Birkenau State Museum does not have a legal and moral right to the paintings of the murdered Gypsies. Instead, this dispute is complicated by valid legal and ethical claims on both sides of the Atlantic Ocean. While the Museum is protected by Polish laws that restrict Ms. Babbitt’s legal ability to access the paintings,\textsuperscript{159} it has stooped to demeaning arguments that reduce the position of Holocaust prisoners to that of Nazi employees.\textsuperscript{160} This argument undercuts the very goal of the Museum, which is to teach the world about Nazi brutality, not the legal rights Nazi soldiers had over their prisoners. Ms. Babbitt created the paintings under duress and coercion\textsuperscript{161} and has a superior moral right to the works; however, her claim that her human rights and power have been taken away, “exactly like when [she] was still an inmate in the camp,”\textsuperscript{162} is excessive and diminishing to the experience of those who suffered in the camps, including herself.

Both parties must retreat from their inflexible, all-or-nothing standpoints to find a compromise that is worthy of the spirit of redemption and forgiveness that rings through the stories of most Holocaust survivors. This conflict has raged for more than three decades.\textsuperscript{163} Dina Babbitt is growing older and her health is


\textsuperscript{160} Cf. Millner, supra note 9; Museum’s Position, supra note 13.

\textsuperscript{161} Fields-Meyer, supra note 2 (“Mengele ordered her [Dina] to create portraits of Gypsy prisoners . . . When she proved useful he spared her . . . from the gas chambers”). See also All Things Considered, supra note 6 (“So Dina was summoned and told [to] paint, and by doing so survived”); Hegstad, supra note 25 (“Mengele kept Babbitt and her mother alive because she painted for him”); Grossman, supra note 1 (“she agreed to do the work as the price of saving her mother, as well as herself, from the concentration camp’s gas chamber”).

\textsuperscript{162} Jagninski, supra note 83.

\textsuperscript{163} Millner, supra note 9 (“This remarkable situation . . . has been at impasse for three decades”). See also Grossman, supra note 1 (“Ever since discovering in 1973 that they [the paintings] were there, Babbitt has tried to get them back”).
b)ing weaker. “[O]ur work must be guided by an urgent resolve to ensure that those who survived the tragedy of the Holocaust will not continue to suffer . . .” Dina Babbitt is suffering and so is the Museum. Following principles of equity and charitableness, as well as the guidelines established by the Washington Conference Principles and Resolution 1205, a peaceable solution may be reached that will benefit Ms. Babbitt, the Museum, and the entire world

164. Arendt, supra note 85 (“the artist is suffering from heart problems”).
165. Eizenstat Opening Ceremony Remarks, supra note 159.
167. EUR. PARL. ASS. RES. 1205, supra note 126.
THE SHOW MUST GO ON: AN EGALITARIAN APPROACH TO DESCENDIBILITY AS APPLIED TO A PROSPECTIVE FEDERAL PERSONARIGHT STATUTE

Justin Pats

INTRODUCTION

In a day and age where the value of one’s celebrity and fame is at an all-time high, cultivating and protecting the earning power of one’s persona has become a matter of great consequence. For international superstars such as Tiger Woods, Michael Jordan, and Bono, their personas should be looked after just like their bank accounts, with great care and attention. The revenue that has been earned by these individuals—not through their craft but merely via endorsements—would astonish even those not from the humblest of means. With such values skyrocketing into the tens of millions of dollars per year, it is no wonder that there is both (1) a greater number of counterfeiters and infringers free-riding off of others’ personas to support their own commercial ventures and (2) a movement for stronger, more unified publicity protection on the side of the rights owners. Unfortunately, with publicity rights only protected individually by the states, there exists much confusion and uncertainty regarding the scope of protection of an individual’s persona.

Given the above situation, there has been a movement toward a federal right of publicity law in the greater legal community.1 Unfortunately, none of these proposals have come to fruition—varied state laws still reign supreme at the current time. That is not to say, however, that the movement for a federal right of publicity should cease operation. Indeed, the author believes that some very promising proposals have been offered2 and that with a few beneficial alterations and adjustments, a comprehensive and workable federal right of publicity statutory scheme will result. So, the author proffers his solution regarding a federal right of publicity not as a replacement for existing proposals but rather as an addendum and supplement to them, especially in the area of descendibility, which appears to be the least developed in most existing state statutes as well as in proposals for a federal law.

1. See discussion infra Part II.B.
CURRENT STATE OF THE RIGHT OF PUBLICITY

Governance of State Law

The right of publicity protects an individual from the unauthorized commercial appropriation of an element of their persona. Generally, although protection initially only extended to an individual’s name or image, many states now, especially through common law, extend protection to include one’s likeness, voice, or identity. Currently, twenty-eight states protect the right of publicity in some form. This protection is levied via statute, common law, or both. Of the aforementioned twenty-eight states, eighteen have some form of statutory protection. Nineteen states have common law rights. Furthermore, twelve states have transferable and descendible rights. In terms of descendibility, rights are extended depending on the state and can be anywhere from ten to one hundred years.

Three states have taken notable stances on the right of publicity. The first of these states is New York. New York only recognizes a statutory right of publicity. Its publicity protection derives from and is included within its privacy statute. Protection is rather limited since the right of publicity is not considered descendible and only an individual’s “name, portrait, or picture” is protectable. Unlike New York, Tennessee recognizes the right of publicity via both statutory and common law, protecting an individual’s “name, 

3. See RESTATEMENT (SECOND) OF TORTS § 652C (1977) (“One who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of his privacy.”); see also Mark Roesler, Intellectual Property Resources: Right of Publicity, http://www.markroesler.com/ipresources/rightofpublicity.htm.
5. Id.
6. Id.
7. Id. Generally, publicity statutory provisions are either derived from and added onto existing privacy laws or created anew within the state laws. See generally id. The following states have privacy-based publicity statutes: FL, MA, NE, RI, NY, UT, VA, and WI. The remainder have created independent publicity statutes: CA, IL, IN, KY, NV, OH, OK, TN, TX, WA.
8. Id. These states are AZ, AL, CA, CT, FL, GA, HI, IL, KY, MI, MN, MO, NJ, OH, PA, TN, TX, UT, and WI.
9. Id. These states are CA, FL, IN, IL, KY, OH, NV, OK, TN, TX, VA, and WA.
11. See id.; see also Celedonia, supra note 2.
photograph, or likeness.” Additionally, descendibility is recognized. Protection is granted for ten years following the death of the individual, and this can be extended potentially forever so long as non-use of the persona for a period of two years following the ten-year grace period is not demonstrated. Thus, as evidenced above, Tennessee has a much broader protection scheme than New York.

A third state that also has rather broad protection is California. Like Tennessee, California recognizes the right of publicity in both the common law and its own publicity statute. California has one of the broadest common law protection schemes for the right of publicity. Furthermore, its statutory protection is strong, protecting an individual’s “name, voice, signature, photograph, or likeness,” and recognizing descendibility for a period of seventy years following the individual’s death. Given its backdrop as the entertainment industry capital of the world, California and the Ninth Circuit have been at the forefront of publicity law, deciding numerous key cases over the past few decades.

Movement for a Federal Law in the Greater Legal Community

As of today, there is currently no federal right of publicity statute. However, in recent years, commentators as well as legal organizations have proposed that Congress enact such a statute. The most convincing of these

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17. See id. § 1103(b).
18. See id. § 1104(b).
24. See id. § 3344(g); see also Drennan, supra note 12, at 141 n.611 (discussing the extension of this period depending on whether the individual is a celebrity or otherwise).
25. See Drennan, supra note 12, at 69–73.
proposals is that of Eric Goodman, who provides an in-depth look at the components of such a law and even draws up the potential statutory language.\textsuperscript{28} The basic tenets of Goodman’s argument are soundly based and will be further discussed below.\textsuperscript{29}

This push for a federal publicity statute derives largely from a need for uniformity in the wake of varied law, varied decisions, and varied viewpoints.\textsuperscript{30} Providing for a federal statute would result in a more predictable environment for both personaright owners and users.\textsuperscript{31} No longer will publicity users have to worry about dozens of different legal schemes in the event their use may be construed as improper. Through preemption, one set of federal laws could provide a single protection scheme.\textsuperscript{32} Additionally, publicity owners would be more easily able to identify and combat infringers with the backing of federal law enforcement.\textsuperscript{33} Furthermore, a federal right of publicity would eliminate the incentive for forum shopping because no matter the jurisdiction, one legal standard would be applicable.\textsuperscript{34}

\section*{ANALYSIS}

\textbf{Federal “Personaright” Statute}

A federal “personaright” law should comprise aspects of existing proposals. A new federal right of publicity statute should be available to all individuals regardless of celebrity status.\textsuperscript{35} The right of publicity is rooted in protecting the commercial value of one’s identity.\textsuperscript{36} Within every person lies commercial value. This commercial value should be thought of as an absolute value, independent from its source. Whether its accrual is through physical beauty, intelligence, or sheer serendipity is of no consequence. Likewise, it matters not whether the commercial value of an individual attaches as a result of the fruits of one’s own labor or mere societal anointment.\textsuperscript{37} The above is true because rights associated with one’s persona are ultimately driven and sustained by social

\begin{thebibliography}{9}
\bibitem{} =5 (last visited 3/4/08) (INTA resolution in support of a federal right of publicity via an amendment to the Lanham Act).
\bibitem{} 29. \textit{Id.; see infra} Part III.A.1.
\bibitem{} 30. Dawson, \textit{supra} note 27, at 662.
\bibitem{} 31. \textit{Id; Jennings, supra} note 26, at 8.
\bibitem{} 32. Goodman, \textit{supra} note 2, at 251–52.
\bibitem{} 33. Dawson, \textit{supra} note 27, at 663.
\bibitem{} 34. \textit{Id}.
\bibitem{} 35. Goodman, \textit{supra} note 2.
\bibitem{} 37. See Drennan, \textit{supra} note 12, at 91 n.304 (“[A] celebrity’s fame may largely be the creation of the media or the audience...” (quoting \textit{Cardtoons, L.C. v. Major League Baseball Players Ass’n}, 95 F.3d 959, 975 (10th Cir. 1996))).
\end{thebibliography}
perception. Almost whimsically, one misstep can bring the most beautiful, the most intelligent, and even the most fortuitous down just as easily as they had been catapulted to the top.

The right at issue concerns the economic value attributable to an individual’s persona. This should not be a couched privacy right or a “celeb” right, protecting only the famous. It is its own entity and should have a moniker that reflects this. As such, the author has decided to use the term “personaright” as a replacement for the “right of publicity.” Like “copyright,” which at its most general is the exclusive right to copy an original creation, a personaright is an exclusive right to all uses of one’s persona. So, for the remainder of this paper, the term “personaright” will be used to signify the “right of publicity.”

All state-rooted publicity laws should be preempted by a new federal personaright statute. The main impetus behind a federal right of publicity statute is to unify existing divergent state law. After all, if every state had a similar, well-functioning approach to the right of publicity that produced universally acceptable results, there simply would not be the outcry to reform the system that exists today. Furthermore, through a preemptive federal law, Congress will provide rights-holders a template with which to simultaneously value their persona-based assets as well as formulate enforcement strategies via more stabilized forum offerings and remedies.

It is important to note that traditional intellectual property and privacy tort-based defenses such as fair use and the First Amendment should maintain their availability under a federal personaright statute. As such, matters of public interest and artistic expression should be exempt from liability. However, as is the general application in first amendment defenses, commercial use of one’s persona should not be considered exempt.

The reason why fair use and the First Amendment are important is that we do not want to curb innovation and creativity through personaright protection. There must exist scenarios where one is able to express his personal beliefs without the imminent threat of a lawsuit. This carries from the political realm, regarding freedom of speech, to the entertainment realm regarding parody, literary, theatrical and other such artistic uses of otherwise protected personas. Eliminating these societal safeguards would undoubtedly result in a chilling of

39. Just as copyright law has a bundle of exclusive rights—the right to reproduce, the right to create derivative works, the right to sell, the right to perform, the right to display publicly, and the right to perform the work publicly—the personaright has exclusive rights in one’s name, voice, signature, photograph, identity, and likeness. Id; see generally Drennan, supra note 12, at 141.
40. Goodman, supra note 2, at 251–52.
41. Dawson, supra note 27, at 662.
42. Goodman, supra note 2, at 270–72 (laying out in his proposed statute the provisions for commercial use, fair use, and newsworthiness).
speech and a marked diminishment of art in the public domain, both of which are
certainly unwanted consequences.

Moreover, personarights should indeed be transferable and assignable. Rationale often pointed to in defending this position is rooted in the claim that the commercial value derived from one’s persona is no different from the value attached to real or personal property, and thus, the rightsholder should have the same rights-shifting powers at its disposal as would a property owner. Furthermore, free rights-shifting ability stimulates economic activity. Without rights-shifting ability, if you yourself didn’t have a particularly marketable persona, you are basically eliminated from competing in the rights of publicity game. But with the availability of rights-shifting, everyone can play—correction, every millionaire can play! If you do not like your own persona, you can just pony up the necessary cash and buy someone else’s!

Descendibility

We now arrive at the critical issue addressed by this paper: as enacted in a federal statute, should personarights be descendible and, if so, how should these rights be treated following the death of the original personaright owner? The fact that merchandise relating to stars who have been dead for decades, such as Marilyn Monroe, Elvis, and James Dean, continues to be sold readily even today demonstrates that personarights can persist long after the subject’s death. Still, there usually are only a handful of individuals every generation with the persona power to outlive their bodies to this extent. The average person is forgotten soon after her death outside her immediate family and friends. And even those personas that are remembered and honored long past their original owner’s deaths do not necessarily translate to sustained commercial value.

Indeed, it is a rare occurrence when you have both longevity and commercial staying power. For example, many of the world’s greatest historical leaders, Thomas Jefferson, George Washington, Abraham Lincoln, Napoleon, and even Adolf Hitler for example, continue to command commonplace notoriety in our present day culture, despite having expired, in some cases, hundreds of years ago. But the idea of a business built around the sale of Adolf Hitler t-shirts is hardly a bright one. Essentially, notoriety and commerciability are not perfect correlates.

So, how do we address the shelf life of a personaright? Do we take a look to copyright law and other forms of intellectual property for the answer? Or maybe we should look at existing state publicity statutes and common law and arrive at a compromised result? A plurality of commentators and lobbyists have proffered this theory. If we do this, an approximate average descendibility extension would be about fifty years after death. The problem here though is that for every one person who has commercial value fifty years after they die, there are tens of millions who do not. So do we cater to this small fraction of the population with
commercial staying power, or do we give more weight to the fact that most people’s personas die along with their bodies, or at best shortly thereafter?

There are further irregularities. Because society is the predominant determinant as to the duration and inevitable termination of one’s personaright value, and present day society generally takes on an unsatisfied and unfulfilled attitude, there is an inherent capriciousness with which personas are often cast away, only to have a replacement immediately shipped in. This can be a cruel reality for those who once knew the taste of fame.

Given this unstable atmosphere, how do we put an amount of time on the posthumous worth of a personaright? One could imagine how much money the owner of Julius Caesar’s persona would be pulling in today—with the royalties from his salad and casinos alone he would be able to put every single one of his descendants through college for dozens of generations to come. If we were to choose a flat number, fifty years after death would seem like a pretty middle-ground position. However, in light of . . . there may be some mechanisms through which the process of adding years posthumously to one’s personaright protection can made more effective.

Mechanisms for efficacious federal personaright protection

First, as has been previously supported, under a federal personaright statute, there should be a registry in which any persona can be registered. Such a registry could be an extension of the USPTO or equivalent federal agency. A registration application “should include the name and date of death of the deceased individual, the name and address of the claimant, the basis of the claim, and the rights claimed,” and should be filed within two years of the death of the individual. This registration would be a prerequisite to claiming royalties on a deceased persona, as well as to bring suit under a federal personaright statute.

One of the key requirements mentioned above is the basis of the personaright claim. In support of this element, the successor-in-interest could offer evidence such as commercial influence of the deceased individual, societal influence of the individual, and current available publicity relating to the individual.

Commercial influence would relate to earning power of the persona—how much projected revenue from merchandise and advertisements is forecast for the near future. Granted this may be a difficult and potentially suspect value to compute, so historical data relating to commercial influence could also serve as a reliable indicator of future influence, given the insertion of standard depreciation factors accounting for the following two facts: (1) the deceased individual is no

43. See Drennan, supra note 11, at 141.
44. See Goldman, supra note 2, at 260–61.
45. Id. at 268–69.
47. Goldman, supra note 2, at 268–69.
longer able cultivate his persona in corpore and (2) the public generally loses interest in a persona over time following the subject’s death.48

Societal influence would relate to the individual’s status nationally and even internationally. Successors-in-interest to figures known commonly in the international community during their lifetimes (such as golfer Tiger Woods, NBA player Michael Jordan, Microsoft founder Bill Gates, U2 lead singer Bono, and Oprah Winfrey) would have a stronger basis of a personaright claim than those known nationally for the most part. Illustration of the latter situation would encompass many American sports stars like former Baltimore Oriole Cal Ripken and current Baltimore Raven Ray Lewis. Societal influence would also extend to national and international political figures, whether it is the oft-maligned president of the United States, George W. Bush, or British Prime Minister Tony Blair.

A rich current domain of available publicity will also further strengthen one’s basis for a personaright claim. Available publicity means an aggregation of all photos, stories, and other references to a particular persona that are in the public domain. On its face, measuring this factor appears to be neither an easy nor straightforward task. Still, the Internet serves as an invaluable tool by which we can quickly, and surprisingly reliably, evaluate one’s current available publicity. Key websites that will be helpful in this analysis are search engines such as Google and perhaps auctions sites such as eBay. In order to gauge an individual’s current available publicity, one could examine the number of Google hits or eBay auction listings a particular person’s name generates. The higher these values are in relation to the average person’s hit count can serve as a comparative rating of one’s current available publicity.

To give an example of the above strategy, Tiger Woods, a persona in his prime rivaled globally by very few at the current time, garnered 6,130,000 hits on Google, and 3376 items on eBay. In comparison, Julius Caesar, a historical persona of epic proportion, although still impressive given his death over two thousand years ago, garners only a fraction of Tiger Woods’ hits, 1,860,000 on Google, and 173 items on eBay. From the above current available publicity analysis, we can see that Tiger Woods has a stronger personaright than Julius Caesar, one with more earning power at the present time.

Registration and maintenance of a federal personaright

Another important aspect of the registration system is when to file and how to maintain your personaright protection. Filing should occur following the death of the individual for whose persona protection is sought and should be done no more than two years after date of death. The reason there is no initial period of continued protection following death, as in several other states,49 is that

48. See discussion infra Part IV.D.1.
49. See TENN. CODE ANN. § 47-25-1104 (2004); see also discussion supra Part I.
compulsory license-related royalties are dependent upon this registration and the sooner a deceased persona is documented and registered, the sooner the general public can freely use the persona and the sooner successors-in-interest are justly compensated via the royalty scheme, which will be discussed further below.

One final noteworthy component to the registration process is personaright maintenance. Tennessee, known for its strong recognition of publicity rights, has a “use it or lose it” philosophy along the lines of trademark law under the Lanham Act.\textsuperscript{50} Under this philosophy, proof of nonuse for two years subsequent to a ten-year period after the death of the individual will result in termination of the successor-in-interest’s personarights.\textsuperscript{51} In the instant proposal, however, the burden would fall squarely on the successor-in-interest to periodically renew their personaright registration and demonstrate its continued value. If this burden is not met, the personaright will terminate and compulsory license-related royalties would no longer be collectable by the successor-in-interest.

More specifically, registration renewal will be required every 15 years. The period of 15 years has been chosen for two reasons. First, it is a period of time which is not so short as to unduly burden the successor-in-interest with seemingly continual defense of his personaright. Second, a period of time roughly one-half to three-quarters the length of an average societal generation is not so long as to unjustly extend personaright protection beyond its deserved duration.

The particulars of the compulsory licensing royalty scheme are also critical to an economically stable system. Under the instant proposal, there will be a mandatory royalty fee of ten cents per use of a deceased, registered personaright. This begs the question, what constitutes a use? Well, the easy answer is any single occurrence that exploits a deceased individual’s name, photograph, voice, identity, or likeness. But it is axiomatic that there is an inherent grey area with personarights, especially given the courts’ ongoing struggle to define protection coverage. Instead of applying a strict definition, recognized categories constituting use could be instituted. Examples would include any commercially driven advertisement, video, or other such depiction that intentionally bears the name or photograph of a protected persona. Another example would be any audio recording that intentionally imitates another’s voice for profit or the recitation of a saying or phrase that is unequivocally attributed to the deceased persona.\textsuperscript{52}

Importantly, a compulsory mechanical license should only be available for clear and concrete uses of one’s persona. As per identity and likeness, these are the grey areas which a compulsory license scheme may not be able to efficiently

\textsuperscript{50} See Goodman, \textit{supra} note 2, at 259–60; see also TENN. CODE ANN. § 47-25-1104.
\textsuperscript{51} TENN. CODE ANN. § 47-25-1104(b)(2).
\textsuperscript{52} Here it is important to note that defenses such as fair use are still available to the personaright user and could be raised in the event of litigation brought by a successor in interest for personaright infringement.
handle and are likely too difficult to police. As such, these contested uses will be left to the court for decision on personaright infringement and are not subject to a compulsory licensing scheme as it is currently drawn up.53

Policing a compulsory mechanical licensing scheme starts with an authority with the resources necessary to monitor persona usage within the United States. To address this issue, an authority similar to ASCAP (American Society of Composers, Authors and Publishers),54 a copyright protection association, could be instituted to license and distribute personaright royalties. Such an association for personarights would make giving and obtaining permission to use personas simple for both successors-in-interest and persona users.55

Rationale for a Compulsory Mechanical Licensing Scheme

Compulsory Mechanical Licensing Generally

Compulsory mechanical licensing has been a fixture of federal copyright law for nearly a hundred years.56 A compulsory license is an implied contract between the rightsholder and members of the public where, in return for a promise to pay a fixed fee at some later date, users are given unlimited use of copyrighted work.57 Moreover, this license is compulsory in that the rightsholder must give the user the right to use the work in any manner set forth by federal copyright statutes.58 In copyright law, compulsory licensing has been applied to the retransmission of broadcast signals by cable and satellite carriers, public performance of music on jukeboxes, public broadcasting, and perhaps most importantly, sound recordings.59

As per sound recordings, “when phonorecords . . . have been distributed to the public in the United States under the authority of the copyright owner, any other person . . . may . . . obtain a compulsory license to make and distribute phonorecords of the work.”60 Currently, the cost is 9.1 cents for each recording of a song that is 5 minutes or less by the licensee.61

53. There are likely other examples of standardized personaright uses that could fall within the confines of the above proposed compulsory licensing royalty structure. The above examples are in no way meant to be exhaustive. The main point above is merely to shed light on a few potential statutory uses.
55. See id.
57. Id. at 226.
58. Id.
Effects of Compulsory Mechanical Licensing

Artists’ ostensible carte blanche to “cover” original non-dramatic musical works has undoubtedly resulted in the creation of new, entertaining renditions of well-known songs, thus enriching our musical domain.62 For example, numerous songs—such as *Blinded by the Light*, first sung by Bruce Springsteen in 1973, later popularized in 1976 by Manfred Mann,63 *Tainted Love*, first sung by Gloria Jones in 1964, made a hit by Soft Cell in 198164, and Jimi Hendrix’s 1968 classic rendition of *All Along the Watchtower*, which was first performed a year earlier by Bob Dylan65—have failed to garner acclaim until their renditions by subsequent artists. At the same time however, covering time-honored classics like Don McLean’s American Pie has left a bad taste in the mouths of many Americans.66 So where does that leave us—what kind of insight can we draw from copyright compulsory licensing in our application of this concept to personarights?

Compulsory Mechanical Licensing and the Human Psyche

Before focusing on compulsory licensing, heed that no matter the proposition, there will always be dissenters and naysayers. Such is intrinsically cemented into our American culture, which was founded by individuals seeking religious freedom, rebelling against persecution. As written by Thomas Jefferson:

[N]o man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer, on account of his religious opinions or belief; but that all men shall be free to profess, and by argument to maintain, their

the rate is 1.75 cents per minute for each recording. Music Copyright F.A.Q.  Broadcast Music, Inc. – Licensing. http://www.bmi.com/licensing/ broadcaster/mech.asp (last visited 3/7/06).


63. See Matt Vemanis Community on IMEEM, About Matt Vemanis, http://groups.imeem.com/eLExIvOT, matt_vemanis_group/ (last visited 3/4/08). (“Blinded by the Light is a song written and originally recorded by Bruce Springsteen. It was originally released as the first track on his first album, Greetings From Asbury Park, N.J. (1973) but attained its greatest success when it was remade by Manfred Mann’s Earth Band, whose version reached Number 1 on Billboard’s Hot 100 in 1977. As of 2005, the Manfred Mann recording of “Blinded by the Light” is still Springsteen’s only Number 1 single as a songwriter on the Hot 100.”).


65. See generally id.; see also 100 GREATEST COVERS, supra, note 67.

66. See 100 GREATEST COVERS, supra, note 13; see also Bevilacqua, supra note 52, at 285–86.
opinion in matters of religion, and that the same shall in no wise diminish, enlarge, or affect their civil capacities.67

Because of this freethinking rebellious mentality that permeates our society, critics have a visible and notable presence. Therefore, just as people complain about bad covers of licensed sound recordings, there will undoubtedly be uses of licensed personas that are opined unacceptable, repulsive, and inappropriate by some. Still, as long as there is significant support for a licensing schematic, the existence of dissension should not overly concern lawmakers and their constituencies.

Moreover, because the dissension over the use of compulsorily licensed intellectual property is often personally and emotionally driven, it is deep-rooted and difficult to quell. Music traditionalists often purport that any attempt to cover a song dilutes the value of or disrespects the original. This is at least partially due to the deeply emotional and personal connection between people and music. Musical passages evoke in the listener memories or images of emotions that the listener has experienced in the past.68 It follows that there can be no emotional reaction to music that is not strongly rooted in emotional experience in life.69 Hence, listening to music becomes an occasion for a selective tour of one’s gallery of emotional remembrances, with some song functioning as a guide.70 As a result, if an artist even slightly alters a particular song in making a cover, the cover artist is effectively tampering with the memories and past experiences of the public.

This concept can easily be transferred from a copyrighted song to the aural aspect of one’s identity or persona, namely one’s voice. When a person listens to a song that she enjoys, not only does she remember the song, she also connects and develops a certain level of comfortability.71 This most powerfully traces back to songs from one’s youth, when the brain is at its peak of development in terms of absorption capacity.72 The composition of a song is imprinted in one’s memory. Included in this imprint is the particular voice singing and its timbre.

So what happens when someone tries to imitate or cover a song that has been “downloaded” into one’s memory? Simply put, the brain does not like to be tricked or deceived—some airport lounge singer belting out Wind Beneath My Wings will irritate to no end anyone who has heard the Bette Midler version and satisfyingly stored it away. The reason for this irritation is because the cover

69. Id.
70. Id.
72. Id.
does not exactly match the music data file that is in our brain. Because that lounge singer’s voice is not an exact replica of Bette Midler, an alarm is triggered in our psyche notifying the discrepancy, often sending us on short-lived “bad trip.”

Why should we Apply Compulsory Mechanical Licensing to Personarights?

The above logic can also be projected onto one’s name, likeness, identity, image, etc. People spend lifetimes building, molding, grooming, and maintaining their personas. To have another person take someone’s persona and exploit it in a manner that does not exactly comport with the goals of the subject is often felt as a direct threat both emotionally and financially. So in light of this built-in hypersensitivity, there will likely be noticeable dissent if a compulsory mechanical license of personarights for deceased individuals is instituted. However, there is persuasion as to why this licensing scheme will work.

Loss of personaright’s value over time

First, the personaright loses value over time, most significantly upon the death of its subject. Generally, a personaright is at its most exploitable during the life of the individual because the persona can still derive sustenance from continued activities, occurrences, and accomplishments. After death, without the ability to answer and appeal to the public in corpore, it is difficult to further cultivate a persona that has been fixed in its legacy as was established during the subject’s life. Along these lines, 16 of the 28 states that do recognize the right of publicity do not recognize descendibility of the right.73 And in the states that do recognize it, protection is usually limited to between ten and a hundred years following one’s death.74 The reason for this limitation is that “[a]fter a certain amount of time . . . it can be assumed that sensitivity to morally objectionable uses will atrophy; the iconic aspect of the persona will come to predominate over the truly personal.”75

Because of this atrophy of sensitivity over time, there is also a proportional diminishing of posthumous rights owners’ bargaining power in attempt to maintain exclusive rights over a deceased individual’s persona. Think of a personaright in terms of a car. Most cars depreciate during their first few years following production.76 In most cases, the depreciation continues until the car has minimal value.77 Likewise, as time goes on, the earning power of average

73. Celedonia, supra note 4.
74. Drennan, supra note 11, at 141.
77. See id.
person’s persona usually dissipates. And just as your not going to be able to sell your 1991 Honda Accord in 2006 for the $15,000 you originally paid for it, rightsowners of descended personas cannot expect to garner full value on their acquired publicity rights.

However, returning to the car analogy, we must still account for those rare circumstances when a particular model of a car will maintain its value after an initial depreciation, and even appreciate long after its inception. In terms of personarights, these rare circumstances would translate to a late Hollywood celebrity, a world leader, or any true innovator in their respective field. Because of this sustained value, for the personaright owners of Marilyn Monroe, John F. Kennedy, or an Albert Einstein, caring for and maintaining their persona property is of utmost importance, even years following their deaths.

And ostensibly, losing exclusive control over personarights would certainly be a cause for concern for these rightsholders. In actuality, however, under the proposed scheme rightsholders are securing their investments by ensuring royalty compensation for each use of the deceased person’s persona. Furthermore, registration at the USPTO or equivalent authority results in comprehensive documentation of the personaright and puts the public on notice as to the persona and its protection. This in turn serves as an evidentiary stake of great use to rightsowners in the event litigation is necessary.

Freeing up the public domain will stimulate the economy

Second, availing free use of deceased personas stimulates the economy in that it allows members of the general public to invest and commercially benefit:

So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable.

The more personas available for use, the more opportunity there is for members of the public, especially start-up entrepreneurs and small business owners, to create and to contribute to the general economy, using those personas as a vehicle.

79. Goodman, supra note 2, at 261.
81. Zimmerman, supra, at 308, n.37 ("[I]mpecunious individuals and small organizations would find it more difficult, absent a rich public domain, to afford access to the preexisting
Other legal recourse will still be available

Finally, concerns regarding improper and indecent uses of descended personas should not be as worrisome as one might be led to believe. Even though legal recourse may not be available via a federal right of publicity statute regarding the alleged improper usage of a descended persona, this law would in no way shield or preempt the licensee from liability in other areas of law. Remedies under *inter alia* contract law, unfair competition, trademark dilution, and copyright infringement would still be available to personaright owners in the event usage is perceived to be a legitimate negative economic impact on their intellectual property. At the same time, it is important to note that in the event of a lawsuit based on an improper use, defenses such as fair use and the first amendment will be available and likely used by personaright licensees.

**CONCLUSION**

At a certain point in the lifespan of an individual’s persona, the good of the public is more important than the desires of the persona’s successor-in-interest. There needs to be a means of maintaining a flow of compensation for deserving heirs while not denying the public access to the earning power of individuals who are often catapulted to fame and notoriety, not by their own accomplishments, but rather by the public’s oft-unpredictable adoration and infatuation for them. The solution to this problem is a mechanical compulsory licensing scheme, which has been described above. During the lifetime of an individual, a uniform federal personaright statute will serve to protect the economic interests associated with the individual’s persona in a much more effective way than our current state-based structure. However, assuming the public’s interest does become greater than that of the individual upon the individual’s death, allowing free use of the persona in exchange for a fee per-use both enables the distribution of significant royalties to deserving successors-in-interest and spurs the budding economic and artistic creativity of the public at large.

It is with this statement that the author urges any legitimate future proposals for a federal personaright statute to include a compulsory mechanical licensing scheme after death, as compared to a single flat term extension approach that has been employed by numerous states. Tennessee has taken a significant step by recognizing that evidence of devaluation may result in termination of personarights. Through a compulsory mechanical licensing scheme that demands periodic registration, this possibility of devaluation becomes an assumed reality, as the burden of proof is rightly shifted from the public-at-large to the successor-in-interest. This burden shift follows the average decline of a

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*information products they need as inputs for their own creations if those inputs were not in the public domain.”*).
personaright after death and signifies what the author believes is a fitting refusal to pander to the desires of the relatively few famous celebrities seeking to expand their already vast fortunes via the personaright.
IGNORING JUSTICE: PROSECUTORIAL DISCRETION AND THE ETHICS OF CHARGING

The United States wins its point whenever justice is done its citizens in the courts.¹

Mitchell Stephens

I. INTRODUCTION

“The prosecutor has more control over life, liberty, and reputation than any other person in America.”² “Because the prosecutor has ‘responsibility for deciding whether to bring charges and, if so, what charges to bring against the accused, as well as deciding whether to prosecute or dismiss charges or to take other appropriate actions in the interest of justice . . . the character, quality, and efficiency of the whole system is shaped in great measure by the manner in which the prosecutor exercises his or her broad discretionary powers.’”³

Powers so great impose responsibilities correspondingly grave. They demand character incorruptible, reputation unsullied, a high standard of professional ethics, and sound judgment of no mean order. Profound learning and unusual intellectual acumen, although eminently desirable, are less essential. A district attorney cannot treat that office as his selfish affair. It is a public trust. The office is not private property, but is to be held and administered wholly in the interests of the people at large and with an eye single to their welfare.⁴

⁴. Att’y Gen. v. Tufts, 132 N.E. 322, 326 (Mass. 1921). Consistent with the theme of prosecutorial power the court also noted: The powers of a district attorney under our laws are very extensive. They affect to a high degree the liberty of the individual, the good order of society, and the safety of the community. His natural influence with the grand jury, and the
Unfortunately, prosecutors are not perfect and can be/are impacted by public familiarity and perception of the crime,\(^5\) career considerations,\(^6\) politics,\(^7\) race,\(^8\) and sheer vindictiveness.\(^9\) In an attempt to determine the proper limits of prosecutorial action, this article takes a critical view of a prosecutor’s decision to charge. In so doing, this article will first examine the ethical duties of prosecutors in general and with regard to the charging decision. Using a recent case, the article will then question whether prosecutors are failing to uphold their ethical standards. Finally, barriers to enforcing prosecutor’s ethical duties are discussed.

