



**COLUMBIA
UNIVERSITY
UNDERGRADUATE
LAW REVIEW**



VOLUME V · ISSUE 2 · SPRING 2011

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**THE COLUMBIA UNDERGRADUATE
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MISSION STATEMENT

The goal of the *Columbia Undergraduate Law Review* is to provide Columbia University, and the public, with an opportunity for the discussion of law-related ideas and the publication of undergraduate legal scholarship. It is our mission to enrich the academic life of our undergraduate community by providing a forum where intellectual debate, augmented by scholarly research, can flourish. To accomplish this, it is essential that we:

- i) Provide the necessary resources by which all undergraduate students who are interested in scholarly debate can express their views in an outlet that reaches the Columbia community.
- ii) Be an organization that uplifts each of its individual members through communal support. Our editorial process is collaborative and encourages all members to explore the fullest extent of their ideas in writing.
- iii) Encourage submissions of articles, research papers, and essays that embrace a wide range of topics and viewpoints related to the field of law. When appropriate, interesting diversions into related fields such as sociology, economics, philosophy, history and political science will also be considered.
- iv) Uphold the spirit of intellectual discourse, scholarly research, and academic integrity in the finest traditions of our *alma mater*, Columbia University.

SUBMISSIONS

The submission of articles must adhere to the following guidelines:

- i) All work must be original.
- ii) We will consider submissions of any length. Quantity is never a substitute for quality.
- iii) All work must include a title and author biography (including name, college, year of graduation, and major.)
- iv) We accept articles on a continuing basis.

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Dear Reader,

It is our pleasure to present to you the Spring 2011 issue of the *Columbia Undergraduate Law Review*. Carefully structured, institutionally diverse, and thoughtfully edited, this edition represents what we see as a more creative and robust attempt at the ever questionable task of assembling a journal of undergraduate legal scholarship. We are confident that after months of inventive planning, increasingly effective fundraising, and vigorous recruiting, we can bring to our readers an issue whose form and variety herald a new chapter in *CULR*'s still short history.

Upon assuming our roles as heads of the journal in September 2010, we sought to achieve a number of initiatives. Not only did we wish to improve our relationship with writers and attract better content, but we also wished to dramatically multiply our readership and make *CULR* a more fun and collegial organization on which to work. As a fledgling publication, *CULR* has historically struggled to simultaneously balance a desire for quality content with one for increased name awareness. With a refined editing process, a more active role on Columbia's campus, and a presence at numerous top private and public universities, *CULR* hopes that it has come closer to walking that fine line.

From December 2010 to February 2011, *CULR* actively solicited content from over 25 undergraduate colleges across the country, targeting professors and pre-law societies. After inaugurating this solicitation process, the journal received a fourfold spike in submissions, thus promising a more competitive selection pool and a superior final product. The editing process has also changed for the better. A greater number of editors and a differently scheduled editing calendar have allowed for critical evaluation of content and vigilant monitoring of the journal's house style. More drafts, more efficient use of "tracked changes," and more Skyping with our writers has led, in our view, to a high-quality set of articles. Finally, with a devoted business staff, we are able to publicize our product to a wider audience than ever before.

Another noticeable addition is the "Notes" section. Containing the first installation of "Law in Practice" essay, this section aligns the journal with the structure of law school law reviews. However, as demonstrated by the topics of our papers, *CULR* has retained its undergraduate flair. We continue to broadcast viewpoints from multiple non-legal disciplines and from writers who lack formal legal training. Blending computer science and philosophy, Aaron Koch's "Rethinking and Reshaping Software Patents" explains why only consequentialism can justify granting proprietary control over software inventions. Koch goes on to propose an updated methodology to patenting software. In her "Interest and Power in the International Criminal Court: Strengthening International Legal Norms within a Sovereign State System," Alice Xie examines how a contradiction of self-interest and international cooperation has made the International Criminal Court so unsuccessful, and prescribes improvements. Vanessa Obas similarly follows the critique-and-correct model in writing "The Case for Reforming U.S. Assisted Reproductive Technology Policy: A Comparative Study of European and U.S. Approaches." In this piece, Obas uses a thorough comparison of U.S., French, German, and British approaches to assisted reproductive technology policy to argue that the U.S.'s approach merits reform. Finally, in his "The Establishment Clause: An Ongoing Controversy," Andrew Heinrich surveys a seemingly disjointed collection of

Establishment Clause court cases to ultimately show that they all conform to a single precedent.

We are proud to publish the result of a year's worth of development and reorganization. We hope that you enjoy the articles.

Sincerely,

Solomon Kim
Scott Levi
Editors-in-Chief

April 2011
Columbia University in the City of New York



STUDENT ARTICLES

Rethinking and Reshaping Software Patents

Aaron C. Koch
Dartmouth College

Abstract

Rapid technological progress threatens to render current intellectual property laws obsolete. Software patents in particular tend to hinder growth instead of promoting it, creating measurable economic inefficiencies and restricting innovation. In this paper, I will examine the philosophical basis for intellectual property law and argue that granting proprietary control over software inventions can only be justified under a consequentialist framework. With this in mind, I will then consider the consequential effects of current intellectual property law on the development and maintenance of computer software. I conclude that current intellectual property law is outmoded and anachronistic when applied to software. Finally, I will track the history of software patent law and suggest that a recent federal patent case is the first step toward reversing a longstanding trend of increasingly lenient patentability rulings and moving software patent law in the right direction for future sustainability.

Introduction

Copyright and patents are designed to encourage innovation by safeguarding the rewards of successful invention, benefiting both the creator and society. However, patents on software programs have proven to be highly contentious, and there is cause to wonder whether we now live in a world where the pace of technological progress renders current intellectual property laws obsolete.

In this paper, I will analyze recent legal trends in the issuance and definition of software patents as well as laws that fit with our technological realities. By identifying the philosophical underpinnings of our current policies, we can extract the underlying reasons for their existence. We can then meld our policies for the future around these base principles instead of our current laws themselves, and ensure more flexible and efficient transitions for our legal system as a whole.

From a philosophical perspective, software patents are a paradigmatic example of a broader phenomenon, the policy vacuum, which helps define the field of contemporary computer ethics.¹ A policy vacuum arises whenever technological progress moves at a pace that leaves existing policies and regulations far behind: Policymakers must either innovate apace with the developing technology or rely on outdated and inefficient rules which tend to dampen the positive effects of innovation.²

So what is the philosophical justification for software patents? We can take one of two essential positions: We can argue that software patent protection comes from the rights of creators to maintain control over their creation, or we can argue that software patents are justified because of the positive consequences they bring to both creators and society as a whole.

In this paper, I will first argue that consequentialism, or evaluation based on whether the positive effects of a decision or ruling outweigh the associated negative repercussions, is the best framework for justifying patents on software. I will then trace the history of software patents through several key patentability court cases, arguing that

U.S. federal courts have for decades enabled the proliferation of consequentially inappropriate software patents through a series of increasingly permissive legal rulings on what software is considered patentable. This trend begins with the landmark case *Diamond v Diehr* (1981) in which the Supreme Court set a general precedent allowing software to be patented, and continues through later cases such as *State Street Bank and Trust Company v Signature Financial Group, Inc.* (1998). Finally, I will look at the recent ruling of the U.S. Court of Appeals for the Federal Circuit *in re Bilski* (2008) and the associated ruling of the U.S. Supreme Court in *Bilski v Kappos* (2010), and defend a form of *in re Bilski*'s "machine-or-transformation test" as a first step in the direction of reestablishing the correct utilitarian calculus for software patents.

Some Brief Definitions and Clarifications

This paper focuses solely on the intellectual property concerns surrounding computer software. Software consists of the coding or programs that run on computers. Common examples include operating systems (such as Microsoft's Windows 7 or Apple's upcoming OS X "Lion") and the applications that run on them (such as Microsoft Office). In contrast, the physical components of a computer are known as hardware. Intellectual property protection for hardware is generally uncontroversial since the end product is much more an "object" than an "idea," as software tends to be considered. As such, this paper does not concern itself with hardware copyright and patents.

Additionally, this paper focuses only on software patents, and is silent on the topic of software copyright. Whereas copyright protects the author's right to control the dissemination of copies and thus prevents direct plagiarism of one's work, patent protection is far more restrictive, giving the patent holder full monopoly over licensing and expression of a process or product.^{3,4} If one independently discovers a process (such as software) under copyright, he or she has a right to ownership of the product. On the other hand, if one independently discovers a process under patent, the original patent holder still maintains full ownership rights.⁵ Both copyrights and patents provide a measure of proprietary control for a significant amount of time. For example, the 1994 World Trade Organization directive, Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), specifies a twenty-year minimum term length for patents.⁶

The Philosophy of Copyright and Patent Protection

Why do copyright and patent protections exist in the first place? There are two key positions on this debate: Either software patents are a simple extension of the Lockean natural right to property or software patent protection is useful because of the aforementioned consequentialist framework. Of the two, only consequentialism suffices to properly justify the existence of software patents.

Natural rights arguments for software patents tend to run as follows: Since people own themselves, they have a natural right to own the product of their labor, or property. Since software is the fruit of programmers' labor, those who create it should maintain control of this product. If they are deprived of their creation, they are placed into an unacceptable subservient (or slave) relationship to the depriver. This type of analysis originates with John Locke and is deeply embedded in Anglo-American legal tradition.⁷

However, natural rights arguments come apart when one considers software patents in particular. For example, software theft usually entails only the creation of an unpermitted copy of the software; the original owner is typically not deprived of the original program.⁸ Therefore, as computer ethicist Deborah Johnson points out, it is not purely a property right that software developers are trying to protect through patent protection. Rather, this process aims to protect an economic right.⁹ The idea that natural rights theory extends to such an economic right is controversial because it entails proprietary control over the labor of others. For a software-specific example, consider a software programmer who is unable to include a certain patented functionality in her work, even though she can recreate the code from scratch. For a more general example, Rousseau argues stringently against all conception of economic right as natural right in his *Discourse on Inequality*.¹⁰ Furthermore, since software programs are inherently idea-based, patenting software runs the risk of patenting an algorithm or general concept, all of which are considered to be in the public domain under Lockean property theory.¹¹

As a result, the most compelling arguments for software patents are consequentialist in nature, highlighting the societal good that arises from incentivizing innovation. Patents are consequentially good because they protect the fiscal rights of inventors, therefore raising the incentive to invent. This in turn leads to more invention throughout society, improving the lot of society as a whole. There are several assumptions in this calculus that should be made explicit. For example, it assumes that human invention generally leads to higher utility for society and that individuals are motivated by economic gain. For the sake of discussion, we will assume that on the whole these assumptions are valid.

Even so, there are still significant tradeoffs to issuing patents. Patent holders have monopoly control over all further innovation on their patent, giving them the power to squelch the related efforts of others. Furthermore, potential inventors must spend time and money ensuring that they are not “inventing” an already-patented product.¹² And finally, patents inevitably lead to litigation, further draining resources from development funding and other productive economic endeavors.

Fortunately, there is empirical data to evaluate the magnitude of each of these effects. The question at stake is: Do software patents lead to increased innovation that offsets any negative effects associated with their existence? If the answer is yes, there is a philosophically sound rationale for the existence of software patents. If the answer is no, one must closely examine current policy to discover the source of inefficiency and eradicate it.

An Empirical View of Software Patents and Innovation

Until 1981, software patents were few and far between. However, that year’s Supreme Court ruling on *Diamond v Diehr* was interpreted as a green light for software patents. Previous to *Diamond v Diehr*, no processes that ran on a computer had been considered patentable material. In granting Diehr a patent on rubber-curing process, the Supreme Court mandated that computer processes (software) were indeed patentable if they represented more than just a mathematical algorithm.¹³ This admittedly vague decision opened the floodgates to well-designed software patent applications. From the late 1980s until the late 1990s the number of new software patents grew at an astonishing rate of 16 percent per annum.¹⁴ This number substantially outpaced the overall growth of the computer industry (7 percent), as well as the growth of successful patents in general (2 percent).¹⁵ The clear delineation between the pre-patent and post-

patent software worlds thus allows us to successfully isolate the effects of patents on the software development process.