II. THE ETHICS OF PROSECUTING

If the ethical duties of a prosecutor had to be summed-up in one word, that word would most certainly be “justice.” As noted by the Supreme Court over 70 years ago, a prosecutor

\[\text{[I]}\text{is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor---indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from confidence commonly reposed in his recommendations by judges, afford to the unscrupulous, the weak or the wicked incumbent of the office vast opportunity to oppress the innocent and to shield the guilty, to trouble his enemies and to protect his friends, and to make the interest of the public subservient to his personal desires, his individual ambitions and his private advantage. The authority vested in him by law to refuse on his own judgment alone to prosecute a complaint or indictment enables him to end any criminal proceeding without appeal and without the approval of another official. Id.}\]

5. See David Bierie & Kathryn Murphy, The Influence of Press Coverage on Prosecutorial Discretion: Examining Homicide Prosecutions, 1990-2000, 41 CRIM. L. BULL. 60, 71 (2005) (after controlling all other variables, the authors attempted to determine the impact press coverage had on a prosecutor’s push for the maximum punishment in homicide cases. The authors concluded: “[T]here is an 11% chance that a motion will be filed in cases receiving no press coverage. However, the presence of even a single article in an identical case generates a jump in the probability to 18%. Likewise, the presence of two articles spurs another jump to a 28% chance that a motion will be filed.”


7. See George, supra note 2.


improper methods calculated to produce a wrongful conviction as it is
to use every legitimate means to bring about a just one.\textsuperscript{10}

“An inscription on the walls of the Department of Justice states the [Supreme
Court’s] proposition candidly . . . ‘The United States wins its point whenever
justice is done its citizens in the courts.’”\textsuperscript{11}

In accordance with the Supreme Court’s ruling and the underlying purpose
of the criminal justice system, several rules and standards have been
promulgated. Some of these rules and standards deal directly with the screening
process and the decision to charge and will be discussed in detail. More
generally, the rules and standards all emphasize the same pursuit – Justice.

Most states have adopted a version of the American Bar Association’s
Model Rules of Professional Conduct as the standard for regulating the conduct
of lawyers.\textsuperscript{12} The Model Rules address everything from advertising to pro bono
service and, not surprisingly, the rules also briefly address the unique duties of
prosecutors. Indeed, Rule 3.8 of the Model Rules of Professional Conduct notes
6 different ethical responsibilities for prosecutors.

First, “[t]he prosecutor in a criminal case shall: . . . refrain from prosecuting
a charge that the prosecutor knows is not supported by probable cause.”\textsuperscript{13} Second, a prosecutor shall “make reasonable efforts to assure that the accused
has been advised of the right to, and the procedure for obtaining, counsel and has
been given reasonable opportunity to obtain counsel.”\textsuperscript{14} Third, a prosecutor
shall “not seek to obtain from an unrepresented accused a waiver of important
pretrial rights.”\textsuperscript{15} Fourth, a prosecutor shall “make timely disclosure to the
defense of all evidence or information known to the prosecutor that tends to
negate the guilt of the accused or mitigates the offense.”\textsuperscript{16} Fifth, a prosecutor
generally cannot “subpoena a lawyer in a grand jury or other criminal proceeding
to present evidence about a past or present client.”\textsuperscript{17} Sixth, a prosecutor is

\begin{itemize}
  \item \textsuperscript{10} Berger v. United States, 295 U.S. 78, 88 (1935).
  \item \textsuperscript{11} Brady v. Maryland, 373 U.S. 83, 87 (1963).
  \item \textsuperscript{12} Although there was some question as to whether Federal Prosecutors were subject to local
and state rules of ethics, see Memorandum from Dick Thornburgh, Attorney General To All Justice
Department Litigators, “Communication with Persons Represented by Counsel”, June 8, 1989
(quoted in part in H.R. Rep. No. 101-986, at 5 (1990)), any question was resolved with the passage
of 28 U.S.C. § 530B (2008) which provides that “[a]n attorney for the Government shall be subject
to State laws and rules . . . governing attorneys in each State where such attorney engages in that
attorney’s duties, to the same extent and in the same manner as any other attorneys in that State.”
  \item \textsuperscript{13} ABA COMMISSION ON EVALUATION OF PROF’L STANDARDS, AM. BAR ASS’N, MODEL RULES
OF PROFESSIONAL CONDUCT Rule 3.8 (2002) [hereinafter MRPC].
  \item \textsuperscript{14} Id.
  \item \textsuperscript{15} Id.
  \item \textsuperscript{16} Id. See also Brady, 373 U.S. at 86-88 (1963) (ruling disclosure of exculpatory evidence is
constitutionally required).
  \item \textsuperscript{17} MRPC, supra note 13, Rule 3.8. Notwithstanding this general rule, a prosecutor can
subpoena a lawyer “to present evidence about a past or present client [if] the prosecutor reasonably
believes: (1) the information sought is not protected from disclosure by any applicable privilege;
limited in making or supporting “extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused.”\textsuperscript{18}

The comments to Rule 3.8 then tie these six ethical limits back to an already familiar term. “A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence.”\textsuperscript{19}

In addition to the ethical rules adopted by most states, there are also various standards that suggest ethical limitations for prosecutors. The most prominent standards are the American Bar Association’s Standards for Criminal Justice Relating to the Prosecution Function, and the National District Attorneys Association’s National Prosecution Standards. Of course the primary difference between these standards and the ethical rules adopted by the states, is that the standards are hortative in nature.\textsuperscript{20}

The first of such standards are the ABA Standards for Criminal Justice Relating to the Prosecution Function.\textsuperscript{21} “These standards are intended to be used as a guide to professional conduct and performance.”\textsuperscript{22} Furthermore, the standards are much more comprehensive than the Model Rules of Professional Conduct. The ABA standards address six main topics: 1) General Standards; 2) Organization of the Prosecution Function; 3) Investigation for Prosecution Decision; 4) Plea Discussions; 5) The Trial; and 6) Sentencing.\textsuperscript{23} In other words, these standards address everything from “Literary or Media Agreements”\textsuperscript{24} to Sentencing.\textsuperscript{25} Nevertheless, the emphasis of the standards resounds in the same principal – Justice. Indeed, the very first section dealing with the role of the prosecutor notes: “The duty of the prosecutor is to seek justice, not merely to convict.”\textsuperscript{26}

A second set of standards concerning the role of the prosecutor is actually authored by the National District Attorneys Association. In other words, “these

\textsuperscript{18} Id.
\textsuperscript{19} Id. at Comment 1 (emphasis added).
\textsuperscript{20} See, e.g., TASK FORCE: PROSECUTION FUNCTION AND DEF. STANDARDS, AM. BAR ASS’N, ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION Standard 3-1.1 (1993) [hereinafter PROSECUTION FUNCTION] (noting the standards are guides).
\textsuperscript{21} MRPC, supra note 13, Rule 3.8 Comment 1.
\textsuperscript{22} PROSECUTION FUNCTION, supra note 20, Standard 3-1.1.
\textsuperscript{23} Id at Contents.
\textsuperscript{24} Id. Standard 3-2.11.
\textsuperscript{25} Id. Standards 3-6.1 to 3-6.2.
\textsuperscript{26} Id. Standard 3-1.2(c).
Much like the ABA Standards, the NDAA National Prosecution Standards are comprehensive in their approach. The NDAA Standards cover five main topics: 1) Functions/Relations; 2) Pre-Trial; 3) Trial; 4) Post Trial; and 5) Juvenile Justice. However, not surprisingly, the standards start by invoking justice. Rule 1.1 titled “Primary Responsibility” provides: “The primary responsibility of prosecution is to see that justice is accomplished.”

III. THE DECISION TO CHARGE

“The choice of whom to prosecute and the strategy of prosecution are generally matters left wholly to the [prosecutor].” Consequently, the courts have rarely overturned the prosecutor’s charging decision. Nevertheless, the model rules and standards that apply to prosecutors have specific guidelines with regard to the determination of when to prosecute.

The least specific of the three standards is the Model Rules of Professional Conduct. Aside from the underlying theme of justice, Rule 3.8 of the Model Rules simply provides that “[t]he prosecutor in a criminal case shall . . . refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause.”

The standards set forth by the National District Attorneys Association are more specific with regard to the prosecutor’s determination of whether to prosecute. To begin with, the standards advocate for a screening process “for the purpose of eliminating matters from the criminal justice system in which

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27. NATIONAL DISTRICT ATTORNEYS ASSOCIATION, NATIONAL PROSECUTION STANDARDS Background (1991) [hereinafter NDAA].
28. Indeed, the standards actually go so far as to provide that “[e]ach secretary should have . . . a swivel, height-adjusted chair.” See id. § 14.4(b)(4).
29. NDAA, supra note 27, Table Of Contents.
30. Id. § 1.1.
31. United States v. Herman, 589 F.2d 1191, 1210 (3d Cir. 1978) (Garth J., concurring in part and dissenting in part); accord United States v. Nixon, 418 U.S. 683, 693 (1974) (“the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case”); Commonwealth v. Taylor, 704 N.E.2d 170, 173-74 (Mass. 1999) (“we note that our decisions uniformly uphold a prosecutor’s wide discretion in deciding whether to prosecute a particular defendant.”); Johnson v. State, 641 N.W.2d 912, 917 (Minn. 2002) (“the power to decide whom to prosecute and what charge to file resides with the executive branch.”); State v. Thrift, 440 S.E.2d 341, 346 (S.C. 1994) (“the Executive Branch is vested with the power to decide when and how to prosecute a case.” “The Attorney General as the State’s chief prosecutor may decide when and where to present an indictment, and may even decide whether an indictment should be sought.”); People v. Glendenning, 487 N.Y.S.2d 952, 954 (N.Y. Sup. Ct. 1985) (“decisions in respect to what charges are to be brought against a defendant are primarily the function of the Executive, that is, the District Attorney.”); Johnson v. State, 641 N.W.2d 912, 917 (Minn. 2002) (“Under our separation of powers doctrine, the power to decide whom to prosecute and what charges to file resides with the executive branch.”).
33. MRPC, supra note 13, Rule 3.8(a).
prosecution is not justified or is not in the public interest” and suggest various factors which may be considered as part of the screening decision.34

Additionally, the standards expressly note the following should not be considered during the screening process: “a. The prosecutor’s rate of conviction; b. Personal advantages which prosecution may bring to the prosecutor; c. Political advantages which prosecution may bring to the prosecutor; d. Factors of the accused legally recognized to be deemed invidious discrimination insofar as those factors are not pertinent to the elements of the crime.”35

The standards then address the actual decision to charge a suspect. The standards note that a prosecutor should only file those “charges which adequately encompass the offense or offenses believed to have been committed by the accused”36 and “can be substantiated by admissible evidence at trial.”37 Indeed, the standards suggest some independent investigation into the facts of the alleged crime38 as “[t]he charge(s) selected should be supported by probable cause and should be supported by the available admissible evidence.”39 In addition, the NDAA standards note “[t]he prosecutor should not attempt to utilize the charging decision only as a leverage device in obtaining guilty pleas to lesser charges.”40

The ABA Standards for Criminal Justice also deal specifically with a prosecutor’s determination of when to prosecute. In fact, the standards presented by the ABA probably come closest to embracing the underlying goal of justice.

The ABA’s standards first provide that “[a] prosecutor should not institute, or cause to be instituted or permit the continued pendency of criminal charges when the prosecutor knows that the charges are not supported by probable cause.”41 Likewise, “[a] prosecutor should not institute, cause to be instituted, or permit the continued pendency of criminal charges in the absence of sufficient admissible evidence to support a conviction.”42

Second, the ABA’s standards provide that a prosecutor “is not obliged to present all charges which the evidence might support.”43 In the interest of justice, “[t]he prosecutor may . . . decline to prosecute, notwithstanding that

34. NDAA, supra note 27, § 42.3.
35. Id. § 42.4.
36. Id. § 43.2.
37. Id. § 43.3.
38. See id. §§ 39.1-39.2 and Commentary (“At the very least, the prosecutor’s judgment and conscience should be tempered and guided by accurate, careful, thorough and pertinent evidence.”).
39. Id. § 43 Commentary.
40. Id. § 43.4. But see United States v. Angelos, 345 F.Supp. 2d 1227, 1231-32 (D.Utah 2004) where a prosecutor told Mr. Angelos that if he did not plead guilty to one count of drug distribution, the prosecutor would obtain a new superseding indictment “that could lead to Mr. Angelos facing more than 100 years of mandatory prison time.”
41. PROSECUTION FUNCTION, supra note 20, Standard 3-3.9(a).
42. Id.
43. Id. Standard 3-3.9(b).
sufficient evidence may exist which would support a conviction.\textsuperscript{44} In short, what these two considerations provide, is that “[t]he prosecutor should not bring or seek charges greater in number or degree than can reasonably be supported with evidence at trial or than are necessary to fairly reflect the gravity of the offense.”\textsuperscript{45} Note that this notion of “fairness” is in accordance with the Model Code § EC7-14 which likewise states that “[a] government lawyer who has discretionary power relative to litigation should refrain from instituting or continuing litigation that is obviously unfair.”\textsuperscript{46}

Finally, the U.S. Department of Justice’s Principles of Federal Prosecution contained in the United States Attorney’s Manual also contain the “overriding theme of ‘ensuring the fair and effective exercise of prosecutorial responsibility’ through prosecutions initiated only on probable cause and ‘evidence sufficient to sustain a conviction.’”\textsuperscript{47} Moreover, the Department’s principles provide: “Merely because this requirement can be met in a given case does not automatically warrant prosecution; further investigation may be warranted, and the prosecutor should still take into account all relevant considerations.”\textsuperscript{48}

Finally, in addition to these rules, standards, and principles, there are “three principal constitutional limitations on the prosecutor’s otherwise essentially unfettered discretion in instituting criminal proceedings.”\textsuperscript{49} First, when a decision to prosecute is “based on ‘an unjustifiable standard such as race, religion, or other arbitrary classification’”\textsuperscript{50} it is a violation of the “equal protection component of the Due Process Clause.”\textsuperscript{51} Second, “a prosecutor’s charging decision exercised in a ‘vindictive’ or ‘retaliatory’ manner violates due process.”\textsuperscript{52} Third, “a prosecution that violates the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution is barred.”\textsuperscript{53}

\begin{itemize}
\item \textsuperscript{44} Id. Standard 3-3.9(f); accord State v. District Court, 53 P.3d 629, 634 (Alaska App. 2002) (“The executive branch has the discretion to charge a defendant with a less serious crime than the facts would support. Likewise, if a defendant is initially charged with the most serious crime that the facts would support, the executive branch has the discretion to reduce the charge to a less serious crime.”).
\item \textsuperscript{45} PROSECUTION FUNCTION, supra note 20, Standard 3-3.9(f).
\item \textsuperscript{46} Model Code EC 7-14.
\item \textsuperscript{48} USAM, supra note 3, § 9-27.200(B).
\item \textsuperscript{49} Herman, supra note 47, at 28.
\item \textsuperscript{51} Id.; accord Yick Wo v. Hopkins, 118 U.S. 356, 373 (1886) (“the facts shown establish an administration directed so exclusively against a particular class of persons as to warrant and require the conclusion that, whatever may have been the intent of the ordinances as adopted, they are applied by the public authorities charged with their administration, and thus representing the state itself, with a mind so unequal and oppressive as to amount to a practical denial of the state of that equal protection of the laws which is secured to the petitioners, as to all other persons, by the broad and benign provisions of the fourteenth amendment to the constitution of the United States.”).
\item \textsuperscript{52} Herman, supra note 47, at 28-29; accord North Carolina v. Pearce, 395 U.S. 711, 723-724 (1969) (“It can hardly be doubted that it would be a flagrant violation of the Fourteenth
Note that for a defense attorney concerned with overturning a conviction based on the prosecutor’s decision to charge, these constitutional limitations are all important. The ethicality of the prosecutor’s actions simply do not form a basis for reversal on appeal; charging decisions “can only be challenged on constitutional grounds, and these challenges are extremely difficult to sustain.”

IV. ETHICAL VIOLATIONS?

Although you would be hard-pressed to find any disciplinary proceedings, in numerous cases there are serious ethical concerns with the prosecutor’s actions in charging a defendant. In fact the Supreme Court has noted the potential for ethical violations. In a dissenting opinion in Bordenkircher v. Hayes, Justice Blackmun noted that “prosecutors, without saying so, may sometimes bring charges more serious than they think appropriate for the ultimate disposition of a case.” In the case of Bordenkircher v. Hayes, the reason for doing so was to obtain bargaining leverage with a defendant when it came time for plea negotiations.

There are hundreds, if not thousands of reported cases which demonstrate that Justice Blackmun’s concern has been realized. For example, keyciting the seminal case of Bordenkircher v. Hayes produces over 1100 cases, even when limited to the relevant headnotes. Furthermore, these are only the cases where the defendant actually tried the issue before a judge. Over 90% of cases in the criminal system are simply resolved by plea bargaining with the defendants foregoing their right to have the case addressed by the court.

A recent and local example is the case of United States v. Angelos. The Defendant, Mr. Angelos, was a twenty-four-year-old first offender who sold roughly $1,000 of drugs to a government informant while carrying a firearm. Originally, the prosecutor felt that justice would be served by offering a plea where Mr. Angelos would plead guilty to drug distribution and one firearm count, and the government would agree to drop all other charges, not supersede the indictment with additional counts, and recommend a prison sentence of 15 years. Amendment for a state trial court to follow an announced practice of imposing a heavier sentence upon every reconvicted defendant for the explicit purpose of punishing the defendant for his having succeeded in getting his original conviction set aside.”

53. Herman, supra note 47, at 29.
54. Angela J. Davis, Prosecution and Race: The Power and Privilege of Discretion, 67 FORDHAM L. REV. 13, 24 (1998); accord G Nicholas Herman, Plea Bargaining 26 (2d ed., 2004) (“the courts have rarely overturned the prosecutor’s charging decision.”).
56. Id. at 368.
57. Id.
60. Id. at 1230-31.
When Mr. Angelos instead insisted on his constitutional right to a jury trial, the prosecution changed its tune and determined that justice now demanded more than 100 years of mandatory prison time. In short, Mr. Angelos faced the choice of accepting 15 years in prison or insisting on a trial by jury at the risk of a life sentence.

Mr. Angelos chose to exercise his constitutional right to a trial. As a result he was found guilty by a jury and sentenced to the statutory minimum of 55 years in a federal prison—effectively a life sentence. The sentence substantially exceeded that which the jury recommended to the court (18 years) and was “far in excess of the sentence imposed for such serious crimes as aircraft hijacking, second degree murder, espionage, kidnapping, aggravated assault, and rape.” Simply put, the sentence sought by the prosecution and ultimately imposed on Mr. Angelos was “unjust.”

Under these circumstances, it is easy to argue that the prosecutor “brought or sought charges greater in number or degree than . . . necessary to fairly reflect the gravity of the offense.” Likewise, it seems fairly clear that when the prosecutor sought an additional 85 years of prison after Mr. Angelos’ refusal to plead guilty, the prosecutor was attempting “to utilize the charging function.”

61. Id. at 1231. Note that the pursuit of justice is still a guiding principle during the plea process. See Subcomm. on Pleas of Guilty, Am. Bar Ass’n, ABA Standards for Criminal Justice: Pleas of Guilty Standard 14-1.1(b) (1999) (“As part of the plea process, appropriate consideration should be given to the [view] of . . . the interest of the public in the effective administration of justice.”); NDAA, supra note 27, § 66.1 (“Where it appears that the interest of the state in the effective administration of criminal justice will be served, the prosecution . . . may engage in plea negotiation for the purpose of reaching an appropriate plea agreement.”); Id. § 68.1 (Providing factors the prosecutor should consider prior to negotiating a plea agreement); Id. § 68.4 (“The prosecutor should always be vigilant for the case where the accused may be innocent of the offense charged.”).

62. 345 F.Supp.2d at 1231.
63. Id. at 1232.
64. Id. at 1260-61.
65. Id. at 1242.
66. Id. at 1230.
67. Id. at 1230. Although, note that District Court Judge Paul Cassell (a Bush appointee) did recommend that President Bush commute Mr. Angelos’ sentence, Id. at 1263, a recommendation that has also garnered public support. See e.g., Commute This Sentence: A Clemency Case Not Event President Bush Can Ignore – Or Can He, N.Y. Times, Dec. 9, 2006. Furthermore, as the United States Attorney’s Manual expressly notes, “[a]ppropriate grounds for considering commutation have traditionally included [the] disparity or undue severity of [the] sentence.” United States Attorney’s Manual Standards for Consideration of Clemency Petitions, 1-2.113 (Standards for Considering Commutation Petitions). Nevertheless, given the fact that President Bush has “has commuted only two sentences, both of inmates who were about to be released anyway”, Commute This Sentence, supra, the likelihood of Mr. Angelos’ sentence being commuted is rather small. See generally Margaret Colgate Love, Reviving the Benign Prerogative of Pardoning, 32 Litig. 25, 25-26 (2006) (discussing the declining use of pardons and the reasons behind the decline).
68. Prosecution Function, supra note 20, Standard 3-3.9(f).
decision only as a leverage device in obtaining guilty pleas to lesser charges.”

And certainly, it seems a stretch to say prosecution was moved only by his duty “to seek justice, [and] not merely to convict.”

V. FAILURE TO ENFORCE THE ETHICAL STANDARD OF JUSTICE

Despite the ethical questions surrounding Mr. Angelos’ prosecution, no inquiry was ever made into the ethics of the prosecutor. To anyone familiar with the wide discretion and history of prosecutorial misconduct, this should not come as a surprise. “Unfortunately, disciplinary action against prosecutors who have been found to engage in professional misconduct is extremely rare.” Indeed, there is a perception that “prosecutors, in their zeal to seek convictions, overreach and do so without fear of discipline.”

For example, in ten cases where federal judges had made written findings of prosecutorial misconduct, “no disciplinary action [had] been taken in any of the ten cases,” even though “the facts as found by the Federal judges were very serious.” “[I]n one case the court found violations of the grand jury rules, violations of statutory witness immunity sections, violations of the fifth and sixth amendments, the knowing presentation of misinformation to the grand jury, and the mistreatment of witnesses.” Still no disciplinary action was taken against the prosecutor.

69. NDAA, supra note 27, § 43.4. Note that while this action has been condemned by the NDAA and ABA as unethical, it has been found constitutional by the United States Supreme Court. In Bordenkircher v. Hayes, the prosecutor gave the defendant the option of pleading guilty to forging an $88 check and serving 5 years in prison, or facing life imprisonment under the habitual criminal act. 434 US 357 (1978). After receiving a life-sentence, the defendant appealed, and the Court held the prosecutor’s actions were constitutional. Id. Although the Court noted “[t]o punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort,” it found there was “no such element of punishment or retaliation so long as the accused is free to accept or reject the prosecution’s offer.” Id. at 363. But see North Carolina v. Pearce, 395 U.S. 711, 724 (1969) (“penalizing those who choose to exercise’ constitutional rights, ‘would be patently unconstitutional.’”) (quoting United States v. Jackson, 390 U.S. 570, 581 (1968)).

70. Prosecution Function, supra note 20, Standard 3-1.2(c). Likewise, although it does not appear to be an issue in the Angelos case, there is a concern when faced with such disparities caused by proceeding to trial that an innocent defendant will plead guilty simply in order to avoid the potential of a sentence that is 10 times greater in length. This concern presumably prompted the NDAA to note that when offering pleas, “[t]he prosecutor should always be vigilant for the case where the accused may be innocent of the offense charged.” NDAA, supra note 27, § 68.4. Such vigilance seems lost when disparities Mr. Angelos faced are at stake.

71. Herman, supra note 47, at 26 n.7.


73. Id. at 24-25.

74. Id. at 25.

75. Id. See also Richard A. Rosen, Disciplinary Sanctions Against Prosecutors for Brady Violations: A Paper Tiger, 65 N.C.L. Rev. 693, 730 (1987) (Noting that in the written universe of disciplinary decisions only nine involved a referral of a prosecutor for withholding exculpatory evidence, and in only one of those was a prosecutor given a major sanction – a suspension).
For the following reasons, a prosecutor’s unethical decision during the charging phase is even less likely to face review.

First, all of the standards governing prosecutorial action call for a subjective determination on the part of the prosecutor. Besides the common notion of justice, all of the rules and standards guiding prosecutorial action have something else in common – they all provide nothing more than a subjective ideal for prosecutors. All of the rules and standards note that justice should be the guiding principle of the prosecutor. However, the ideal of justice is varied and vague.

For example, in the case of Weldon Angelos, the prosecutor could argue that he was seeking justice. After all, the citizens of the United States, through their elected officials, had determined that the crimes Weldon Angelos committed were punishable by certain mandatory minimum sentences. Thus, justice was served by following with exactness the demands of the citizenry of the United States. Under this view, justice is defined by the legislature and only perfected when the legislature’s laws are followed.

An alternative view is that justice is served by minimizing the number of criminal defendants and activities, even if that means maximizing the penalty of certain criminals. Under this view, the sentence imposed on Weldon Angelos was just in the sense that it sent a message to any future drug dealer “to leave his gun at home.”

Undoubtedly other justifications could be created to rationalize the prosecution’s action in cases like Weldon Angelos as the pursuit of justice.

The result of these differing views of justice and the subjective ethical standard given to prosecutors, is that it is difficult to determinately state when a prosecutor acted in an unethical manner.

Second, the decision of who to charge and with what crimes is a power reserved for the executive branch. Article II of the United States Constitution begins by stating: “The executive Power shall be vested in a President of the United States of America.” Similarly the Constitution of Utah provides that “[t]he executive power of the state shall be vested in the Governor.” As noted


77. See supra notes 10-30 and accompanying text.


79. As noted by Attorney General Robert H. Jackson, “The qualities of a good prosecutor are as elusive and as impossible to define as those which mark a gentleman. And those who need to be told would not understand it anyway.” Robert H. Jackson, The Federal Prosecutor, 24 JUDICATURE 18, 18 (1940) (Delivered at the Second Annual Conference of United States Attorneys).

80. U.S. Const. art. II, § 1, cl. 1.

81. Utah Const. art. VII, § 5, cl. 1. Additionally, the Utah Constitution also has a constitutional mandate regarding separation of powers. Utah Const. art. V, § 1 provides; “The powers of the government of the State of Utah shall be divided into three distinct departments, the
by Justice Thomas, the power to bring prosecutions “is manifestly and quintessentially executive power.”⁸² For this reason, both state and federal case law have long held that the decision of “[w]hether to prosecute and what charge to file or bring before a grand jury are decisions that generally rest in the prosecutor’s discretion.”⁸³ Accordingly, “[c]ourts consistently hesitate to attempt a review of the executive’s exercise of” its prosecutorial powers.⁸⁴

Third, the only people directly injured by a prosecutor’s unethical conduct are those who have been declared guilty. When the prosecution engages in unethical behavior by overcharging, if the accused is found not guilty, the prosecution’s behavior has not materialized into an alarming violation. The defendant has been declared innocent and the charges brought by the prosecution have suddenly become seemingly irrelevant. Under these circumstances, justice has already prevailed and no further action seems necessary.

Conversely, if the prosecution overcharges and the accused is declared guilty,⁸⁵ the only result is that a guilty person is being punished longer than expected. For many, this result is an unmitigated blessing – the state is finally taking a tough stand on crime. Others view the result simply as a chance each criminal takes when he commits a crime. Either way, most everyone would agree that if there is any question of fairness or justice, it is better to punish the molester or drug user excessively, than it is to punish the prosecutor who was overaggressive in putting that criminal behind bars. As such, it is unlikely a public official would suggest a prosecutor should be reprimanded for being too...
aggressive in bringing charges. After all, the only people injured by the prosecutor’s actions, are the “guilty.”

VI. CONCLUSION

The criminal justice system of the United States places a lot of trust in its prosecutors. Indeed, the United States House of Representatives has noted “the character, quality, and efficiency of the whole system is shaped in great measure by the manner in which the prosecutor exercises his or her broad discretionary powers.” Furthermore, those who draft and enforce the ethical guidelines applicable to prosecutors also seem to place a great deal of trust in prosecutors.

Unfortunately, some of this trust appears to be misplaced. The result, is a system in which prosecutors have essentially unfettered discretion and can ignore their ethical duties, which is to ignore justice itself.

86. Additionally, review of prosecution action by the executive agencies themselves has proven ineffective. A report to the House of Representatives of the United States noted that the Department of Justice claims to maintain the “highest level of professional excellence” through internal review of ethical concerns. However, that same report noted: “[T]he pattern of difficulties encountered in trying find out how the Department [of Justice] actually goes about maintaining this ‘highest level of professional excellence’ and the results of those efforts tended to further, rather than dispel, perceptions of the Department as a fox guarding the chicken coop.” H. R. Rep. No. 101-986, at 31 (1990).

SPHERES OF SOVEREIGNTY: CHURCH AUTONOMY DOCTRINE
AND THE THEOLOGICAL HERITAGE OF THE SEPARATION OF
CHURCH AND STATE

Robert Joseph Renaud & Lael Daniel Weinberger

INTRODUCTION

The phrase “separation of church and state” is not explicitly mentioned anywhere in the U.S. Constitution. However, the principle of church/state separation is implicitly embodied in its First Amendment by not allowing the federal government to establish a national church as well as by recognizing the people’s freedom to worship according to the dictates of their own consciences. The institutional separation of the church and state embodied in the First Amendment to the Constitution is familiar to the public mostly for removing (in one form or another) the church from the civil government’s sphere of authority. Rarely does a case make the news that works the other way by removing the civil government from the church’s jurisdiction. The church autonomy cases have been some of the most interesting in this line, and it is precisely this kind of case that best illustrates the issues that historically gave rise to a doctrine of the separation of church and state.

As many scholars have noted, the doctrine of the separation of church and state had its origin (interestingly enough) in theology. The desire of theologians to preserve church integrity from encroachment by the civil government was always at or near the center of this development, and what we now know as the church autonomy cases are the fulfillment of these wishes.

Today, there are few phrases in public policy parlance more misinterpreted, misquoted, and misapplied than the “separation of church and state.”¹ The church autonomy cases shed light on the issue from an often-neglected angle when viewed in light of the theology and church history that preceded them.² In

¹ Writing in 1897, theologian R.L. Dabney stated: “You may deem it a strange prophecy, but I predict that the time will come in this once free America when the battle for religious liberty will have to be fought over again, and will probably be lost, because the people are already ignorant of its true basis and conditions.” R.L. DABNEY, THE PRACTICAL PHILOSOPHY 394 (photo. reprint 1984) (1897).

² Even as to the terminology, “separation of church and state,” theologians had it first. See DANIEL L. DREISBACH. THOMAS JEFFERSON AND THE WALL OF SEPARATION BETWEEN CHURCH AND STATE (2002). John Calvin, for instance, used the phrase “wall of separation” in his commentary on Genesis 47:3, discussing how Jehovah kept distinctions between Joseph’s brothers who were Jews versus the Egyptians:
this article, we shall endeavor to examine, first, the theological underpinnings of separation, and, second, the church-history context in which the theology was developed, with an eye for those sources that most directly influenced the American view of church and state. Finally, we shall look at the outworking of this theology and history in the church autonomy cases.

I. THEOLOGY OF CHURCH AND STATE

A. Two Governments Under God

In one of the most famous single statements in the New Testament, Jesus Christ answered one of the most defining legal and jurisdictional questions of the ages: What authority may be rightfully exercised by a civil magistrate? His simple proposition was this: “Render therefore unto Caesar the things which be Caesar’s and unto God the things which be God’s.”

The Reformers recognized two sides to Jesus’ answer, both of which must be appreciated for proper church-state theology to be realized. First, Christ recognizes the authority of the civil government. John Calvin explained the necessity of civil jurisdiction in these terms: “[T]he amount of it therefore is, that those who destroy political order are rebellious against God, and therefore, that obedience to princes and magistrates is always joined to the worship and fear of God . . . .”

Second, Christ denies that the civil ruler has an absolute power over citizens. Psalm 24:1 declares that “The earth is the LORD’s, and the fullness thereof; the world, and they that dwell therein.” Clearly, then, Caesar cannot be lord over
all. Only Christ can make that claim. Calvin continued: “[O]n the other hand, if princes claim any part of the authority of God, we ought not to obey them any farther than can be done without offending God.”

As the Reformers saw it, the two sides of the coin merge into one overriding principle: Civil government has its proper sphere of authority under the ultimate authority of God. John Gill, writing in the eighteenth century but in a strong Reformation tradition, explained: “[S]ubjection to civil magistrates is not inconsistent with the reverence and fear of God; all are to have their dues rendered unto them, without intrenching [sic] upon one another.”

Yet civil government is not the only God-ordained government, as the church is another distinct sphere. Jesus Christ is “the head of the . . . church,” said Paul in his epistle to the Colossians, and as Calvin commented, “[H]e speaks chiefly of government. He shews . . . that it is Christ that alone has authority to govern the church.”

From these principles, the Reformers recognized the church and the state as two forms of government. Both were administered by men, but both were ordained by God and under His ultimate authority. Both were created with different spheres of authority, one holding the power of the sword, and the other the power of church discipline. Neither had sovereignty over the other, and both were equally ultimate in their own spheres.

B. The Hebrew Model

This framework that the New Testament establishes—that church and state are two different, coexisting, and equally ultimate governments under God—was recognized and embraced by the Bible expositors of the Reformation, who also found the institutional separation of church and state modeled plainly in the Old Testament, long before Christ’s earthly advent. In the book of Exodus, the
position of civil magistrate and priest are established separately.\textsuperscript{14} Furthermore, in two key narrative passages, the institutional separation of church and state are presented as divinely ordained, and in both, serious consequences followed when established jurisdictional boundaries were violated.

In the first passage,\textsuperscript{15} Saul, king of Israel, was worried by the absence of Samuel the prophet on the eve of a battle. To encourage his men, he proceeded to offer the sacrifice to God that only Samuel the priest was authorized to discharge. Upon arriving on the scene, Samuel rebuked Saul, “Thou hast done foolishly: thou hast not kept the commandment of the LORD thy God, which he commanded thee: for now would the LORD have established thy kingdom upon Israel forever. But now thy kingdom shall not continue . . . .”\textsuperscript{16}

In the second passage, Uzziah king of Judah entered the temple in Jerusalem to burn incense to the Lord,\textsuperscript{17} thus usurping the duty of the priests.\textsuperscript{18} The priests confronted him for this breach of jurisdictional boundaries:

And they withstood Uzziah the king, and said unto him, It appertaineth not unto thee, Uzziah, to burn incense unto the LORD, but to the priests the sons of Aaron, that are consecrated to burn incense: go out of the sanctuary; for thou hast trespassed; neither shall it be for thine honor from the LORD God.\textsuperscript{19}

The consequence of Uzziah overstepping his jurisdictional place was serious. The Scriptural account states that, immediately after the priests’ rebuke, God struck Uzziah with leprosy.

Both of these passages present the highest civil authority, the king, taking upon himself the administration of a “church” function. In both cases, the errant king is severely reprimanded and received divine judgment. The lesson was clear: the theoretical principle of distinct jurisdictions had practical consequences and could not be violated but at the risk of God’s judgment.

In addition to these negative examples, a third narrative passage presents a positive example of the Scriptural doctrine of the separation of church and state. Jehoshaphat, a righteous king of Judah,\textsuperscript{20} implemented a jurisdictional distinction between ecclesiastical and civil governments as he appointed officers in his administration: “Amariah the chief priest is over you in all matters of the LORD; and Zebadiah the son of Ishmael, the ruler of the house of Judah, for all the king's matters . . . .”\textsuperscript{21} This was an excellent positive example of the

\textsuperscript{14} The office of judge was created in \textit{Exodus} 18:13–26, while the office of priest was created in \textit{Exodus} 28:1. These offices remained separate even after the Babylonian captivity, with its otherwise significant alterations in the social structure. See BahnSEN, \textit{supra} note 13, at 389.

\textsuperscript{15} 1 Samuel 13:9–14.

\textsuperscript{16} \textit{Id.} at 13–14.

\textsuperscript{17} 2 Chronicles 26:16.

\textsuperscript{18} \textit{See, e.g., Exodus} 30:7–8, \textit{Numbers} 4:16.

\textsuperscript{19} 2 Chronicles 26:18.

\textsuperscript{20} \textit{See} 2 Chronicles 18:3–6.

\textsuperscript{21} 2 Chronicles 19:11.
jurisdictional difference between the “high priest, presid[ing] in [the] court of all things sacred,” and “the prince of the tribe of Judah . . . for . . . such [matters] as related to civil government.”\(^\text{22}\)

C. The Nature of Sovereignty

The concept of church and state as separate institutions results in a division of jurisdiction. This has more recently been termed “sphere sovereignty”\(^\text{23}\) in theological circles, due to the influence of Dutch theologian and statesman Abraham Kuyper.\(^\text{24}\) In defining the phrase “sphere sovereignty,” sovereignty is used in a limited sense, for absolute sovereignty can only rest in God, as Kuyper was careful to explain: “The dominating principle . . . [is] the sovereignty of the Triune God over the whole Cosmos, in all spheres and kingdoms, visible and invisible.”\(^\text{25}\) Thus, no human institution is “sovereign” in the absolute sense. Because of this, no human institution has absolute power. By theological necessity, all powers possessed by man are limited powers.\(^\text{26}\) This provides a powerful grounding for human freedom as Professor McConnell has stated:

> While theological in origin, the two-kingdoms idea lent powerful support to a more general liberal theory of government. The separation of church from state is the most powerful possible refutation of the notion that the political sphere is omnicOMPETENT—that it has rightful authority over all of life. If the state does not have power over the church, it follows that the power of the state is limited. The extent of state power need not be left to the discretion of rulers.\(^\text{27}\)

It is with this theological background in mind that we should approach the terminology of separate jurisdictions, and, in the church autonomy context particularly, the idea of “spheres of sovereignty.”

II. HISTORICAL DEVELOPMENT OF JURISDICTIONAL THEORY IN THEOLOGY

A. Early Development

1. Augustine and Gelasius

The doctrine of separate spheres of authority for church and state was introduced early in the church era by Augustine’s separation of the city of man

\(^{22}\) 3 John Gill, Exposition of the Old Testament, 67 (1810).
\(^{23}\) See generally R.J. Rushdoony, This Independent Republic 146 (1964).
\(^{24}\) Id.; and see Abraham Kuyper, Lectures on Calvinism (1943).
\(^{25}\) Kuyper, supra note 24, 79 (emphasis in original).
\(^{26}\) See Rushdoony, supra note 23, 33–40, 146–51.
\(^{27}\) McConnell, supra note 6, at 1246.
and the city of God. In the late 5th century, Pope Gelasius developed this into an explicit political formula. Writing to Anastasius, emperor in the east, Gelasius stated, “There are, then, august Emperor, two powers by which the world is chiefly ruled, the sacred power of the prelates and the royal power.” The Augustinian-Gelasian theory served to uphold the independence of the church from state dominance in the tempestuous Byzantine era. But the practical reality was that the doctrine did depend on the relative powers of the “prelates” and the emperors—in other words, regardless of the theory, the stronger party (church or state) at any given time tried hard to assert supremacy over the other. After the pressures of dealing with the Byzantine emperors were past in the eleventh century, the doctrine metamorphosed in the hands of Gregory VII into a claim of papal supremacy. Innocent III added the emperor’s title, “Vicarius Dei,” to his own. Pope Boniface VIII explained that there were “two swords, namely, the spiritual and the temporal,” but, as one scholar has summarized it, “both were in the power of the church, the former being wielded ‘by the church [ab ecclesia]’ and the latter by the government but ‘on behalf of the church [pro ecclesia].’”

The Reformation occurred during the times when papal supremacy claims reigned dominant. Because the Reformation had the most direct influence on church-state development in the United States, we will focus our historical survey on the Reformation development of church-state theory. Nevertheless, it is important to recognize the fact that the dual jurisdiction doctrine received its early affirmation and development in the Roman Catholic tradition.

2. English Law and the Church

In England, the dual jurisdictions doctrine took hold and became embodied in practice in the common law. There is no better example than the Magna Charta itself. Its first clause proclaimed:

In the first place we have granted to God, and by this our present charter confirmed for us and our heirs forever, that the English church

28. Gelasius was pope from 492 to 496.
31. Id. at 716.
33. RUSHDOONY, supra note 23, 148.
34. 5 JAROSLAV PELIKAN, THE CHRISTIAN TRADITION, 322 (1989).
35. Id.
36. The official position of the Catholic Church has since the Reformation returned to a more Gelasian theory of church and state. See 1 ENCYCLOPEDIA OF CHRISTIANITY 504 (Erwin Fahlbusch, et al., eds. 1999).
37. TITUS, supra note 3, 71.
shall be free, and shall have its rights entire, and its liberties inviolate; and we will that it be thus observed . . . .

By the term “liberties,” the document referred to the right of the English church to be governed ecclesiastically, without intervention from the civil rulers. Magna Charta thus began with the protection of the independence of the church from the state.

Magna Charta was of course not the only way that the common law recognized a distinction between the jurisdictions of church and state. Bracton recognized a distinction between the adjudication of “spiritual” and “temporal” matters and said that the common law courts were only competent to judge the latter. According to legal scholar Herb Titus:

For several centuries, English judges battled over whether cases involving marriage, tithes, inheritance of property, and the like were “temporal” or “spiritual.” Whatever the merits of these claims and counterclaims, this principle was established: Some “wrongs” were not within the jurisdiction of the civil government courts that enforced the common law but were within the jurisdiction of the ecclesiastical courts and vice versa; moreover, some wrongs were not within the jurisdiction of any human court.

B. Early Reformation

1. Calvin

As far as influence on American law and philosophy goes, arguably the most significant reformer was John Calvin. Calvin spent considerable time dealing

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40. Id.

After Martin Luther had introduced into Germany the liberty of thinking in matters of religion, and erected the standard of reformation, John Calvin, a native of Noyon, in Picardie, of a vast genius, singular eloquence, various erudition, and polished taste, embraced the cause of reformation. In the books which he published, and in the discourses which he held in the several cities of France, he proposed one hundred and twenty-eight articles in opposition to the creed of the Roman Catholic church. These opinions were soon embraced with ardor, and maintained with obstinacy, by a great number of persons of all conditions. The asylum and the centre of this new sect was Geneva, a city
with the proper view of church-state relations. He was concerned to avoid two extremes:

[O]n the one hand, frantic and barbarous men are furiously endeavoring to overturn the order established by God [in the realm of civil government], and, on the other, the flatterers of princes, extolling their power without measure, hesitate not to oppose it to the government of God. Unless we meet both extremes, the purity of the faith will perish.

For those superficially acquainted with Calvin as the head of a theocracy in Geneva, it comes as something of a shock to think of him as one of the key fathers of church-state separation. Calvin’s time in Geneva is far more complex than the simplistic “theocracy” accusations commonly lodged against him, and although this is beyond the scope of this study, it would behoove us to look past these caricatures so that we might rightly appreciate the theoretical contributions that Calvin made.

First, Calvin believed in a separation of the jurisdictions of church and state. In the words of one church historian, “[Calvin] made a clear distinction between church and state—institutionally, functionally and jurisdictionally—without separating Christianity from the state, which, equally with the church, is accountable to the triune God.” In his magnum opus, The Institutes of the Christian Religion, Calvin stated his belief that church discipline should “be altogether distinct from the power of the sword”—that is, the power of civil government. To those who did not believe in the need for church government, Calvin responded, “[T]he Church of God, as I have already taught, but am again obliged to repeat, needs a kind of spiritual government. This is altogether

situat[ed] on the lake anciently called Lemanus, on the frontiers of Savoy, which had shaken off the yoke of its bishop and the Duke of Savoy, and erected itself into a republic, under the title of a free city, for the sake of liberty of conscience. Let not Geneva be forgotten or despised. Religious liberty owes it much respect, Servetus notwithstanding. From this city proceeded printed books and men distinguished for their wit and eloquence, who spreading themselves in the neighboring provinces, there sowed in secret seeds of their doctrine. Almost all the cities and provinces of France began to be enlightened by it.”


42. See Calvin, Institutes, supra note 12, 4.11, 4.20.
43. Id. at 4.20.1.
44. See Otis Scott, Change at the Top, in THE GREAT CHRISTIAN REVOLUTION: HOW CHRISTIANITY TRANSFORMED THE WORLD 99–100 (Otis Scott, ed. 1994); R.J. Rushdoony, Politics of Guilt and Pity 269–275 (1970). The notorious Servetus affair was, for instance, extremely complex. Calvin was not even a citizen of Geneva at the time of Servetus’s death on October 26, 1533.
45. Morecraft, supra note 41, 3.
46. Calvin, Institutes, supra note 12, 4.11.5.
distinct from civil government . . . ."47 To those who believed that new spiritual life eradicated the need for civil government, Calvin responded, “Christ’s spiritual kingdom and the civil jurisdiction are things completely distinct.”48 In both cases, the jurisdictional separation of church and state was the basis of Calvin’s response.

Calvin believed in an independent church supported and reinforced by a godly civil magistrate.49 In this we see hints of a blending of roles, where church and state cooperate to maintain purity. This is what most observers think of first when they think of Calvin’s contributions to church-state relations. But what is often missed is that even when Calvin speaks of the cooperation of church and state, he does not speak of the subordination of one to the other. Calvin believed that the church and the state coexisted as two forms of government separated from one another by God, but both under God and subject to his law-word. He explained, “As the magistrate ought by punishment and physical restraint to cleanse the church of offenses, so the minister of the Word should help the magistrate in order that fewer may sin. Their responsibilities should be so joined that each helps rather than impedes the other.”50 An example given in the Institutes illustrates what Calvin means by this:

Does any one get intoxicated [Sic.]. In a well ordered city his punishment will be imprisonment. Has he committed whoredom? The punishment will be . . . more severe. Thus satisfaction will be given to the [civil] laws, the magistrates, and the external tribunal. But the consequence will be, that the offender will give no signs of repentance, but will rather fret and murmer. Will the Church not here interfere?51

Thus, by the exercise of church discipline, the church assists the magistrate by bringing the offender to repentance in an ecclesiastical proceeding entirely separate from the civil proceeding. This is not a merging of roles—the church does not commandeer the reigns of civil government, and the civil government does not dictate the exercise of church discipline. Even in the sensitive issue of the church “aiding” the civil government, Calvin recognized a separation of jurisdictions.

2. Luther

Luther’s views of church and state paralleled those of Calvin in many respects. Though his influence on American law was not as direct Calvin’s, his contributions permeated the corpus of Reformation thought. First, Luther

47. Id. at 4.11.1.
49. See KELLY, supra note 41, at 139.
50. Id. at 15 (quoting John Calvin, letter of 24 October 1538).
51. CALVIN, INSTITUTES, supra note 12, 4.11.3.
recognized the error of a sacred-secular dichotomization. He recognized two
kingdoms, earth and heaven. But all people exist here on earth—the realm of
heaven is God’s. Thus for Luther, “there was no distinction between spiritual
and temporal, sacred and secular work.” 52 All of life was to be for the glory of
God. 53 Rather than viewing society as some sort of spiritual hierarchy, a vertical
perspective where the clergy are closer to God than the laity, Luther viewed
society horizontally with “no person and no institution obstructed or mediated by
any other in relationship to and accountability before God.” 54

From this recognition of all of society, institutions and persons, under God,
Luther could see clearly that the church and the state were institutional equals.
Here were another pair of two kingdoms, church and state. And again, “For
Luther, the relationship between the two kingdoms was parallel rather than
hierarchical . . . . The Lutheran conception of the two kingdoms placed the
temporal on roughly the same plane as the spiritual vis-à-vis the divine: the
temporal was not subordinated to the spiritual.” 55 Also, “In Lutheran theology,
both the spiritual and the temporal kingdoms are God’s; one is not ‘more’ the
kingdom of God than the other, nor in this life is one assigned to rule over the
other.” 56

Both of the “two kingdoms” were ordained by God and under His authority.
The church obviously was governed by “sola scriptura,” and while Luther was
more cautious than Calvin in his application of Scripture to civil government, 57
still, in Lutheran thought, “The temporal realm remains God’s creation and
subject to God’s law.” 58

The effect of Luther’s thought was substantially similar to Calvin’s. Two
kingdoms, the state and the church, were recognized as having distinct
jurisdictions. Neither could claim supremacy over the other, for both were
equals before God.

53. Id. at 265–67.
54. JOHN WITTE, JR., LAW AND PROTESTANTISM 6 (2002).
55. ARTHUR P. MONAHAN, FROM PERSONAL DUTIES TOWARDS PERSONAL RIGHTS 201 (1994).
56. John R. Stumme & William W. Tuttle, Lutheran Thinking on Church-State Issues, in
Church and State: Lutheran Perspectives 9 (John R. Stumme & William W. Tuttle, eds.
2003).
57. See JOHN EIDSMOE, GOD AND CAESAR 14–15 (1997); Witte, supra note 54, at 10.
58. Stumme & Tuttle, supra note 56, at 9. Any ambiguity in Luther’s thought on the subject
did not affect his contemporary jurist followers, who very unambiguously used the Bible as the
“highest source of law for life in the earthly kingdom.” Witte, supra note 54, at 10.
C. Reformation in the British Isles

1. Melville

Immediately following the pioneers of the Reformation was a remarkable burst of writing in England and Scotland on the theological and practical implications of the new faith. Scotland’s Presbyterians inherited the strongest dose of Calvin’s jurisdictional ideas and did the most to perpetuate them. The reformation in Scotland was the scene of constant church-state conflicts. Catholic Queen Mary Stuart vigorously opposed the reformation (and was famously rebuked by John Knox59), while Parliament supported it in varying degrees.60 But even after Mary’s forced abdication in 1567, conflicts continued as the church’s General Assembly struggled with Parliament over the control of church property.61

Into this chaos stepped Andrew Melville, Knox’s most important successor in leading the Scottish reformed church, perhaps more responsible than any other for Scotland’s general adoption of Presbyterian rather than Episcopal church government.62 Melville authored the Second Book of Discipline, adopted by the general assembly in 1578, specifically to deal with the problem of church-state relations. The document begins:

by laying down the essential line of distinction between civil and ecclesiastical power. Jesus Christ, it declares, has appointed a government in his church, distinct from civil government . . . . Civil authority has for its . . . object the promoting of external peace and quietness among the subjects, ecclesiastical authority, the directing of men in matters of religion and which pertain to conscience; the former enforces obedience by external means, the latter by spiritual means; yet . . . they “both be of God . . . .”63

As one historian has summarized it: “The [Second] Book postulated the existence of two parallel, divinely ordained jurisdictions, separate and distinct, yet co-ordinate. The phraseology of the ‘two kingdoms’ was not employed to describe the relationship, but the implication was there.”64

In a 1596 meeting, Melville did not shrink from presenting this doctrine directly to the young King James, much to the king’s annoyance. As the story

60. See KELLY, supra note 41, 56–64.
61. Id. at 65.
62. See id. at 64–65.
64. KELLY, supra note 41, 66 (quoting JAMES KIRK, THE SECOND BOOK OF DISCIPLINE, 58 (1980)).
has come down from an early biographer, Melville tactlessly caught the king by the sleeve, addressed him as “God’s sillie vassal,” and continued:

Therefore, sir, as divers times before I have told you, so now again I must tell you, there are two kings and two kingdoms in Scotland: there is King James, the head of this commonwealth, and there is Christ Jesus, the King of the Church, whose subject James the Sixth is, and of whose kingdom he is not a king, nor a lord, nor a head, but a member. We will yield to you your place, and give you all due obedience; but again I say, you are not the head of the Church . . .

2. The 1638 Protestation

The Church of Scotland continued to draw sharp lines between Christ’s authority and the Church’s authority in its contest against King James’ son, Charles I. In November of 1638, the General Assembly of the Church of Scotland met with 150 ministers and 98 elders who were determined to resist Charles I’s attempts to impose the Anglican establishment upon them. They defied instructions from the King’s High Commissioner, the Marquis of Hamilton, to dissolve their Assembly. It was Hamilton who presented the Assembly with a new "covenant" drafted by the king. The Assembly, which was made up of such notable men as Alexander Henderson, George Gillespie, and Samuel Rutherford rejected the king’s edict. The Assembly published a document titled, THE PROTESTATION of the Generall Assemblie of the Church of Scotland. The Protestation declared its sole dependence upon Christ's crown and announced its independence from the crown of the English king. The 1638 Protestation drafted by Alexander Henderson stated:

It was most unnatural in itself and prejudicial to the privileges which Christ in His word, has left to His church to dissolve or break up the assembly of this church, or to stop and stay their proceedings in constitution of acts for the welfare of the church or execution of discipline of offenders and so to make it appear that religion and church government should depend upon the pleasure of the prince.

66. Id. at 85.
67. Rutherford is an important political theorist mostly remembered as the author of LEX REX (1644), arguing that the king is under the law, and thus providing a rationale for resistance. See HALL, supra note 41, 252–54.
This important document, written at a pivotal time in English and Scottish history, clearly was based on an institutional and jurisdictional separation of the church from the state.

3. Gillespie

George Gillespie was one of Scotland’s commissioners to the Westminster Assembly. In his short life, Gillespie authored *Aaron’s Rod Blossoming*, a major treatise that is one of the definitive works on the biblical doctrine of the separation of church and state. Gillespie wrote this work to confront the post-Henry VIII English view that a Christian civil magistrate should be the head of the church. In denying this view, Gillespie argued, “The controversy is not about taking from the magistrate what is his, but about giving to Christ that which is his. We hold a reciprocal subordination of persons, but a co-ordination of powers.” Gillespie rooted his argument for church and state as separate jurisdictions in the Old Testament’s division of power between civil and ecclesiastical realms:

The Jewish church was formally distinct from the Jewish state. I say formally, because ordinarily they were not distinct materially, the same persons being members of both; but formally they were distinct, as now the church and the state are among us Christians.

4. Westminster Confession

The Westminster Assembly was dominated by Presbyterians like Gillespie who followed Melville’s conception of church and state. Chapter XXIII on the civil magistrate reflects this understanding:

God, the Supreme Lord and King of all the world, hath ordained civil magistrates to be under him over the people, for his own glory and the public good; and to this end, hath armed them with the power of the sword, for the defense and encouragement of them that are good, and

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69. Gillespie died in 1648 at the age of 35. OXFORD DICTIONARY OF NATIONAL BIOGRAPHY 257 (H.C.G. Matthew & Brian Harrison, eds. 2004).
70. This state-above-the-church view may have been typically English, but it received its first significant theological defense from Swiss-born academic Thomas Erastus, and hence is known as “Erastianism.” JUSTO L. GONZALEZ, ESSENTIAL THEOLOGICAL TERMS 54 (2005). David C. Lachman writes: “Gillespie wrote primarily against the prevailing error of his time and place, the ‘Erastian’ view which taught that, in a Christian state, the chief magistrate ought to be the head of the church as well as of the state and that, consequently, there should be no independent ecclesiastical government or discipline. The government of the church should be co-terminus with and subsumed under that of the state.” David C. Lachman, Preface to the Reprint of GEORGE GILLESPIE, AARON’S ROD BLOSSOMING (reprint, 1985) (1646).
71. GILLESPIE, supra note 70, xvi.
72. Id. at 3. See also DANIEL J. FORD, IN THE NAME OF GOD, AMEN 229 (2003).
for the punishment of evil-doers.”[73] But it was expressly provided that, “The civil magistrate may not assume to himself the administration of the Word and sacraments, or the power of the keys of the kingdom of heaven . . . .”[74]

5. English Puritans

A Puritan, according to historian Iain Murray, was “a man ready to suffer not only for the gospel but for Christ’s right to rule the church by his own authority.”[75] Enter the brilliant polymath theologian Richard Baxter who was born in England on November 12, 1615. Although Baxter was ordained in the Church of England, “Baxter held that the episcopacy as it had been practiced in the Church of England, with autocratic prelates lording it over unduly large dioceses, badly needed reform.”[76] In 1659, Baxter would write his most controversial book, A Holy Commonwealth. Baxter wrote in this classic work, “God doth not communicate all that Power in kind which is Eminently and Transcendently in himself to any one man, or sort of Officers; but distributeth to each their part; Civil Power to Civil Rulers, and Ecclesiastical to Church-Rulers.”[77] This was, of course, a succinct and direct statement of the theology of two distinct kingdoms, i.e., the two distinct governments of church and state.

D. America

1. The Reformation Heritage

The first settlers in America brought with them a strong Protestant heritage, including the two kingdoms theory. Doubtless, this fact will be a novel perspective for many who have viewed the colonial era primarily as one of established churches and the suppression of dissent. It is important to emphasize at this point that none of the preservers of “two kingdoms” theory were perfect, and for many of them, serious inconsistencies existed between their theory and practice. These are often glaringly obvious to modern historians with the benefit of hindsight. The problem, which hopefully this note serves as a corrective to, is that in pointing out inconsistencies and errors in the past, we miss the nuggets of gold that they have to give to us—insight into issues that they understood much better than we have. Although state churches were established in many of the

73. Westminster Confession XXIII, 1 (1646).
74. Id. at 3.
colonies, the germs of the two-kingdom doctrine were far from dead in colonial America.

Several English Separatist congregations—later to walk onto the pages of history as the Pilgrims—originally left England for Holland because of the intrusion of the state into their local assembly. Their 1609 petition to the king is rich in the terminology of two kingdoms theology. Several decades later, the Massachusetts colony may not have completely fulfilled the two-kingsdom ideal, but it was still frequently articulated there. No less notable a New England minister than John Cotton wrote in 1645, “The power of the keys is far distant from the power of the sword and though one of them might need the help of the other, when they go astray, and administered, the one of them doth not intercept, but establish the execution of the other.”

Antiquarian Daniel J. Ford writes that the New England ideal remained independent, covenanted congregations, with “the keys of heaven . . . administered by the local congregation and the civil sword . . . administered by the colonial Governor and the magistrates.”

The New England Calvinists brought the basic principles of two kingdoms with them in their theology, but perhaps an even more important influence was the immigration of large numbers of Scots and the so-called “Scotch Irish,” Scottish Presbyterians who had relocated to Ulster in the early 1600s. Beginning in the 1680s, Scottish Covenanters began immigrating to America to escape a new wave of persecution under James II. This first group was followed by a wave of Scotch-Irish immigrants in 1717, then four more waves of immigration, the last occurring from 1771 to 1775. In 1775, it is estimated that there were about 900,000 Scotch-Irish in America, out of a total population of roughly three million. These immigrants created a strong citizen base saturated in the Scottish Presbyterian version of “two kingdoms” theology.

By the time of the American War for Independence, approximately two-thirds of the American population was comprised of non-Anglican (dissenting)
groups, the majority of which had a Calvinist theological orientation. It is not surprising then that the Reformation heritage of “two kingdoms” should have some influence in the legal questions of church-state relations immediately following the War for Independence.

2. Memorial and Remonstrance

It was not long after the war that the subject of the relationship between church and state arose in a major way. A bill “Establishing a Provision for Teacher of the Christian Religion” was introduced in the Virginia House of Delegates in 1784. The non-Anglican dissenters—particularly the Baptists—saw this as a threat, and through alliances with powerful figures like James Madison, successfully defeated the bill. The battle over this bill resulted in what is arguably the most significant, and certainly the most famous, statement of church-state relations in the early republic, Madison’s *Memorial and Remonstrance*.

Although the argument in *Memorial and Remonstrance* was in terms of individual liberties (religious freedom) rather than institutional jurisdictions (ecclesiastical autonomy), it rested on a similar basis. First, civil society is recognized as under God: “[E]very man who becomes a member of any particular Civil Society . . . [does it yet reserving] his allegiance to the Universal Sovereign.” Because of this, “We maintain . . . that in matters of religion no man’s right is abridged by the institution of Civil Society, and that religion is wholly exempt from its cognizance.” Madison continued by reasoning that “if religion be exempt from the authority of the society at large, still less can it be

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86. Hall, *supra* note 41, 417.
89. The contributions of the Baptists to religious liberty in Virginia are extensive; see generally Charles Fenton James, *Documentary History of the Struggle for Religious Liberty in Virginia* (1899). On their tradition of religious freedom, James has written, Of the Baptist, at least, it may be truly said that they entered the conflict in the New World with a clear and consistent record on the subject of soul liberty. “Freedom of conscience” had ever been one of their fundamental tenets. John Locke, in his “Essay on Toleration,” says: “The Baptist were the first and only propounders of absolute liberty, just and true liberty, equal and impartial liberty.” And the great American historian, Bancroft, says: “Freedom of conscience, unlimited freedom of mind, was from the first a trophy of the Baptist.” *Id.* at 14.
92. *Id.*
subject to that of the Legislative Body.” This is a jurisdictional issue: if society as a whole has no right to interfere with religion, neither does the legislature, for its “jurisdiction is both derivative and limited.” Madison said the proposed bill was objectionable precisely because it “implies either that the Civil Magistrate is a competent judge of religious truth, or that he may employ religion as an engine of civil policy.”

The presentation style may be more reminiscent of Locke than Calvin, but the theoretical ideas Madison presented—a jurisdictional inability of the state to meddle in the church’s business, because it is a separate relationship between God and man—are right in line with Reformation theology. In fact, historian George Bancroft suggests that Madison may have been drawing on some of the “theological lore” he had learned in college, studying under the Scottish Presbyterian, John Witherspoon.

3. Context of the First Amendment

Forces similar to those that led to the defeat of the bill “Establishing a Provision for Teacher of the Christian Religion” in the Virginia House of Delegates were again at work in the drafting of the First Amendment to the Constitution. Non-established religious groups, again led by the Baptists, brought up the issue of governmental jurisdiction—or lack thereof—over religion. The resulting product, prohibiting the government from “establish[ing]” a religion or meddling with the free exercise of religion, has been the subject of reams of scholarship, but for now it is sufficient to note what the First Amendment did from a theological perspective. It prohibited the national civil government as an institution from interfering with the church as an institution. It did nothing to restrain the religiosity of its framers (upon the House approving the Bill of Rights, Elias Boudinot famously recommended a day of thanksgiving, and President Washington willingly complied), a fact that has been awkward for modern strict separationists. But what was absolutely clear from the beginning was that the First Amendment did prohibit Congress from involving itself in church affairs. It could not enter the judicial sphere of the church. When put in these terms, the First Amendment is a

93. Id.
94. Id. at 634.
95. See Witte, supra note 54, at 6 (“no person and no institution obstructed or mediated by any other in relationship to and accountability before God.”).
96. See Esbeck, supra note 90, 1560.
98. See id. at 79–80.
99. “The First Amendment . . . is a recognition . . . that the civil courts have no subject matter jurisdiction over the internal affairs of religious organizations.” Esbeck, supra note 90, 1589.
natural fit with the two-kingdoms approach of the Reformation. As Professor (now Judge) McConnell has succinctly stated, “The two-kingdoms view of competing authorities is at the heart of our First Amendment.”

III. THE LEGAL OUTWORKING: THE CHURCH AUTONOMY CASES

The long history of jurisdictional distinctions between church and state in theology lives on in the legal doctrine of church autonomy. Church autonomy doctrine is grounded in the First Amendment, and “prohibits civil court review of internal church disputes involving matters of faith, doctrine, church governance, and polity.” This autonomy is unique among religion clause doctrines for several reasons. First, it derives its strength from both of the First Amendment’s religion clauses. Civil governmental intrusion into the jurisdiction of church government may impermissibly entangle that governmental entity with religion and thereby violate the Establishment Clause; at the same time, it will probably infringe on the free exercise of religion by telling a church what it may or may not do. Second, despite the autonomy doctrine’s constitutional rooting, it was articulated before its constitutional basis was identified. It grew out of a larger, broader theoretical tradition that shared a common source with the First Amendment. Hence, church autonomy can be found in the Amendment, but it did not originate there. In light of the history outlined above, the theological “two kingdoms” concept must be considered a primary influence.

The two kingdoms doctrine was, as we have seen, sketched in broad and varied terms by the Reformers in multiple countries. Today, the courts have not always been clear or consistent in the details of their rationale when applying church autonomy doctrine. Nevertheless, it is possible to recognize several specific points of convergence between the theological doctrine of two kingdoms and the legal doctrine of autonomy.

Two key components of Reformation theory can be identified in American court cases: first, the governmental nature of the two “spheres” or “kingdoms,” church and state; second, the equality of these governments, such that neither is

100. Indeed, just as Calvin would have wanted, the first constitutional Congress kept itself out of church affairs while openly displaying its theological beliefs as it moved for a day of thanksgiving and then proceeded to attend church on that occasion.
101. McConnell, supra note 6, at 1246.
105. Watson v. Jones, 80 U.S. 679 (1872), the first autonomy case in the Supreme Court, nowhere mentions a constitutional basis for its holding. See Kedroff, 344 U.S. at 115.
superior or inferior to the other. Beyond these theoretical underpinnings, which can be classed in the field of doctrinal theology, the American courts have followed to a great degree Reformation ideas of church polity, both in the cases where autonomy is recognized and where it is not.

A. The Nature of Autonomy

1. Two Governments

Church and state are both separate governments. A philosophical trend toward statism has tended to absolutize civil government in the 20th century. (Who today thinks of anything but the civil government as “government”?) But in the church autonomy cases, the courts have countered this trend, sounding remarkably like the Reformers as they explain that the state is just one government among others, including church government. As the Texas Supreme Court explained in its recent decision of *Westbrook v. Penley*:

> [T]he First Amendment recognizes two spheres of sovereignty when deciding matters of government and religion. The religion clauses are designed to “prevent, as far as possible, the intrusion of either [religion or government] into the precincts of the other,” and are premised on the notion that “both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere.”