Empirical data suggest that, contrary to intent, software patents have not led to increased innovation, and might even have a net negative effect on software development. A 2003 paper by James Bessen, a researcher at the Boston University School of Law, and Robert Hunt, Assistant Vice President and Director at the Federal Reserve Bank of Philadelphia, finds that patents tend to substitute for software Research and Development (R&D) funding.¹⁶ Their calculations suggest that by 2000, R&D spending would have been 10 percent higher without the influx of software patents.¹⁷ In addition, they find that companies with the most software patents are also the most likely to substitute patent protection for R&D, relying on “strategic patenting” to block competitors.¹⁸

Even empirical academic work defending software patents fails to establish a statistically significant connection between patents and increased innovation. For example, Professor Robert Merges of the University of California at Berkeley argues in a 2006 paper that software patents have not hurt competition in the software industry.¹⁹ However, he does not present evidence that innovation itself has increased, conceding that patents often stifle new and complex software projects.²⁰ In the end, Merges offers the barely reassuring conclusion: “Whatever the effects of patents on the software industry, they have not killed it.”²¹

Papers from Bessen and Maskin (2000), Waterson and Ireland (1998), Somaya and Teece (2000), and the London Intellectual Property Institute (2000) all point to a similar conclusion: Even if software patents have not hurt innovation, there is certainly no statistically significant evidence that they have helped it either.^{22,23,24,25} This in and of itself, however, is not the end of the story: We must also consider the negative byproducts of software patents in our analysis.

The rapid increase in software patents has led to an equally rapid rise in the negative byproducts, measured in both time and money, associated with checking, obtaining, and defending software patents. First, an aspiring software developer or company must ensure that their intended invention is not already covered by a patent. Exponential growth in the number of software patents (forty thousand were issued in 2007 alone) makes checking the patent databases time-consuming and costly.²⁶ This “discovery phase” is estimated to cost \$2,000 per process (not program) in the potential software.²⁷ In addition, even a careful search of existing patents can miss late-issuing patents, in which case the company will likely waste any R&D dollars put toward the new software.²⁸

If a company runs afoul of an existing patent, they will likely be taken to litigation by the patent holder. In litigation, each party is likely to spend a minimum of \$150,000 on discovery, with the cost of a full trial ranging from \$250,000 up into the millions of dollars, not counting appeals.²⁹ When we consider that fifty-five new software patent suits are filed each week, total legal costs of software patents can range into the billions of dollars per year.³⁰ Although quite a boon for patent lawyers, these suits are not likely a positive contribution to the welfare of society.

Thus, there are significant negative costs stemming from current software patent law, and very little to indicate any counterbalancing positive effects. Quite simply, the consequentialist justification for software patents fails, and some sort of policy change is needed.

What Changes Should We Make to Software Patent Policy?

There are two obvious ways in which we can change our current policies on software patents to try and achieve better consequentialist outcomes. We can either reduce the term length of software patents or reduce the number of software patents awarded. Reducing the length of software patents will promote innovation by releasing patented ideas into the public domain sooner than before, and indirectly discourage frivolous patent applications because of the reduced fiscal reward from obtaining a patent. Reducing the number of software patents through the implementation of stricter patentability standards would have much the same effect: Innovation would increase due to fewer software ideas being under proprietary control, and frivolous patent applications would be discouraged due to the smaller probability of success.

Reducing software patent term length

Reducing the term length of patents is a theoretically appealing approach to solving the software patent problem. The computer revolution is notable for its speed and volatility, so restructuring patents to more closely match the expected lifespan of a software program that is typically no more than a few years is intuitively appealing. In addition, cutting the term length of software patents is a much simpler solution than trying to precisely define patentability standards for the rapidly evolving field of software.

Unfortunately, there are significant logistical barriers in the way of such a move. As mentioned earlier, TRIPS not only establishes an international standard for patent term length but declares that to be the minimum acceptable standard.³¹ In addition, the United States standard has long been to issue all patents at the same term length. Thus, in order to reduce the term length of software patents, we have to amend not only U.S. law and custom, but also an established international treaty of commerce. This treaty overrides U.S. domestic law and as such can only be changed by either a new treaty or the United States' withdrawal from the existing treaty. Changing the treaty would require a vast legislative effort on the international level, and simply withdrawing from the treaty could have a destabilizing effect on international commerce. As such, it is not currently feasible to limit the effect of software patents by reducing term length.

Adopting stricter patentability standards for software

As such, the best way to address problems with current software patent policy is by adopting more stringent standards of patentability. If implemented correctly, innovation would be stimulated because companies would be forced to value quality over quantity and be required to invent truly original software processes to be eligible for patent protection. The negative byproducts of patents would be minimized for several reasons, including, but not limited to, the reduction of resources devoted to patent litigation and patent roll cross-checking.

This of course raises a question: What are the current standards of software patentability? The Supreme Court's ruling in *Diamond v Diehr* (1981) set a precedent for patenting "physical processes controlled by a computer program," but soon thereafter software patents were granted for software not strictly adhering to that definition. The next landmark case, *State Street Bank and Trust Company v Signature Financial Group, Inc.* (1998) continued the trend of looser patentability standards. In *State Street*, the

Court of Appeals for the Federal Circuit (CAFC) held that software only had to produce a “useful, concrete, and tangible result” to be patentable, meaning that a whole new range of software (particularly financial software) was deemed worthy of patent protection.³²

Fortunately, the 2008 CAFC ruling in *In re Bilski* reversed the trend established by *Diamond v Diehr* and *State Street* and established stricter patentability standards. It suggested a “machine-or-transformation” test for patentability, meaning that a process either must be implemented by a machine specifically designed for it, or must transform an article from one state to another.^{33 34} Pure software programs, or programs that run on an ordinary computer and do not change the state of objects in the physical world, most financial software programs, and the majority of business practices are not considered patentable under the ruling in *Bilski*.

The United States Supreme Court took up *in re Bilski* on appeal as *Bilski v Kappos* (2010), issuing a ruling that sent mixed signals about the machine-or-transformation test. In *Bilski v Kappos*, the Supreme Court affirmed CAFC’s denial of a patent to *Bilski et al.*, but downgraded the machine-or-transformation test from a decisional standard to a “useful tool” by which patent applications could be measured.³⁵ The fact that the Supreme Court used *Bilski v Kappos* primarily to differ on the reasoning behind the CAFC’s ruling (rather than the ruling itself) suggests that the Supreme Court is not yet ready to make a full break from the precedents set by *Diamond v Diehr* and *State Street*. Nevertheless, the Supreme Court still concurred on the basic applicability of the machine-or-transformation test as a measuring stick of patentability, and *in re Bilski* still stands as a potential first step toward a new precedent for the patentability of software.

We can build on the machine-or-transformation test to further restrict the influx of minor or redundant software patent applications. The “machine” part of the test, which states that software is patentable if it runs on a machine designed explicitly for it, seems somewhat irrelevant to a consequentialist rationale for software patents. Designing a new piece of hardware to run software on does not necessarily make the software itself any more original or inventive: Software should be judged by what it does instead of how it runs.

As such, we should seek to build off the “transformation” part of the test, which states that software is patentable if it transforms an article from one state to another. What constitutes an “article” has not been well explained by court rulings to date, and will be refined through future cases. Nevertheless, emphasizing this portion of the machine-or-transformation test keeps the focus on our consequentialist basis for patenting software in the first place. We seek to patent innovative, original software that significantly advances our ability to control processes in the physical world, and while we can certainly imagine loopholes in the “transformation” part of the machine-or-transformation test, it nevertheless is a positive first step on the road to appropriate software patenting.

Conclusion

In this paper, I have argued that traditional “natural rights” arguments are not an adequate philosophical basis for software patents, and that we are better off using a consequentialist framework to ground our policies. I then find that present-day software patenting cannot be shown to bring about any of the currently purported positive effects, and has inescapable negative costs which more than offset any ostensible gains. As such,

I recommend establishing stricter standards for software patentability modeled after the machine-or-transformation test required by the 2008 *in re Bilski* ruling, considering it the most realistic and efficient way to establish an acceptable consequentialist basis for software patents. By doing so, we can ensure that only the most innovative and original software inventions are placed under patent protection. Achieving this goal is particularly critical in the software world, where the naturally rapid pace of development and invention can be seriously hindered by overpatenting and the costs associated with it.

Software innovation and our current system of intellectual property protection are inherently at odds, with significant societal repercussions on the horizon if we allow the stalemate to continue. Allowing vague or relatively trivial software to be patented simply pushes us into a vicious, self-reinforcing cycle of patenting and litigating. *In re Bilski* is a first step on the way to a solution, but only continued progress toward fewer software patents will ensure that software remains at the frontiers of human innovation in the years to come.

Endnotes

- ¹ James H. Moor, “What is Computer Ethics?” 16 *Metaphilosophy* 4, 266-275 (1985).
- ² id
- ³ id at 267
- ⁴ id at 272
- ⁵ id at 269-270
- ⁶ Uruguay Round Agreement: TRIPS, *Part II- Standards concerning the availability, scope, and use of Intellectual Property Rights*, World Trade Organization (April 15, 2004). Article 33. Online at http://www.wto.org/english/docs_e/legal_e/27-trips_04c_e.htm (visited November 28, 2010).
- ⁷ Deborah G. Johnson, *Computer Ethics: Fourth Edition* 125 (Prentice Hall 2009).
- ⁸ id at 126
- ⁹ id at 126-127
- ¹⁰ Jean-Jacques Rousseau, *A Discourse on the Origin of Inequality*, 1754. Online at <http://www.constitution.org/jjr/ineq.htm> (visited March 12, 2011).
- ¹¹ id at 126
- ¹² Deborah G. Johnson, *Computer Ethics: Fourth Edition* 122 (Prentice Hall 2009).
- ¹³ Daniel A. Tysver, *Diamond v Diehr*, Bitlaw (2008). Online at http://www.bitlaw.com/source/cases/patent/Diamond_v_Diehr.html (visited March 28, 2011).
- ¹⁴ James Bessen and Robert M. Hunt, *An Empirical Look at Software Patents* (2004). Online at <http://www.researchoninnovation.org/swpat.pdf> (visited November 29, 2010).
- ¹⁵ id at 16
- ¹⁶ id at 2
- ¹⁷ id at 32
- ¹⁸ id at 39
- ¹⁹ Robert P. Merges, *Patents, Entry, and Growth in the Software Industry*, 4 (August 2006). Online at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=926204 (visited November 28, 2010).
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- ²¹ id at 1

- ²² James Bessen and Eric Maskin, *Sequential Innovation, Patents, and Imitation*, Massachusetts Institute of Technology (2000). Online at <http://www.researchoninnovation.org/patent.pdf> (visited November 29, 2010).
- ²³ Michael Waterson and Norman Ireland, *An Auction Model of Intellectual Property Protection: Patent Versus Copyright*, *Annales D'Economie Et De Statistique*: No. 49/50 (1998). Online at <http://www.jstor.org/pss/20076117> (visited November 29, 2010).
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- ²⁶ Deborah G. Johnson, *Computer Ethics: Fourth Edition*, 122 (Prentice Hall 2009).
- ²⁷ Brian Kahin, *The Software Patent Crisis*, *Technology Review* (April 1990). Online at <http://deoxy.org/swpc.htm> (visited November 29, 2010).
- ²⁸ Deborah G. Johnson, *Computer Ethics: Fourth Edition*, 122 (Prentice Hall 2009).
- ²⁹ Brian Kahin, *The Software Patent Crisis*, *Technology Review* (April 1990). Online at <http://deoxy.org/swpc.htm> (visited November 29, 2010).
- ³⁰ Matt Asay, *\$11.4 billion wasted on software patent litigation...and counting*, CNET News Online. Online at http://news.cnet.com/8301-13505_3-9882152-16.html (visited November 29, 2010).
- ³¹ TRIPS, *Standards concerning the availability, scope, and use of Intellectual Property Rights*, Article 33.
- ³² Lori E. Lesser, *We've Got Algorithm- Software Patents Boom*, Findlaw Library (August 1999). Online at <http://library.findlaw.com/1999/Aug/1/130894.html> (visited November 29, 2010).
- ³³ Gene Quinn, *Bilski Arguments Complete at the US Supreme Court*, IP Watchdog Online (November 9, 2009). Online at ipwatchdog.com/2009/11/09/bilski-arguments-complete-at-the-us-supreme-court (visited November 29, 2010).
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Interest and Power in the International Criminal Court: Strengthening International Legal Norms within a Sovereign State System

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Abstract

The International Criminal Court (ICC) has faced considerable political obstacles since its creation in 2002, demonstrating a striking incapacity to enforce arrests or punish the guilty. Although critical evaluations of its performance have been limited, the structure of the Court clashes with the basic principles of modern international relations: interest and power. In a world where self-interested states enjoy a monopoly on hard power, nascent transnational institutions must derive strength from normative authority and external political support. Drawing from a historical review of ICC performance throughout the past decade, analyzed through the lens of classic political theory, this paper offers a substantial policy critique of the international judicial body. It proposes two key structural reforms: first, it must limit its jurisdiction to crimes committed within party states and cases referred by the United Nations Security Council; and second, it must strengthen institutional ties to the foremost international organization of the UN.