The state cannot be absolutized as the sole source of real government. To borrow the terminology of the Dutch statesman and theologian Abraham Kuyper, many spheres of law emanate from many different governments. This is basic to the judicial treatment of autonomy. The Supreme Court made this clear in the first autonomy case it decided, *Watson v. Jones*. The foundation for church autonomy is found in the right of the people to create religious associations:

> The right to organize voluntary religious associations to assist in the expression and dissemination of any religious doctrine, and to create tribunals for the decision of controverted questions of faith within the association, and for the ecclesiastical government of all the individual members, congregations, and officers within the general association, is unquestioned.

Reiterating this point in 1952, the Supreme Court recognized the “power [of churches] to decide for themselves, free from state interference, matters of

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107. KUYPER, supra note 24.
church government as well as those of faith and doctrine.” 109 The Texas court in Westbrook repeated this principle, calling this power a “fundamental right.” 110

If, then, there is an unquestioned right to organize self-governing religious associations, it logically follows that the state must respect this governmental system:

All who unite themselves to such a body do so with an implied consent to this government, and are bound to submit to it. But it would be a vain consent and would lead to the total subversion of such religious bodies, if any one aggrieved by one of their decisions could appeal to the secular courts and have them reversed. It is of the essence of these religious unions, and of their right to establish tribunals for the decision of questions arising among themselves, that those decisions should be binding in all cases of ecclesiastical cognizance, subject only to such appeals as the organism itself provides for. 111

This strikingly echoed the words of Calvin, penned three centuries earlier:

Some . . . are led astray, by not observing the distinction and dissimilarity between ecclesiastical and civil power. For the Church has not the right of the sword to punish or restrain, has no power to coerce, no prison nor other punishments which the magistrate is wont to inflict. Then the object in view is not to punish the sinner against his will, but to obtain a profession of penitence by voluntary chastisement. The two things, therefore, are widely different, because neither does the Church assume anything to herself which is proper to the magistrate, nor is the magistrate competent to what is done by the Church. 112

The Reformation’s theoretical framework of two governments—two kingdoms—has been clearly recognized by the American legal tradition and precedent. Therefore, in American law, church and state each have spheres of authority that operate concurrently.

2. Coeval Authority

Neither of the two spheres is superior to the other. The Reformation thinkers reasoned that since both were ordained by God, neither could claim superiority over the other, and both answered to the same Superior:

The church—as an institution—does not have authority over the affairs of civil government, and the state—as an institution—does not have authority over the affairs of church government . . . . Acknowledgment

111. Watson, 80 U.S. at 728–29.
112. CALVIN, INSTITUTES, supra note 12, 4.11.3.
of this separation comes from a recognition that God is the source of all power.\textsuperscript{113} It may be rare for the courts to explicate the theological justification, but the idea of governmental spheres, with two governments operating concurrently, with equal authority within their respective separate spheres, has been preserved.

The basic issue is jurisdictional. The two governments, church and state, must operate concurrently because they both operate in different jurisdictions. As the Supreme Court reasoned in \textit{Watson}, there is an “unquestioned” right to establish “religious unions,” and the power to come to binding decisions “in all cases of ecclesiastical cognizance” was essential to such associations.\textsuperscript{114} Because of this jurisdictional right,

\begin{quote}
[T]he judicial eye cannot penetrate the veil of the church for the forbidden purpose of vindicating the alleged wrongs of excised members; when they became members they did so upon the condition of continuing or not as they and their churches might determine, and they thereby submit to the ecclesiastical power and cannot now invoke the supervisory power of the civil tribunals.\textsuperscript{115}
\end{quote}

Not only was the independence of ecclesiastical governments dictated by the first principles the court articulated, it was also counseled by prudence. Following its exposition of the principal necessity of autonomy, the \textit{Watson} court also offered a telling pragmatic justification for leaving ecclesiastical matters to the ecclesiastical courts, refuting the notion that the civil courts could decide church controversies more justly than ecclesiastical tribunals could:

\begin{quote}
It is not to be supposed that the judges of the civil courts can be as competent in the ecclesiastical law and religious faith of all these bodies as the ablest men in each are in reference to their own. It would therefore be an appeal from the more learned tribunal in the law which should decide the case, to one which is less so.\textsuperscript{116}
\end{quote}

It is important to note that the \textit{Watson} court proceeded to the pragmatic grounds for church autonomy only after establishing its jurisdictional basis.

The courts have not always consistently articulated this jurisdictional principle. For some modern courts, the difficulty is keeping the basis of autonomy in sight when the pragmatic justifications of autonomy predominate over the jurisdictional argument. In two Alabama cases,\textsuperscript{117} the state’s Supreme Court decided the outcome of contested church elections. The decisions were

\begin{itemize}
\item \textsuperscript{113} Yates v. El Bethel Primitive Baptist Church, 847 So. 2d 331, 355 (Ala. 2002) (Moore, C.J., dissenting).
\item \textsuperscript{114} \textit{Watson}, 80 U.S. at 729.
\item \textsuperscript{115} \textit{Id.} at 731.
\item \textsuperscript{116} \textit{Id.} at 729.
\item \textsuperscript{117} Abyssinia Missionary Baptist Church v. Nixon, 340 So. 2d 746 (Ala. 1977); Yates v. El Bethel Primitive Baptist Church, 847 So. 2d 331 (Ala. 2002).
\end{itemize}
premised on the notion that the civil judiciary could decide “whether the fundamentals of due process have been observed”\(^{118}\) in a church proceeding. In a dissenting opinion, the chief justice decried the implication “that the state is merely the less preferred ‘power’ for determining ecclesiastical and religious matters . . . . On the contrary, the state is simply without jurisdiction in such matters: ‘It belongs not to the civil power to enter into or review the proceedings of a spiritual court.’”\(^{119}\)

The distinction between the majority and dissenting opinions in the Alabama cases can be seen in the terminology of “abstention” versus the terminology of “autonomy.” “Ecclesiastical abstention” is often used interchangeably with “church autonomy.”\(^{120}\) There is no substantial difference in the way the courts have used them. But there are subtle linguistic distinctions. “Abstention” suggests that the court will not adjudicate the ecclesiastical question on \textit{pragmatic} or \textit{prudential} grounds; that is, the court is voluntarily staying out of the dispute as an exercise of prudence. “Autonomy,” on the other hand, suggests something stronger; it implies that the courts are jurisdictionally incapable of adjudicating an ecclesiastical issue. In terms of Reformation thought, this is an outworking of the principle that church and state are to govern coevally, neither subordinate to the other. From the theological perspective, then, “autonomy” is the more accurate term.

It is interesting to note that the current trend in the courts seems to favor the language of “autonomy.”\(^{121}\) In 1981, Professor Laycock used the term in an influential article on the religion clauses,\(^{122}\) and since then “autonomy” has swept through the case law. The Texas Supreme Court adopted the autonomy term in a recent articulately reasoned opinion, an apparently self-conscious choice—for the implications of the term had been discussed in an important amicus brief before the court.\(^{123}\) Even in the cases where the language of “abstention” lingers on, it is used in such a way as to come out as strong as any “autonomy” terminology.\(^{124}\) Equally relevant in reasserting the jurisdictional

\(^{118}\) Abyssinia, 340 So. 2d at 748.

\(^{119}\) Yates, 847 So. 2d at 356–57 (Moore, C.J., dissenting) (emphasis in original) (quoting Watson v. Jones, 80 U.S. 679, 730 (1872)).

\(^{120}\) See, e.g., Malichi v. Archdiocese of Miami, 945 So. 2d 526 (Fla. App. 2006).


\(^{123}\) In its choice of language, the court was following the advice of the National Association of Evangelicals in their brief for Westbrook. Brief for National Association of Evangelicals as Amici Curiae Supporting Petitioner, 4–5, Westbrook v. Penley, 50 Tex. Sup. Ct. J. 949 (2007), 2006 WL 2843840.

realities of church-state relations are two recent holdings that church autonomy considerations can be raised as a jurisdictional objection at any point in the proceedings, just like any other basic defect of subject-matter jurisdiction. In sum, the Reformation doctrine of the equality of the two spheres, church and state, remains healthy and well—and indeed, revitalized as the courts have asserted the equality of the “spheres of sovereignty.”

B. The Core of Autonomy

Turning from the theory to the practice, the central concern of the theologian-framers of jurisdictional theory was to preserve the freedom of church government from secular interference. Besides the axiomatic truth that the church must be the final arbiter of its own doctrine, two of the quintessential church governmental functions are discipline and the election or appointment of officers. Discipline is unique because it is the occasion where doctrine meets practical reality in the form of sanctions—it is the only situation where the church uses sanctions. Similarly important is the inability of a state to adjudicate elections or appointments in a church, for this goes to the heart of a church’s status as an “equal” but distinct government. These two church governmental functions are at the core of church autonomy protections.

Confusion and divergent opinions have surrounded the resolution of church property disputes—usually arising when there is a split in the membership of a church or some similar circumstance, making it difficult to determine who is in fact the rightful church government—and this field has generated a substantial body of scholarship. But in the abundance of discussion on how to resolve property issues, an important point is often missed: this confusion is nonexistent when the courts have considered who should decide the validity of the core, practical, juridical functions of church government—discipline, and the election or appointment of officers.

120. (Miss. App. 2001) (“the disciplining of a minister is church-related and the doctrine of ecclesiastical abstention requires us to abstain from questioning the matter of Mallette’s discipline”); Archdiocese of Miami, Inc., v. Minagorri, 954 So. 2d 640 (Fla. App. 2007) (“the ‘ecclesiastical abstention doctrine,’ precludes courts from exercising jurisdiction where an employment decision concerns a member of the clergy or an employee in a ministerial position”); Southeastern Conf. Ass’n of Seventh-Day Adventists, Inc. v. Dennis, 862 So. 2d 842 (Fla. App. 2003) (“[c]ourts may not consider employment disputes between a religious organization and its clergy” when involving “questions of internal church discipline, faith, and organization that are governed by ecclesiastical rule, custom, and law”).

125. See Harris v. Matthews, 643 S.E.2d 566 (N.C. 2007), and Bryce v. Episcopal Church in the Diocese of Colorado, 289 F.3d 648, 654 (10th Cir. 2002).


127. “[I]f we would not make void the promise of the keys, and abolish altogether excommunication, solemn admonitions, and everything of that description, we must, of necessity, give some jurisdiction to the Church. . . . This Christ establishes in his Church . . . and with a heavy sanction.” CALVIN, INSTITUTES, supra note 12, 4.11.3.
1. Discipline

The power of a church to exercise discipline over its members is a universally recognized Christian doctrine.\textsuperscript{128} It is the “power of the keys,” to use the Reformers’ metaphor.\textsuperscript{129} As Calvin explained, “[S]o . . . that doctrine may not be held in derision, those who profess to be of the household of faith ought to be judged according to the doctrine which is taught.”\textsuperscript{130} This is done “not . . . by fine, imprisonment, or other civil penalties,” but “by the word of God only. For the severest punishment of the Church . . . is excommunication . . . .”\textsuperscript{131}

Civil suits have often come into the courts based on the church’s execution of discipline. And with very few exceptions, the courts have held that these suits were outside of their jurisdiction. An outstanding recent example is \textit{Westbrook v. Penley}.

C.L. Westbrook, in the dual role of licensed marriage counselor and pastor, had learned during a personal counseling session that church member Peggy Penley was engaging in a “biblically inappropriate”\textsuperscript{132} extramarital sexual relationship. Westbrook initiated disciplinary proceedings that culminated when he published a letter to the congregation urging church members to shun Penley for her unrepentant violation of Biblical principles.\textsuperscript{133} Penley sued Pastor Westbrook for professional negligence in his role as a marriage counselor.\textsuperscript{134} The state supreme court dismissed the case for want of jurisdiction, noting:

\begin{quote}
It seems to be settled law in this land of religious liberty that the civil courts have no power or jurisdiction to determine the regularity or validity of the judgment of a church tribunal expelling a member from further communion and fellowship in the church. . . . [T]he right of a church to decide for itself whom it may admit into fellowship or who shall be expelled or excluded from its fold cannot be questioned by the courts, when no civil or property rights are involved.\textsuperscript{135}
\end{quote}

The \textit{Westbrook} court is squarely in line here with the most recent Supreme Court precedent in regard to church disciplinary action.

\textsuperscript{128} See, e.g., Westminster Confession of Faith XXIII, III (1646); Westminster Shorter Catechism XXXI, II (1647); Heidelberg Catechism 83, 85 (1563).
\textsuperscript{129} See generally supra, note 12.
\textsuperscript{130} \textsc{Calvin}, \textsc{Institutes}, supra note 12, 4.11.5.
\textsuperscript{131} \textsc{Id}.
\textsuperscript{133} \textsc{Id}.
\textsuperscript{134} Originally, the suit was against Westbrook as well as the church elders and the church itself, alleging defamation, breach of fiduciary duty, intentional infliction of emotional distress, invasion of privacy, and professional negligence. Subsequently, all claims were dismissed except the professional negligence claim against Westbrook himself.
In a 1976 case, the Serbian Orthodox Church had initiated an investigation on the controversial American bishop Dionisije Milivojevich, resulting in his suspension and ultimately defrocking. The hierarchal church leadership in Yugoslavia also ordered a reorganization of the diocese. Milivojevich sued for a judicial declaration that he was the true bishop of the diocese, and for an injunction to prevent church officials from interfering with the assets of his diocese. The Supreme Court ruled against Milivojevich on the grounds that it was a church governmental decision protected by autonomy considerations:

[W]here resolution of the disputes cannot be made without extensive inquiry by civil courts into religious law and polity, the First and Fourteenth Amendments mandate that civil courts shall not disturb the decisions of the highest ecclesiastical tribunal within a church of hierarchical polity, but must accept such decisions as binding on them, in their application to the religious issues of doctrine or polity before them.

The Milivojevich decision was followed three years later by Jones v. Wolf, which some commentators have viewed as a move away from the “deferential” approach to church autonomy represented by Milivojevich. The emphasis was indeed different—where Milivojevich emphasized the jurisdictional inability of courts to “pierce the veil” of church government, Jones emphasized the ability of courts to decide cases by the application of “neutral principles.” The Court may be “still groping for a consistent and satisfactory approach” to intrachurch disputes, but the two approaches are not as different as they may appear at first glance. Jones was a property dispute of the classic “church split” variety. Here, the Court viewed the church government as only incidentally involved in the determination of who owned the church property. It made it clear that if the situation were otherwise, the only proper authority to adjudicate the matter would be the church government. This is distinct from the situation in Milivojevich, where the court viewed the basic issue as church discipline. In

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137. Id. at 709.
140. See Serbian Eastern Orthodox, 426 U.S. at 708–12.
142. “If in such a case the interpretation of the instruments of ownership would require the civil court to resolve a religious controversy, then the court must defer to the resolution of the doctrinal issue by the authoritative ecclesiastical body.” Jones v. Wolf, 443 U.S. 595, 604 (1979), citing Serbian Eastern Orthodox Diocese for U. S. of America and Canada v. Milivojevich, 426 U.S. 696, 709 (1976).
Jones, then, the application of generally applicable legal rules of deeds and trusts
to determine ownership of property is drastically different from the court
applying the internal rules of the Serbian Orthodox Church in Milivojevich to
determine if the church had properly followed its own rules to divide a diocese.
Whether the majority in Jones was correct that doctrinal issues were not
implicated by the decision is another question. The point here is that the
rationale of deference to church government discipline decisions, as presented in
Milivojevich, remained intact even after Jones. Discipline is doctrinal: “[T]hose
who profess to be of the household of faith ought to be judged according to the
doctrine which is taught.”143

There is no way to resolve an issue of church discipline by “neutral
principles.”144 And the overwhelming majority of court decisions have
recognized this fact. Church autonomy considerations raised by church
discipline actions were held to bar claims for interference with business
relationship,145 defamation,146 negligent supervision,147 professional
negligence,148 blacklisting,149 breach of contract,150 and even negligent infliction
of emotional distress,151 among others. A ministerial exception to Title VII, to
avoid civil rights claims arising out of church hiring and firing decisions, is now
established case law as well.152 Religious educational institutions were included
within the protections of church autonomy in Illinois153 and Pennsylvania.154

143. CALVIN, INSTITUTES, supra note 12, 4.11.5.
144. It is important to note that, when the courts use the term “neutral” in this context, they are
speaking in relation to the specific doctrinal issue under discussion. From a theological and
philosophical perspective, however, the entire concept of philosophical or religious “neutrality” is
problematic, and a number of incisive critiques have been written. See generally GREG L. BAINSEN,
ALWAYS READY 3–9 (Robert R. Booth, ed. 1996); GREG L. BAINSEN, VAN TIL’S APOLOGETIC 101–
2005).
146. Hiles v. Episcopal Diocese of Massachusetts, 773 N.E.2d 929 (Mass. 2002); Seefried v.
1994).
152. See, e.g., EEOC v. Roman Catholic Diocese, 213 F.3d 795, 800 (4th Cir. 2000); EEOC v.
Southwestern Baptist Theological Seminary, 651 F.2d 277 (5th Cir. 1981); Gellington v. Christian
Methodist Episcopal Church, 203 F.3d 1299 (11th Cir. 2000); Bollard v. California Province of the
Soc’y of Jesus, 196 F.3d 940 (9th Cir. 2000); Werfl v. Desert Southwest Annual Conf., 377 F.3d
1099 (9th Cir. 2004); EEOC v. Catholic Univ. of Am., 83 F.3d 455 (D.C. Cir. 1996); Young v.
Northern Ill. Conference of United Methodist Church, 21 F.3d 184 (7th Cir. 1994); Scharon v. St.
1994).
cases. Just in the past ten years, these holdings have come from the Third Circuit,\(^{155}\) the Fourth Circuit,\(^{156}\) the Ninth Circuit,\(^{157}\) the Tenth Circuit,\(^{158}\) the Eleventh Circuit,\(^{159}\) Colorado,\(^{160}\) Connecticut,\(^{161}\) Florida,\(^{162}\) Indiana,\(^{163}\) Maryland,\(^{164}\) Massachusetts,\(^{165}\) Mississippi,\(^{166}\) Missouri,\(^{167}\) New Jersey,\(^{168}\) New Mexico,\(^{169}\) Rhode Island,\(^{170}\) Tennessee,\(^{171}\) and most recently, Texas\(^{172}\) and North Carolina.\(^{173}\) As the *Westbrook* court noted, “the autonomy of a church in managing its affairs and deciding matters of ‘church discipline . . . or the conformity of the members of the church to the standard of morals required of them’ has long been afforded broad constitutional protection.”\(^{174}\)

In 1875, three years after the *Watson* decision, Associate Justice of the Supreme Court William Strong, a Presbyterian, gave two lectures at Union Theological Seminary in New York on the nature of church-state relations. He stated:

Again, the law recognizes the right of every church to determine finally who are, and who are not its members. Herein is a marked difference between churches and other organizations. . . . But a church is allowed to determine for itself, construing its own organic rules, whether a member has been cut off; and no civil court will inquire whether the motion was regularly made, or issue a mandamus to compel a

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156. EEOC v. Roman Catholic Diocese, 213 F.3d 795, 800 (4th Cir. 2000).
158. Bryce v. Episcopal Church in the Diocese of Colorado, 289 F.3d 648 (10th Cir. 2002).
159. Gellington v. Christian Methodist Episcopal Church, 203 F.3d 1299 (11th Cir. 2000).
162. Southeastern Conf. Ass’n of Seventh-Day Adventists, Inc. v. Dennis, 862 So. 2d 842 (Fla. App. 2003); Malichi v. Archdiocese of Miami, 945 So. 2d 526 (Fla. App. 2006).
restoration. It accepts the decisions of church courts upon questions of membership as not subject to civil law review.\textsuperscript{175}

The power of the keys is thus defended by civil government. The attitude of the courts toward discipline is about as on-point as it gets for making a legal reality of the Reformers’ ideal—the “spiritual power . . . altogether distinct form the power of the sword.”\textsuperscript{176}

2. Polity Decision-Making

The ability of a church to follow its own polity for making decisions without a civil court telling it whether it did so rightly is basic to a practical outworking of “two kingdoms” theology. This is an issue that is distinct from discipline: discipline issues as they arise in the autonomy cases are about the ability of a church to stick by a decision it has made; polity decision-making is about the ability to make the decisions in the first place without a court telling the church how to do so. These distinct issues do have some overlap and have arisen in the same case. Again, the courts have echoed the sentiments of the Reformers. The Supreme Court first articulated the right to manage church administration in \textit{Watson}:

In this class of cases we think the rule of action which should govern the civil courts, founded in a broad and sound view of the relations of church and state under our system of laws, and supported by a preponderating weight of judicial authority is, that, whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them, in their application to the case before them.\textsuperscript{177}

Over fifty years later, the Court held that the state could not intermeddle with the appointment of a chaplain in the Catholic church, again, because doing so would interfere with the self-government of the church:

Because the appointment is a canonical act, it is the function of the church authorities to determine what the essential qualifications of a chaplain are and whether the candidate possesses them. . . . [T]he decisions of the proper church tribunals on matters purely ecclesiastical

\textsuperscript{175} WILLIAM STRONG, \textit{TWO LECTURES UPON THE RELATIONS OF CIVIL LAW TO CHURCH POLITY, DISCIPLINE, AND PROPERTY} 38–39 (1875). Associate Justice William Strong served on the U.S. Supreme court from 1870–80. From 1866 to 1869, he was president of the National Reform Association, which since 1864 has called for an amendment to the United States Constitution confessing Jesus Christ as King of the nation. Additionally, he opposed a national church. See \textit{Purpose and Mission Statement}, http://www.natreformassn.org/purpose.html (last visited September 7, 2007).

\textsuperscript{176} CALVIN, INSTITUTES, \textit{supra} note 12, 4.11.5.

\textsuperscript{177} Watson v. Jones, 80 U.S. 679, 727 (1872).
are accepted in litigation before the secular courts as conclusive, because the parties in interest made them so by contract or otherwise.\textsuperscript{178}

In 1952, the Court revisited \textit{Watson}, invoking it to invalidate a New York statute awarding property from one religious group to another, and made the point even stronger: “The [\textit{Watson}] opinion radiates . . . a spirit of freedom for religious organizations, an independence from secular control or manipulation—in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.”\textsuperscript{179}

A classic example of a polity decision outside the cognizance of the civil courts occurred in a recent New Jersey case. The church’s governing body terminated the pastor over a doctrinal dispute, and the pastor refused to leave. When the controversy went to the courts, the trial court appointed a moderator to “supervise and oversee the annual meeting election, and to resolve issues of church membership, voter qualification, election notice, and voting procedures.”\textsuperscript{180} This, the appellate court held, was clearly unconstitutional, and it reversed, noting, “the intrachurch dispute here is the type of primarily religious dispute that led to complete judicial deference in \textit{Watson v. Jones} . . . .”\textsuperscript{181} In a similar (and even more recent) determination, the North Carolina Supreme Court was explicit in recognizing that a “church’s view of the role of the pastor, staff, and church leaders, their authority and compensation, and church management” are affected by the “church’s religious doctrine,” and hence the “courts must defer to the church’s internal governing body” on such matters.\textsuperscript{182}

In pure polity decisions, more than in discipline cases, there are serious problems for the courts to grapple with. For example, when a church membership splits, and it is not clear which part of the membership is the rightful owner of church property, the outcome may appear to turn on which side has kept proper church procedures in voting for or against the division, or which side stuck to the church’s original doctrine. But the courts have not gone this route. It would be a doctrinal determination, inappropriate for a court, to resolve such an issue by construing the church’s beliefs and polity. This was the message of \textit{Presbyterian Church v. Hull Church}, where the Supreme Court held that a church property dispute could not be adjudicated by the courts if the civil court was going to inquire whether the original church denomination had “abandoned or departed from” its original doctrine.\textsuperscript{183} Not all courts have been as conscious of the need to preserve church autonomy in these settings—the pair of Alabama cases discussed earlier decided church elections outright. But these

\textsuperscript{178} Gonzalez v. Roman Catholic Archbishop, 280 U.S. 1, 16 (1929).
\textsuperscript{181} \textit{Id}. at 160.
\textsuperscript{182} Harris v. Matthews, 643 S.E.2d 566, 571 (N.C. 2007).
\textsuperscript{183} Presbyterian Church v. Hull Church, 393 U.S. 440 (1969).
are the exceptions. In general, here as elsewhere in the autonomy field, the courts are squarely in a “two kingdoms” tradition.

C. The Limits of Autonomy

It is not surprising that court decisions recognizing an ecclesiastical immunity would fit neatly with the theological writings of churchmen; this by itself is natural self-interest. Perhaps more surprising is the extent to which even the limits of autonomy can be attributed, at least in part, to a theological heritage.

1. The Reformation and the Restructuring of Ecclesiastical Courts

At the height of medieval church authority, the church claimed an almost complete immunity from the jurisdiction of the civil courts. 184 This included, as Harold Berman has noted, exclusive ecclesiastical jurisdiction over “all civil and criminal cases involving clergics.” 185 In England, this was known as “benefit of clergy.” 186 The broad protections of the benefit of clergy frustrated kings for several centuries, and many attempts were made to circumscribe it, with varying degrees of success. 187 In England, Henry II’s attempt to cut back the privileges via the Constitutions of Clarendon famously precipitated the showdown with Thomas Becket. Becket died, but Henry did penance and was forced to renounce the constitutions—a victory for the ecclesiastical courts. 188

Given this long history of tension and frustration with the clergy’s extensive exemption from criminal prosecution, the upheaval and drastic alterations to church authority occurring during the Reformation made it the ideal time to constrict the canon law sphere of ecclesiastical courts. 189 This constriction is precisely what happened—yet without abolishing ecclesiastical jurisdiction

184. BERMAN, supra note 32, 260–64.
185. Id. at 261.
188. Id., at 256. See also Esbeck, supra note 90, at 1405–07.
189. Calvin expressed the frustration of many of the reformers at the abuses of the ecclesiastical court system:

Whoredom, lasciviousness, drunkenness, and similar iniquities, they not only tolerate, but by a kind of tacit approbation encourage and confirm, and that not among the people only, but also among the clergy. Out of many they summon a few, either that they may not seem to wink too strongly, or that they may mulct them in money. I say nothing of the plunder, rapine, peculation, and sacrilege, which are there committed. I say nothing of the kind of persons who are for the most part appointed to the office. It is enough, and more than enough, that when the Romanists boast of their spiritual jurisdiction, we are ready to show that nothing is more contrary to the procedure instituted by Christ, that it has no more resemblance to ancient practice than darkness has to light.

CALVIN, INSTITUTES, supra note 12, 4.11.7.
altogether.\textsuperscript{190} Blackstone summarized the effect of the Reformation, noting both the continued recognition of a sphere of ecclesiastical immunity, and the fact that it had been constricted from its former scope: “[The clergy] have . . . large privileges allowed them by our municipal law: and had formerly much greater, which were abridged at the time of the reformation on account of the ill use which the popish clergy had endeavoured \textit{sic} to make of them.”\textsuperscript{191}

This was not merely the product of the Reformation’s social and political forces, but also had a basis in its theology. The Reformers recognized that the church and the state were to be institutionally separated and yet not dichotomized.\textsuperscript{192} But dichotomization is exactly what happened by exempting clergy from the cognizance of the civil courts. When clergy and laity were to be tried in different judicial systems, the effect could only be dichotomization. The Reformers did not see this as the command of Scripture, nor as the example of history:

To [the Catholic Church’s ecclesiastical] jurisdiction is annexed the immunity claimed by the Romish clergy. They deem it unworthy of them to answer before a civil judge in personal causes; and consider both the liberty and dignity of the church to consist in exemption from ordinary tribunals and laws. But the ancient bishops, who otherwise were most resolute in asserting the rights of the Church, did not think it any injury to themselves and their order to act as subjects.\textsuperscript{193}

In contrast to the clergy-laity distinction stood the Reformation’s doctrine of the priesthood of all believers.\textsuperscript{194} The priesthood of the believer meant that all of Christendom would (ideally) be comprised of “churchmen” in a new sense of the word.\textsuperscript{195} To exempt them all from prosecution for crimes would be to destroy civil order and would indeed destroy the institution of the state. This was impermissible because the state was ordained by God. The Reformation did not deny the Catholic position that the church retains jurisdiction over ecclesiastical issues and the state over civil issues—this it affirmed. What the Reformation did

\textsuperscript{190} See Berman, supra note 32, 267; Harold Berman, Law and Revolution II 309 (2003).
\textsuperscript{191} William Blackstone, 1 Commentaries *376.
\textsuperscript{192} This in turn grew from the fact that “the reformers rejected,” as a general proposition, the typical “medieval distinction between the ‘sacred’ and the ‘secular.’” McGrath, supra note 52, 265.
\textsuperscript{193} Calvin, Institutes, supra note 12, 4.11.15. Calvin went on to cite the example of Ambrose in detail. Id.
\textsuperscript{194} See generally Gonzalez, supra note 70, at 140; Alister E. McGrath, The Christian Theology Reader, Section 7.13 (2001).
\textsuperscript{195} In Luther’s thought, “Ordination is a rite of the Church, but it confers no invisible grace and no indelible status. The minister is a Christian set apart by the congregation for the performance of a particular office. He is not thereby constituted a priest because Christians were priests.” Roland H. Bainton, The Reformation of the Sixteenth Century 47 (1952). See also McGrath, supra note 52, at 118, 203, 223.
was to classify the offence to the proper jurisdiction based upon the nature of the offence rather than by the status of the offender.196

2. Civil Jurisdiction over Civil Offenses

Against this backdrop, courts have refused to recognize claims of autonomy proffered to escape civil or criminal liability for such offenses as sexual assault and molestation. In *dicta*, the *Watson* Court established the principle that certain crimes were suitable for the civil courts alone to punish:

> There is, perhaps, no word in legal terminology so frequently used as the word jurisdiction, so capable of use in a general and vague sense, and which is used so often by men learned in the law without a due regard to precision in its application. As regards its use in the matters we have been discussing it may very well be conceded that if the General Assembly of the Presbyterian Church should undertake to try one of its members for murder, and punish him with death or imprisonment, its sentence would be of no validity in a civil court or anywhere else. Or if it should at the instance of one of its members entertain jurisdiction as between him and another member as to their individual right to property, real or personal, the right in no sense depending on ecclesiastical questions, its decision would be utterly disregarded by any civil court where it might be set up. And it might be said in a certain general sense very justly, that it was because the General Assembly had no jurisdiction of the case.197

In drawing the line between church and state, the courts have echoed the concerns of the Reformers that, first, the civil jurisdiction remain intact over real violations of the civil law, and, second, that the church’s liberties be preserved inviolate, including the ability to conduct its own internal affairs. It has become standard for courts to begin with the “threshold inquiry” of whether the allegedly illegal conduct was “rooted in religious belief.”198 Where it is a matter of doctrine, the courts keep their hands off. Since the courts have recognized that matters of “discipline, . . . internal organization, or ecclesiastical rule, custom, or law”199 are essentially doctrinal, these are protected. On the other hand, where there is no claim of doctrine at issue, the courts address this as a civil issue within judicial cognizance. In so doing, the courts have embraced, rather than rejected, the Reformation heritage on church autonomy.

196. *See, e.g.,* CALVIN, INSTITUTES, *supra* note 12, 4.11.15 (criticizing the clergy for refusing to “answer before a civil judge in personal causes”).


An excellent example of this kind of distinction in practice is a Rhode Island Superior Court decision on a claim against a church based on an alleged act of molestation by a priest.\(^{200}\) The court held that the plaintiff’s claims of negligent hiring and supervision case against the church were barred by the autonomy doctrine, because to determine whether the diocese was negligent would require inquiry into the church’s manner of employing the priest. “This Court is satisfied that in order for it to determine whether or not the relation between a bishop and his priests is sufficiently agent-like to give rise to a common law duty to exercise reasonable care in the exercise of . . . supervisory authority . . . the Court is required to examine . . . the rules, policies and doctrine of the Roman Catholic Church.”\(^{201}\) Because of this doctrinal element, the court recognized that this “examination . . . is prohibited by the First Amendment.”\(^{202}\) In other words, when the only way the court can determine that a civil wrong was committed is by making a doctrinal determination, the court does not have jurisdiction. At the same time, claims for intentional failure to supervise were not barred, because this is within the court’s “common law jurisdiction” to protect citizens.\(^{203}\)

A critical observer might note that underlying this approach to autonomy issues is an unacknowledged assumption that civil morality will not conflict with a religious doctrine. It is easy for the courts to rebut a claim of ecclesiastical immunity by saying, “Sexual molestation is not a doctrine of Church X,” and proceed to take jurisdiction of the case. But if some exotic religion showed up and explicitly declared that molestation is a doctrine of their organization and subject to its ecclesiastical courts, what then? The conduct would be rooted in religious belief, meeting the “threshold inquiry” to trigger autonomy protections. But surely no court would let the offender off on a church autonomy theory, for a trial in his own ecclesiastical court system. This would certainly be an easy case to assert an exception to autonomy protections for neutral laws of general applicability.\(^{204}\) The problem is not that the courts are without resources to deal with this problem—they have resources from Employment Division v. Smith\(^{205}\) stretching back to Reynolds v. United States.\(^{206}\) The problem is more abstract, namely, that the church autonomy doctrine is not self contained. It exposes the fact that church autonomy doctrine assumes that religious belief will not conflict with the morality of civil government.

Whatever difficulties this might raise for a modern court trying to justify the standard church autonomy approach, this assumption reveals the extent to which

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\(^{201}\) Id., at *9.

\(^{202}\) Id.

\(^{203}\) Id. at *10.

\(^{204}\) Newport Church of Nazarene v. Hensley, 56 P.3d 386 (Or. 2002) (Title VII claim for sexual harassment not barred by autonomy considerations, because it is a neutral law of general applicability).


\(^{206}\) 98 U.S. 145 (1879).
autonomy doctrine has proceeded in a theological tradition—and has often done so unconsciously. First, the morality of the American legal system is in general accord with Biblical morality, and in practice, ecclesiastical disputes have arisen almost exclusively in the Christian context. As a result, the issue of conduct “rooted in religious belief” yet which is clearly not appropriate to ecclesiastical resolution (ritual rapes or torture, for instance), has never arisen. Second, the general ecumenical agreement that the power of the “sword” is assigned to civil government, not the church, has meant that churches have never claimed the power to punish violations of biblical morality with civil sanctions. As Calvin wrote:

[T]he church has not the right of the sword to punish or restrain, has no power to coerce, no prison nor other punishments which the magistrate is wont to inflict. . . [T]he church [does not] assume anything to herself which is proper to the magistrate, nor is the magistrate competent to what is done by the Church.  

Thus, the courts never needed to fear an expansive claim of church courts to take cognizance of felonies and similar serious offenses. Perhaps in this as much as anything else, the intimate connection between theology and the legal doctrine of autonomy is highlighted.

Even with the relatively neat approach the courts have generally been able to adopt, the decision to apply civil law despite a claim of church autonomy is rarely if ever clear-cut. It has been applied to uphold an order for a church to disclose information under a criminal subpoena, and to force a church to pay unemployment benefits because this is a secular law of general applicability. The general ministerial exception to Title VII employment claims was held to not bar a suit based on general social duties as it arose in a sexual harassment context. A church school could not exempt itself from a suit to recognize the teachers’ union. All of these representative cases appear to fit tolerably within the Reformation paradigm: the courts take jurisdiction over civil issues, unless an alleged civil offense relies on a doctrinal determination to prove its existence. There are cases that seem to overstep this bound—for

207. CALVIN, INSTITUTES, supra note 12, 4.11.3.
208. Calvin outlines the extent to which a church could be involved: it may use ecclesiastical sanctions—such as excommunication—to bring a criminal, who has already been punished by the civil authorities, to repentance. Id. at 4.11.3.
212. See supra, note 152.
215. For others, see Shields, supra note 121.
instance, a federal trial court upheld judicial cognizance of negligent supervision claims against a church despite the fact that supervisory negligence seems to implicate church polity.

The classic subject matter in this gray area of the boundaries of church and civil jurisdiction is church property disputes. An adequate analysis of the issues raised in church property disputes between autonomy considerations and “neutral principles” adjudication by the civil courts is beyond the scope of this paper. For our purposes, the key point is that even here at the limits of autonomy, the considerations the courts use are theologically grounded. The Supreme Court has introduced to this area of law “neutral principles” analysis in which the civil courts can adjudicate the property dispute under legal principles of general applicability, “so long as it involves no consideration of doctrinal matters.” This approach remains consonant with the autonomy of church governmental functions: it recognizes that churches do have a legitimate sphere of government where the civil courts cannot infringe.

We should no more expect easy distinctions on the borderlines of church-state jurisdiction than we would in the difficult questions of federalism. Two simultaneously operating legal systems inevitably lead to difficult questions about the proper bounds of their authority. In the difficult decisions of where to draw the lines, it is important to remember that the line-drawing act itself is part of our theological heritage.

IV. CONCLUSION

The notion of two kingdoms, church and state, as equals operating in distinct jurisdictions, is a theological concept with roots extending back almost three thousand years to the Old Testament. This doctrine was recognized in the church of antiquity and then received its most significant development (from an American perspective especially) in the Protestant Reformation. Reformation thought, and particularly Calvinistic thought, recognized church and state as institutionally separate entities—both under God, but neither usurping the administration of the other. We have seen that these principles are now embodied in the legal doctrine of church autonomy. The church autonomy doctrine has had its ups and downs and has not always been applied consistently. But the overall tenor of the decisions, and the philosophy that the autonomy doctrine embodies, remains strikingly consonant with the “two kingdoms”

theology from which it grew. And the doctrine retains as much vitality as ever, as evidenced by two recent decisions from state supreme courts. 219

The issue remains, as it always has, jurisdictional. Is the state omnicompetent? Or are there limits to the state’s reach? If there are limits, then it follows that there are jurisdictions other than the state. That there is such a multiplicity of jurisdictions follows from the Reformation belief that only God is sovereign and omnicompetent, and thus no human institution can be either omnicompetent or “sovereign” in an absolute sense. Personal liberty follows from this limit on human institutions. For these reasons, an understanding of church autonomy cases comes near to the very root of freedom. By understanding this, we can better appreciate the goals of church autonomy and its message of “spheres of sovereignty.” 220


IN LIGHT OF AHLBORN – DESIGNING STATE LEGISLATION TO PROTECT THE RECOVERY OF MEDICAID EXPENSES FROM PERSONAL INJURY SETTLEMENTS

Joseph D. Juenger*

I. INTRODUCTION

On May 1, 2006, the opinion of the Supreme Court of the United States in Arkansas Department of Health and Human Services v. Heidi Ahlborn1 marked a significant victory for the plaintiffs’ bar.2 According to the holding, where a State seeks to recover Medicaid expenditures from the settlement amount of a personal injury case, the State is entitled only to the portion of the settlement amount which correlates to the State’s payments for medical care.3 This interpretation of State and Federal Medicaid statutes – candidly referred to as “this nest of statutes” by Justice Breyer during oral arguments – will significantly impact personal injury settlements throughout the United States.4 In myriad personal injury cases, Ahlborn authorizes a larger net settlement award amount for the plaintiff, but at the expense of the States’ ability to recover Medicaid expenditures.5

Within the unanimous opinion of the Supreme Court, Justice Stevens expressly addressed the lawful scope of liens, assignments, and subrogation.6 Curiously, however, Justice Stevens did not re-establish the basic definitions and relationships of terms of art such as “lien,” “assignment,” and “subrogation” with respect to federal Medicaid legislation.7 This omission was inopportune for

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3. See Ahlborn, 547 U.S. at 275.
5. See Ahlborn, 547 U.S. at 274, 292 (reducing the amount of a $215,645 Medicaid lien to $35,581, thus resulting in a marginal benefit of over $180,000 for the personal injury victim); see also In re Zyprexa Prod. Liab. Litig., 451 F. Supp.2d 458, 469 (E.D.N.Y. 2006) (applying Ahlborn within the context of a multi-district, mass-tort product liability case); see also Lugo v. Beth Israel Med. Ctr., 819 N.Y.S.2d 892, 897 (Sup. 2006), 13 Misc.3d 681, 686 (N.Y. Sup. Ct. 2006) (contending that the effect of Ahlborn is highly fact-dependent).
6. See Ahlborn, 547 U.S. at 284-86.
7. Id.
two reasons. First, since the inception of the Federal Medicaid program, these terms of art have been utilized loosely and mischaracterized by practitioners, courts, and state legislators alike. Such mischaracterization has resulted in a convoluted settlement resolution process for Medicaid recipients. Second, Ahlborn involved competing interpretations of these terms within state and federal Medicaid statutes. For example, Justice Stevens asserted that forced assignments are a limited exception to the general anti-lien provision. Such a statement confounds distinct terms of art: an assignment is “the transfer of rights or property,” and such right becomes property of the transferee. In the context of the recovery of Medicaid expenditures, the state would not “need a lien on its own property.”

As a result of Ahlborn, personal injury practitioners and settling parties should anticipate the impact of forthcoming changes to state Medicaid statutes for several reasons. Foremost, several states’ legislation related to the recovery of Medicaid expenditures has now been preempted as a result of a more stringent, yet imprecise interpretation of Federal Medicaid statutes, and a void has been created in these states’ Medicaid legislation. Moreover, Ahlborn precluded a long-standing practice utilized by the states to recover Medicaid expenditures from third-party tortfeasors. Further, the purported “Ahlborn formula” may provide an opportunity for Medicaid recipients who are parties to personal injury settlements to “allocate away the State’s interest” related to Medicaid recovery “without judicial oversight or input from the State.”

10. Ahlborn, 547 U.S. at 284-85.
11. Id.
15. Id.
17. Ahlborn, 547 U.S. at 288.
18. Id. at 287; see Calvert v. Weiner, 2007 N.Y. Misc. LEXIS 6395 (N.Y. Misc. 2007) (denying a motion to vacate a Medicaid lien in the amount of $85,713.78 upon a settlement award of $2.5 million).
However, the states maintain one powerful arrow in their quiver: the ability to amend legislation to protect the states’ interests.19 Accordingly, on November 1, 2007, in light of the holding of Ahlborn and pursuant to federal guidance, Oklahoma enacted several statutes designed to protect the State’s recovery of Medicaid expenditures related to personal injury settlements.20 As a bellwether for other states, Oklahoma will attempt to effect legislation which prioritizes the payment of damages related to medical costs, assigns the right of recovery of particular medical expenses exclusively to the State, thus minimizing Medicaid costs to the State.21

For several reasons, however, this amended legislation is a poor template for other states. First, the state Medicaid legislation fails to simply mirror the requirements of Federal Medicaid legislation.22 Second, the legislation continues to cultivate the mischaracterization of legal terms of art, including “assignment,” “lien,” “chose,” and “subrogation.”23 Finally, the legislation purports to allow liens to be placed upon the settlements of Medicaid recipients, a convoluted and legally tenuous means of effecting the recovery of Medicaid expenditures from third-party tortfeasors.24

II. BACKGROUND

A. Ahlborn’s Injury, Medicaid Benefits, and Settlement

On Monday, January 2, 1996, Heidi Ahlborn, a nineteen year-old college student, was badly injured in an automobile accident.25 Ahlborn suffered

permanent brain damage and was unable to continue her college education.\textsuperscript{26} Medical bills accrued immediately, and the Arkansas Department of Human Services determined that Ahlborn was eligible to receive Medicaid benefits.\textsuperscript{27} In exchange for access to medical care, Arkansas law required the Medicaid recipient to “assign” rights to payments from the culpable party to the State.\textsuperscript{28} The state of Arkansas ultimately paid $215,645.30 on her behalf to medical providers.\textsuperscript{29}

In 1997, Ahlborn filed suit against two alleged tortfeasors, claiming damages related not only to medical expenses (for which she received Medicaid benefits), but also to permanent physical injury, future medical expenses, pain and suffering, and loss of earnings.\textsuperscript{30} No hearing ever occurred; Ahlborn ultimately settled the case in 2002 for $550,000.\textsuperscript{31} Although distinct injuries were defined in Ahlborn’s claim, the settlement amount was not expressly allocated amongst particular injuries.\textsuperscript{32} The State was not notified of the settlement, nor did the State participate in negotiations.\textsuperscript{33}

Later, Ahlborn and the State stipulated in agreement that Ahlborn’s claim was actually valued at $3,040,708.12.\textsuperscript{34} Ahlborn had settled for one-sixth of the value of the claim.\textsuperscript{35}

B. Arkansas’ Lien on the Settlement to Recover Medicaid Payments

Pursuant to state law and long-standing practice, the State then placed a statutory lien upon the plaintiff’s settlement amount in order to indirectly recover all Medicaid expenses from the third-party tortfeasor.\textsuperscript{36} Purportedly, this lien reflected the fruit of the student’s assignment of rights to the State\textsuperscript{37}; the State purported to effect the Medicaid recipient’s assignment by imposing a statutory lien in the amount of $215,645.30.\textsuperscript{38}

\begin{itemize}
  \item \textsuperscript{26} Id. at 274.
  \item Id.
  \item ARK. CODE ANN. § 20-77-307(a) (2007) (stating that “[a]s a condition of eligibility” for Medicaid, each applicant “shall automatically assign his or her right to any settlement, judgment, or award which may be obtained against any third party to [the Arkansas Department of Human Services] to the full extent of any amount which may be paid by Medicaid for the benefit of the applicant”).
  \item Id.
  \item Id. at 274.
  \item Id.
  \item Id.
  \item Id.
  \item Id.
  \item Id.
  \item Id.
  \item Id. at 274.
  \item See id.
  \item Id. at 286.
  \item Id. at 274 (stating that, in the absence of any express allocation of damages within the settlement, the Arkansas Department of Human Services asserted a lien upon the settlement in the full amount of the State’s payment of Medicaid benefits to Ahlborn, $215,645.30).
\end{itemize}
However, in order to retain a larger net settlement amount by reducing this lien, Heidi Ahlborn filed an action in the United States District Court for the Eastern District of Arkansas seeking declaratory judgment against the State.\textsuperscript{39} Ahlborn asserted that “satisfaction of the State’s lien requires payment out of proceeds meant to compensate the recipient for damages distinct from medical costs--like pain and suffering, lost wages, and loss of future earnings.”\textsuperscript{40} Thus, Ahlborn first argued that the actual value of the settlement was only one-sixth of the stipulated value of the claim, and therefore the actual lien should be only one-sixth of the full amount of the State’s payment of Medicaid benefits, $35,581.47.\textsuperscript{41} Second, Ahlborn argued that medical injuries constituted only a fraction of the total injuries.\textsuperscript{42} As a result, Ahlborn argued, the State should be entitled to recover only a fraction of a fraction of Medicaid expenditures via the lien.\textsuperscript{43}

Inattentively, however, Ahlborn neglected to argue that \textit{a lien of any amount} violated the general anti-lien provision of Federal Medicaid legislation.\textsuperscript{44} In the absence of a lien, the state owned merely an assignment.\textsuperscript{45} Per such right, the State might have had to exercise the right to recover directly against the tortfeasor.

\textit{C. The State and Federal Medicaid Statutory Framework}

Notably, the State and Federal Medicaid statutory framework, “this nest of statutes,” is Byzantine.\textsuperscript{46} According to Justice Stevens, the “crux of the parties’ dispute lies in their competing constructions of the federal Medicaid laws.”\textsuperscript{47} Such competing interpretations ultimately led to the preemption of State Medicaid statutes by Federal Medicaid statutes.

The Medicaid Program was created in 1965 per Title XIX of the Social Security Act and is thus a creature of federal legislation.\textsuperscript{48} Congress intended the Medicaid Program to be a “payor of last resort”\textsuperscript{49} “for individuals who cannot afford to pay their own medical costs.”\textsuperscript{50} The Medicaid program is funded both by the federal government and the participating states.\textsuperscript{51} All states voluntarily

\begin{itemize}
  \item \textsuperscript{39} See id.
  \item \textsuperscript{40} Id. at 272.
  \item \textsuperscript{41} Ark. Dep’t of Health and Human Services v. Ahlborn, 547 U.S. 268, 274 (2006).
  \item \textsuperscript{42} Id.
  \item \textsuperscript{43} See id.
  \item \textsuperscript{44} Id. at 284; see 42 U.S.C. § 1396p(b) (2007).
  \item \textsuperscript{45} Ahlborn, 547 U.S. at 284.
  \item \textsuperscript{47} Ahlborn, 547 U.S. at 275.
  \item \textsuperscript{48} 42 U.S.C. § 1396 (2007).
  \item \textsuperscript{49} S. Rep. No. 99-146, at 313 (1985).
  \item \textsuperscript{50} Ahlborn, 547 U.S. at 275.
  \item \textsuperscript{51} Id.
\end{itemize}
participate, and the federal government pays for 50-83% of each State’s costs of medical care.\textsuperscript{52} In exchange, federal legislation imposes several requirements upon the states, including an obligation whereby each state participating in the Medicaid Program must enact particular state legislation.\textsuperscript{53}

For example, the Federal Medicaid statute mandates:

A state Medicaid plan must provide that to the extent that payment has been made under the State plan for medical assistance in any case where a third party has a legal liability to make payment for such assistance, the State has in effect laws under which . . . the State is considered to have acquired the rights of such individual to payment by any other party for such health care items or services.\textsuperscript{54}

Federal statutes also mandate state statutes which require the plaintiff to assign to the State any rights “to payment for medical care from any third party” and to “cooperate with the state in obtaining support and payments.”\textsuperscript{55}

Thus, the Medicaid Program is also a creature of disparate state statutes.\textsuperscript{56} “[T]his nest of statutes” includes federal statutes which mandate state statutes as a condition of State participation, State statutes which in turn require an assignment of rights by the Medicaid recipient as a condition of participation, and unwarranted State statutes which purport to effect the assignment by the attachment of a lien.\textsuperscript{57}

In everyday practice, states meet the federal Medicaid requirements by imposing “third party liability” rules.\textsuperscript{58} To impose third party liability, state agencies must undertake at least one of two strategies, “cost avoidance” or “collections.”\textsuperscript{59} Cost avoidance strategies are proactive because, “the provider of services bills and collects from liable third parties before sending the claim to

\textsuperscript{52} Id.
\textsuperscript{54} Id.
\textsuperscript{55} Id.
\textsuperscript{56} 42 U.S.C. § 1396k(a)(1)(A) (2007) (requiring the state to enact laws to acquire rights for the payment of health care services); 42 U.S.C. § 1396k(a)(1)(C) (2007) (requiring the state to mandate cooperation in recovery from the Medicaid recipient).
\textsuperscript{57} See 42 U.S.C. § 1396a(a)(25)(H) (2007); see also Amicus Curiae Brief Of The States of Washington et al. In Support Of Petitioners at 1-2, Ark. Dep’t of Health and Human Services v. Ahlborn, 547 U.S. 268, 1 (2006) (No. 04-1506) (listing state Medicaid laws and asserting, “Within the parameters outlined in federal law, states have considerable discretion in structuring their Medicaid program, but are subject to ongoing oversight by CMS, which can impose sanctions if it determines that a state’s Medicaid program is not being administered consistent with the requirements of federal law.”).
\textsuperscript{59} Id.
Medicaid.” 60 The collections strategy, also referred to as the “pay and chase” strategy, is reactive. 61 Per this strategy, the government “pays the medical bills and then attempts to recover from liable third parties.” 62 According to the U.S. Solicitor General’s amicus brief in Ahlborn, “[i]n 2004, approximately $1.6 billion in third party liability payments were recovered nationwide.” 63

D. The Ahlborn Holding

The Supreme Court navigated the nest of Federal and State Medicaid statutes to reach a unanimous opinion: the State is “entitled only to that portion of the judgment that represented payments for medical care.” 64 The federal statute preempted the State statute which purported to assert that Arkansas may place a lien on a settlement “to the full extent of any amount which may be paid by Medicaid . . . .” 65 In contrast, the federal statute provides that a state may only place a lien for the value of “such health care items or services.” 66 If an amount of the settlement is expressly allocated to past medical costs for which a plaintiff received Medicaid benefits, and this amount is less or equal to the state’s expenditures for medical services, the state may recover this allocated amount only. 67 However, if no allocation is stipulated (as in Ahlborn), the State is entitled only to the fraction of the settlement amount which correlates to the State’s payments for medical care. 68

Thus, Ahlborn argued successfully that Arkansas State Medicaid statutes violated federal statutes, and the State statutes were preempted. 69 Moreover, the Supreme Court’s opinion in Ahlborn would apply across the states to maximize plaintiffs’ awards in personal injury settlements. 70

E. The Federal Government’s Response to the Ahlborn Holding

Even before Justice Stevens had issued the unanimous opinion of the Court, leading practitioners anticipated a state legislative response to Ahlborn and

60. Id.
61. Id.
62. Id.
67. Ahlborn, 547 U.S. at 282.
68. Id. at 275 (holding that the state of Arkansas could recover only one-sixth of its Medicaid expenditure, a difference of over $180,000 for the victim).
69. See U.S. Const. art VI, cl. 2 (enacting the Supremacy Clause, the basis for preemption).
70. Id.
warned of a short-lived, if not “Pyrrhic,” victory for the plaintiffs’ bar.71 For example, in his article entitled What Does the Ahlborn Decision Really Mean?, Matthew L. Garretson warns that “the Ahlborn decision leaves open the door for states to seek a political solution, including, perhaps, a change in the state statutory framework that may force a favorable allocation for the state.”72

To this end, on July 3, 2006, The Center for Medicare and Medicaid Services, an agency within the Federal Department of Health and Human Services, publicized a memorandum regarding “State Options for Recovery Against Liability Settlements In Light of U. S. Supreme Court Decision in Arkansas Department of Human Services v. Ahlborn.”73 Within the memorandum, the Federal Government – which had filed an amicus brief on behalf of the State of Arkansas to no avail – clarified the rules regarding the recovery of Medicaid expenditures in light of Ahlborn.74 The memorandum also reflects that, in Ahlborn, the Supreme Court “strongly noted that the States should become involved in the underlying tort litigation in order to influence the amount that is allocated in a settlement to medical items and services.”75 Most importantly, however, the memorandum provides federal advice to guide state legislators in drafting new State Medicaid statutes.76 For example, the memorandum suggests that the States may enact laws which provide for specific allocations of particular types of damages, such as a specific minimum allocation for past and future medical costs.77 The memorandum also suggests that the State may enact laws which give the State a priority right of recovery in tort actions.78 For example, the State may seek recovery of Medicaid expenditures prior to the time when the plaintiff, a Medicaid recipient, may seek a settlement for personal injury damages, or the payment of medical expenses may be given a statutory priority over payments for other types of damages such as damages for pain and suffering.79 In addition, it suggests that the States may enact laws which require a mandatory joinder of the State when a Medicaid lien may be at

72. Id.
73. Letter from Gale Arden, Director of The Centers for Medicare & Medicaid Services, to All Associate Regional Administrators for Medicaid and State Operations (July 3, 2006) (on file at http://www.nasmd.org/issues/docs/CMS_Advisory_Ahlborn_Settlement_Options_July%202006.doc).
75. Letter from Gale Arden to All Associate Regional Administrators for Medicaid and State Operations supra note 74, at 2.
76. Id. at 2–4.
77. Id. at 3.
78. Id.
79. Id.
Finally, the memorandum suggests that a State may enact laws to impose upon the Medicaid recipient a duty to notify the State of actions and settlements, a duty to cooperate with the Medicaid recovery efforts of the State, and approval by the State of personal injury settlements involving Medicaid recipients.

F. State Legislatures’ Responses to the Ahlborn Holding

State legislatures have followed the advice of the Supreme Court and The Center for Medicare and Medicaid Services. For example, during the 2007 Regular Legislative Session, the Commonwealth of Kentucky attempted to pass legislation which would require State approval of personal injury settlements from which the State has an interest in recovering Medicaid expenditures. The proposed legislation also would have provided the State a cause of action if a Medicaid recipient failed to notify the Commonwealth of a personal injury claim or failed to provide the Commonwealth with an ability to review and approve a settlement. Although the bill was not approved, the bill evinces the State’s concern with manipulation of the allocation of damages within settlement awards, whereby a settling party may allocate away damages related to medical costs and thus avoid recovery of Medicaid expenditures by the Commonwealth.

In addition, Oklahoma sought to preclude Medicaid recipients who are parties to personal injury settlements from “allocat(ing) away the state interests” related to Medicaid recovery “without judicial oversight or input from the State.” As a bellwether for other states, Oklahoma has successfully passed legislation designed to protect the State’s interest in the recovery of Medicaid expenditures. The amended state statute reflects that the State is “entitled only to that portion of the judgment that represented payments for medical care,” and purports to avoid preemption and comport to the holding of Ahlborn. By maintaining a requirement of notice of settlements in addition to an assignment of the right to recover from third-party tortfeasors, the State purports to maintain an ability to “become involved in the underlying tort

80. Id.
81. Letter from Gale Arden, Director of The Centers for Medicare & Medicaid Services, to All Associate Regional Administrators for Medicaid and State Operations (July 3, 2006) (on file at http://www.nasmd.org/issues/docs/CMS_Advisory_Ahlborn_Settlement_Options_July%202006.doc) at 3.
82. See 2007 Okla. Sess. Laws 74; H.R. 431, 2007 Reg. Sess. (Ky. 2007) (creating a cause of action where the Medicaid recipient does not provide the State prior notice and reasonable opportunity to review and approve a settlement agreement).
84. Id.
85. Id.
87. Id. at 287.
litigation in order to influence the amount that is allocated in a settlement to medical items and services.”\textsuperscript{90} According to the legislature’s stated intent, “only OHCA has the right to attempt recovery after it has paid for Medicaid services. Neither the recipient nor the provider has any right to further payment from any source for the services.”\textsuperscript{91}

\textbf{G. The Revised Oklahoma Medicaid Statute}

The State’s revised Medicaid recovery statute falls within Title 63, concerning “Public Health and Safety,” and Chapter 80, concerning “Health Care Services.”\textsuperscript{92} Upon enactment on November 1, 2007, the revised state Medicaid statute prescribes in relevant part (revisions per session law italicized):

\begin{itemize}
\item[$\S$ 5051.1.] Recovery from tortfeasors of amounts paid for medical expenses of injured and diseased persons--Liens or other legal actions

A. 1. The payment of medical expenses by the Oklahoma Health Care Authority for or on behalf of or the receipt of medical assistance by a person who has been injured or who has suffered a disease as a result of the negligence or act of another person creates a debt to the Authority, subject to recovery by legal action pursuant to this section. \textit{Damages for medical costs are considered a priority over all other damages and should be paid by the tortfeasor prior to other damages being allocated or paid}. \ldots

C. The recipient of medical assistance from the Authority for an injury or diseases who asserts a claim or maintains an action against another on account of the injury or disease, or the recipient’s legal representative, shall notify the Authority of the claim or action and of any judgment, settlement or compromise arising from the claim or action prior to the final judgment, settlement or compromise.

D. If the injured or diseased person asserts or maintains a claim against another person or tortfeasor on account of the injury or disease, the Authority:

\begin{enumerate}
\item Shall have a lien upon payment of the medical assistance to the extent of the amount so paid upon that part going or belonging to the injured or diseased person of any recovery or sum had or collected or to
\end{enumerate}

\begin{itemize}
\item \textsuperscript{90} Letter from Gale Arden, Director of The Centers for Medicare & Medicaid Services, to All Associate Regional Administrators for Medicaid and State Operations (July 3, 2006) (on file at http://www.nasmd.org/issues/docs/CMS_Advisory_Ahlborn_Settlement_Options_July%202006.doc) at 2.
\item \textsuperscript{92} 2007 Okla. Sess. Laws 74.
\end{itemize}
be collected by the injured or diseased person *up to the amount of the damages for the total medical expenses*, . . . .

The lien authorized by this subsection shall:

d. be applied and considered valid as to the entire settlement, after the claim of the attorney or attorneys for fees and costs, unless a more limited allocation of damages to medical expenses is shown by clear and convincing evidence;

§ 5051.2. Right to reimbursement for medical services--Assignment to Oklahoma Health Care Authority

A. Whenever the Oklahoma Health Care Authority pays for medical services or renders medical services, for or on behalf of a person who has been injured or suffered an illness or disease, the right of the provider of the services to reimbursement shall be automatically assigned to the Oklahoma Health Care Authority, upon notice to the insurer or other party obligated as a matter of law or agreement to reimburse the provider on behalf of the patient.

B. Upon the assignment, the Authority, for purposes of the claim for reimbursement, becomes a provider of medical services.  

III. ANALYSIS

A. Requirements Imposed upon States by Federal Medicaid Statutes

In order to determine whether the revised Oklahoma Medicaid statute comports with federal requirements, and in order to design defensible State Medicaid legislation in the future, the federal statutory requirements of the Medicaid program should first be enumerated. Per federal Medicaid statutes, the State Medicaid agency must:

Adopt a “State plan” which provides that, “as a condition of eligibility for medical assistance under the State plan . . . the individual is required to assign the State any rights . . . to payment for medical care from any third party”.

Have “in effect laws under which, to the extent that payment has been made under the State plan for medical assistance for health care items or services furnished to an individual, the State is considered to have

93. *Id.*

acquired the rights of such individual to payment by any other party for such health care items or services."; 95

“Take all reasonable measures to ascertain the legal liability of third parties”; 96

“Seek reimbursement for such assistance to the extent of such legal liability”; 97 and

Comport with the federal Medicaid statute’s general anti-lien provision. 98

Notably, the first two enumerated federal requirements merely require a State to adopt a plan and statute. The requirements are enabling, but no active enforcement of the plan or statute is expressly required. In contrast, the second two federal requirements expressly require enforcement action by the State. The State must ascertain the liability of third parties and seek reimbursement. This distinction between enactment and enforcement is important: while a State may be very well-equipped to enact legislation, the State may not be well-equipped to most efficiently enforce the legislation. 99

B. The Terms of Art of Federal Medicaid Requirements

The distinction between enactment and enforcement is also important in light of the juxtaposition between the broad terminology utilized throughout federal Medicaid legislation and the specific terminology within State legislation. The federal statutes require general State legislation and action; State Medicaid statutes more precisely describe the actual means by which the State will enforce federal legislation. 100 For example, federal legislation imposes a requirement of “assignment,” 101 a plan under which the State “acquired the rights” 102 of a Medicaid recipient as well as action to “seek reimbursement.” 103

In response, States’ varying Medicaid legislation seeks reimbursement via lien,

99. 42 U.S.C. § 1396a(a)(25)(B) (2007) (mandating that states seek reimbursement from third-party tortfeasors “where the amount of the reimbursement the State can reasonably expect to recover exceeds the costs of such recovery”). The costs of recovery are a function of the state’s efficiency. Thus, states should select the most efficient means of enforcement whether by a state agency or private organization in order to maximize recovery of Medicaid expenditures.
Confounding the interpretation of state statutes, certain terms of art – lien, assignment, and subrogation – are often used interchangeably in practice. For example, in some states, “[a]lthough a Medicaid claim against the proceeds of a settlement or judgment for a personal injury claim is sometimes referred to as a Medicaid ‘lien,’ it is more properly characterized as a claim based on assignment or subrogation”.

Liens, assignments, and rights of subrogation are three common methods by which the States seek to recoup Medicaid expenditures from settling parties and third-party tortfeasors. Black’s Law Dictionary provides universal and distinctive definitions for the terms. A “lien” is defined as “A legal right or interest that a creditor has in another’s property, lasting usu[ally] until a debt or duty that it secures is satisfied. 

Assignment” is simply “the transfer of rights or property.” In Ahlborn, the court observes that a state may receive either an assignment or a “chose in action.” A chose is “[p]ersonal property that one person owns but another person possesses, the owner being able to regain possession through a lawsuit.” Black’s defines “Subrogation” as “the substitution of one party for another whose debt the party pays, entitling the paying party to rights, remedies, or securities that would otherwise belong to the debtor.” In summary, a chose is one’s own property, and a lien is a right in another’s property. Assignment is a means to transfer the right to another, and subrogation is a means to transfer another to the right.

C. Federal Requirements: The General Anti-lien Provision

The distinction between liens, assignment, and subrogation is significant because the term “lien” holds a precarious place within federal Medicaid

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106. Id.


110. BLACK’S LAW DICTIONARY 258 (8th ed. 2004) (also referred to as a “thing in action.”).

111. BLACK’S LAW DICTIONARY 1467-68 (8th ed. 2004).

112. In Ahlborn, the Arkansas Medicaid statute asserted, “[a]s a condition of eligibility” for Medicaid, each applicant “shall automatically assign his or her right to any settlement, judgment, or award.” Ark. CODE ANN. § 20-77-307(a) (2007). Then, the state automatically placed a lien on any settlement in an amount equal to Medicaid’s costs. The lien represented the right; the assignment was the transfer of the right to the state. In Ahlborn, the assignment comported to Federal law; the lien violated federal law.
legislation. As a preliminary matter, the federal Medicaid statute’s general anti-lien provision prohibits States from imposing liens “against the property of any individual prior to his death on account of medical assistance paid . . . on his behalf under the State plan” pursuant to 42 U.S.C. § 1396p(a)(1).113 There are two possible interpretations of this general anti-lien provision. First, per dicta in Ahlborn, Justice Stevens wrote:

“Read literally and in isolation, the anti-lien prohibition contained in § 1396p(a) would appear to ban even a lien on that portion of the settlement proceeds that represents payments for medical care. Ahlborn does not ask us to go so far, though; she assumes that the State’s lien is consistent with federal law insofar as it encumbers proceeds designated as payments for medical care. Her argument, rather, is that the anti-lien provision precludes attachment or encumbrance of the remainder of the settlement.”114

Indeterminately, Justice Stevens continued, “Accordingly, we leave for another day the question of its impact on the analysis.”115

At first glance, it may be argued that the general anti-lien provision of the Federal Medicaid situation simply proscribes all liens related to Medicaid upon settlements. One practitioner in New York seems to express wonder that the anti-lien provision appears to have been overlooked by both legislators and practitioners since its inception:

New York State has long taken the same position as Arkansas, that it has a “lien” on any third-party recoveries where medical expenses have been paid by Medicaid. That New York believed it had a lien as opposed to a subrogation right, one only has to look to the title of Social Services Law § 104-b: “Liens for public assistance and care on claims and suits for personal injuries.” It would appear that the federal Medicaid Act’s “anti-lien” provision had escaped practitioners and legislative attention in New York and elsewhere, from its inception to the present.116

However, Ahlborn provided a sound basis for a contrary interpretation of the federal anti-lien provision. The federal Medicaid statute’s general anti-lien provision may be read within the broader context of the complete, undivided Federal Medicaid statutory framework; Per such reading, legislative intent may

113. 42 U.S.C. § 1396p(a) (2007) (excepting circumstances wherein “benefits were incorrectly paid, or the lien is imposed against the real property of a beneficiary who is a patient in a nursing facility or other medical institution, is required to pay all but a minimal amount of her income for the cost of her care, and is not reasonably expected to be discharged and return home”).
115. Id. at 284 n.13.
be extrapolated. 