Introduction

For those familiar with the ICC, the recent developments in Kenya instill an uneasy sense that history is about to repeat itself. It is no coincidence that the situation unfolding in the most recent ICC case today parallels those in Darfur and Uganda several years ago. The Court is hampered by neither temporary nor case-specific problems, but fundamental structural flaws which have and will continue to haunt every case which falls under its purview. To perform its responsibility to enforce arrests and punish the guilty, the ICC must align itself with the two defining features of the sovereign state system: interest and power.

The chief prosecutor of the ICC, Luis Moreno-Ocampo, launched investigations into the post-election crisis in Kenya in the spring of 2007. The outcome of the fiercely contested presidential election earlier that year had sparked riots and ethnic killings throughout the country. Thousands died and hundreds of thousands were displaced before a peace settlement was reached the following February. By the end of 2010, Ocampo had at last identified the six suspects responsible for perpetrating the violence, all high-ranking officials of the current coalition government.¹

Nairobi's response was swift and emphatic. Parliament, with overwhelming bipartisan support, immediately passed a motion calling for withdrawal from the ICC Rome Statute.² Cabinet members from both sides of the coalition government pledged to oppose the ICC, launching a "charm offensive" in which they lobbied state capitals across Africa to support blocking Court investigations in Kenya.³ Meanwhile, despite Parliament's repeated rejection of a local tribunal in the past, the government now rushed to revamp the national judicial system, asserting their capacity to try suspects

locally instead.^{4,5} As of now, the ICC case in Kenya is going nowhere. If the lessons of the past bear out, the case in Kenya can be expected to unravel in much the same way as the one in Sudan; a protracted struggle with an unaccommodating government, eventually dwindling to an inconclusive and fruitless end.

This paper is a four-part analysis that draws from the guiding principles of modern international relations to explain the core structural inconsistencies within the ICC. After a brief historical overview, this paper will first explain the clash between its jurisdiction and the interests of dominant states. Beginning with the U.S. opposition to the Court through this framework, it will continue to explain the difficulties the Court has encountered in past cases, emphasizing its overdependence on legitimacy and poverty of hard power. Finally, having evaluated how the principles of the Court relate to political interest and power, this paper will propose two key institutional reforms to maximize the pursuit of justice in the modern world system.

Background

The notion of an international legal institution began after the Second World War when the Nuremberg and Tokyo courts introduced the concept of universal crimes. During the postwar rise of global institutions, advances toward international cooperation also followed in the legal realm. Near the beginning of the 1990s, the United Nations (UN) Security Council established ad hoc tribunals in war-torn areas like the former Yugoslavia and Rwanda.⁶ By the end of the decade, it had organized an international conference on the Rome Statute to the International Criminal Court, designed to adjudicate crimes in post-conflict areas. The Statute won widespread support with a vote of 120-7 and achieved rapid ratification by the required sixty countries in the turn of the twenty-first century.⁷

On the other hand, the Court is not without significant detractors. Some of the world's most influential states, including India, China, and Russia, have chosen not to ratify the ICC. Other major groups such as the Arab League and the African Union, which number among them state parties to the Statute, have obstructed past Court cases. The United States opposed the ICC most vigorously, declaring its jurisdiction over crimes committed in signatory states a transgression of state sovereignty. Washington had lobbied for the additional qualification that only crimes committed by the citizens of signatory nations would be open to investigation.⁸ Following ratification, Washington has determinedly campaigned for complete immunity through the UN Security Council as well as other forums.⁹ The Bush administration, for instance, withheld forces from UN peacekeeping areas unless American citizens are exempt from ICC prosecution.¹⁰ U.S. officials have also pressured parties to the Statute to sign bilateral treaties granting American citizens immunity under their territory, at times cutting or threatening to cut aid from the less cooperative.

A Paradigmatic Opposition

Unfortunately, the U.S.-ICC debate is frequently argued on the wrong grounds. Statesmen and scholars have urged the United States to fulfill its moral obligations, perhaps in the hopes that enough vitriol and finger-wagging will eventually push the United States into line with international opinion.¹¹ Such arguments are relevant, but off-center: the American state, like any other, is primarily compelled not by duty, but interest.

Since the Peace of Westphalia in 1648, the international stage has been an anarchic system dominated by sovereign states. Being free from a higher code of law, government interactions are necessarily driven by self-interest; the interests that ultimately prevail in the course of these interactions are in turn determined by calculations of state power.¹² However, political competition has also been tempered by the tentative steps taken towards international cooperation since the First World War. Some initiatives, like the UN, survived. Others, like the League of Nations, aimed too high. These historical experiences evince the expanding role of supra-state institutions and global norms, but more importantly, they demonstrate the limits of this growth, warning against overly ambitious idealism and the backlash which is sure to follow.

Progressive international norms accompanied the rise of these global institutions. Modern governments actively contribute to humanitarian causes: disaster relief towards the Indian Ocean Tsunami, the China and Haiti earthquakes, and the Pakistan floods are a few notable examples from recent years. Many countries have similarly stood by the ICC as a matter of principle. Despite recognizing that the benefits they gained from the Court were “intangible, uncertain and only possibly realizable in the long-term,” a significant number of states refused to grant the United States immunity via non-surrender agreements because they “valued the rule of law,” or were compelled by a sense of commitment and obligation as parties to the Statute.¹³

On the other hand, governments have overlooked humanitarian crises of equal or greater magnitude. The West notoriously ignored the genocide in Rwanda of 1994, sending a mere 1,000 soldiers to rescue foreign nationals and then leaving the local populations to be slaughtered.¹⁴ Years after the “giant step forward in the march towards universal human rights and the rule of law” that marked the completion of the ICC statute, the international community again exhibited remarkable apathy towards the mass atrocities unfolding in Darfur.¹⁵

One can surmise from this seemingly contradictory behavior that dedication to accountability, justice, and other global norms is neither extensive nor constant, but it can prosper under certain circumstances. Governments are indeed more altruistic than their seventeenth century counterparts, but their newfound morality is often negated by immediate self-interest. The swing factor is cost. States increasingly desire to protect human rights and the rule of law, but at what cost to national interest?

For many powerful states, the legal framework of the ICC puts an unacceptable price on the pursuit of world justice—the dilution of state sovereignty. Few scholars are still willing to defend non-signatories to the ICC, possibly because they are reluctant to oppose ongoing human rights operations or fatigued by fighting a seemingly entrenched feature of the international political landscape. Yet, as it will be shown, concerns over the jurisdiction of the Court are real and legitimate.

On Self-Interest: U.S. Sovereignty

This paper concentrates on the U.S. perspective in this regard for three reasons. First, it remains the world’s foremost power by any standard and its opposition is therefore the most influential on the success of the Court. Second, it has engaged in the most forceful and conspicuous opposition to the ICC, such that its criticisms are more transparent and likely encompass those typical to a powerful state. Third, it has demonstrated a firm overall adherence to the rule of law and accountability (compared to states such as Saudi Arabia or Russia), domestically and abroad. Its criticism may therefore serve as a minimum bar of sorts for a legitimate and viable global institution.

American officials find serious practical concerns in giving the ICC jurisdiction over its overseas citizens. To start with, the legal code of the ICC is distinct from that of the United States: prohibitions against “severe deprivation of physical liberty”¹⁶ or “seizing the enemy’s property unless...imperatively demanded by the necessities of war,” are ultimately a matter of interpretation, legal ambiguities which the United States has no patience to pore over during military campaigns.¹⁷ Even more striking are the overt clashes between ICC and American constitutional law.¹⁸ David J. Scheffer, leader of the U.S. delegation in Rome Statute negotiations, grimly affirmed “one of the great weaknesses we still have with respect to this court” constituted by “gaps between crimes recognized by the [U.S.] Code and those set forth in the Rome Statute.”¹⁹ These “gaps” would directly impact the hundreds of thousands of U.S. troops across the globe who are vulnerable to prosecution in signatory states.²⁰

Any unprecedented and experimental institution is vulnerable to corruption. One common worry has been the appointment of, or progression towards, an activist prosecutor. Americans are particularly suspect of the expansion of Court powers over time—a fear that strengthens with the publication of each increasingly generous interpretation of the Statute. In an informal expert paper prepared for the prosecutor a year after ratification, “a group of distinguished jurists” claimed to have found a “hidden” third contingency in the two explicitly stated contingencies (unwillingness and inability), adding a whole new category of scenarios in which the Court may intervene.²¹ Such adjustments may seem negligible, but as a cumulative long-term process they seem to be proof enough for many that the current Statute is merely the first step down a slippery slope of legal interventions.

Above all, the crux of American opposition is that the jurisdiction of the ICC—regardless of how often it will be exercised—inherently infringes on the principle of sovereign decision-making. As the executive summary of the 2005 National Defense Strategy declared: “The United States...[has] a strong interest in protecting the sovereignty of nation states. In the secure international order that we seek, states must be able to effectively govern themselves and order their affairs as their citizens see fit.”²² The United States is a staunch defender of world security, but it cannot contravene the core foreign policy view of a “secure international order” in which states are governed first and foremost by the will of their own citizens.

The Rome Statute is especially objectionable in this regard not simply because the Court would regulate U.S. freedom of action abroad, but because it would do so when it is in fact the United States which provides the bulk of humanitarian aid, and has historically born the burden of keeping the peace. As John B. Bellinger III, former Legal Adviser to the Secretary of State Condoleezza Rice, explained, the United States is forced to act as the “world’s policeman,” deploying military peacekeeping forces at the request of various foreign countries. When things don't go according to that country's plan, the U.S. military does not want its forces tried before the Hague on the pretext of human rights abuses.²³ To ask the United States to continue contributing extensively to humanitarian causes, and also to surrender its responsibility to the soldiers and civil service officers working towards these causes throughout the world, comes off as unjust. Such an expectation furthermore seems hypocritical—until the Court has sacrificed the resources and effort that Americans have, it has no right to judge, and certainly no right to punish, U.S. dedication to peace and justice.

Some dismiss these complaints as half-hearted excuses, cover for an insular knee-jerk hawkishness towards anything hinting of liberal internationalism. They are both right and wrong. U.S. citizens have always held a fierce pride in their democratic

institutions, and in the inviolable sanctity of the Constitution as the bedrock of the law and state. American patriotism as a whole is distinguished by a protectiveness of the national political system and the superlative success it has ostensibly engendered. This culture has cultivated skepticism of grandiose schemes of world peace: loyal to the tested and enduring traditions of U.S. government, the American public distrusts restructurings of the global order as temporary, abstract, and dangerously utopian. They become defensive against any potential intrusion on American sovereignty, a threat made all the more repugnant in the guise of a supposedly noble cause.

This quality is not shared by all powerful and sovereign states—European nations are comparatively eager to sponsor the experiments America spurns—but it is not uncommon. Similar cultural beliefs can be found in countries such as Russia or China, which both exhibit keen nationalistic tendencies and view their right to territory and independent governance as inviolate. Thus, what might appear to be disingenuous fear-mongering is often sincere concern stemming from historical and national identity. Such concern will diminish neither with nominal concessions nor the passage of time.