Although the general anti-lien statute precludes liens, a separate federal statute which was enacted over a decade later in 1977, 42 U.S.C. § 1396k(a), prescribes that States must require Medicaid recipients to “assign the State any rights . . . to payment for medical care from any third party.” Notably, this provision expressly requires an assignment, not a lien. Further, 42 U.S.C. § 1396a(a)(25) requires State laws whereby the State acquires “the rights of such individual to payment by any other party for such health care items or services.” Again, this provision does not expressly require liens.

Arguably, however, imprecise federal legislators may have intended to allow liens as an alternative means to achieve the same effect as that of a forced assignment, thereby avoiding a right without a remedy where a claimant’s settlement already includes damages associated with Medicaid expenditures. At first glance, this argument appears suspect. Regardless of legislative intent, such a lien clearly appears to violate the federal anti-lien provision. Further, the State owns assigned rights, and may enforce these rights directly against the third-party tortfeasor; no lien appears to be necessary. However, where the settling party has already received a settlement amount which includes damages associated with Medicaid expenditures, the settling party has either improperly co-opted rights assigned to the state, or exercised a chose exclusively. The State must then protect assigned rights by proceeding directly against the settling party. In order to associate a remedy with the State’s right, the State might assert a lien, a legal right or interest that the State has in the settling party’s property, lasting until the settling party reimburses the State for the misappropriated assignment. Although logical, this interpretation of Federal Medicaid statutes is convoluted, and the process may or may not be defensible in light of the federal anti-lien provisions.

Nonetheless, the revised State Medicaid statutes of Oklahoma reflect this interpretation that 42 U.S.C. § 1396a(a)(25) and 42 U.S.C. § 1396k(a)(1)(A)
establish limited exceptions to the general anti-lien provision. Per session law, Oklahoma expressly seeks to continue to employ liens to recover Medicaid expenditures from third-party tortfeasors. For example, Oklahoma Statute, title 63 § 5051.1 is still entitled “Recovery from tortfeasors of amounts paid for medical expenses of injured and diseased persons—Liens or other legal actions.” Further, Section 5051.1(D) asserts that the State:

\[
\text{Shall have a lien upon payment of the medical assistance to the extent of . . . of any recovery or sum had or collected or to be collected by the injured or diseased person up to the amount of the damages for the total medical expenses, . . .}
\]

Oklahoma will likely continue to assert liens even in light of the federal general anti-lien provision. Oklahoma seemingly takes the stance that liens “up to the amount of the damages for total medical expenses” fall within the “exception carved out by §§1396a(a)(25) and 1396k(a)” but are “limited to payments for medical care.” Per Justice Stevens, “Beyond that, the anti-lien provision applies.”

D. Federal Requirements: Assignment and the Acquisition of Rights

In light of the Federal Medicaid statute’s general anti-lien provision and the challenge of extrapolating legislative intent, several States do not purport to impose a “lien” in order to recover Medicaid expenditures from third-party tortfeasors.

Alternatively, such States comply with the federal requirement to adopt a “State plan” which provides that, “as a condition of eligibility for medical assistance under the State plan . . . the individual is required to assign the State any rights . . . to payment for medical care from any third party.” States must also have “in effect laws under which, to the extent that payment has been made under the State plan for medical assistance for health care items or services furnished to an individual, the State is considered to have acquired the rights of such individual to payment by any other party for such health care items or services.” Thus, States must adopt a plan and codify assignment.

128. Id. (emphasis added).
131. Id. at 285.
132. Id.
Accordingly, States may seek reimbursement by directly asserting the assigned rights or chose in action against the third-party tortfeasor, as opposed to imposing a lien against a Medicaid recipient. In *Ahlborn*, the Supreme Court expressly approves of the use of assignment, holding:

There is no question that the State can require an assignment of the right, or chose in action, to receive payments for medical care. So much is expressly provided for by §§ 1396a(a)(25) and 1396k(a). And we assume, as do the parties, that the State can also demand as a condition of Medicaid eligibility that the recipient 'assign' in advance any payments that may constitute reimbursement for medical costs. To the extent that the forced assignment is expressly authorized by the terms of §§ 1396a(a)(25) and 1396k(a), it is an exception to the anti-lien provision.135

According to Oklahoma’s revised Medicaid statutes, Oklahoma seeks an assignment in addition to the imposition of a lien. Oklahoma Statute, title 63 § 5051.2 is entitled, “Right to reimbursement for medical services--Assignment to Oklahoma Health Care Authority.”136 The section mandates, “the right of the provider of the services to reimbursement shall be automatically assigned to the Oklahoma Health Care Authority, upon notice to the insurer or other party obligated as a matter of law or agreement to reimburse the provider on behalf of the patient.”137 According to the legislature’s stated intent, “only OHCA has the right to attempt recovery after it has paid for Medicaid services. Neither the recipient nor the provider has any right to further payment from any source for the services.”138 One Oklahoma legislator concludes, “Oklahoma statutes create both a right of subrogation and assignment rights in OHCA.”139

Other State legislatures seek to comport with federal requirements by employing the term “assignment” and omitting the term “lien” within the State Medicaid statutes. For example, unlike the Arkansas and Oklahoma statutes, North Carolina State Medicaid statutes do not characterize the State’s claim as a lien.140 North Carolina’s State statutes reflect that “(a)ccptance of medical assistance constitutes assignment to the State of (the) right to third party benefits.”141 The Medicaid recipient, “correspondingly, is divested of her

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137. Id.
139. See id.
interest in the claim and may not bring a legal action on the claim against the
debtor or third party.” 142 According to the statute, the State should take legal
action against the third-party tortfeasor directly. 143

In addition to assignment, the North Carolina statutory framework also
employs subrogation. 144 Subrogation, “the substitution of one party for another,”
is commonly employed by private health insurers to recoup expenditures from
third-party tortfeasors. 145 The purpose of subrogation in the insurance context is
to “prevent a windfall double recovery by the insured.” 146 “Without subrogation
the insured could potentially recover twice for the same loss--first from his
insurance company through the insurance proceeds and again by suing the
tortfeasor.” 147 Analogous to a private insurer, the State of North Carolina applies
subrogation to recoup Medicaid expenditures from third-party tortfeasors. 148
Further, the States’ contractual subrogation right is assigned as a condition of the
receipt of Medicaid benefits. 149 In practice, however, North Carolina purports to
enforce a right of subrogation by imposing a lien upon the Medicaid recipient. 150

Notably, subrogation within the insurance context is often limited by the
“made whole” doctrine. This doctrine states that “the right of equitable
subrogation only arises ‘if the amount received in compensation by the plaintiff
[from plaintiff’s insurer and the tortfeasor] exceeds the plaintiff’s amount of
loss.’” 151 However, in Ahlborn, the plaintiff was not made whole by the
settlement; Heidi Ahlborn settled for only one-sixth of the true value of her
losses. 152 Although the issue was not addressed in Ahlborn, States which require
the plaintiff to be “made whole” prior to subrogation may be challenged where

142. Saxon, supra note 142, at 7.
(refusing to limit a lien purportedly resulting from subrogation to medical expenses); see also John
L. Saxon, supra note 142, at 11 (contending that the Ezell holding is unlawful).
144. See N.C. GEN. STAT. § 108A-57 (2007); see also John L. Saxon, supra note 142, at 5
(articulating that “r(e)ad literally and in isolation, therefore, G.S. 108A-57 appears to create a broad
right of subrogation that may be asserted with respect to all Medicaid payments made on behalf of
a Medicaid beneficiary . . . regardless of whether a third party would have been liable to the
beneficiary for by Medicaid . . . and against any right of recovery the Medicaid beneficiary might
have against a third party . . . regardless of whether the third party’s liability involves payment of
the medical care that was covered by Medicaid.”).
145. BLACK’S LAW DICTIONARY 1467 (8th ed. 2004).
146. Melissa A. Perry, Comment: Is the Made-Whole Requirement More than We Bargained
For?: From Franklin to Tallant--a Call to Reexamine the Made-Whole Doctrine in Arkansas, 60
147. Id.
(N.C. 2006), (improperly asserting and justifying a statutory lien upon reasoning, “Our cases have
consistently rejected attempts by plaintiffs to characterize portions of settlements as being for
medical bills or for pain and suffering in order to circumvent DMA’s statutory lien.”)
151. Perry, supra note 148, at 297-98 (quoting Powell v. Blue Cross & Shield of Ala., 581
So.2d 772, 778).
the plaintiff’s loss exceeds the settlement amount in addition to the amount of Medicaid payments.

Overall, North Carolina’s statutory approach should be favored over that of Oklahoma for several reasons. First, the statute avoids preemption by the federal anti-lien provision; no lien is placed on any portion of the settlement. Second, the language of the legislation more simply mirrors the mandate of federal statutes. Finally, where the State reserves the right to take legal action directly against the third-party tortfeasor, “the States should become involved in the underlying tort litigation.”

To conclude a discussion of statutory terminology, it may be argued that a distinction between the terms “lien,” “assignment,” and “subrogation” within the context of State and Federal Medicaid statutes is a “distinction without a practical difference for purposes of calculating a fair reduction” of a Medicaid recipient’s settlement amount. From an economic standpoint, one could argue that the same result is reached whether the state employs a lien, an assignment, or subrogation; the reduction in the Medicaid Recipient’s settlement amount should be equal regardless of whether the reimbursement is recovered via lien, assignment, or subrogation. Thus, substance and not form might control.

However, such approach is ill-advised. In order to predictably and reliably navigate this “nest of statutes,” form must control over substance, and the terminology within statutes must be more strictly construed. Moreover, in order to provide for more efficient resolutions of personal injury settlements, State legislators and practitioners must avoid mischaracterizing terms of art, and the parties and property rights associated with liens, assignments, and subrogation should be particularly identified.

E. Federal Requirements: Ascertain the Legal Liability of Third Parties

In addition to mandating a State plan and state statutes which impose forced assignments, the Federal Medicaid legislation also requires State enforcement action. Per 42 U.S.C. § 1396a(a)(25)(A), the State must “take all reasonable

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155. See id.
measures to ascertain the legal liability of third parties . . . to pay for care and services available under the plan.\textsuperscript{159}

In response, Oklahoma seeks to ascertain the legal liability of third parties by requiring parties to a settlement to provide notice to the State prior to settlement. Oklahoma Statute, title 63 § 5051.1 prescribes, “The recipient of medical assistance . . . shall notify the Authority of the claim or action and of any judgment, settlement or compromise arising from the claim or action prior to the final judgment, settlement or compromise.”\textsuperscript{160}

Upon receipt of notice of a settlement between a Medicaid recipient and a third-party tortfeasor, however, the State has not “ascertained(ed) the legal liability of third parties” to the State.\textsuperscript{161} The State has merely ascertained the existence of a settlement, the theoretical market value of the claim. The State must go one step further; the State must ascertain legal liability of the tortfeasors to pay “for such health care items or services.”\textsuperscript{162} Thus, the State must allocate the settlement amount into at least two categories: damages for Medicaid-provided health care items or services, and all other damages such as pain and suffering or lost income.

\textbf{F. The Allocation and Prioritization of Damages}

According to \textit{Ahlborn}, if a “jury or judge allocated a sum for medical payments . . . the agency would be entitled to reimburse itself only from the portion so allocated.”\textsuperscript{163} However, where no allocation of damages is expressly set forth, the States must establish rules and procedures in order to “seek reimbursement.”\textsuperscript{164} Furthermore, the States must prevent express allocations wherein settling parties allocate away damages related to medical costs, thereby escaping Medicaid reimbursement and maximizing net settlement amounts.\textsuperscript{165}

States may avoid unfair allocations of damages by several means. As a preliminary measure, States may require parties to a settlement to provide notice to the State prior to settlement. Upon notice, the State may make a non-judicial determination regarding the existence and fairness of the damage allocation within the settlement. If the State feels that Medicaid reimbursement interests

\begin{itemize}
  \item\textsuperscript{160} 42 U.S.C. § 1396a(a)(25)(A) (2007) (\textit{emphasis added}).
  \item\textsuperscript{161} 2007 Okla. Sess. Laws 74 (adding redundantly, “A Medicaid recipient must notify the Authority prior to a compromise or settlement against a third party in which the Authority has provided or has become obligated to provide medical assistance”).
  \item\textsuperscript{163} \textit{Ark. Dep’t of Health and Human Services v. Ahlborn}, 547 U.S. 268, 282 n.12 (2006).
  \item\textsuperscript{165} \textit{Ahlborn}, 547 U.S. at 288 (reflecting the State’s concern with the Medicaid recipient “allocating away” the State’s interest).
\end{itemize}
have been unfairly allocated away by the settling parties, the State may require an allocation hearing.

In *Lugo v. Beth Israel Medical Center*., the Supreme Court of New York County noted that several States “already have well-developed procedures in place for allocating the proceeds from a tort settlement.” For example, Minnesota may employ a “Henning hearing” to allocate settlement proceeds amongst categories of damages. Wisconsin employs a “Rimes hearing”, a post-settlement mini-trial. New York now employs a “Lugo Hearing” to provide both state and settling parties a meaningful opportunity to be heard in regards to damage allocation.

In *Lugo*, the State asserted that it was inconceivable that a $3,500,000 personal injury settlement did not include past medical expenses equal to the full $47,349.58 Medicaid lien amount. In defense, the Medicaid recipient argued that, according to a purportedly precise formula within the dicta of *Ahlborn*, the lien amount must be reduced by the ratio of the settlement amount to the value of the claim (the lien would be reduced by approximately half of the lien value). In this case, the New York court held that no precise *Ahlborn* formula exists, and that *Ahlborn* allocations are fact-sensitive. Such *Ahlborn* allocation hearings may be required to meet the federal requirement to “take all reasonable measures to ascertain the legal liability of third parties.”

In addition, the memorandum by the Centers for Medicare and Medicaid Services suggests that a State may enact laws which give the State a priority right of recovery in tort actions. For example, the state may seek recovery of Medicaid expenditures prior to the time when the plaintiff, a Medicaid recipient, may seek a settlement for personal injury damages, or the payment of medical expenses may be given a statutory priority over payments for other types of damages, such as damages for pain and suffering.

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170. *Id.* at 894.
171. *Id.* at 897-98 (holding, “A court determination is necessary to confirm the full value of the case and the value of the various items of damages, including plaintiff’s injuries and how they compare to verdicts awarded in other cases. The parties are also entitled to be heard on the fair allocation of the settlement proceeds.”); *See also also In re Zyprexa Prod. Liab. Litig.*, 451 F. Supp.2d 458 (E.D.N.Y. 2006) (reflecting innovative applications of allocation hearings in the mass-tort context.).
173. Letter from Gale Arden, Director of The Centers for Medicare & Medicaid Services, to All Associate Regional Administrators for Medicaid and State Operations (July 3, 2006) (on file at http://www.nasmd.org/issues/docs/CMS_Advisory_Ahlborn_Settlement_Options_July%202006.doc) at 3.
174. *Id.*
Oklahoma’s revised State Medicaid statutes reflect this advice. Oklahoma Statute, title 63 § 5051.1(A)(1) states in part, “Damages for medical costs are considered a priority over all other damages and should be paid by the tortfeasor prior to other damages being allocated or paid.” Further, Oklahoma Statute title 63 § 5051.1(D)(1)(d) asserts that the State’s lien shall “be applied and considered valid as to the entire settlement, after the claim of the attorney or attorneys for fees and costs, unless a more limited allocation of damages to medical expenses is shown by clear and convincing evidence.” Thus, to protect the State’s interest in reimbursement, the statute encourages settling parties to not only allocate damages amongst categories, but also to show clear and convincing evidence of an allocation for medical expenses, lest the State assert a tenuously defensible lien upon the entire settlement.

Allocation and prioritization of damages have long been governed by State common law. For example, State law governs the allocation of damages per joint tortfeasors, as well as the allocation of damages per contributory and comparative negligence. Further, case law supports the lawful prioritization of the payment of types of damages. For example, in one multidistrict asbestos litigation case, the federal court noted, “It is responsible public policy to give priority to compensatory claims over exemplary punitive damage windfalls.” Analogously, it is responsible public policy to prioritize damages in order to protect State Medicaid programs from inequitable damage allocations.

G. Federal Requirements: Seek Reimbursement

Finally, Federal Medicaid statutes imprecisely require the States to “seek reimbursement for such [Medicaid] assistance to the extent of such legal liability.” Beyond passing legislation to create an assignment of recovery rights to the State, the State may actually enforce the assignment per several means. First, the CMS memorandum suggests that the States may enact laws which require a mandatory joinder of the State when a Medicaid lien may be at issue. Thus, the State may become a party to the litigation and settlement. The revised Medicaid statute in the State of Oklahoma does not reflect this strategy.

In addition, the State may require an assignment by the Medicaid recipient of all rights of recovery of Medicaid expenses exclusively to the State, and thus

180. Letter from Gale Arden to All Associate Regional Administrators for Medicaid and State Operations (July 3, 2006) (on file at http://www.nasmd.org/issues/docs/CMS_Advisory_Ahlborn_Settlement_Options_July%202006.doc) at 3.
181. Id.
avoid concerns regarding the misallocation of damages. The State may then straightforwardly exercise the State’s exclusive right directly against the tortfeasor. Although Oklahoma purports to enact this strategy, this effort is confounded. An assignment of the right to recovery provides to the State an exclusive right of recovery, but only if all parties agree that the right is singular, all-inclusive, and indivisible.

Where the State does not have resources necessary to enforce the assigned rights to recover Medicaid expenditures, the State may employ an objective third party organization to represent the State. Analogous to traditional “debt collection” practices, the State might adopt a recovery model whereby the State sells the Medicaid recipient’s assigned rights to a private firm. The firm then may manage enforcement of the assigned rights against third-party tortfeasors or Medicaid recipients (thereby side-stepping some Ahlborn problems with States’ liens, and freeing State resources), and maximizing cost-efficient recoveries by the States.

III. CONCLUSION

As a result of Ahlborn, State Medicaid legislation has been preempted, and a void has been created in State Medicaid statutes. Ahlborn now authorizes the plaintiffs’ bar to increase Medicaid recipients’ net personal injury settlement amounts in myriad cases, but only at the expense of the states ability to recover Medicaid expenses from third-party tortfeasors. Ultimately, such expense is incurred by taxpayers and may affect the availability of Medicaid to persons in need. Further, as awareness and understanding of the holding in Ahlborn proliferates amongst personal injury practitioners, states may find an increasing fraction of claims to reimbursement indefensible.

In response, states such as Oklahoma have begun to revise State Medicaid legislation in order to protect the recovery of Medicaid expenditures from third-party tortfeasors. Oklahoma’s amended State Medicaid legislation, however, reflects a halfhearted effort to protect the recovery of Medicaid expenditures

183. Letter from Gale Arden to All Associate Regional Administrators for Medicaid and State Operations, supra note 182, at 3.
184. Id.
186. Letter from Gale Arden to All Associate Regional Administrators for Medicaid and State Operations, supra note 182, at 3.
187. Id.
188. Id.
190. Amicus Curiae Brief Of The States of Washington et al. In Support Of Petitioners at 5-6, Ark. Dep’t of Health and Human Services v. Ahlborn, 547 U.S. 268 (2006) (No. 04-1506) (pleading that “reduction in recoveries that results from the Eighth Circuit’s decision will in turn reduce the financial resources available to the states to provide medical assistance to their citizens, or require that states divert their finite resources from other worthwhile public purposes to make up the difference).
from personal injury settlements, and the amended statute provides a poor template for other states. Unlike Oklahoma, states should be more attentive to the use of terms of art within State and federal legislation. Although liens, assignments, and subrogation have long been mischaracterized within the context of Medicaid recovery, the terms are not interchangeable in light of federal restrictions. In Ahlborn, the court implicitly distinguished the terms, and such distinction constituted a basis for preemption. Further, the particular terms of art employed in revised legislation will inevitably serve to guide the process by which the state maximizes the recovery of Medicaid expenditures from personal injury settlements.

In the future, a more careful distinction between liens, assignments, and subrogation in amended State legislature may provide a more defensible foundation for states’ recoveries of Medicaid expenditures and ultimately increased availability of medical care for low-income citizens.
PLACING THROUGH HOOPS – RESPONDEAT SUPERIOR IN § 1962(C) RICO SUITS

Matthew D. Hemmer

I. INTRODUCTION

Suppose that auto repairs performed at a car dealership had been fraudulently characterized as “under warranty work.” The false characterization induced the manufacturer to pay the costs of repair rather than the car owners. These representations were made through forms completed by a handful of sales associates and submitted by the car dealership to the manufacturer. The sales associates have developed a loyal group of repeat customers who enjoy the favorable treatment they have received. From the perspective of the sales associates, the dealership is selling more cars and the customers are happy. Everyone wins, except for the defrauded manufacturer. The manufacturer may file a lawsuit for each time it was defrauded. Additionally, because an employee of the dealership committed the fraud while acting within the scope of employment, the manufacturer may also hold the car dealership vicariously liable in the lawsuit.

In addition to suing on the basis of each instance of fraud, the manufacturer could characterize the sales associates’ conduct as a pattern of racketeering and initiate a lawsuit under the Racketeer Influenced and Corrupt Organizations Act1 (“RICO”). It is advantageous for the manufacturer to characterize the sales associates’ conduct as a pattern of racketeering, rather than multiple instances of fraud, because the RICO action awards triple damages,2 attorney’s fees,3 and permits a choice of federal or state forums.4 An employee who conducts the affairs of an enterprise, such as the car dealership, through a pattern of racketeering acts that affect interstate commerce is liable under § 1962(c) of the RICO Act.5 Racketeering is not a single discrete activity, but a wide variety of culpable conduct. In the context of legitimate business operations, racketeering

2. “[A]ny person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains…” Holmes v. Sec. Investor Prot. Corp., 503 U.S. 258, 265 (1992) (citing 18 U.S.C. § 1964(c)) (noting that while the statute makes no mention of it, proximate and but-for causation are required).
3. Regions Bank v. J.R. Oil Co., 387 F.3d 721, 728 (8th Cir. 2004) (citing 18 U.S.C. § 1964(c) and noting that, just as with the treble damages, traditional causation is required).
acts committed by employees often involve fraud, such as insurance agents who employ fraudulent methods to increase sales,6 employees of a car dealership who commit mail fraud when mischaracterizing repair work as “under warranty,”7 and investment advisors who repeatedly violate securities laws during their employment with a brokerage company.8

The cause of action chosen by the plaintiff will affect who may be sued. Though the car dealership may be held vicariously liable for the sales associates’ individual frauds, the business may be immune from RICO consequences. Courts disagree on two points of law that are essential to holding the car dealership liable under § 1962(c) of the RICO Act. First, courts differ as to whether an employee who commits racketeering acts within the scope of his employment can be separate from a business that employs him. To pursue any claim under § 1962(c) of the RICO Act, the plaintiff must identify an enterprise that is distinct from the racketeer.9 Courts disagree as to the level of distinction that is required.10 For any RICO action to succeed, the sales associates must be distinct from their employer’s business, the dealership, even when acting within the scope of their employment. Second, respondeat superior is not universally available in § 1962(c) RICO actions.11 A § 1962(c) action may only be directed against the employee-racketeer.12 While a plaintiff may hold an employer, such as the car dealership, vicariously liable in a lawsuit premised on the individual

6. Davis v. Mut. Life Ins. Co. of N.Y., 6 F.3d 367 (6th Cir. 1993) (life insurance policy holders filed suit against two insurance companies where the common agent used fraudulent means to sell policies).
7. Jaguar Cars, Inc. v. Royal Oaks Motor Car Co., 46 F.3d 258 (3rd Cir. 1995) (employees of a car dealership performed non-warranty repair work, and then mischaracterized the expenses as work incurred pursuant to a warranty agreement).
8. Brady v. Dairy Fresh Prods. Co., 974 F.2d 1149 (9th Cir. 1992) (violation of federal securities laws by investment advisors, who acted without any company policy instructing them to do so).
9. “Under RICO, an ‘enterprise’ is a ‘being different from, not the same as or part of, the person whose behavior the act was designed to prohibit.’” Sever v. Alaska Pulp Corp., 978 F.2d 1529, 1533 (9th Cir. 1992) (quoting Rae v. Union Bank, 725 F.2d 478, 481 (9th Cir. 1984) (quoting United States v. Computer Scis. Corp., 689 F.2d 1181, 1190 (4th Cir. 1982)). See also Sogecable, SA v. NDS Group PLC, No. 04-56990, 2006 WL 3698713 (9th Cir. Dec. 13, 2006) (district court held that plaintiff failed to plead an enterprise that was distinct from the RICO person, but appellate court reversed, finding a distinct RICO enterprise pleaded if viewed in a light most favorable to plaintiffs).
10. Compare Panix Promotions, Ltd. v. Lewis, No. 01 CIV. 2709(HB), 2002 WL 122302 (S.D.N.Y. Jan. 22, 2002) (complete distinction); with Jaguar Cars, 46 F.3d 258 (only partial distinction is required).
11. Compare Tryco Trucking Co., v. Belk Stores Servs, Inc. 634 F.Supp. 1327 (W.D.N.C. 1986) (vicarious liability permitted under RICO); with Schofield v. First Commodity Corp. of Boston, 793 F.2d 28 (1st Cir. 1986) (§ 1962(c) does not give rise to respondeat superior liability).
frauds, courts disagree as to whether vicarious liability is appropriate in the RICO context. Thus, in jurisdictions where respondeat superior is not available, the enterprise can not be held liable, even after adequate distinction is shown.

These inconsistencies must be resolved to permit an injured plaintiff to file a § 1962(c) RICO suit against a vicariously liable employer. First, the sales associates are sufficiently distinct from the dealership employing them. Prior holdings of the Supreme Court have established that § 1962(c) applies to employees acting within the scope of their employment, and legitimate business firms employing those individuals may be labeled as the RICO enterprise. Second, respondeat superior is appropriate and the dealership should be held vicariously liable. Enterprises are liable under the RICO Act in many contexts, and § 1962(c) should not be treated differently. In jurisdictions where vicarious liability is denied, there is an incentive to mischaracterize the RICO enterprise and plead a convoluted associated-in-fact enterprise with many extraneous entities rather than an accurate and concise statement of the facts. Respondeat superior principles translate well into the RICO framework and should be applied against a firm engaging in legitimate business that employs racketeers.

II. BACKGROUND LAW

A federal statute may identify behavior or activity that, when committed, permits an individual to seek recovery through a tort action. Any person that commits the wrongful actions specified in the statute is directly liable to the plaintiff, and is called the tortfeasor. Third parties related to the tortfeasor, such as employers, may also be held accountable under principles of vicarious liability. Section 1962(c) of the RICO Act places direct liability on an employee who carries on the business of a RICO enterprise through a pattern of racketeering activities.

13. RESTATEMENT (SECOND) OF AGENCY § 228 (1958) (noting the principles of direct liability and respondeat superior principles). Compare Mary M. v. City of Los Angeles, 814 P.2d 1341 (Cal. 1991) (holding that a public entity can be held liable for actions of its employee under respondeat superior) with Maniaci v. Georgetown Univ., 510 F.Supp.2d 50 (D.D.C. 2007) (noting that respondeat superior is not always applicable in the public employment context).

14. See Miller v. Yokohama Tire Corp., 358 F.3d 616 (9th Cir. 2004) (refusing to permit vicarious liability, and noting that the § 1962(c) action is directed against the employee). See generally 77 C.J.S. RICO § 8 (2006) (discussing the availability of respondeat superior in § 1962(c) actions).


17. Chee v. Amanda Goldt Prop. Mgmt., 50 Cal. Rptr. 3d 40, 52 (2006) (noting that vicarious liability is liability for another based on a relationship, not on any conduct that the vicariously liable person has engaged in).

single legal entity, such as a legitimate business or firm, or proving that multiple individuals are associated-in-fact.19

A. Direct liability imposed by federal statutes

In response to an injury suffered by the conduct identified in § 1962(c) of the RICO Act, a plaintiff may file a lawsuit against the employee-racketeer. Statutory materials20 may define wrongful conduct that gives rise to liability in tort; this right to file suit is called a private right of action.21 Federal statutes may create express or implied private rights of action22 to file suit in federal23 or state24 court. A private right of action exists when Congress intended to create a right and provide a remedy for violations,25 and places direct liability on the tortfeasor and vicarious liability on other related parties. Direct liability indicates that the party has engaged in culpable conduct – in this case the behavior identified by that statute. Many statutes, including the RICO Act, identify culpable conduct and a specific remedy, which creates an express right of action.26

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20. “Statutory materials” are not limited to legislative materials; administrative decisions, local ordinances, and constitutions can also create tort causes of action in the same manner. See Hargis v. Baize, 168 S.W.3d 36 (Ky. 2005) (violations of administrative regulations); Zimmerman v. St. Peter’s Catholic Church, 622 N.E.2d 1184 (Ohio Ct. App. 1993) (a variety of materials including administrative decisions and local ordinances can create tort liability).
22. Touche Ross & Co. v. Redington, 442 U.S. 560 (1979) (whether a statute creates an express or implied right of action requires examination of the wording of the statute and congress’ intent). Note that while statutes may create private rights of action, they may also be consulted for determining the level of ordinary care in negligence actions. See Whaley v. Perkins, 197 S.W.3d 665, 673 (Tenn. 2006) “Thus, the courts must ultimately decide whether they will adopt a statutory standard to define the standard of conduct of reasonable persons in specific circumstances.” (quoting Rains v. Bend of the River, 124 S.W.3d 580, 591 (Tenn. Ct. App. 2003)).
24. First Capital Mortg. Corp. v. Union Fed. Bank of Indianapolis, 872 N.E.2d 84 (Ill. App. Ct. 2007) (There is concurrent jurisdiction in state and federal courts to sue based on a private right of action created by federal statute. The Constitution’s Supremacy Clause, Article 6, clause 2, makes federal law supreme in each of the state courts as well.).
25. “The judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy.” Alexander v. Sandoval, 532 U.S. 275, 286 (2001) (citing Transamerica Mortg. Advisors, Inc. v. Lewis, 444 U.S. 11, 15 (1979)).
26. Haw. Disability Rights Ctr. v. Cheung, 513 F.Supp.2d 1185, 1194 (D. Hawaii 2007) (Express private right of action found after examination of the statute and its supporting regulations yielded language that plainly stated a right was created and that violation of that right would permit the injured party to “pursue legal, administrative, and other appropriate remedies….”) (referencing 42 U.S.C. §§ 15043(a)(2)(A)(i), (a)(2)(B) (2000)).
When the statute does not explicitly include an express right of action, courts engage in a multifactor analysis of the statute, related statutes, supporting regulations, legislative history, and general principles of law to determine whether Congress implicitly created such a right.\footnote{27} Congressional intent is the determining factor.\footnote{28} While courts interpret statutes, no court can create or expand a statutory right of action where Congress did not intend to do so.\footnote{29} Thus, no court can expand the RICO Act beyond what the legislature intended.

Section 1962(c) of the RICO statute only allows a private right of action directly against the employee.\footnote{30} Direct liability cannot be imposed on other parties without congressional action. Therefore in the case of the car dealership, because the action is committed by the sales associates, and the RICO private right of action may not be expanded to hold employers directly liable, any § 1962(c) suit against the car dealership must be premised on vicarious liability.

**B. Respondeat Superior**

In contrast to direct liability, which requires a defendant to have committed a wrongful act or omission,\footnote{31} vicarious liability is applied in response to a third party’s tortious acts, regardless of whether the defendant was at fault,\footnote{32} or acted to prevent the injury from occurring.\footnote{33} Vicarious liability is imposed due to a relationship between the tortfeasor who committed the wrongful conduct and the defendant.\footnote{34} In cases where the defendant was not individually negligent,

\begin{itemize}
\item \footnote{27} Four factors should be examined: whether “(1) the plaintiff is part of the class ‘for whose especial benefit the statute was enacted,’ (2) Congress intended, explicitly or implicitly, to create a private remedy for the plaintiff, (3) the underlying scheme of the statute comports with such a private right and remedy, and (4) the cause of action is one that traditionally is relegated to state law, as a concern of the states, and, thus, would be inappropriate for federal courts to consider.” \textit{Id.} at 1191 (citing \textit{Cort v. Ash}, 422 U.S. 66, 78 (1975) (quoting \textit{Tex. & P. Ry. Co. v. Rigsby}, 241 U.S. 33, 39 (1916))).
\item \footnote{28} \textit{Id.}
\item \footnote{29} \textit{Touche Ross & Co.}, 442 U.S. at 568 (“[O]ur task is limited solely to determining whether Congress intended to create the private right of action asserted…”) (Rehnquist, J., delivering the opinion of the Court).
\item \footnote{30} United States v. Goldin Indus., Inc., 219 F.3d 1268 (11th Cir. 2000) (reversing a prior holding in the Eleventh Circuit that permitted the § 1962(c) action to proceed against the employer-enterprise).
\item \footnote{31} Aguirre v. Turner Constr. Co., 501 F.3d 825 (7th Cir. 2007) (direct liability based on a negligence theory requires the employer to be negligent, it is not sufficient that an employed servant was negligent).
\item \footnote{32} Fisher v. Townsends, Inc., 695 A.2d 53 (Del. 1997) (while respondeat superior theory of vicarious liability does not consider any fault of the employer, Delaware permits a plaintiff to simultaneously pursue direct theories of liability, and the actions of the employer may still be relevant).
\item \footnote{33} Farmers Ins. Group v. County of Santa Clara, 906 P.2d 440 (Cal. 1995) (vicarious liability permitted despite employer policy against the alleged actions).
\item \footnote{34} See W. Page Keeton, \textit{PROSSER AND KEETON ON TORTS (LAWYER’S EDITION)}, § 69 at 499 (5th ed., 1984) (“[Vicarious liability] means that, by reason of some relation existing between A and B, the negligence of A is to be charged against B, although B has played no part in it, has done nothing whatever to aid or encourage it, or indeed has done all that he possibly can to prevent it.”).
\end{itemize}
liability is still imposed but indemnity may be sought from the tortfeasor. Thus, innocence is not a defense to vicarious liability and culpability is only considered when indemnity is sought.