On Power: Laws Without Teeth

Many of those who criticize the United States for withholding aid from the ICC nonetheless affirm its relevance independent of American involvement. Where it has fallen short, academics claim that the legitimization of the Court is merely a lengthy process, but one which will ultimately endow it with independent authority.²⁴ Without the formal membership of the United States, argues Antonio Cassese, former president of the International Criminal Tribunal for Yugoslavia (ICTY), Moreno-Ocampo must use his moral and legal authority to shame the international community into aiding Court cases.²⁵ This is representative of a broad scholarly tendency to label recent Court setbacks as temporary rather than intrinsic and overarching.²⁶

It is clear enough that the Court, not being vested with enforcement powers, ultimately depends on the active support of other states. Moreno-Ocampo himself once lamented, “I have 100 states under my jurisdiction and zero policemen.”²⁷ Yet when later asked how he would enforce arrests in Sudan, he responded with certainty, “[With] the same weapons that the court has in this country: legitimacy. People learn to respect that.”²⁸ The key test of ICC durability concerns whether the weight of its role in defending global norms is sufficiently potent to compensate for a lack of hard police power.

The historical record provides compelling evidence in the negative. Moderate gains have been limited to the cases of the Democratic Republic of the Congo and the Central African Republic—both requested by the states themselves. Even in these countries, the ICC has yet to complete a trial.²⁹ The performance of the Court has proved highly disappointing in those countries ruled by uncooperative governments, namely Uganda and Sudan. In both cases, Moreno-Ocampo was equipped with few resources and minimal political leverage. His approach over the years can be described as a shift from deference, an attempt to gain the support and trust of the local government, to aggressiveness, a demonstration of his commitment to the arrests and an attempt to shame powerful states abroad. These are essentially the only two possible means of conducting ICC cases in the territories of uncooperative states. Neither has resulted in meaningful reciprocation from local governments.

Uganda was initially welcoming since the state had voluntarily requested ICC investigations into the Lord’s Resistance Army (LRA), a local insurgent group

responsible for mass crimes against humanity. The prosecutor accordingly proceeded investigations with deference to the Ugandan government, hoping to make the most of their goodwill.³⁰ But even with the combined forces of the Ugandan government, the ICC was unable to apprehend the named suspects and the government turned its focus instead to offers of peace talks and amnesty. Defending this decision, Ugandan President Yoweri Museveni said the international community had no moral authority to demand the trial of LRA leader Joseph Kony after failing to arrest him for nine months, during which time Kony had killed even UN troops. “I am sending my people to talk to Kony because I have no partners [on arresting him],” Museveni asserted. “The UN don’t [sic] have the capacity to hunt for Kony; they don’t allow us to hunt for him.”³¹

Tensions rose as ICC operations soon began to conflict with the instigation of peace talks between the Ugandan government and the LRA. Without the ability to actually arrest the indicted suspects, Moreno-Ocampo’s insistence on indictments became seen as an obstacle to the path of reconciliation that was meant to replace it. Sensing the abandonment of Ugandan state support, he reaffirmed his determination to bring LRA suspects to trial, steadfastly refusing to abandon the five arrest warrants of rebel leaders and rejecting the proposal of amnesty endorsed by the Ugandan government.³² The inability to enforce Court decisions has thus stalled both the peace process and the legal process. None of the individuals charged have yet been arrested (though two are believed dead).³³ Most disappointingly, Joseph Kony, the LRA mastermind of innumerable heinous crimes, is still free.³⁴

Even so, the Court’s struggle in Uganda is dwarfed by the difficulty it experienced in its most prominent investigation, situated in the Darfur region of Sudan. Again, Ocampo began carefully, even adopting what many legal academics critiqued as an overly cautious attitude.³⁵ A mere day after Moreno-Ocampo announced he was opening investigations, Khartoum announced the newly-established Darfur Special Criminal Court in a desperate bid to prove its capacity to prosecute the guilty, appointing none other than one of the first two officials to be charged with crimes against humanity to hear human rights complaints from what, in all likelihood, would be his own victims.³⁶ Nonetheless, Moreno-Ocampo took care to thoroughly evaluate the court before stating that the ICC was authorized to investigate Darfur.³⁷ Up until when he issued summons for the indicted officials, the prosecutor continued to proceed quietly, hoping to assuage the antagonism of the Sudanese government by publicly crediting it for its cooperation although its actual assistance was minimal.³⁸

Yet as Richard Dicker, director of the international justice program at Human Rights Watch, said at the time, “The secretary general has erred in placing so much reliance on quiet diplomacy with a government that is hellbent on obstructing justice and peacekeeping.”³⁹ As he realized that Khartoum would do everything in its power to prolong its legacy of impunity, Moreno-Ocampo changed tack. Once the polite diplomat, he employed the full range of moral and legal influence he held to shame Sudan into compliance. He called on the Security Council to send “a strong and unanimous message” to Khartoum to arrest the named suspects and urged world leaders to “break their silence” at the UN.⁴⁰ He attempted to forcibly arrest one suspect by arranging to divert his plane to Saudi Arabia.⁴¹ Finally, in a strikingly audacious move, he indicted the Sudanese head of state himself, charging President Omar Hassan al-Bashir with genocide, crimes against humanity, and war crimes.⁴²

Yet all of Moreno-Ocampo’s efforts combined could not elicit the recognition of the international community. His plan to divert the suspect’s plane failed. The Security Council was reluctant to get involved in the one case it had itself referred.

Despite the prosecutor's impassioned appeal for help in 2007, Chinese and Russian oil ties to Khartoum prevented even a weak show of action. It took another year for the Council to issue a lukewarm statement rebuking Sudan, much less to take punitive measures against the regime.⁴³ The European Union, supposedly one of the staunchest advocates of the ICC, remained silent for three years after the opening of investigations before finally issuing rhetorical statements on the matter.⁴⁴ Said then British Foreign Secretary David Miliband, "We deeply regret that the government has not taken these allegations seriously or engaged with the court, and we repeat today our call for its cooperation."⁴⁵ To the surprise of no one, Khartoum ignored him.

Though the chances of cooperation were virtually nonexistent from the outset, the Sudanese government grew bolder as the stalled ICC case highlighted the ostensible apathy of the world. Before, officials had limited their opposition to aggressive noncompliance—Interior Minister Al-Zubayr Bashir Taha threatened to slaughter any international official who tried to arrest a Sudanese official.⁴⁶ But after the Bashir arrest warrant was released, Khartoum expelled thirteen international and three domestic organizations that had provided critical humanitarian aid to over four million people.⁴⁷ In the following two months, President al-Bashir appealed to his various Arab and African allies for their diplomatic endorsement.⁴⁸ Domestically, the state waged a campaign broadcasting high-profile attacks on the ICC by not only Sudanese officials but African and Arab allies.⁴⁹

President al-Bashir's public reception of the arrest warrant was the most telling response. The scene as reported by the *BBC News* is as follows:

"Speaking on Tuesday ahead of the announcement, Mr. Bashir said the Hague tribunal could 'eat' the arrest warrant. He said it would 'not be worth the ink it is written on' and then danced for thousands of cheering supporters who burned an effigy of the ICC chief prosecutor."⁵⁰

The indictment of al-Bashir had been a last attempt at a striking demonstration of ICC authority, and Khartoum did not bother this time to defend itself nor even condemn the decision as expected—it waved it aside as a harmless joke. In that moment, the very puerility of the Sudanese government had succeeded in humiliating the Court, reducing the dramatic intervention of the Court to a farce. To date, President al-Bashir has not been arrested and remains ruler of Sudan.

The cases of Uganda and Sudan clearly illustrate the impotence of the Court where it is in fact needed most: where any possibility of just resolution, regardless of capacity, is actively suppressed by autocratic, corrupt, and otherwise illegitimate ruling elite. Whether he was conciliatory or aggressive, Prosecutor Moreno-Ocampo was unable to exceed his role as an investigator—his legal and moral authority convinced neither illegitimate states to cooperate nor the international community to pressure them into doing so. Thus, the law of the ICC, which has no hope of being enforced, is no law at all. And to attempt to advocate and investigate it without attaining an actual arrest may be called a form of charity, journalism, or diplomacy, but it is far from the firm justice envisaged by the Rome Statute.

Empowering the ICC

Authors both for and against the ICC have argued that making the Court amenable to sovereign states inherently conflicts with its goal of strengthening accountability.⁵¹ This is an overly simplistic perspective of a nuanced and evolving

political world. On the contrary, the principles of interest and power present valuable guidance on the advancement of international legal norms. As discussed in Part II, powerful states, most particularly the United States, cannot accept a framework of human rights protections which violates their own core interests of sovereignty. As evinced in Part III, further, even those states which accept Court jurisdiction as parties to the Statute are frequently reluctant to support its actual functions. Therefore, if the ICC is to enforce its arrests, it must first accept the partial limitations imposed by the prevailing concerns of sovereign states and jettison the complementarity principle. Second, in addition to the legitimacy acquired through the backing of the United States and its allies, the ICC should strengthen its institutional ties to the UN.

Reform ICC Jurisdiction

The back-story of the UN is a valuable allegory for the design of global institutions. It was not created in a flawless flash of inspiration. Rather, it is the carefully revised second draft of an idea which, however elegant, was utterly incompatible with the actual needs and characteristics of the political world. It was perhaps not as revolutionary as the League of Nations, but it understood how to address the core interests of its sponsors in a way its predecessor did not. This enabled it to become a viable institution, and, eventually, the most prominent one in the world.

Today, similarly, we should not regard reform of the ICC as a kind of moral defeat, but a measured step towards progress. The inclusion of crimes committed by non-party nationals abroad is a self-imposed political impediment that has cut the Court off from crucial state support. In order to attain this support for its own operations, it must demonstrate a reciprocal respect for sovereign interests, limiting its territorial jurisdiction to crimes of nationals of party states and to cases referred by the Security Council.

Given the recent demonization of U.S. opposition to the ICC, it is easy to forget the extraordinary legacy of U.S. support for global stability and international norms. As far back as its emergence as a superpower, it has played a pivotal role in the development of such historic institutions as Bretton Woods, the IMF, and not least of all the UN, which arranged the convention of the Rome Statute. The United States has been central to the advancement of progressive and universal values such as free trade and global security. Most importantly, it has given enormous support to the recognition and defense of human rights, the criminalization and punishment of atrocities such as genocide, and the general promotion of accountability, transparency, and the rule of law. It proves its commitment in not just words, but deeds. Of 192 member UN states, nine hold up 75 percent of the entire budget; of those nine, the United States gives and has always given the most. The same is true of U.S. support to the separate peacekeeping budget.

Moreover, the United States has repeatedly signaled its desire to aid international justice with respect to the ICC. In signing the Rome Statute (though refusing to follow through with ratification), President Clinton reaffirmed his “strong support for international accountability,” further announcing that a “properly constituted and structured” criminal court could “make a profound contribution in deterring egregious human rights abuses worldwide.”⁵² Since then, Washington has endeavored to aid the ICC without eroding its own mandate of sovereignty. Explaining its implicit consent in referring the ICC to the Darfur crisis, the United States encouraged “practical and constructive ways to cooperate in advancing our common values and our shared

commitment to international justice.”⁵³ John B. Bellinger III, legal adviser to the Bush administration, offered the possibility of aid to the ICC case in Sudan, emphasizing that the U.S. decision not to join the ICC was due to issues of jurisdiction and national sovereignty but was “in no way...a vote for impunity.”⁵⁴

Typically, scholars either dismiss such incidents as negligible aberrations in U.S. hostility to the Court or tout them triumphantly as indications of U.S. capitulation before diplomatic pressure. Neither explanation is consistent with the robust leadership of the United States in the development of international norms. Washington has demonstrated a genuine dedication to an international system of justice, but one that cannot be fully realized under the current structure of the Court. Though President Clinton refused to ratify the Rome Statute as the detailed blueprint of a flawed institution, he signed it in support of the abstract and commendable goals of international justice. Similarly, American statesmen have stressed that their opposition to the ICC, however passionate, is a divergence on design and not principle. They carefully target the aspects of the Court they disagree with—namely, its jurisdiction—without undermining it as a whole. Meanwhile, they constantly strive to work around these political differences so as not to prevent collaboration with the Court on common goals.

If and when the Statute is amended accordingly, the backing of the American state would enable the Court to obtain compliance from uncooperative regimes where it was formerly impossible. Apart from direct material aid towards investigations and peacekeeping, the United States would be a compelling advocate for the Court in international forums. When Moreno-Ocampo’s moral appeals fell flat, for instance, Washington could have negotiated with China and Russia in the clear language of their political interests, possibly enough to weaken their interests in Sudan. American patronage, furthermore, combined with the Court’s acknowledgement for state sovereignty, is also likely to provoke renewed consideration of membership from U.S. allies such as Israel or India, particularly given that the majority of non-party states will then be countries where the rule of law, transparency, and accountability is notoriously weak.

Limiting the *de jure* authority of the Court by demonstrating respect for sovereignty in this sense maximizes its *de facto* strength. It renounces jurisdiction over cases which are unlikely to come to the Court in the first place, as the majority of crimes prosecuted internationally are and have been executed by governments within their own country. At the same time, the ICC would vastly improve its ability to prosecute and conclude trials across the board.

Establish Strong Institutional Ties with the UN

The advantages which follow from the membership of the United States and other assorted countries may be considerable, but they will not be sufficient. Certain non-party states, particularly China or Russia, would not necessarily follow the U.S. lead in signing the Rome Statute. And as discussed earlier, even party states to the ICC have been slow to offer concrete aid when it comes to the enforcement of arrests. Overall, the global sense of moral duty is weak. States do not acknowledge the ICC as a body they belong to, let alone one they are bound to support. Once it has acquired a wider range of signatories, the next step is to strengthen the institutional authority of the Court as the embodiment of international legal principles. And at a future point when the ICC has

earned global respect for its work, it should aim ultimately for formal democratic adoption into the UN.

UN Membership endows definitive credibility and legitimacy which is crucial to a state's political strength; explicit recognition or endorsement through a UN resolution similarly empowers individual state decisions. Consider that even Sudan, which responded to Moreno-Ocampo's investigations so viciously, frequently took care to show caution and respect before the UN, protesting the case in rational terms of fairness or morality.⁵⁵ It is unlikely that the diplomatic involvement of the UN alone would have forced compliance, given its limited sway in international politics overall. But it would certainly put Sudan in the difficult position of having to defy the wishes of the combined international community, or of being branded a pariah state.

The ICC, however, is not a UN body. It is an independent institution created through a separate multilateral treaty. This, in addition to the frequently divergent or conflicting behavior of the two institutions, has noticeably widened the gap between them. Such a rift has been disastrous for the ICC, which must now struggle twice as hard to build legitimacy, its only form of leverage and a relatively weak one to boot. Not only must it start completely from scratch as opposed to inheriting the reputation of an already accredited institution, but the apathy of the UN—its parent institution and the representative body of the world—is a definitive green light for every other state to disregard it as well.

The ICC is too permanent and controversial to be quickly incorporated into the UN through a Security Council mandate. Yet a process of gradually expanded coordination will reinforce Court legitimacy over time. Regular updates between a new subsidiary committee to the Security Council and the Office of the Prosecutor, for instance, could evaluate the status of Court cases and discuss matters of diplomatic or material aid. Above all, the UN must be reminded that it cannot leave the ICC to flounder helplessly. The Court should concentrate on using these incremental reforms to complete successful prosecutions one at a time until it has demonstrated its ability to live up to its role and has accumulated more legitimacy.

Following the accession of the ICC as a UN body, the Court would function ideally as a specialized agency such as the World Bank or the UN Education, Scientific and Cultural Organization (UNESCO), both which execute important functions in promoting global norms and which enjoy a level of acclaim and prominence the ICC should aspire to. While the Office of the Prosecutor and Judicial Divisions would remain independent and objective, the ICC Assembly of States Parties would be replaced by the General Assembly, and the Registry might be incorporated in the UN clerical bureaucracy.

At this level of coordination, the strongest weapon of UN affiliation would be the hard political support which legitimacy begets. Take the ICTY, blessed with the support of virtually all members of the UN, and especially the five powerful members of the Security Council, due to its creation under a Security Council mandate. Tribunal officials still struggled with obstructionist local officials who had been complicit in the atrocities, but government noncooperation was inevitably overcome. All things considered, the hard power of the West—whether it was the American threat to block Serbian access to a half-billion dollars in aid or the prospect of EU accession for the Croatian government—decisively brought the suspects, most prominently President Slobodan Milosevic, to trial.⁵⁶

Even considering these incentives, Kenneth Rodman notes that the ICTY “was only able to play a meaningful role after Western powers took coercive actions to end

the war.⁵⁷ Similarly, most Court cases are situated in conflict or post-conflict areas. In Uganda, the LRA continued to commit mass atrocities while Moreno-Ocampo announced his findings. The government soon felt no other choice but to resort to offers of amnesty for the guilty in exchange for negotiations. When the Court continued to press for justice, the public vilified it for endangering their only chance of peace. Two years after the opening of investigations in Sudan, an African news source reported a similar situation: “Since the ICC has started its investigation, Khartoum not only continued its campaign of atrocities, but escalated it—despite warnings from the then UN secretary-general Kofi Annan that those responsible would be held accountable.”⁵⁸

It is hard to imagine anything more damaging to the credibility of a judicial body than to have its carefully issued decrees flagrantly flouted throughout the entire legal process. In the eyes of local victims, a helpless Court is nothing but an abstract intellectual exercise. The military and peacekeeping forces of the UN must be emphasized in particular to complement the legal proceedings of the ICC, perhaps with its subsidiary committee to the Security Council working with the Department of Peacekeeping Operations. As the accepted executive authority of the international system, the Security Council should exercise, when necessary, its widely recognized right to humanitarian intervention as stated in Chapter VII of the UN Charter.⁵⁹ This right was invoked throughout the 1990s to protect civilians, maintain the rule of law, and provide aid in Bosnia, Somalia, and Haiti. It must again be invoked to complement the presence of the ICC in comparable areas today.⁶⁰

Conclusion

Ironically enough, the utopian aspirations of ICC proponents coincide with a keen cynicism of status quo *realpolitik*. This suspicion of anything less than a stark departure from conventional interstate politics is preventing the institution of the two aforementioned reforms today. For lower and mid-level powers, shifting the ICC closer to an exclusive and small cohort of dominant states in the Security Council betrays its original principles of equal and impartial justice. The inefficacy of humanitarian intervention in regional conflict, in the egregious failures of UN peacekeeping in Bosnia, for instance, has furthermore engendered disillusionment in the capabilities of the Security Council.

More troubling than the uncertain capabilities of the Security Council are its purportedly dubious intentions. Though differing on whether the international system can be altered, realists and liberals alike have argued that the global protection of justice cannot be entrusted to the political schemes of states.⁶¹ Accordingly, while permanent members of the Security Council had argued that the Council must determine ICC cases, other countries suggested that another UN organ determine the focus of Court prosecutions instead.⁶² States were split on the question of whether Security Council findings of aggression should bind the Court.⁶³ Developing countries resisted the notion of prior authorization from the Security Council most vehemently of all; tellingly, even many U.S. allies believed it ran contrary to a system of universal legal standards.⁶⁴ A measured wariness of “victor’s justice” pervaded the Rome Statute negotiations; ten years later, the ostensible triumph of powerful state interests will swiftly rekindle it.

Without delving too deeply into the multifaceted subject of UN peacekeeping, it is generally agreed upon that an international peacekeeping force remains vital in the world. Since then, the international community has been called upon to intervene in new humanitarian catastrophes of the twenty-first century. Western inaction towards the

Rwandan genocide in 1994 was universally condemned. The UN called the Darfur genocide the worst in recent memory, one whose severity required sustained assistance and engagement by the global community.⁶⁵ If anything, the flawed humanitarian record of the UN should spur us to improve rather than neglect our efforts. For example, the 2000 Report of the Panel on UN Peace Operations formally proposed a UN rapid-deployment force, and political scientists have suggested consistent troop provisions from the permanent five members of the Security Council to maintain a limited peacekeeping force.⁶⁶ Reform of UN peacekeeping, in supplementing ICC investigations and otherwise, is one auspicious area for further research.

If effective, it would be naive to assume that the Security Council will be eager to intervene in every crisis where it is needed—it has already demonstrated that it is limited by political interests when dealing with existing ICC cases. The ICC therefore will not succeed in all of its ventures, as there will be instances when, despite all efforts of international pressure and U.S. diplomacy, UN involvement is precluded by the narrow strategic interests of a Security Council state. Unfortunately, unqualified and perpetual support for humanitarian action, remains beyond reach in an overwhelmingly anarchic world. But for the time being, it is a firm first step towards strengthening international norms and empowering a global criminal court in its infancy.

On the other hand, it would be similarly misguided to expect Security Council states to somehow appropriate the Court to fulfill its political goals. The ICC as a judicial body will remain entirely autonomous of the Security Council and of the United States. All legal proceedings and decisions should continue to proceed independently. The Court must collaborate and coordinate with the UN, but as a specialized agency it would be no more liable to political bias than the IMF or UNESCO.

Furthermore, it must be reemphasized that powerful states do not aim to control the judicial decisions of the ICC. U.S. concerns are defensive rather than aggressive: it seeks to ensure that the protection of international law and order—goals it heartily endorses—does not infringe on its own sovereignty. In most cases, powerful governments are sufficiently secure in their ability to protect their interests through political institutions such as the UN or their independent foreign policies. Conversely, they are loathe to destroy their own credibility in the eyes of the world by exploiting a humanitarian disaster. When a state does choose to risk international disrepute, as in the U.S. blunders in Iraq and Afghanistan, it is blocked from taking action through international bodies by competing powers.

Thus, the world continues to recognize the responsibility of powerful states to achieve peace and justice in areas ravaged by conflict. The World Summit Outcome Document, adopted by 170 countries in 2005, pronounced that “we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the UN Charter, including Chapter VII...should peaceful means be inadequate and national authorities manifestly failing [sic] to protect their populations” from “genocide, war crimes, ethnic cleansing and crimes against humanity.”⁶⁷ Likewise, it has in part acknowledged the need for great powers to provide the resources and diplomatic momentum to promote international rule of law: the Rome Statute allows the Security Council to order both referrals and deferrals of investigations to the Court.⁶⁸

It is now time for the international community to take the next step towards global justice. The past decade has abundantly confirmed that the ICC is an institution in serious need of reform: its performance in Uganda, then Sudan, and now Kenya illustrate that its efforts to punish the guilty have been consistently frustrated in the most egregious cases of regional injustice. The consistent and overarching problems before

the Court originate from a fundamental misjudgment of international politics—one based on an overreliance on legitimacy and a distorted view of power relations. Consequently, without the threat of hard power, the ICC has been helpless to enforce its decisions. Its authority is titular, not simply because it is ignored by obstructionist authorities, but because even its own signatories refuse to come to its aid.

To function effectively, the ICC must recognize the evolving roles of interest and power in the world. First, regarding interest: the dominant actors on the international stage, most significantly the U.S. government, have demonstrated substantial support for humanitarian goals in the past, indicating the pursuit of global in addition to immediately selfish interests. But because such altruism is stifled by a legal framework which violates the core self-interest of state sovereignty, the ICC must limit its jurisdiction in return for their active support. Second, on power: the poor performance of the Court illustrates not only its obvious weakness in hard political power, but more subtly its shortage of credibility. It must seek integration with the UN, which embodies both the legitimacy as well as military and economic strength the ICC desperately needs, in increased bureaucratic and institutional ties as well as the substantive coordination of operations.

Only after thorough reevaluation of the principles on which it was created can the ICC function as an effectual international judicial body. The perpetuation of injustice and impunity, not only in Kenya, not only in the unstable and war-torn regions throughout the world, but also in the unknown humanitarian crises of the future, demands an institution which can take concrete action now—not a romantic vision of what might be. The Court has been a promising first step in the development of international law, albeit one with great room for improvement. With careful optimism and a keen regard for the status quo, let us now continue to build upon it.

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The Case for Reforming U.S. Assisted Reproductive Technology Policy: A Comparative Study of European and U.S. Approaches

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Abstract

The United States has a distinctly noninterventionist approach to the regulation of assisted reproductive technology (ART) in that there is limited government oversight of ART use. Like the United States, European nations experience high levels of ART use, and the most substantial portion of all infertility treatment cycles on the continent occurs in the United Kingdom (UK), Germany, and France.¹ Yet while the U.S. government has no established laws on assisted reproduction procedures, its European peers have taken a position on ART regulation. The UK regulates ART through a statutory licensing body that sets progressive but cost-conscious standards on ART use. Germany is highly prohibitive and places strict restrictions on access to ART and the handling of human embryos. France takes a cautious regulatory approach; it encourages childbearing through ART but limits access to maintain the traditional nuclear family. Drawing on the policies of the UK, Germany, and France, this paper argues that the United States should: (1) recognize infertility as an illness, (2) mandate insurance coverage of its treatment and (3) create a government body to oversee the use of ART.