An employer, not directly liable, may still be vicariously liable in a tort suit arising from a private right of action directed against its employees. Vicarious liability in the employment setting is called “respondeat superior.” Liability is imputed to the employer when a tort is committed by an employee working within the scope of his or her employment. Some jurisdictions also look for some purpose of the employee to serve the employer, but the more accepted reasoning determines whether the conduct occurred during general activity that was within the scope of employment. Respondeat superior only applies to “employees,” workers entirely under the control of the employer. The employer’s control must extend to the outcome of endeavor and to the particulars of how that work is to be performed. Otherwise, employee classification is not appropriate. The classification does not include independent contractors, who perform work to the specifications of an employer but independently determine how the work will be done. Returning to the car dealership example, once the sales associates commit fraud in the course of their employment, the dealership can be held vicariously liable by virtue of the employment relationship.

An employee’s acts do not need to be lawful to be within the scope of employment. Acts within the scope of employment include the services an employee is hired to perform and any action reasonably incidental to such employment. The test does not require any authorization of the specific

Maniaci, 510 F. Supp. 2d at 61 (noting that vicarious liability would have to be based on some relationship between the parties).

35. Note however the awkward situation that could arise if a plaintiff agrees to a general release with the employee-tortfeasor: any judgment won by the plaintiff would be paid by the employer, who could seek indemnity from the employee, who, by reason of the release, would be entitled to indemnity from the plaintiffs. The plaintiff would have to pay his own judgment! See Whitaker v. T&M Foods, Ltd., No. 2006-CA-01365-COA, 2007 WL 2772001 (Miss. Ct. App. Sept. 25, 2007).


38. RESTATEMENT (SECOND) OF AGENCY § 228(1)(c) (1958).

39. This is particularly relevant in the context of intentional torts. See Chuy v. Phila. Eagles Football Club, 595 F.2d 1265 (3rd Cir. 1979) (employee assaulted and battered an individual while attempting to collect a debt).


41. Warr v. QPS Cos., Inc., 728 N.W. 2d 39, 43 (Wis. App. 2006) (discussing the control element, but using the alternate and indistinguishable term “servant” for employee) (quoting Kerl v. Dennis Rasmussen, Inc., 682 N.W.2d 328, 334 (Wis. 2004)).

42. Murrell v. Goertz, 597 P.2d 1223 (Ok. App. 1979) (newspaper delivery man found to be independent contractor).

43. O’Shea v. Welch, 350 F.3d 1101 (10th Cir. 2003) (store manager made detour on his way to district office in order to obtain estimate for routine maintenance on personal vehicle; still deemed to be incidental to employment and therefore within scope of employment).
conduct engaged in, but the behavior must be foreseeable from the nature of the employment, in light of all the responsibilities and duties conferred. Even when employees act selfishly or for their own benefit, their conduct is within the scope of employment unless the employees have completely abandoned their job duties.

Respondeat superior is a deliberate allocation of risk based on public policy, rather than employer culpability or causation. It is inequitable to force the costs of injury onto an innocent plaintiff. The public interest is best served when costs are shouldered by “deep pockets” of the business that chose to enter the field; or could have modified operations to be safer, or could have selected better employees, and could spread the incurred costs through insurance or market measures. This arrangement benefits the public because the enterprise is more likely to prevent the tortious conduct, there is a greater assurance that the victim will be compensated, and the victim’s losses are equitably borne by those who benefit from the enterprise that gave rise to the injury. In the context of the car dealership, the business’ vicarious liability will be deliberately imposed in response to its employment relationship with its sales associates, not because of its own culpability.

C. History and scope of RICO civil actions

RICO has evolved from a weapon against organized crime to a broad statute that enables a private right of action against legitimate and criminal businesses alike. RICO was enacted in 1970 in response to fears that organized crime was infiltrating and corrupting American businesses. While the climate of RICO’s

44. Ira S. Bushey & Sons, Inc. v. United States, 398 F.2d 167 (2nd Cir. 1968) (risk that a seaman might become highly intoxicated and turn a dry dock valve was foreseeable to the employer and the actions of the employee were deemed within the scope of employment).

45. Doe by Doe v. B.P.S. Guard Servs., Inc., 945 F.2d 1422 (8th Cir. 1991) (Security guards who were slyly videotaping women while disrobing were acting within the scope of their employment. While the specific actions were not authorized, and the men were not acting solely for the employer’s benefit, they were continuing to oversee the premises and videotape the area as per their job instructions.).

46. See Id.

47. W. Page Keeton, PROSSER AND KEETON ON TORTS (LAWYER’S EDITION), § 69 at 500 (5th ed., 1984) (citing Thomas Baty, Vicarious Liability; A SHORT HISTORY OF THE LIABILITY OF EMPLOYERS, PRINCIPALS, PARTNERS, ASSOCIATIONS AND TRADE-UNION MEMBERS, WITH A CHAPTER ON THE LAWS OF SCOTLAND AND FOREIGN STATES, 154 (Oxford: Clarendon Press 1916) (multiple public policy reasons for vicarious liability including imputed control over the servant, the employer as the first cause in a causal chain, the burden should be on the individual that selected the employee, or simply that the employer has the money available to compensate the injured).

48. Id.


50. See Ann K. Wooster, Annotation, Validity, Construction, and Application of Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C.A. §§ 1961 et seq. -- Supreme Court Cases,
creation was influenced by fears of large scale criminal operations, Congress expressly rejected any terms that would have limited the statute to those illicit entities, likely in light of constitutionality issues that could arise. RICO is unusual because it provides both criminal sanctions and an express private right of action to initiate a civil suit. The RICO civil action encourages private citizens to act as “private attorneys generals,” investigating the claims and deterring racketeering behaviors. Attorney’s fees and treble damages are awarded to encourage this vigilance.

In light of the legislature’s motivations for enacting RICO, courts initially required plaintiffs alleging RICO violations to establish the presence or influence of a criminal syndicate or illegal motive. The Supreme Court rejected this practice in 1985. RICO is now applied to legitimate businesses, organized crime, and groups that fall anywhere in between. In scenarios where application of RICO to a particular type of organization is ambiguous, the statute contains a “liberal construction clause” designed to encourage a broad interpretation in lieu of one which would preclude application of the statute.


51. H.J. Inc. v. Nw. Bell Tel. Co., 492 U.S. 229 (1989) (Congress adopted language capable of extending beyond organized crime. Sponsors of the legislation that included RICO expressly stated that language limiting application to organized crime was intentionally left out, and congress expressly rejected inclusion of the term “organized crime” in the bill. Also, to defend the constitutionality of the Act, RICO supporters stated that the Act would apply to other entities as well. It is uncertain whether an act targeted specifically at only organized crime could have passed constitutional review).


54. 18 U.S.C. § 1964(c) (2000) (The statute includes both a right and a remedy, stating, “Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney’s fee…”).


56. Barr v. WUI/TAS, Inc., 66 F.R.D. 109 (S.D.N.Y. 1975) (RICO claim dismissed because the complaint failed to allege that the defendant was conducting business as part of an organized crime operation).

57. Sedima, 473 U.S. at 497-98 (“RICO is to be read broadly…[and]…liberally construed to effectuate its remedial purposes.”) (quoting Pub.L. No. 91-452, § 904(a), 84 Stat. 947 (1985)). Also note that the Court rejected any connection between criminal and civil penalties — either or both can be pursued without affecting the availability of the other. Id. at 488.


Use of the civil arm of the RICO statute has been overwhelmingly against legitimate businesses.60

D. Elements of a civil RICO claim in the employment context

The private right of action created by § 1962(c) of the RICO statute is unusual because it specifies a number of actions that may give rise to liability, when such acts are committed multiple times in a pattern by an employee61 conducting the affairs of an enterprise.62 Because RICO was enacted under the congressional power to regulate interstate commerce,63 the behavior must also be shown to impact commerce among the several states or foreign nations.64 This is not difficult to establish under modern constitutional law jurisprudence.65

The actions in question are often referred to as “predicate acts”66 and constitute the racketeering activity.67 Ten categories of state crimes68 and dozens application are not just limited to the criminal infiltration context; the Supreme Court has rejected other attempts by courts to narrowly interpret the availability of establishing a civil RICO claim. See Nat’l Org. for Women, Inc. v. Scheidler, 510 U.S. 249, 261 (1994) (rejecting a narrow interpretation by the Seventh Circuit that required the organization to have a motive to profit financially; “Congress has not...required that an ‘enterprise’ in § 1962(c) have an economic motive.”).

60. “The ABA Task Force found that of the 270 known civil RICO cases at the trial court level, 40% involved securities fraud, 37% common-law fraud in a commercial or business setting, and only 9% ‘allegations of criminal activity of a type generally associated with professional criminals.’” Sedima, 473 U.S. at 499 n.16 (citing REPORT OF THE AD HOC CIVIL RICO TASK FORCE OF THE ABA SECTION OF CORPORATION, BANKING AND BUSINESS LAW 55-56 (1985)).

61. The language of 18 U.S.C. § 1962(c) specifies “any person employed by or associated with...”.

62. The Supreme Court has stated that in order to be conducting or participating in the business of an enterprise, an individual must either take part in the business or direct it. Reves, 507 U.S. 170.

63. 18 U.S.C. § 1962(c) (“It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise’s affairs through a pattern of racketeering activity or collection of unlawful debt.”). Note however that RICO violations can also occur when the defendant does any of the following through a pattern of racketeering activity: invests in an enterprise, acquires an interest in or maintains control over an enterprise, or conspires to do any of the previously mentioned activities. See 18 U.S.C. § 1962 (a), (b), and (d) (2000).

64. See United States v. Parness, 503 F.2d 430 (2nd Cir. 1974) (upholding the constitutionality of RICO as a valid measure to control interstate commerce, and discussing the same).

65. U.S. Const. art. 1, § 8, cl. 3.

66. See Wickard v. Filburn, 317 U.S. 111 (1942) (an example of the extent to which actions undertaken by a single person, within the boundaries of a single state, without directly affecting any third party, can still be classified as affecting interstate commerce).

67. BancOKlahoma Mortg. Corp. v. Capital Title Co., 194 F.3d 1089, 1102 (10th Cir. 1999) (“The various acts of racketeering activity described in the statute are often referred to as ‘predicate acts’ because they form the basis for liability under RICO.”) (citing Bacchus Indus., Inc. v. Arvin Indus., Inc., 939 F.2d 887, 891 (10th Cir. 1991)).
of federal statutes are classified as racketeering under RICO. It is not necessary for these violations to be independently charged or identified for RICO purposes before their respective statutes of limitations. Most noteworthy, the predicate acts may be used under RICO, even in the criminal law context, after a defendant has been acquitted of the underlying crimes constituting the predicate acts. In the context of employees carrying on the affairs of a legitimate business enterprise, common predicate acts include fraud, mail fraud, violations of securities laws, and wire fraud.

68. “Racketeering activity, which is frequently described as a ‘predicate act’ or ‘predicate acts,’ consists of federal and state crimes identified in 18 U.S.C. § 1961(1).” United States v. Smith, 413 F.3d 1253, 1268-1269 (10th Cir. 2005).

69. This broad category of laws includes a number of acts defined in state penal codes as carrying a penalty of one or more years of imprisonment such as murder, kidnapping, gambling, arson, robbery, bribery, extortion, obscenities, and drug offenses. See Ross Bagley, Dorian Hurley, and Peter Mancuso, Racketeer Influenced and Corrupt Organizations, 44 AM. CRIM. L. REV. 901, 905 n.30 (citing 18 U.S.C. § 1961(1)(A) (2000); United States v. Polanco, 145 F.3d 536, 541 (2nd Cir. 1998) (participation in murder may serve as a predicate act); Ideal Dairy Farms, Inc. v. John Labatt, Ltd., 90 F.3d 737, 746-747 (3rd Cir. 1996) (plaintiff failed to prove state law fraud claims, so RICO claims were dismissed).

70. See id. at 905-907 n.32-41 (including all specified acts indictable under United States Code Title 18, Title 29, and other individual statutes).


72. 18 U.S.C. § 1961(1) (2000) (the offense must be “chargeable”). See Sedima, 473 U.S. at 488 (predicate acts are not only those which an individual has been charged with, but also any which he or she could be charged with); also Conduct v. Conduct, 826 F.2d 923, 927 (10th Cir. 1987) (court held that common-law fraud is not a predicate act indicating a “pattern of racketeering activity” in this instance, but indictment, nor conviction of predicate acts is necessary to bring a RICO claim).

73. Note that the statute of limitations for RICO civil actions is four years, the same as all other federal causes of action that permit treble damages. Klehr, 521 U.S. at 180 (1997) (Citing § 4B of the Clayton Act, and noting that there was some dispute as to when the RICO cause of action accrues. The Third Circuit’s “last predicate act” rule, measuring the time from the final predicate act to the time the action is commenced, is rejected by the court as inappropriate in the RICO context.).

74. United States v. Farmer, 924 F.2d 647 (7th Cir. 1991) (defendant acquitted of murder charges, but later faced RICO charges based on predicate act of murder).

75. Jaguar Cars, 46 F.3d at 261 (employees mischaracterized repair work performed as being within the manufacturer’s warranty, enabling the company to bill the manufacturer instead of the customer). But see Conduct, 826 F.2d at 927 (stating that common-law fraud is not a predicate act indicating a “pattern of racketeering activity.”)


77. Harrah v. J.C. Bradford & Co., 37 F.3d 1493 (4th Cir. 1994) (unpublished table decision) (discussing the North Carolina Investment Adviser’s Act as a potential predicate act toward finding a RICO violation, but failing to hold that the brokerage firm that the primary defendant operated through was defendant’s employer for purposes of vicarious RICO liability).
For a RICO violation, at least two predicate acts must be committed, as part of a pattern. The most basic requirement of the pattern element is that the two acts occur within ten years of each other. Beyond ten years, any relation is deemed too tenuous to establish a pattern. The Supreme Court has stated that two predicate acts only form a pattern when they are continuous and interrelated. The Court labeled this “continuity plus relationship.” The continuity element can be satisfied with evidence showing the predicate acts continued over a substantial period of time, or by showing that the conduct posed a threat of extending into the future.

E. Contrasting views of the RICO enterprise

In the § 1962(c) context, the enterprise is the firm or organization whose business the employee is conducting. There are two primary methods for establishing the RICO enterprise: (1) identification of a particular “entity” that is acting as an enterprise; and, (2) establishing that a group of entities are “associated in fact.” With respect to the first method, the RICO statute indicates that any legal entity or associated-in-fact group of individuals may be considered an “entity.” Even a single individual, such as a sole proprietor, may be an enterprise under RICO.

However, the Supreme Court’s elaboration on the associated-in-fact RICO enterprise requirement in United States v. Turkette has led to some confusion.

79. H.J. Inc., 492 U.S. at 237-238 (while two acts are required, it is not sufficient to only plead that two acts were committed without establishing a pattern to connect them) (citing Sedima, 473 U.S. at 496 (Powell, J., dissenting)).
80. Mani v. United Bank, 498 F. Supp. 2d 406 (D. Mass. 2007) (RICO is intended only to address extended racketeering conduct, not isolated events that do not threaten to create future criminal conduct).
81. Jennings v. Auto Meter Products, Inc., 495 F.3d 466 (7th Cir. 2007) (citing 18 U.S.C. § 1962(c) and explaining the ten year limitation and the basic requirement of a pattern).
82. Sedima, 473 U.S. 479.
84. Id. at 241 (the two methods are referred to as the closed-ended and open-ended continuity approaches) (citing Barticheck v. Fidelity Union Bank/First Nat. State, 832 F.2d 36, 39 (3rd Cir. 1987).
85. See United States v. Calabrese, 490 F.3d 575, 583 (7th Cir. 2007) (Wood, J., concurring in part and dissenting in part) (quoting United States v. DeCologero, 364 F.3d 12, 18 (1st Cir. 2004)).
86. “Individual” in this sense includes legal entities such as corporations; an enterprise can be formed from multiple corporations. United States v. Goldin Industries, Inc., 219 F.3d 1271 (11th Cir. 2000) (enterprise formed from separate corporations and other entities, found to be associating in fact).
88. Odom v. Microsoft Corp., 486 F.3d 541, 548 (9th Cir. 2007) (“As is evident from the text, this definition is not very demanding. A single ‘individual’ is an enterprise under RICO. Similarly, a single ‘partnership,’ a single ‘corporation,’ a single ‘association,’ and a single ‘other legal entity’ are all enterprises.”).
The holding in *Turkette* was straightforward: an enterprise may have a wholly illegitimate or criminal purpose for organizing.⁹¹ The First Circuit had come to the opposite conclusion, holding that the enterprise requirement would be superfluous if it included wholly illegitimate enterprises, because such an enterprise could be shown through a pattern of racketeering activity.⁹² The Supreme Court rejected this reasoning, ruling that the wholly illegitimate organization was an enterprise, and emphasized the separation that existed between the racketeering activity and the illegitimate enterprise, stating:

> The “enterprise” is not the “pattern of racketeering activity”; it is an entity separate and apart from the pattern of activity in which it engages. The existence of an enterprise at all times remains a separate element which must be proved by the Government.⁹³

Five circuits understand this language to impose a structural requirement⁹⁴ on the associated-in-fact enterprise.⁹⁵ Four of those jurisdictions have interpreted this language to require that all associated-in-fact enterprises must have an ascertainable structure that is separate from the level of organization required to commit the predicate acts.⁹⁶ Those courts have stated that unless an enterprise is interpreted to require a structure more elaborate than what was necessary for the commission of the predicate acts, simple patterns of racketeering could constitute a RICO violation.⁹⁷ Courts in these jurisdictions

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⁹¹. *Turkette*, 452 U.S. at 580-581. In fact, the motivations and purposes of an enterprise are largely irrelevant in the RICO discussion. See *Nat’l Org. for Women*, 510 U.S. at 261 (economic motive not required).

⁹². *Turkette*, 452 U.S. at 582 (citing United States v. Turkette, 632 F.2d 896, 899 (1st Cir. 1980)) ("If ‘a pattern of racketeering’ can itself be an ‘enterprise’ for purposes of section 1962(c), then the two phrases ‘employed by or associated with any enterprise’ and ‘the conduct of such enterprise’s affairs through [a pattern of racketeering activity]’ add nothing to the meaning of the section. The words of the statute are coherent and logical only if they are read as applying to legitimate enterprises.”).

⁹³. *Id.* at 583.

⁹⁴. See generally Goldfine v. Sichenzia, 118 F. Supp. 2d 392, 401 (S.D.N.Y. 2000) (dismissing complaint because the plaintiff failed to claim that there was a hierarchy directing the predicate acts to be performed).

⁹⁵. See *Odom*, 486 F.3d 541, 549-552 (9th Cir. 2007) (discussing the Ninth Circuit’s decision to split with those five circuits and holding that a RICO enterprise does not require a particular organizational structure). But see Asa-Brandt, Inc. v. ADM Investor Servs., Inc., 344 F.3d 738 (8th Cir. 2003); United States v. Sanders, 928 F.2d 940 (10th Cir. 1991); United States v. Tillett, 763 F.2d 628 (4th Cir. 1985); United States v. Riccobene, 709 F.2d 214 (3rd Cir. 1983) overruled on other grounds by Griffin v. United States, 502 U.S. 46 (1991); Richmond v. Nationwide Cassel L.P., 52 F.3d 640 (7th Cir. 1995).


⁹⁷. United States v. Bledsoe, 674 F.2d 647, 664 (8th Cir. 1982) (“Thus unless the inclusion of the enterprise element requires proof of some structure separate from the racketeering activity and
often de-emphasize the liberal construction clause;\textsuperscript{98} note the language from \textit{Turkette} stating that the enterprise is a “separate element,” and segregate evidence relating to structural requirements from proof of racketeering activity to ensure that the two are not combined.\textsuperscript{99} The Seventh Circuit requires that there exists some type of ascertainable structure, reiterating that the two elements are not to be combined, but the enterprise is not required to be separate from the predicate acts.\textsuperscript{100}

At least five circuits currently construe the language from \textit{Turkette} not to add any structural requirements to the enterprise requirement.\textsuperscript{101} These circuits reason that criminal and business operations often do not follow formal organizational plans\textsuperscript{102} and a group should be defined by its actions, not by abstract structural analysis.\textsuperscript{103} Because the RICO statute deals with inherently criminal behavior, specific evidence regarding the form of the associated-in-fact enterprise may be hard to come by and is not required in these jurisdictions.\textsuperscript{104} Since no structure is needed, these jurisdictions are willing to infer an enterprise based on the particularities of the predicate acts; no segregation of predicate act and enterprise evidence is required.\textsuperscript{105}

When pleading a company or firm as an associated-in-fact RICO enterprise, plaintiffs must account for these nuances. While the plaintiff can plead the legitimate business itself as the RICO enterprise under the entity-pleading method, the plaintiff is also free to plead the same as an associated-in-fact enterprise.\textsuperscript{106} The business hierarchy of a legitimate company lends itself well to establishing the structural requirements needed in some jurisdictions.\textsuperscript{107} If the
jurisdiction requires separation, a lawful business, by definition, must exist in a form beyond what is essential to commit the criminal predicate acts. The firm must participate in business activities; otherwise it would be an illegitimate or criminal organization. Thus, both methods of pleading a RICO enterprise are effective in the context of legitimate businesses. For instance, the manufacturer could plead the car dealership as a RICO enterprise by providing the legal name of the dealership, or by listing the owners, sales associates, corporate hierarchy, and a general overview of the sales and repair work conducted by the business.

III. DISTINCTION BETWEEN ENTERPRISE AND RACKETEER

Courts disagree as to whether an employee conducting the affairs of a legitimate business can be sufficiently distinct from his firm to incur RICO liability as a distinct racketeer. Under modern RICO jurisprudence, § 1962(c) must apply direct liability to the employee before application of respondeat superior can be argued. But one circuit previously permitted a § 1962(c) suit to proceed directly against the employer.\textsuperscript{108} The court reasoned that no distinction between enterprise and racketeer was required, and the same entity could be both.\textsuperscript{109} Essentially, a firm was construed to carry on its own business through a pattern of racketeering. Courts rejected this holding, and now every circuit agrees that no direct liability may be pursued against the employer-enterprise in § 1962(c) suits.\textsuperscript{110} The private cause of action is properly directed against the offending employee, who must be distinct and separate from the RICO enterprise.\textsuperscript{111} However, courts disagree as to whether the employee is sufficiently separated from the enterprise in cases of a single legitimate business entity and its employees.\textsuperscript{112} If not sufficiently separate, direct liability cannot be placed on the employee in these jurisdictions.\textsuperscript{113}

\begin{enumerate}
\item[108.] United States v. Hartley, 678 F.2d 961 (11th Cir. 1982) (the same entity was named as the enterprise and the defendant in the lawsuit) \textit{overruled by Goldin}, 219 F.3d 1268.
\item[109.] Id.
\item[110.] Cases from the Eighth Circuit accurately reflect this approach currently practiced in every jurisdiction. Nagle v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 790 F. Supp. 203 (S.D. Iowa 1992); Atlas Pile Driving Co. v. DiCon Fin. Co., 886 F.2d 986 (8th Cir. 1989); Bennett v. Berg, 685 F.2d 1053 (8th Cir. 1982) (not requiring the two entities to be completely distinct but noting that the entity named as the defendant in the complaint cannot also be named as the enterprise).
\item[111.] Yellow Bus Lines, Inc. v. Drivers, Chauffeurs & Helpers Local Union 639, 883 F.2d 132 (D.C. Cir. 1989); Crowe v. Henry, 43 F.3d 198, 204 (5th Cir. 1995) (citing Landry v. Air Line Pilots Ass’n Intern. AFL-CIO 901 F.2d 404, 425 (5th Cir. 1990)) (a RICO person is the defendant).
A. The direct liability viewpoint

Initially, neither the legitimacy of respondeat superior nor the separation between enterprise and employee were relevant because the employer-enterprise could be sued under a theory of direct liability under § 1962(c). This is because no distinction between enterprise and employee was required. This direct liability approach was announced by the Eleventh Circuit in United States v. Hartley, which marked the first time any jurisdiction had addressed the issue of distinction. But the court reversed its stance in June of 2000 in United States v. Goldin Industries, Inc. Though the direct liability approach is no longer practiced in the Eleventh Circuit, it illustrates an alternative to the separate entities approach. Also, many of the arguments in favor of the direct liability approach are relevant to determining whether complete or partial distinction is needed under the separate entities approach.

Hartley first noted that the enterprise in question fit the congressional definition of “person,” which included “any individual or entity capable of holding a legal or beneficial interest in property.” Because the enterprise also fit the definition of defendant, the court concluded that it could occupy both roles so long as the enterprise test from Turkette was satisfied; Hartley did not read Turkette to require segregation of the enterprise element. The court stated that due to the separate existence corporations enjoy from their employees, a RICO action could often be structured in such a way as to name every employee, officer, customer, and associate of a firm as a RICO person, and name the legal fiction of separate corporate personhood as the enterprise. More significantly, the available parties against whom a lawsuit or RICO criminal action could be directed could potentially vary based on the enterprise format pled – in this case an associated-in-fact enterprise would have yielded

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114. Hartley, 678 F.2d 961 overruled by Goldin, 219 F.3d 1268. The Fourth Circuit had an opportunity to change its position, and allow the enterprise and defendant to be the same person; it declined, but held that the same was permissible in the investment context of § 1962(a). Busby, 896 F.2d 833 (overruling Computer Scis. Corp., 689 F.2d 1181).
116. Davis v. S. Bell Tel. & Telegraph Co., No. 89-2839-CIV-NESBITT, 1994 WL 912242, at *21 (S.D. Fla. Feb. 1, 1994) (“The Eleventh Circuit was the first to decide the issue; the other circuits have declined to follow its lead.”).
118. Hartley, 678 F.2d at 988 (citing 18 U.S.C. § 1961(3) (1976)).
119. Id.
120. Id. at 989 (noting FMC Fin. Corp. v. Murphree, 632 F.2d 413, 420-421 (5th Cir. 1980) to establish that a corporation has a legal identity that is separate and independent).
different results. Thus, to preclude direct liability against the enterprise would only encourage clever pleading and indictment. The Hartley court declined to let the choice of enterprise the government elected to establish determine who could be named as a defendant in the indictment and ruled against the RICO defendants. If the direct liability approach were applied to the car dealership example, a § 1962(c) lawsuit could proceed directly against the dealership, without the need for vicarious liability and regardless of whether the dealership is also the RICO enterprise.

In Goldin, the Eleventh Circuit justified the reversal of Hartley by listing a number of jurisdictions that had rejected the direct liability approach. The Goldin court stated that every circuit court that had considered the issue ruled contrary to Hartley, but the court failed to note that Hartley had garnered some support in the lower courts of other circuits. Goldin concluded by joining the other jurisdictions in adopting the separate entities approach on the syntax of the statute and legislative intent. This is not surprising because the jurisdictions cited had already justified the separate entities approach on those two grounds.

B. The separate entities viewpoint

The separate entities viewpoint places direct liability on the employee who must be distinct from the RICO enterprise. Conversely, the direct liability approach permitted a single business to be the RICO enterprise and the person carrying on the affairs of the enterprise. Courts following the separate entities viewpoint have argued that an individual can not conspire with itself and therefore should not be construed to carry on its own affairs either. Because

121. Id.
122. Id. (quoting Stratton, 649 F.2d at 1075 (“[T]here is no logical or statutory reason to force the government to choose between alternative enterprise theories…as long as the indictment is otherwise sufficient.”).

123. “It would be anomalous indeed if the mere format chosen by the government could circumvent the proper application of RICO to the case presented. We refuse to allow this to happen. We hold that a corporate defendant may simultaneously be named in the indictment as the enterprise through which defendants conduct a pattern of racketeering.” Id. at 990.


125. Id. at 1270 (collecting cases from the D.C., First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, and Tenth, Circuits).

126. Id. (“After Hartley was decided, every other circuit had the opportunity to address the question and unanimously held, contrary to Hartley, that the defendant named in a § 1962(c) indictment must be separate and distinct from the ‘enterprise’ named therein.”)


128. Goldin, 219 F.3d at 1270 (citing Yellow Bus Lines, 883 F.2d at 139).

129. “We conclude that ‘enterprise’ was meant to refer to a being different from, not the same as or part of, the person whose behavior the act was designed to prohibit, and, failing that, to punish….Still, we would not take seriously, in the absence, at least, of very explicit statutory
the § 1962(c) private right of action is directed against the employee, and direct employer liability in the Eleventh Circuit was premised on the employer-enterprise simultaneously acting as the “employee,” the employer-enterprise is not subject to direct liability under the separate entities viewpoint. In terms of the car dealership example, the manufacturer would have to identify two parties: a RICO enterprise and a racketeer. While the dealership could be labeled as the enterprise, only the racketeer is liable under the separate entities approach. Therefore, the manufacturer would have to attempt to characterize the sales associate as a racketeer, and the lawsuit may not proceed directly against the dealership. Some theory of vicarious liability would be needed to impute the sales associate’s liability to the dealership.

Two justifications have arisen for this view – one based on the supposed intent of the legislature and one based on the language of the statute. First, courts have stated that the legislature intended for § 1962(c) to specifically target “the exploitation and appropriation of legitimate business by corrupt individuals.” Because a firm may only be a passive conduit for the criminal acts, it may be without actual blame and liability would be improper. Second, because the plain language of § 1962(c) specifies two entities, a single party could not simultaneously be both. Specifically, § 1962(c) prohibits any person employed by or associated with an enterprise from conducting or participating in the affairs of that organization through a pattern of racketeering activity. Courts have interpreted this statute to require both an enterprise and a person, i.e., two different entities.

language, an assertion that a defendant could conspire with his right arm, which held, aimed and fired the fatal weapon.” Computer Scis. Corp., 689 F.2d at 1190 overruled by Busby, 896 F.2d 833 (while this represents the wholly distinct approach, it can apply to the more general separate entities viewpoint as well).

130. Schofield, 793 F.2d 28 (the enterprise cannot be pursued under a direct theory of liability under § 1962(c), nor can it be attacked via respondeat superior).

131. “As the above decisions point out, requiring a complaint to distinguish between the enterprise and the person conducting the affairs of that enterprise in the prohibited manner is supported by the plain language of section 1962(c), which clearly envisions two entities. Moreover, requiring a distinction between the enterprise and the person comports with legislative intent and policy. Such a distinction focuses the section on the culpable party and recognizes that the enterprise itself is often a passive instrument or victim of the racketeering activity.” Bennett, 770 F.2d at 315 (With respect to the legislative intent justification, the court also noted B.F. Hirsch v. Enright Ref. Co., 751 F.2d 628, 633-634 (3rd Cir. 1984); Haroco, 747 F.2d at 401.).

132. Yellow Bus Lines, 883 F.2d at 139 (Reviewing the legislative history of S. Rep. No. 91-617, at 76-78 (1969)).

133. Bennett, 770 F.2d at 315.


136. Berg, 685 F.2d at 1061.
C. Partially and wholly distinct approaches

While every jurisdiction follows the separate entities approach and agrees that the employer-enterprise and racketeering person must be separate, there are two standards with respect to the level of distinction required. Specifically, courts disagree as to whether an employee acting within the scope of his employment can be distinct from the business that employs him. Some jurisdictions require the enterprise and person to be wholly distinct from one another; the RICO person cannot be the whole or a part of the enterprise, and the two cannot overlap. Because a business can only act through its employees, and the acts of an employee performed within the scope of employment are adopted by the business, the acts of employees and the enterprise often overlap. The wholly distinct approach considers this employee too similar, if not indistinguishable from the enterprise. In order to pursue a § 1962(c) suit against employees of a legitimate business entity, the employees of that business must be serving a different enterprise. Restated, the employees must abandon their employer to serve a third party enterprise, outside the scope of their employment.

Applied to the car dealership hypothetical, this would preclude a RICO suit against the sales associates. Even if the sales associates acted to partially benefit themselves, or knowingly broke the law, their misrepresentations occurred

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138. These two approaches, discussed infra, will be referred to as the wholly and partially distinct approaches.

139. Computer Scis. Corp., 689 F.2d 1181 (Adhering to the wholly distinct theory in the § 1962(c) context and rejecting the contention that a corporation and its unincorporated divisions could be distinct from one another; application in other RICO contexts is expressly rejected by Busby, 896 F.2d 833.; Gilbert, 643 F. Supp. 107 (Complete distinction required. Individual branches of a corporation could only give rise to RICO liability under § 1962(c) if they were performing the business of a separate enterprise other than the central corporation.); Riverwoods Chappaqua Corp. v. Marine Midland Bank, N.A., 30 F.3d 339 (2nd Cir. 1994) (discussing that employees of a bank are incapable of forming an enterprise separate from the bank); Rush, 628 F. Supp. 1188 (a single business cannot be separated into parts because none would be wholly distinct).

140. Old Time Enters. v. Int’l Coffee Corp., 862 F.2d 1213, 1217 (5th Cir. 1989) (“When the alleged section 1962(c) violator is a legal entity, such as a corporation, this required separation is not established merely by showing that the corporation, through its employees, officers, and/or directors, committed a pattern of predicate acts in the conduct of its own business. Nor does the fact that individual officers and employees of a corporation, in the course of their employment associate together and commit in the conduct of the corporation’s business a pattern of predicate acts in its name and on its behalf, suffice to constitute such officers and employees…an association in fact enterprise distinct from the corporation.”) (citing Atkinson v. Anadarko Bank & Trust Co., 808 F.2d 438, 440-441 (5th Cir. 1987)).

141. Gilbert, 643 F. Supp. at 109 (“[B]efore the defendant…can be held liable under § 1962(c), it must be shown that [the defendant] conducted the affairs of an enterprise other than [its own business]…”)
within the scope of employment. The acts of the sales associates overlap with the acts of the dealership. From this reasoning, the sales associates and dealership merge eliminating a wholly distinct racketeer to file suit against.

Not every jurisdiction will blur the employee with the firm. Other jurisdictions only require legal or partial distinction between the person and enterprise. In this manner, the individual segments and employees of the RICO enterprise could be distinct persons in some contexts. Employees, acting within the scope of employment, can be distinct from the business they serve in the jurisdictions only requiring partial distinction. Courts have justified the partial distinction approach with the legal fictions associated with the formation of business firms and generally ignore the factual realities of the case at hand. Because business firms exist as a legally distinct person after formation, employees and owners cannot be combined with them. This is true even though an enterprise is often a legal fiction, incapable of acting unless doing so through its members. Due to the focus on the legal status of the entities involved, partial distinction may arise in some jurisdictions when multiple corporate entities associate in a manner that would not be distinct between a single business firm and natural persons. Another basis for the development of this approach is respect for the Supreme Court’s ruling that RICO is to apply equally to legitimate and illegitimate business. In summation, when only partial distinction is required, the legal fiction of an independent personhood for business firms prevents employees from overlapping with the business that employ them. Employees acting within the scope of employment, such as the sales associates, can be partially distinct from the business that employs them and a § 1962(c) lawsuit may be filed against

142. Ashland Oil, Inc., v. Arnett, 875 F.2d 1271, 1280 (7th Cir. 1989).
143. Richmond, 52 F.3d 640 (corporation and the individual managing it must be distinct).
144. Jaguar Cars, 46 F.3d 258.
146. Id.
147. Sever, 978 F.2d at 1534 (corporation and its officers are distinct).
148. Compare Cullen v. Margiotta, 811 F.2d 698 (2nd Cir. 1987) overruled on other grounds by Agency Holding Corp., 483 U.S. 143 (finding sufficient distinction in the case of multiple separate legal entities associating together); with Riverwoods, 30 F.3d 339 (employees of a single business entity cannot form a distinct enterprise). But see Discon, Inc. v. NYNEX, Corp., 93 F.3d 1055 (2nd Cir. 1996) vacated on other grounds, 525 U.S. 128 (1998) (distinction not found when there is a parent corporation and multiple wholly owned subsidiaries). While the Supreme Court had an opportunity to overrule Discon when dealing with distinction requirements in the context of a single corporation, it elected not to address the issue. King, 533 U.S. at 164 (“We note that the Second Circuit relied on earlier Circuit precedent for its decision. But that precedent involved quite different circumstances which are not presented here. This case concerns a claim that a corporate employee is the ‘person’ and the corporation is the ‘enterprise.’”).
149. Jaguar Cars, 46 F.3d at 263-265 (discussing Sedima, 473 U.S. 479) (“The fact that RICO has been applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth.” (quoting Sedima, 473 U.S. at 499)).
them. In contrast, the dealership and sales associates overlapped under the wholly distinct approach.

IV. RESPONDEAT SUPERIOR IN § 1962(C) SUITS

Jurisdictions disagree as to whether respondeat superior is available in § 1962(c) civil RICO actions. Without respondeat superior, the employer cannot be held accountable in a lawsuit against the employee. In the context of the fraudulently-operated car dealership, the issue of distinction determines whether a RICO suit could be filed against the sales associates, but the availability of respondeat superior affects whether the car dealership can also be held liable in the lawsuit. Courts have developed two diverging views of respondeat superior in § 1962(c) suits; both are based largely on the arguments expressed in the context of enterprise distinction.

A. Jurisdictions only permitting direct liability

Despite the likelihood that the employee-person’s racketeering activity was within the scope of employment, respondeat superior is not widely available in § 1962(c) suits. Jurisdictions that only permit direct liability have held that even if the enterprise could be shown to be a distinct entity, common law principles such as respondeat superior will only be applied if it could be shown that they are consistent with the language and goals of the federal statute. Other justifications for denying vicarious liability mirror those for requiring the defendant to be distinct from the enterprise: supposed congressional intent to protect the passive and blameless entity, and interpretation of statutory language. Because the justifications are tied to the separate entities viewpoint, vicarious liability is not discouraged in all direct liability jurisdictions when the employer is an entity other than the RICO enterprise. Referring to the car dealership example, if the sales associates were secretly working for a competing manufacturer and were compensated by it for mischaracterizing the repair work, some courts would hold the competing manufacturer vicariously liable in a RICO action directed against the sales associates.

150. See Schofield, 793 F.2d 28 (no vicarious liability permitted).
151. Id. (neither direct nor vicarious liability available); compare with Tryco Trucking, 634 F. Supp. 1327 (W.D.N.C. 1986) (discussing a number of jurisdictions that permit vicarious liability).
152. See generally 77 C.J.S. RICO § 8 (2006) (outlining many jurisdictions that decline to apply respondeat superior in many RICO contexts).
153. Schofield, 793 F.2d at 33 (the extent to which common law agency principles and vicarious liability are intertwined with a federal statute depends on whether the first is consistent with the language and policies of the latter).
155. Schuster v. Anderson, 378 F. Supp. 2d 1070, 1099-1105 (N.D. Iowa 2005) (a bank was not the same entity pled as the enterprise, thus respondeat superior was permissible).
B. The imputed liability approach

Jurisdictions that were willing to impute liability to the enterprise have stated that the RICO statute suggests that the normal rules of agency and vicarious liability should apply.\textsuperscript{156} Courts that follow this approach have been unable to point to specific language supporting this stance, but have noted that nothing in the statute indicates otherwise.\textsuperscript{157} These courts have noted that the same reasoning has been applied in the anti-trust context, and was approved by the Supreme Court. Specifically, the Supreme Court ruled that civil liability imposed by federal statute should be guided by normal rules of agency unless Congress clearly indicated intent to the contrary.\textsuperscript{158} In summation, denial and justification of respondeat superior in the § 1962(c) context has been premised on a lack of congressional guidance in favor of either position.

V. EXPANDING EMPLOYER-ENTERPRISE LIABILITY

A legitimate business entity classified as a RICO enterprise should be subject to § 1962(c) RICO liability because an employee is sufficiently distinct from the employer to be classified as the racketeer and the employer should be vicariously liable for these damages. The Supreme Court has indicated that complete distinction is not necessary, so an employee acting within the scope of employment is sufficiently distinct from the employer-enterprise.\textsuperscript{159} Enterprise liability is not unusual in the RICO context.\textsuperscript{160} Vicarious liability is necessary in light of the pleading inconsistencies that have arisen when the enterprise is pleaded as an associated-in-fact organization, rather than a specific entity. Respondeat superior could be consistently and equitably applied in § 1962(c) actions.

A. Recent action by the Supreme Court is inconsistent with the wholly distinct approach

The Supreme Court’s ruling in Cedric Kushner Promotions, Ltd. v. King\textsuperscript{161} approves the approach utilizing a distinction between the enterprise and an employee acting within the scope of employment and discredits the wholly distinct approach. King came before the Court from the Second Circuit, which

\textsuperscript{156} Connors v. Lexington Ins. Co., 666 F. Supp. 434, 453 (E.D.N.Y. 1987) (outlining a number of jurisdictions that prohibit the practice, but declining to follow the trend).

\textsuperscript{157} Id.


\textsuperscript{159} King, 533 U.S. 158.

\textsuperscript{160} Petro-Tech, Inc. v. W. Co. of N. Am., 824 F.2d 1349 (3rd Cir. 1987); Brady, 974 F.2d at 1153.

\textsuperscript{161} 533 U.S. 158 (2001).
had denied a § 1962(c) claim. This denial was on the basis that the corporation-enterprise was not sufficiently distinct from the RICO person alleged – an employee of the corporation acting within the scope of his employment. To reach this conclusion, the Second Circuit first noted that the RICO enterprise cannot also be the RICO person. Next, the court demonstrated how an employee who is acting within the scope of employment blurs with the corporation and is rendered indistinguishable. The court referred to agency law principles – a corporation can only act through its agents.

The Supreme Court rejected this analysis, stating that incorporation creates a distinct legal entity and § 1962(c) does not require any heightened segregation beyond this. The Supreme Court also rejected the Second Circuit’s agency approach for determining distinction; § 1962(c) specifically mentions that the person may be employed by the enterprise and immunity for these individuals is inconsistent with the broad aims of RICO. The Court seemingly endorsed a partially distinct approach – noting that some level of distinction was necessary, but that individuals employed by or associated with a corporation need not serve a third party enterprise. But the Court failed to address the remaining wholly distinct case law in the Second Circuit.

Because the Supreme Court failed to directly address the lingering precedent that determined King in the Second Circuit, many courts continue to apply a wholly distinct approach. This is inconsistent with the spirit and broad

163. Id.
164. Id. at 116. See also Riverwoods, 30 F.3d at 344 “We have determined that the person and the enterprise referred to must be distinct.” (referencing Official Publ’ns, Inc. v. Kable News Co., 884 F.2d 664, 668 (2nd Cir. 1989); Bennett, 770 F.2d at 315 (expressing the syntax and legislative intent justifications)).
165. Id. (citing Riverwoods 30 F.3d at 344).
166. “The corporate owner/employee, a natural person, is distinct from the corporation itself, a legally different entity with different rights and responsibilities due to its different legal status. And we can find nothing in the [RICO] statute that requires more ‘separateness’ than that.” King, 533 U.S. at 163.
167. Id. at 164.
168. It would not be consistent to immunize a high ranking officer in a criminal organization merely because his racketeering acts were within the scope of his employment. Id. at 165.
169. “We do not quarrel with the basic principle that to establish liability under § 1962(c) one must allege and prove the existence of two distinct entities: (1) a ‘person’; and (2) an ‘enterprise’ that is not simply the same ‘person’ referred to by a different name.” Id. at 161. However, the Court continues to explain that it is not persuaded that the statute requires any more than identifying the employee as legally different from the corporation. Id. at 163.
170. “We note that the Second Circuit relied on earlier Circuit precedent for its decision. But that precedent involved quite different circumstances which are not presented here.” Id. at 164.
171. Cyco.Net, 383 F. Supp. 2d at 548 (The Second Circuit District Court states, “Plaintiff’s reliance on [King] is misplaced. The Supreme Court was careful to differentiate the facts in [King], where the defendant Don King, who was also an employee, was the ‘person’ and the defendant corporation was the RICO ‘enterprise,’ from other cases…”); Bates v. Nw. Human Servs., Inc., 466 F. Supp. 2d 69, 81-82 (D.D.C. 2006) (rejecting contention that King applies to
language of King. King only requires practical or “formal legal distinction” which can be satisfied without complete distinction. By expressly requiring something less than complete distinction, the holding could be read to reject the wholly distinct approach. The Court’s emphasis on independence created by legal fiction mirrors the same focus expressed by courts that support the partially distinct framework. No special meaning should be read into King’s failure to refute the other wholly distinct precedents because the Court also mentioned the availability of respondeat superior liability but declined to resolve the issue. Because the Court specifically found distinction for an employee acting within the bounds of his employment, the partially distinct approach is likely more appropriate than the wholly distinct approach.

B. There is existing RICO enterprise liability

Respondeat superior is permitted in some jurisdictions when the employer is not the RICO enterprise. An enterprise should not be given unique immunity from vicarious liability that is not enjoyed by other employers because enterprises are subjected to liability in other RICO contexts. Because enterprises are not excused in these other contexts, § 1962(c) should have uniform vicarious liability for employers regardless of enterprise status.

First, the enterprise is held accountable in § 1962(a) suits. Under § 1962(a), an express private right of action is given in response to an injury suffered when a person invests income derived from a pattern of racketeering activity in an enterprise. As is the case with § 1962(c), the investment subheading includes both a RICO person and enterprise. However the entities other than natural persons employed by a corporation and denying a § 1962(c) claim against a number of wholly owned subsidiaries.

172. King, 533 U.S. at 165.
174. “[Our holding] does not assert that ordinary respondeat superior principles make a corporation legally liable under RICO for the criminal acts of its employees; that is a matter of congressional intent not before us.” King, 533 U.S. at 166.
175. See Schuster, 378 F. Supp. 2d at 1104 (“For these reasons, the court is not persuaded by…arguments that Gunderson incorrectly decided that vicarious liability theory was available where a corporate defendant was not the alleged enterprise…” ) (citing Gunderson v. ADM Investor Servs., Inc., 85 F. Supp. 2d 892 (N.D. Iowa 2000)).
177. Jurisdictions are split with respect to the nature of the injury. While some permit the injury to be the result of the predicate acts, others claim that injuries must be caused by the investment of racketeering income. Compare Rose v. Bartle, 871 F.2d 331, 356-58 (3rd Cir. 1989) (injury from racketeering predicate acts insufficient); with Mid-State Fertilizer Co. v. Exch. Nat’l Bank of Chicago, 693 F. Supp. 666, 671-673 (N.D. Ill. 1988) (injuries suffered from the predicate racketeering acts without a subsequent investment of those proceeds is sufficient to maintain the § 1962(a) cause of action).
178. Masi v. Ford City Bank and Trust Co., 779 F.2d 397 (7th Cir. 1985) (an example of a civil suit permitted under the RICO investment subheading).
179. “It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity… to use or invest, directly or indirectly, any part
enterprise may be named as a defendant in a RICO civil action, and is directly
liable under § 1962(a).\textsuperscript{180} Courts have justified this distinction by asserting that
the language of the two subsections is different.\textsuperscript{181} In actuality, the language of
the two statutes is very similar. Both statutes require the RICO person to do
something with the enterprise. It is just as inconceivable that an individual is
able to associate with himself\textsuperscript{182} as that same person could invest in himself.\textsuperscript{183}
To hold otherwise would merge the enterprise-related act with the racketeering
behavior.\textsuperscript{184} If a person could invest in himself, would the investment be
complete upon receipt and retention of the ill-gotten gains of the predicate acts?

Second, erosion of racketeer distinction has left the enterprise liable in
effect. The distinction some courts demand in the § 1962(c) context is often
illusory because the Supreme Court only requires partial distinction.\textsuperscript{185} Partial
distinction fails to account for the unity of enterprise and racketeer that occurs
when the enterprise is wholly owned by the racketeer. In the case of a sole
proprietorship, this means that the same entity can be both enterprise and
racketeer because the business form does not offer a separate legal identity.\textsuperscript{186}
Liability and distinction are also appropriate in other types of business forms
when the enterprise is wholly owned by the person conducting its business,
essentially placing the same individual in both roles.\textsuperscript{187} While not formal
enterprise liability, the enterprise is effectively liable in these scenarios.

of such income, or the proceeds of such income, in acquisition of any interest in, or the
establishment or operation of, any enterprise which is engaged in, or the activities of which affect,
interstate or foreign commerce." 18 U.S.C. § 1962(a) (emphasis added).

180. \textit{Busby}, 896 F.2d 833 (overruling \textit{Computer Scis. Corp.}, 689 F.2d 1181, to the extent that it
held the same true in the § 1962(c) context). \textit{See also S. Bell Tele. & Telegraph Co.}, 1994 WL
912242 at *20 (Applying Florida civil RICO statute which is substantially the same as its federal
counterpart. No distinction between enterprise and person is required in a RICO investment claim,
citing federal authority for the proposition) (citing Liquid Air Corp. v. Rogers, 834 F.2d 1297,
1306 (7th Cir. 1987)).

181. \textit{Haroco}, 747 F.2d at 401-402.

182. \textit{Eva}, 143 F. Supp. 2d at 873 (in the § 1962(c) context, a person cannot fill two roles at one
time).

183. \textit{Busby}, 896 F.2d 833.

184. \textit{Turkette}, 452 U.S. at 583 (“The ‘enterprise’ is not the ‘pattern of racketeering activity’; it
is an entity separate and apart from the pattern of activity in which it engages. The existence of an
enterprise at all times remains a separate element which must be proved by the Government.”).

185. \textit{King}, 533 U.S. at 165.

186. \textit{McCullough v. Suter}, 757 F.2d 1227, 1244-1245 (1st Cir. 1985) (finding distinction when there was one additional employee
in the sole proprietorship).

187. \textit{Fleischhauer v. Feltner}, 879 F.2d 1290, 1297 (6th Cir. 1989); \textit{United States v. Benny}, 786
F.2d 1410, 1415-16 (9th Cir. 1986).
C. Hartley’s rejection encouraged convoluted pleadings of associated-in-fact enterprises

Without respondeat superior liability, plaintiffs are encouraged to plead the RICO enterprise in a convoluted and inaccurate manner rather than by a clear and accurate statement of the facts of the situation. In search of enterprise liability, plaintiffs mischaracterize the RICO enterprise as a mere component in an associated-in-fact group. This establishes direct enterprise liability as a RICO person. The scope of entities liable in a § 1962(c) action should not change based on the method used to plead the RICO enterprise. By permitting vicarious liability, plaintiffs will no longer have an incentive to complicate or misrepresent the RICO enterprise. Also, there would be no disadvantage to pleading a discrete entity as the enterprise.

In United States v. Hartley, the court justified direct liability against the enterprise because it wanted to avoid determining RICO liability on the basis of the pleading format chosen for the enterprise requirement. In Hartley, both parties agreed that the question of direct liability for the enterprise would never have arisen if, rather than pleading a corporate defendant, the government had pled a broad associated-in-fact enterprise. If direct liability was denied, liability of the corporate employer under § 1962(c) would hinge on the creativity of the pleading.

After the rejection of Hartley, plaintiffs who wish to name the employer-enterprise in § 1962(c) suits describe the employer in a piecemeal fashion. When a corporation is singularly named as the enterprise, without pleading an associated-in-fact enterprise, § 1962(c) applies direct liability to the employees. But if that corporation could be characterized as a RICO person in

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188. 678 F.2d 961 overruled by Goldin, 219 F.3d 1268.
189. The distinction between person and enterprise must be laid out in the pleadings. Fleischhauer, 879 F.2d at 1296-1297.
190. Hartley, 678 F.2d at 990 overruled by Goldin, 219 F.3d 1268 (“It would be anomalous indeed if the mere format chosen by the government could circumvent the proper application of RICO to the case presented. We refuse to allow this to happen.”).
191. “The government also suggests, and the defendants concede, this problem would never have surfaced had it charged the defendants collectively as an ‘association in fact’...” Id. at 989.
192. See Burrell v. State Farm and Cas. Co., 226 F. Supp. 2d 427, 444 (S.D.N.Y. 2002) (Plaintiff’s complaint did not allege an enterprise separate and apart from the defendant. The plaintiff is permitted to file another complaint including the company’s employees, agents, and other third party individuals that could combine to form an associated-in-fact enterprise.).
193. See Goldin, 219 F.3d 1268 (rejecting Hartley and direct liability against the enterprise under § 1962(c)).
194. See Brittingham, 943 F.2d 297, 301-302 (the court dismisses the RICO action and notes the attempt to “circumvent the distinctiveness requirement by alleging enterprises that are merely combinations of individuals or entities affiliated with a defendant corporation.” overruled on other grounds by Jaguar Cars, 46 F.3d 258.
195. Jaguar Cars, 46 F.3d 258 (Finding that the individual car salesmen were the RICO persons, participating in the enterprise of their employer. Just as King would later rule, the employees were found to be sufficiently distinct from their employer.).
a broader associated-in-fact enterprise, direct liability could attach against the
employer.\footnote{Complainants began to plead parties outside of the corporation as being involved; in this
manner, the corporation itself would only be a person in a larger enterprise consisting of outside
individuals. \textit{See} \textit{Dirt Hogs Inc. v. Natural Gas Pipeline Co. of Am.}, 210 F.3d 389 (10th Cir. 2000)
(unpublished table decision) (Pleading an employer, which would have formally been described as
an enterprise, as a RICO person. Plaintiff attempted to justify by including other third parties as
RICO persons. When no activities of the third parties could be established, the action was
dismissed.).\footnote{\textit{Jaguar Cars}, 46 F.3d at 266.}
\footnote{\textit{Elliott v. Foufas}, 867 F.2d 877, 881 (5th Cir. 1989) (Noting that in order to name the
corporate employer as a defendant, the plaintiff must establish more proof of the enterprise than
simply alleging that the corporation’s agents committed the predicate acts while conducting the
business of the corporation.); \textit{Anatian v. Coutts Bank (Switz.) Ltd.}, 193 F.3d 85, 88-89 (2nd Cir.
1999).}\footnote{\textit{Whelan v. Winchester Prod. Co.}, 319 F.3d 225, 229-30 (5th Cir. 2003) (itemized pleading
of a number of persons could not constitute an enterprise because the jurisdiction’s separate
ascertainable structure requirement was not met).}
\footnote{\textit{Jaguar Cars}, 46 F.3d at 266.}
\footnote{\textit{Elliott v. Foufas}, 867 F.2d 877, 881 (5th Cir. 1989) (Noting that in order to name the
corporate employer as a defendant, the plaintiff must establish more proof of the enterprise than
simply alleging that the corporation’s agents committed the predicate acts while conducting the
business of the corporation.); \textit{Anatian v. Coutts Bank (Switz.) Ltd.}, 193 F.3d 85, 88-89 (2nd Cir.
1999).}

The proposed associated-in-fact enterprise should include more
than a single corporate entity associating with itself,\footnote{\textit{Jaguar Cars}, 46 F.3d at 266.}
and the complaint must satisfy the requirements of an associated-in-fact enterprise in the jurisdiction.\footnote{\textit{Elliott v. Foufas}, 867 F.2d 877, 881 (5th Cir. 1989) (Noting that in order to name the
corporate employer as a defendant, the plaintiff must establish more proof of the enterprise than
simply alleging that the corporation’s agents committed the predicate acts while conducting the
business of the corporation.); \textit{Anatian v. Coutts Bank (Switz.) Ltd.}, 193 F.3d 85, 88-89 (2nd Cir.
1999).}

Essentially, this means that a plaintiff is prohibited from naming the same
defendant as both RICO person and RICO enterprise, but is free to use functional
equivalents.

Because an associated-in-fact enterprise does not require a formal legal
entity,\footnote{\textit{Jaguar Cars}, 46 F.3d at 266.}
a plaintiff may justify direct liability on the employer by pleading an
associated-in-fact enterprise that includes the employer. An associated-in-fact
enterprise can include the employer without including any additional third
parties. If the scope of the scheme can be shown to extend beyond the business,
even though only the company’s employees are involved, the firm could be
joined as a directly liable RICO person.\footnote{\textit{See id.}} One way of establishing this type of
associated-in-fact enterprise is to claim the employees’ predicate acts occurred
outside the scope of their employment, yet the corporation attempted to benefit
from them.\footnote{\textit{Odom}, 486 F.3d 541 (Microsoft and retailer chain Best Buy were associated-in-fact; this
permitted the suit to name the corporations themselves rather than merely individual employees).}

Alternatively, a complaint may justify inclusion of an employer as a
defendant, directly liable as part of an associated-in-fact enterprise, once
sufficient additional third parties have been included. Complaints may allege
involvement by a second company and its agents to name the employer in the
lawsuit.\footnote{\textit{Odom}, 486 F.3d 541 (Microsoft and retailer chain Best Buy were associated-in-fact; this
permitted the suit to name the corporations themselves rather than merely individual employees).}

While subsidiary companies may not generally be alleged to be RICO
persons in the enterprise of their parent,\footnote{\textit{Brannon v. Boatmen’s First Nat’l Bank of Okla.}, 153 F.3d 1144 (10th Cir. 1998) (A parent
corporation could not be an enterprise in which a wholly owned subsidiaries participated. Multiple
cases holding the same are collected and discussed.).}
if the pleading asserts that each
individual subsidiary enjoys a level of independence, sufficient distinction has
been found. Employers have also been found to be distinct persons when involvement by individual third party natural persons can be proven and the additional people are not employees.

In addition to blurring the facts of the situation, pleading in this manner has led to inconsistent RICO liability. Courts have stated that liability should not change with the enterprise theory pled. In fact, "there is no logical or statutory reason to force the government to choose between alternative enterprise theories...as long as the indictment is otherwise sufficient." Pleading an associated-in-fact enterprise that includes the employer frustrates the goals of notice pleading, which seeks only a "short and plain statement" of the allegations, and creates differing outcomes based on the enterprise theory used.

D. Respondeat superior should be applied in § 1962(c) actions

Employer liability should not be based on the manner in which the pleadings establish a RICO enterprise. The analysis should be a question of fact, not one of form. Determining employer liability under a respondeat superior framework would analyze "the context of the particular enterprise [to find if] an employee’s conduct is not so unusual or startling that it would seem unfair to include the resulting loss in the employer’s cost of doing business." Respondeat superior is presently applied by a number of jurisdictions and could be applied in all partially distinct jurisdictions to reduce the incentive to misclassify the employer-enterprise. The principal objection to imputing liability to the employer derives from a fear that the business is merely a passive conduit, dominated by the criminal. This reasoning is not persuasive in light of the Supreme Court’s response to the innocent business defense in Sedima S.P.R.L. v.

206. United States v. Elliott, 571 F.2d 880, 898 (5th Cir. 1978) (“There is no distinction, for ‘enterprise’ purposes, between a duly formed corporation that elects officers and holds annual meetings and an amoeba-like infra-structure that controls a secret criminal network.”).
207. Hartley, 678 F.2d at 989 (overruled by Goldin, 219 F.3d 1268) (quoting Stratton, 649 F.2d at 1075).
208. See 61A AM. JUR. 2D Pleading § 5 (1999) (discussing notice pleading as it differs from fact pleading).
210. Myers, 56 Cal. Rptr. 3d at 519 (Cal. App. 2007) (discussing respondeat superior in the context of a variety of claims including sexual harassment) (citing Farmers Ins. Group, 906 P.2d 440 (Cal. 1995)).
211. See Harrah, 37 F.3d 1493 (collecting cases from a number of jurisdictions that support respondeat superior in the § 1962(c) context).
212. See Davis v. Mut. Life Ins. Co. of N.Y., 6 F.3d 367, 379 (6th Cir. 1993) (citing Luthi v. Tonka Corp., 815 F.2d 1229, 1230 (8th Cir. 1987)).
Imrex Co. \(^{213}\) Respondeat superior could be applied equitably in § 1962(c) suits, even when a passive or blameless enterprise is involved.

The Supreme Court rejected an argument that RICO liability was inappropriate when applied to innocent businesses. \(^{214}\) Even though opponents of RICO argued this point in the legislative history, \(^{215}\) the RICO bill never included language that would indicate otherwise. \(^{216}\) In fact, the statute’s liberal construction clause indicates that courts should construe RICO broadly. \(^{217}\) Since the Supreme Court has declined to limit RICO liability based on claims that the statute did not impose liability on innocent businesses, vicarious liability should not be denied on the basis of a passive or blameless business defense.

Respondeat superior principles can be applied equitably to innocent businesses and unscrupulous beneficiaries of racketeering, due to the limitations imposed by indemnification and by the scope of employment. First, indemnification is the proper way to address vicarious liability when the company is blameless. Respondeat superior continues to apply because employer participation, or lack thereof, is irrelevant in the vicarious liability context. \(^{218}\) Courts have consistently found that a blameless employer is still subject to vicarious liability for the torts of its employees, \(^{219}\) including common RICO predicate acts such as securities law violations \(^{220}\) and fraud. \(^{221}\) An employer who is not culpable or directly liable may seek indemnification from the tortfeasor. \(^{222}\) In fact, indemnification is only available when the employer is

\(^{213}\) 473 U.S. 479.

\(^{214}\) Id. at 498-500.

\(^{215}\) “Its opponents, also recognizing the provision’s scope, complained that it provided too easy a weapon against ‘innocent businessmen,’ H.R. REP. No. 91-1549, at 187 (1970), and would be prone to abuse, 116 CONG. REC. 35342 (1970).” Id. at 498.

\(^{216}\) Id. at 499-500.


\(^{220}\) See generally 79A C.J.S. Securities Regulation § 220 (1995) (citing many authorities applying traditional agency principles and respondeat superior to hold a principle vicariously liable when its employees or agents employ manipulative and deceptive devices in connection with the sale of securities).

\(^{221}\) Makris v. Williams, 426 So.2d 1186 (Fla. App. 1983) (employer fault is not an element of the fraud claim against the employee real estate broker; the employer is subject to vicarious liability for this tort because it was committed in the scope of the broker’s employment).

\(^{222}\) Am. Transtech Inc. v. U.S. Trust Corp., 933 F. Supp. 1193, 1202 (S.D.N.Y. 1996) (indemnification is not available when the vicariously liable party was also culpable – but contribution may still be sought).
blameless. This shifts the loss to the culpable party, but forces the employer to put forth the effort to recover from the racketeer. While this may not work in practice due to insolvent employees, respondeat superior intentionally shifts the risk of loss to the employer. Because respondeat superior is applied in so many instances where the employer is blameless, and a system of indemnification accounts for this fact, § 1962(c) claims should not be treated any differently.

The scope of employment limitation prevents vicarious liability when a racketeer is only acting for his own benefit. A racketeer that is dominating a passive business and using it as a conduit to solely achieve his own ends is acting outside of the scope of employment. An employee acts with at least a partial purpose to serve the employer; acts that are only consistent with selfish ends are an abandonment of employment. The employer is served when benefits flow from the employee to the master, irrespective of whether the employee benefits as well. Following the benefits is an effective way to prevent legitimate businesses from being victimized twice – first by the racketeer and a second time by a RICO suit. In situations where the employer-enterprise has retained the benefits of racketeering, courts have reasoned that the activities must have been within the scope of employment because the employee did not solely reap the rewards.

Other federal criminal statutes permit respondeat superior, but adopt a strategy to follow the benefits and protect victimized businesses. RICO is not a tort; rather, it is a federal statute that imposes criminal sanctions, and litigants that file RICO suits are turned into “private attorney generals.” Corporate

223. Taft v. Shaffer Trucking, Inc., 383 N.Y.S.2d 744, 746 (N.Y.A.D. 1976) (the common law principle of indemnity, in contrast to one based on contract, arises when a blameless party is forced to pay for another’s wrong).


226. Id. (ultimately, the priest was found to have abandoned his employment; the court cites a number of authorities holding the same).

227. A-G Foods, Inc. v. Pepperidge Farm, Inc., 579 A.2d 69, 74 (Conn. 1990) (“A servant acts within the scope of employment ‘while engaged in the service of the master...’” (quoting Levitz v. Jewish Home for Aged, Inc., 239 A.2d 490, 492 (Conn. 1968)). Id. at 74 (“[A] servant may be acting within the scope of his employment when his conduct is ‘negligent, disobedient and unfaithful’” (quoting Butler v. Hyperion Theater Co., 124 A. 220, 221 (Conn. 1924), quoting Loomis v. Hollister, 55 A. 561, 563 (Conn. 1903)). Id. at 74 (“Unless [the employee] was actuated at least in part ‘by a purpose to serve a principal, the principal is not liable.’” (quoting Meyers, 281 A.2d at 437, quoting M.J. Uline, 171 F.2d at 133, quoting Park Transfer, 142 F.2d at 100).

228. Brady, 974 F.2d at 1154; Petro-Tech, 824 F.2d at 1361-1362.

229. See Turkette, 452 U.S. 576 (RICO was the ninth count in a twelve count indictment).

230. See supra note 55.
employers can face criminal sanctions through respondeat superior when their employees violate federal criminal statutes. However, respondeat superior is only applied when employees steal for their employer, not when they steal from it. Courts require that the employee act on behalf of the company, or with an intent to benefit the employer. This framework of following the benefits of racketeering is a better way of determining § 1962(c) liability because it discourages mischaracterization of the RICO enterprise, ensures proper compensation to innocent victims, and could allay any remaining fears that a victimized business will be forced to incur the liabilities of a racketeer.

V. CONCLUSION

Employer vicarious liability in § 1962(c) suits would eliminate inconsistencies between the methods of pleading a RICO enterprise. Liability is consistent with other RICO contexts and the underlying principles of vicarious liability. It would not result in a loss of distinction between enterprise and employee because the partially distinct approach seems to have won the endorsement of the Supreme Court. That endorsement comes with an approval of distinction in cases of an employee acting within the scope of his own employment. By extending this reasoning to § 1962(c) cases, respondeat superior analysis shifts the emphasis from third party involvement to whether or not the employer benefited from the acts of its employee or exerted some level of control over him.

231. Commonwealth v. Beneficial Fin. Co., 275 N.E. 2d 33 (Mass. 1971) (corporation charged with bribery under the respondeat superior doctrine after employees were found to have committed the acts within the scope of employment and with an intent to benefit the company).

232. Standard Oil Co. of Tex. v. United States, 307 F. 2d 120 (5th Cir. 1962).

233. See United States v. Hilton Hotels Corp., 467 F. 2d 1000 (9th Cir. 1972) (discussing whether an employee acts on behalf of its employer when acting contrary to an express company policy).