Introduction

Infertility affects millions of individuals around the globe, and recent advances in medical technology have finally made treatment possible. In the United States alone, nearly 10 percent of women between the ages of fifteen and forty-four are infertile.² Infertility refers to the inability to get pregnant after one year of attempts.³ The recent advent of assisted reproductive technology (ART) has given these women the possibility of becoming pregnant. ART refers to the group of methods or treatments that handle both eggs and sperm to help infertile women conceive.⁴ Of the ART available, the most common and effective infertility treatment method is in vitro fertilization (IVF), which describes fertilization outside of the body. Widespread use of ART in much of the developed world began in the late 1970s, and presently, over 1 percent of all childbirths in the United States result from ART use.⁵

This paper will explore the policy positions of the United Kingdom (UK), France, and Germany on the use of ART, focusing on regulation of IVF. U.S. treatment of ART use will be discussed next, along with policy recommendations for the nation in light of the policy choices of the aforementioned peer countries. The UK sets cost-conscious restrictions on ART such that ART is accessible, and the patient and doctor have a say in how ART is used. The Human Fertilization and Embryology Authority (HFEA), the UK statutory licensing body, has the authority to deal with matters related to ART use.⁶ France has what is described as a “cautious regulatory” approach, where the use of ART is encouraged but it is confined for the creation of a nuclear family. Owing to its history of scientific and ethical abuses, Germany places strict restrictions on ART access and

the handling of human embryos.⁷

The United States has a distinctly noninterventionist approach to ART regulation in which the use of technology is largely unfettered. In fact, the government has not established any laws on the procedures. This paper discusses the possibility of more effective monitoring of ART use in the United States. Based on the policies of peer countries, the United States should take on a model that recognizes infertility as an illness and provides safe access to its treatment.

Problems Without Control: U.S. Regulation of ART

Most countries allow some form of assisted reproduction, and the extent to which governments intervene in the practice varies drastically and depends on factors like culture, religion, and politics. The review of the policies of France, Germany, and the UK provided in this paper reveals that important features defining a countries' policies on ART use include licensing standards for fertility clinics, the eligibility requirements of ART recipients, and treatment guidelines. Additionally, the government may attempt to make ART more accessible by covering ART through public health insurance or enforcing a government mandate for private insurance companies to finance ART use. Of course, such considerations require determining whether the use of ART demands government attention.

Reasons for government regulation of ART include public health concerns, considerations of cost and access, and protection against abuse. The potential benefits are clear: of infertile women younger than thirty-five years old, ART leads to live births in 40 percent of the cases.⁸ However, with these possible gains come possible dangers like high rates of twinning and other multiple births. In the United States, for example, the incidence of multiple births is 33 percent through IVF compared to only 3 percent through natural conception.⁹ Multiple births place an extra burden on the mother and present serious health risks for the child.¹⁰ Another danger of ART involves children's health. Infants conceived through IVF have low birth weights, regularly experience preterm delivery, and present poor perinatal health indicators.^{11,12} Research also suggests that the hormones involved with IVF heighten the risk of breast, ovarian, and endometrial cancer for mothers.¹³ This paper asserts the viewpoint that these public health concerns demand government regulation of the procedure.

Government regulation would also likely help reduce the costs of expensive infertility treatments and grant ART access to the low-income. One cycle of IVF costs about \$12,000 in the United States, and the mean cost per live birth delivery is about \$41,000—a cost that rapidly climbs with the high incidence of multiple births associated with IVF.^{14,15} Since the United States does not provide universal health care under the current system, the treatment of infertility seems to be limited to the wealthy and well-educated. To give an example, nearly half of those who undergo IVF in Massachusetts have an advanced degree, compared to only 12.4 percent of the general state population.¹⁶ Additionally, most Americans access health care through private health insurance, and most insurance companies do not cover the costs of infertility treatment. Admittedly, a few states in the country, like Massachusetts and New Jersey, indeed require insurers to cover infertility treatment, but without government assistance, access to expensive ART is likely to remain limited.¹⁷

There is little government control over the actions of fertility clinics, and as a result, multiple births and inappropriate screenings for gender persist when they could be avoided with greater government surveillance. There is a serious concern that IVF in

conjunction with pre-implantation genetic diagnosis (PGD), the procedure developed to screen embryos for certain genetic traits, may be abused. Although PGD is currently used to cull the propagation of genetic disorders, it can be perverted and used for sex selection.¹⁸ There is also worry that in the future PGD can be used to destroy embryos with unfavorable traits that may be linked to genes, like short stature, obesity, and limited intelligence. The media attention to the unemployed, single mother Nadya Suleman who gave birth to all fourteen of her children through IVF brings to light other dangers of unrestricted IVF.¹⁹ This case suggests that individuals and couples seeking ART need to be screened to protect the best interests of children. The government should respond to these exploitative practices and more closely control ART use in the hope of warding off misuses of ART.

Considering the issues about access, public health, and abuse associated with ART, the use of these technologies demands government regulation, particularly in the United States, where these issues are more severe than in European counterparts. Although the U.S. government approves of the right to practice assisted reproduction and permits the use of ART, such as PGD, the government plays a minimal role in actually supervising ART use. Relatively powerless and only loosely linked to the issues surrounding ART, the Food and Drug Administration (FDA) and Centers for Disease Control and Prevention (CDC) represent the only government bodies involved in ART use. The FDA requires that all fertility clinics are registered and mandates the screening of sperm and eggs for risk factors.²⁰ The CDC has requirements for basic clinic and lab sanitation standards.^{21,22}

Due to the disengaged attitude the U.S. government takes toward ART regulation, this function is instead served by professional societies.²³ But these entities still lack true administrative clout for effective control of ART. For instance, the Society for Assisted Reproductive Technologies (SART) sets “good practice standards” like the suitability of recipients that, despite acting as guidelines, cannot be enforced. In lieu of a federal licensing program, SART also nominally issues certificates to clinics that meet their standards.²⁴ The increasingly high rates of multiple births through IVF point to the ineffectiveness of SART’s unenforceable directives, which additionally recommend the number of embryos for implantation.²⁵ The United States’ non-interventionist stance on ART is severely inadequate and the government should follow the lead of its peer countries to closely monitor the use of ART. By fusing select aspects of the reproductive technology policies of England, France, and Germany, this paper will set out to argue that the United States should fundamentally reform its approach to ART by taking on three initiatives: officially considering infertility as an illness; requiring insurance coverage of its treatment; and creating a government body to resolve the problems associated with public health and access.

ART in the United Kingdom: A Cost-Conscious Approach

In the UK (specifically Great Britain, which will be referred to as the UK throughout the rest of this paper), the public health care system operates through the National Health Service (NHS). The NHS provides free health services to the majority of the population in an effort to promote good health and to treat sickness and disease.²⁶ The system is publicly financed and functions by directly compensating members for health care expenses.²⁷ The British government is, in a sense, directly responsible for health care services in the nation. One exceptional feature of the system is that it establishes cost-effective measures, making it widespread practice that physicians take

into account cost considerations in their clinical decisions. Currently, the National Institute for Health and Clinical Excellence (NICE) sets cost-effectiveness recommendations to encourage the prioritization of certain treatments and medicines over others.²⁸ Clearly, cost considerations are integral to the British government's policy on ART.

The British government institutes explicit limits with respect to treatment, access to treatment, informed consent of recipients, and licensing of facilities. According to NHS guidelines, IVF treatment is limited to three cycles per recipient and a maximum of two embryos can be transferred to the uterus at one time.^{29,30} It is probable that these requisite conditions are aimed both to address the public health worries of high incidence of multiple births and to control costs.³¹

The English system further constrains access to infertility treatment by screening ART candidates. These screens integrate factors such as age, medical history, and extent of infertility into an assessment of the likelihood of success and the NHS implements this data as a basis for treatment eligibility.³² Candidates are also screened for their suitability as parents.³³ Although the screening of recipients is intended to find readily capable parents, it can be exploited to bar the poor and other marginalized groups from access to assisted reproduction, like in the United States. This phenomenon constitutes the source of the strongest criticism of the British model: health care rationing. Similarly, many sectors of the U.S. population cannot gain access to assisted reproduction due to the prohibitively expensive cost of ART. Despite the relative inevitability that cost-effectiveness becomes a major consideration in a publicly funded health care system, steps can be taken to help block discrimination against minorities and the poor.

At least in the British system, discrimination is lessened by laws that attempt to reduce costs by emphasizing factors that are not inherently socioeconomic, such as parental maturity, seriousness about the procedure, and a thorough understanding of the risks and pitfalls of treatment. The 1990 Human Fertilization and Embryology Act in England, for instance, requires the informed consent of recipients of ART. The law also recommends that patients undergo counseling prior to treatment to discuss the difficulties of treatment and prepare for the reasonable possibility of failure.³⁴ Counseling is intended to contain cost by deterring less determined couples from continuing with treatment and protect the patient.³⁵

Another area under the government's purview, the licensing of infertility facilities forms part of an effort to ensure standards of safety and efficacy.³⁶ The specific body responsible for the statutory licensing of ART activity is the Human Fertilization and Embryology Authority (HFEA).³⁷ Broadly described, the HFEA establishes procedural regulations of ART and maintains quality assurance standards in clinics with its licensing authority.³⁸

ART in France: Pronatalism and the Nuclear Family

France has a government-funded health insurance scheme where taxes are collected to pool risks and the government acts as the insurance provider. Patients pay their health care expenses up front, and the government reimburses them for about 70 percent of costs in most cases; fertility treatment is fully reimbursed.³⁹

The French position on ART is rooted in the government's pronatalist stance and conservative tradition.⁴⁰ In other words, the French government encourages its citizens to have children, but it argues that children should be raised in a traditional

nuclear family. Accordingly, access to ART is limited to married couples or heterosexual individuals who are in a committed relationship for at least two years; treatment is not offered to homosexual couples.^{41,42} While the French policy position aims to extend access to IVF to the poor, it unfairly excludes homosexuals from ART. The government defends its exclusion of homosexuals from IVF access by insisting that an upbringing in a traditional family setting is in a child's best interest. Yet, research on the disadvantages and benefits of raising children by homosexual parents is inconsistent.⁴³

Counseling and the number of treatment cycles covered are two other important factors in the French policy that distinguish it from its British counterpart.⁴⁴ While these measures are not motivated by cost considerations in France like in the UK, they do effectively deter some individuals from seeking treatment. Some candidates who receive counseling and learn of the difficulties and frustrations associated ART use may become discouraged from further pursuing infertility treatment. Finally, those who are permitted treatment are entitled to four treatment cycles rather than the three afforded by the British model.⁴⁵ Overall, French policies on ART are more financially inclusive than those of other countries, in accord with the nation's pronatalism.

ART in Germany: A Paternalistic Approach

Germany has a "corporatist" health care system, meaning large interest groups control the provision of health care.⁴⁶ The insurance obligation operates through government-regulated social insurance funds that offer the same services and compete with each other to offer reasonable premiums.⁴⁷ Employers, local organizations, and trade unions contribute to social insurance funds, which provide health insurance for their members.⁴⁸ Everyone must purchase affordable health insurance coverage either individually or through groups, and individuals purchase insurance at premiums commensurate to their earnings rather than to their risk status or family size.⁴⁹ Still, the government plays a strong role in health care provision, supervising the regulation of health care provision through strict legislative structures.⁵⁰

Germany has a highly prohibitive and confining approach to the regulation of ART, restricting the use of ART to a greater extent than its peer countries. A major motivator of German policy is the desire to distance the country from a history of science and human rights abuses during the Second World War.⁵¹ The Bundesärztekammer, the country's federal medical association, is the regulatory authority on ART in the nation, and it sets guidelines on ART use much like the HFEA of the British system.⁵² The German government only allows for three embryos to be transferred for implantation at a time, and coverage of ART by public health insurance is limited to only 50 percent.^{53,54} Access to IVF is strictly limited to married heterosexual couples, although extramarital couples may send requests to use IVF to a special commission.⁵⁵ The ban on pre-implantation diagnosis (PGD) is distinctive to German policy.⁵⁶ As previously mentioned, the concern regarding PGD stems from the potential abuse of the procedure to destroy embryos with undesirable traits rather than simply screen for genetic diseases. This problem is even more prevalent in Germany again due to the inhumane medical experiments that took place in the country during the Second World War.⁵⁷

In an effort to protect persons who would be conceived by IVF and guard against human rights abuses, the German government closely monitors the use of ART. However, the strict regulations on ART inhibit some of the German population from access to valuable medical technology.

Recommendations for United States Policy on ART

Despite the tremendous reform that the 2014 Patient Protection and Affordable Care Act is said to bring to the U.S. health care system, ART policy will remain undefined. The total absence of legislation on ART in the United States is risky considering the problems it presents for public health and access. The actions of professional societies that regulate ART, such as SART, are insufficient, and so the safety and efficacy of fertility treatments administered in the United States are not guaranteed. SART's efforts to collect data on the outcomes of fertility clinics have been filled with instances of falsely high success rates and other ethical and scientific infractions.⁵⁸ Better equipped than professional societies to monitor ART, the government has legitimate authority to hold fertility clinics accountable for their failures. Without reform to assisted reproduction policy, doctors and fertility clinics will continue to treat patients as they see fit, and public health issues, such as the high incidence of multiple gestations, may only worsen.

In light of the policy choices of the UK, France, and Germany, this paper puts forth two major ART policy recommendations for the United States. First, the U.S. government should consider legislation on ART to resolve concern for access and public health. The proposal includes a government mandate for insurance coverage of ART to deal with the aforementioned concerns. Second, the United States should create a single government body to monitor the use of ART and enforce guidelines on the safe use of ART, a suggestion based on the efficiency of such a body in the UK and the inadequacy of legislation alone in the United States. At the very least, government agency should determine the suitability of ART recipients and aim to resolve public health issues.

Government-Mandated Insurance Coverage of ART

The U.S. government should mandate that insurance companies cover infertility treatment in order to ensure access to ART. Without government involvement, poverty has become a major barrier to ART access in the United States. In the peer countries reviewed, the government funds at least a portion of permissible technologies. The French government, for one, recognizes infertility as a serious illness and provides relatively extensive access to infertility treatment. Low-income French citizens, consequently, have a certain level of access to ART that their U.S. counterparts lack. Similarly, Germany covers half the cost of permissible ART.⁵⁹ In the United States, one standard cycle of IVF costs about half of the average worker's annual disposable income.^{60,61} The cost of ART in the U.S. is highly prohibitive, and without insurance coverage of ART, infertility treatment is likely to stay available to a small, affluent portion of society.

Government-mandated insurance coverage for in vitro fertilization also stands to ameliorate the public health concerns associated with the use of ART. There have been positive outcomes in states where such a policy exists; for instance, Massachusetts has experienced a lower multiple-birth rate and fewer embryo transfers than states that do not require insurance coverage of ART.⁶² The high incidence of multiple births due to IVF is a major public health issue related to that form of reproductive technology. Fewer embryos are transferred in states that require insurance coverage for IVF, and the implantation of fewer embryos lowers the chance of multiple gestations.^{63,64} Thus, insurance coverage of IVF encourages safer medical practices by eliminating the

incentive for numerous embryos to be implanted through IVF. In Germany, the UK, and France—countries where insurance coverage extends to IVF and where the number of embryos for implantation is limited—the incidence of multiple births is significantly reduced relative to these rates in the United States.⁶⁵

The Creation of a Government Body to Regulate ART

The United States should create a government body with the authority to set guidelines on ART and the power to enforce these guidelines since an independent federal body can best control the use of ART in the United States.⁶⁶ The government is better equipped than professional societies to evaluate the effectiveness of the practices of fertility clinics. This is supported by the effectiveness of ART guidelines in the UK and the comparative inadequacy of U.S. government monitoring of ART use. The UK case shows that adequate ART regulation operates best under the direction of one federal agency and that the United States lacks such centralization. The UK's HFEA monitors ART by managing the licensing of fertility clinics and laboratories that handle human embryos.⁶⁷ The government sets national safety and ethics standards, and the HFEA maintains these standards through regular review of licensed clinics and laboratories.⁶⁸ The HFEA also requires clinics to submit data on ART use for research purposes and disseminates objective assisted reproduction research to the public.⁶⁹

Moreover, a government agency is needed to monitor ART since a set of laws and regulations on ART is insufficient considering the technologies' current evolution. Presently, in the United States, the CDC and the FDA play limited roles in the control of ART use. The CDC's Division of Reproductive Health surveys the use of ART and collects data on the outcomes of ART with heavy reliance on professional societies, such as SART and the American Society for Reproductive Medicine.⁷⁰ Fertility clinics are required to register with the FDA, and the FDA is responsible for ensuring that human reproductive tissue, including donated sperm and egg, are screened for certain risk factors.^{71,72} The government oversight of ART by the CDC and FDA is minimal, and the ever-present concerns for public health demonstrate that the efforts of these agencies are insufficient; greater oversight stands to produce improved public health, as is the case in the UK.^{73,74,75} A single government agency is needed to adapt the regulations of ART as is appropriate.

Recommended Guidelines for ART Use

Despite the efforts of professional societies, the FDA, and the CDC to regulate ART, the persistent problems in the current system demand more extensive government involvement in the regulation of ART. For example, under the current system, the incidence of risky multiple gestations in the United States is high relative to that in European counterparts.⁷⁶ Thus, a government body is necessary to strengthen the force of guidelines for minimizing multiple births. The number of embryos transferred should be limited to two embryos at a time, as in the peer countries examined. Such a policy would probably discourage the occurrence of multiple births, given the lower incidence of high-order births in the peer countries considered.⁷⁷

Second, the use of ART also introduces problems regarding the suitability of recipients, thus motivating the requirement that candidates are screened for their suitability as parents. The agency should formulate criteria like those of the UK to determine a candidate's suitability for parenthood with care to avoid discrimination

based on marital status or sexual orientation. For instance, candidates should have no history of child abuse or neglect and should be financially able to care for the child.

The agency should also require and verify the informed consent and counseling of ART recipients to eliminate unacceptable recipients of these technologies, like in the UK and France. Recipients of ART should be obligated to undergo counseling to confirm their understanding of the difficulties and limited promise of infertility treatment. Not only may this decrease psychological and physiological distress among ART recipients, but it could also deter those who are not fully committed from pursuing treatment—just as is the case in France. The federal agency should standardize the screening and counseling of candidates in order to eliminate unsuitable recipients for ART.

Objections and Conclusion

The U.S. noninterventionist approach to the regulation of ART should change in response to concern for public health, abuse, and access. The continued unregulated use of ART may pose serious health risks to the mother and child. Beyond the health issues related to pregnancies through ART use, children conceived through ART tend to present with poor health indicators that demand medical attention even after they are born.⁷⁸ The existing treatment of ART use in the United States also leads to an elevated incidence of high-risk multiple gestations. In regard to ART abuse, the high-profile story of Nadya Suleman, the unemployed single mother of fourteen children conceived through IVF, highlights the worry that a lack of control of ART use allows unsuitable candidates to become parents; in particular, these ART recipients may not be adequate parents for financial, emotional, or physical reasons. Finally, there is also an equity gap with respect to ART access, which could be mitigated by government action. The benefits of ART for infertile women and couples are undeniable, yet the U.S. government has allowed access to these technologies to remain limited to the nation's wealthiest. This inequity persists despite recent health care reform to resolve the U.S. health care system's inadequacies in other respects.

This paper's review of ART policies in the UK, France, and Germany exposes varied approaches to regulating these technologies. While no one country's policy position precisely aligns with the tradition and precedent set in the United States, each case informs the strategy the U.S. government should consider in order to address the failings of the present system. First, the decision by all three countries to require insurance coverage for the treatment of infertility meets concern associated with public health and access. The greater accessibility of ART and better safety outcomes in France, the UK, and Germany, in part to the credit of these European nations' insurance coverage of infertility treatment, motivate my recommendation that the U.S. mandate insurance coverage of ART.

The efficient monitoring of standards concerning safety, public health, and abuse by the HFEA in the UK additionally supports the proposal that the United States regulate ART through a single federal agency. While regulation of ART functions without a federal agency in France and Germany, the existing division of regulation of ART among professional societies, the CDC, and the FDA in the United States has already proven ineffective. Moreover, the current rapid evolution of ART calls for the creation of a single government body to keep up with the advances of these technologies and maintain their safe use.

Some health care consumers may resent government involvement in assisted reproduction in light of the nation's non-interventionist tradition. However, this negative outlook toward ART is unsupported. The recommended policies do not compromise reproductive liberty or individual rights since Americans can still pay for ART out-of-pocket. Instead, the recommendations broaden ART access to Americans who cannot afford to pay for it otherwise, and address issues about the safety and efficacy of ART use. The proposal intends to solve problems of public health, access, and cost without encroaching on reproductive liberty. Thus, any shortsighted opposition to the reform can be overcome considering the concrete benefits to public health and the integrity of ART that comes from government involvement in the use of these technologies. Certainly, the benefits of the proposed conditions for ART regulation in the United States far outweigh any reservations about restrictions on assisted reproduction

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Religious Liberty and The Establishment Clause: An Ongoing Controversy

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Abstract

On April 15, 2010, Judge Barbara Crabb of the United States District Court for the Western District of Wisconsin reignited a firestorm over one of the oldest controversies in American law: the role of religion in public life. In *Freedom From Religion Foundation v Obama*, Judge Crabb ruled that the National Day of Prayer is unconstitutional because it violated the First Amendment's Establishment Clause¹. This ruling brought the issue of religious freedom back to the forefront of the American political debate.

The most commonly cited phrase regarding American religious freedoms is "the separation of church and state"; however, no such separation is dictated by the Constitution. In reality, the Constitutional definition of religious liberty is embodied by the Establishment and Free Exercise Clauses of the First Amendment. First amendment jurisprudence suffers from a perception of diverging precedents: some rulings call for universal religious liberty while others call for substantial restrictions on religious activity.

Despite popular perception, there is a clear, single precedent set by past religious liberty cases. Rather than granting, as the Freedom From Religion Foundation's name suggests, the freedom from religion (as many believe it does), the precedent grants freedom of religion. This means that each individual citizen has the right to practice and preach his/her religious beliefs, that religion may invoked in public, and that the government may not take any action that would be perceived as the endorsement or inhibition of any specific religion.

Introduction

It is peculiar that the most frequently cited representation of the Constitution's principles regarding religion, the separation of church and state, is a phrase that never appears in the Constitution at all. The notion of complete separation was coined in Thomas Jefferson's 1802 Letter to the Danbury Baptist Association, in which he proclaimed that the First Amendment served the purpose of "building a wall of separation between Church and State."^{2,3} In fact, the First Amendment makes no mention of such a separation; instead, the First Amendment states that "Congress shall make no laws concerning the establishment of religion, or prohibiting the free exercise thereof."⁴ Respectively known as the Establishment and Free Exercise Clauses, they set two clear precedents: first, that Congress shall make no law that either endorses or inhibits the establishment of any given religion, and second, that Congress shall make no law that inhibits the free exercise of any religion.⁵ Thus, it seems that the clauses seek not to prohibit any government action that involves religion; rather, they seek to prevent discrimination by the government based on religion. Religious discrimination can be defined as an explicit statement by the government of a specific set of views regarding

religious issues. The Court puts it best when it says that “the government should not prefer one religion to another, or religion to irreligion.”⁶

The Supreme Court and lower courts have generally adhered to the precedent of Establishment Clause cases. However, as the casework became more convoluted, so too did the jurisprudence. The Court has, in my instances, set divergent precedent. As the majority opinion noted in *Van Orden v Perry* (2005):

“Our cases, Januslike, point in two directions... One face looks toward the strong role played by religion and religious traditions throughout our Nation’s history... The other face looks toward the principle that governmental intervention in religious matters can itself endanger religious freedom.”⁷

That there are significant differences in the motivations of these two directions is undeniable. However, the presence of two focal points of Establishment Clause and Free Exercise Clause jurisprudences does not translate into divergent precedents. Indeed, there is a single clear precedent that has been set by numerous cases that offers a clearly defined, middle-of-the-road approach. This philosophy mandates, as does the Constitution, that no religion or set of religious beliefs be singled out by the law, whether the purpose of such a law is to favor or suppress.

This paper is divided into four sections. First, the background of generally accepted precedent on issues of religious freedom will be investigated to develop a definition of the meaning of religious freedom in the American legal system. Then, this paper will briefly explain common misconceptions and misinterpretations of this precedent. It will use the contrast between two superficially similar cases, *Van Orden v Perry* and *McCreary County v ACLU of Kentucky* to demonstrate the precise nature of religious freedom in the United States. Finally, the discussion will return to the question of *Freedom From Religion Foundation v Obama*, and demonstrate why, contrary to Judge Crabb’s point of view, the National Day of Prayer is indeed constitutional.

Laying the Groundwork: The Basic Principles of Religious Liberty

There is the prevailing sense among many judges, legal scholars, and common citizens alike that the First Amendment mandates a purely secular society.⁸ Undoubtedly kindled by Jefferson’s concept of the “separation between church and state,” this sentiment has been given the same weight as the text of the First Amendment by Supreme Court Justices and common citizens alike.⁹ For example, in *Everson v Board of Education*, the Court invoked Jefferson’s maxim to explain its interpretation of the First Amendment: “the clause against the establishment of religion by law was intended to erect ‘a wall of separation between church and state’”.¹⁰ Similarly, in *Kitzmiller v Dover*, Judge Jones ruled that treating creationism as science along with evolution violates the Establishment Clause “to preserve the separation of church and state mandated by the Establishment Clause of the First amendment to the United States Constitution”.¹¹ In the mass media, reference to separation of church and state is a far more widespread pandemic. In a January 6, 2011 search of NYT.com, the website of *The New York Times*, the search for the exact phrase “Separation of Church and States” yielded 5350 results of stories published in the previous thirty days.¹²

However, as it has been previously stated, neither the phrasing used by Jefferson nor anything similar appears in the Constitution. Indeed, it is evident that the

First Amendment does not seek to create such a separation.¹³ The First Amendment does not prohibit all government action that pertains to religion; rather, it restricts the scope of the capabilities that the government has to interact with religion. By preventing the government from establishing a state religion and deciding which religion citizens should practice, the First Amendment intends to universally protect the religious liberties of all citizens and private organizations.¹⁴ Therefore, it is the task of the government to protect every American's right to adhere to, practice, preach, and demonstrate his or her personal religious beliefs in all settings, public and private.

Given the broad and extensive set of religious liberties afforded to citizens by the First Amendment, it might be difficult to understand when the government does indeed have the Constitutional authority to intervene. Such instances do certainly exist, and it is these cases that are of the greatest importance for protecting the religious freedoms that Americans value. Though the limitations of the government's right to intervene are widely debated, there is a set of cases that represents a fairly undisputed precedent for Establishment Clause and Free Exercise Clause jurisprudence:

- *Lemon v Kurtzman* (1971): The Court ruled that using public funds to reimburse Catholic schools for teachers' salaries, textbooks, and other expenses violated the Establishment Clause because it caused "excessive government entanglement" with religion. This case gave rise to the oft-cited Lemon Test, which is used to determine if a government action is constitutional. In order to pass the Lemon Test, the action must satisfy the Test's three "prongs": 1) The government's action must have a secular legislative purpose, 2) the government's action must not have the primary effect of either advancing or inhibiting religion, and 3) the government's action must not result in an excessive government entanglement with religion.¹⁵
- *Daniel v Waters* (1975): In the first high-profile case concerning teaching creationism in public schools, the US Court of Appeals for the Sixth Circuit ruled that a Tennessee law requiring balanced teaching of creationism and evolution was unconstitutional. The court found the law to be in violation of the Establishment Clause because the law essentially established Christianity as a state religion.¹⁶
- *Stone v Graham* (1980): The Court ruled that a Kentucky law requiring that all public school classrooms have a posted copy of the Ten Commandments violated the Establishment Clause because it had no clear secular purpose.¹⁷
- *Perry Education Association v Perry Local Educators' Association* (1984): Though not directly pertaining to an issue of religious liberty, the case offers the legal definition of "public forum", a forum in which a citizen has the right to express his opinion freely. After ruling that a public school's mailing system does not qualify, the Court explains that peaceful demonstrations and displays are permitted in "public forums", which includes most government property. This case was used in multiple future opinions relating to religious freedom to justify the public display of a religious icon by a private citizen or organization in a public forum.¹⁸
- *Lynch v Donnelly* (1984): The Court upheld the constitutionality of a state-sponsored Christmas display that included a Christmas tree, a Santa Clause House, a "Season's Greetings" sign, and a nativity scene, arguing that the display had "legitimate secular purposes." In her concurring opinion, Justice

O'Connor developed the Endorsement Test. The Endorsement Test deems a government action is invalid if it creates the perception in the mind of an objective observer that the government is either endorsing or disapproving of religion.¹⁹

- *Edwards v Aguillard* (1987): The Court ruled that teaching creationism as science alongside evolution in public school was unconstitutional. Using the Lemon Test, the majority of the Court determined that laws requiring the balancing of creationism and evolution do not pass the Lemon Test. Such laws violate, according to the Court, all three prongs of the Test: they do not have a primarily secular purpose, they have the primary effect of advancing a single religion, and they result in “excessive government entanglement” with religion.²⁰
- *Employment Division v Smith* (1990): The Court ruled that banning peyote, a potent drug that has religious meaning in a Native American religious tradition, does not violate the Free Exercise Clause because the law is a “neutral law with secular applications”.²¹ The Court argued that “to permit this would be to make the professed doctrine of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself.”²²

A basic working definition of religious liberty can be derived from these cases. In all of these cases, one can see the attempt to balance the Establishment and Free Exercise Clauses. The government may not establish any specific religion as a state religion, and it also cannot inhibit the practice or public display of any religious belief. However, *Employment Division v Smith* offers a crucial exception to the Free Exercise Clause: it is constitutional to inhibit the free exercise of religion if a law that does so is a “neutral law with secular applications”.²³ Indeed, the overarching theme of the cases presented above is best explained by the Endorsement Test. Though some have argued that the Endorsement Test is a departure from the Lemon Test, the two tests are actually congruent; any law that passes the Endorsement Test would almost certainly pass the Lemon Test as well. Furthermore, the Endorsement Test could be perfectly applied to all of the other cases mentioned above to validate the Court’s rulings.

The Ongoing Debate

Despite the jurisprudence described above, there are still many points of contention. As demonstrated by *FFRF v Obama*, some believe that the First Amendment calls for a completely secular government.²⁴ Any public invocation of a supreme being, according to proponents of this legal philosophy, should be considered an explicit endorsement of religion. According to Judge Crabb, any such public demonstration is a “religious expression by the government” that is “exclusionary or even threatening... [and] poses for creating ‘in’ groups and ‘out’ groups”.²⁵ As Hamburger explains, this interpretation of the Free Exercise and Establishment Clauses often leads its supporters to advocate for complete separation between organized religion and government.²⁶

Clearly, there is still significant ambiguity about the exact definition of religious liberty. Before discussing *FFRF v Obama* in greater detail, it is helpful to compare two relatively similar cases that resulted in opposite rulings: in the first case, in which the Court ruled that an action was in violation of the constitutional principles in religious liberties, and in the second, in which the Court ruled that a similar action did

not. By examining these fairly similar cases, one can more accurately pinpoint the precise nature of religious liberty.

***Van Orden v Perry* and *McCreary County v ACLU of Kentucky*: A Distinct Difference**

On June 27, 2005, the Supreme Court handed down two significant rulings regarding the role of religion in public life: *Van Orden v Perry* and *McCreary County v ACLU of Kentucky*.^{27, 28} Though many have argued that the rulings on these cases are inherently contradictory, a close examination of their respective circumstances shows that the one justice who “changed” his vote, Justice Stephen Breyer, who concurred with the opinion of the Court in both cases, was justified in his decision.²⁹

Van Orden v Perry (2005) was a case brought by Thomas Van Orden, a resident of Texas. He argued that a stone monument displaying the Ten Commandments that was erected on the grounds of the Texas State Capitol was unconstitutional because it violated the Establishment Clause.³⁰ The monument was six feet high and three feet wide, a fairly diminutive monument in the shadow of the State Capital. As described in the plurality opinion of the Court:

“[the] primary content is the text of the Ten Commandments. An eagle grasping the American flag, an eye inside of a pyramid, and two small tablets with what appears to be an ancient script are carved above the text of the Ten Commandments. Below the text are two Stars of David and the superimposed Greek letters Chi and Rho, which represent Christ. The bottom of the monument bears the inscription ‘PRESENTED TO THE PEOPLE AND YOUTH OF TEXAS BY THE FRATERNAL ORDER OF EAGLES OF TEXAS 1961.’”³¹

As the inscription suggests, the monument was not a state-order or state-funded display; rather, it was the gift of The Fraternal Order of Eagles of Texas, a local branch of the private organization Fraternal Order of Eagles International³². Founded in 1898, its mission statement explains that it is “an international non-profit organization, [which] unites fraternally in the spirit of liberty, truth, justice, and equality, to make human life more desirable by lessening its ills, and by promoting peace, prosperity, gladness, and hope.”³³

The Court ruled that this display is constitutional. Citing the non-religious historical significance of the Ten Commandments, the plurality of the Court explained that the monument, while certainly portraying a religious text, had secular significance as well.³⁴ Furthermore, the Court distinguished this display from any public display of religion that would violate Justice O’Connor’s Endorsement Test, such as scholar prayer in *Lee v Weisman* (1992) or teaching Creationism as science in *Daniel v Waters* (1975).³⁵ Therefore, given the partially secular function of the monument, the fact that it was the donation of a private organization whose purpose is not to endorse religion, and the perception that the monument is not a government endorsement of a religion, the Court ruled that the monument did not violate the Establishment Clause.³⁶

On the same day, the Court handed down its opinion in *McCreary County v ACLU of Kentucky* in which it deemed a very different display of the Ten Commandments to be unconstitutional.³⁷ The set of displays in this case are of the Ten

Commandments, but were physically situated inside two Kentucky county courthouses. These displays were ordered, designed, and displayed by the county governments.³⁸ In the Pulaski County Courthouse, the display was hung in an official ceremony overseen by the Judge-Executive and the pastor of his church. In his speech at the ceremony, the Judge-Executive referred to the Commandments as “good rules to live by” and said that “there must be a divine God.”³⁹

Foreseeing prolonged legal battles after the ACLU initially filed the lawsuit, the county courts altered their display multiple times and finally arrived at presenting the Ten Commandments alongside other religious and secular documents.⁴⁰ Near the displays of the Ten Commandments and The King James Bible, a plaque was added that recognized that the Commandments “have profoundly influenced the formation of Western legal thought and the formation of our country.”⁴¹ The plaque continues to explain that “The Ten Commandments provide the moral background of the Declaration of Independence and the formation of our legal tradition.”⁴²

The Court found these displays to be unconstitutional on the grounds of violating the Establishment Clause. The opinion of the Court posits that this display is an overt statement of endorsement of a specific religion by the local government, which violates the principle set forth in the Establishment Clause which “require[s] the Government to stay neutral on religious belief, which is reserved for the conscience of the individual.”⁴³

Justice Breyer, who joined the majority in both cases, faced significant criticism in the aftermath of these decisions for apparent inconsistencies in his judicial philosophy. The title of a June 28, 2005 *New York Times* article serves as a microcosm of the criticisms leveled against Breyer and the Court overall: “Justices Allow a Commandments Display, Bar Others.”⁴⁴ A contemporary article in the *Harvard Law Review* stated that Justice Breyer’s decisions were “damning” to Establishment Clause jurisprudence.⁴⁵

Rather than being ridiculed as the only justice to have delivered antagonistic opinions, Justice Breyer deserves praise as the only justice to have appropriately considered the striking differences in the circumstances of the respective cases. Though both cases involve a public display of the Ten Commandments on government-owned property, the similarities end there. Surely it would be irrational to equate the display of a gift from a private organization which acknowledges its non-governmental origins on the display itself and the display of the same religious text, along with other religious displays, placed in a courthouse by the local government that explicitly states its desire to recognize the Judeo-Christian influences on the legal system.

In order to draw the contrast between these two displays, it is most prudent to implement the Endorsement Test. An “objective observer” would likely find the state-ordered display of only Judeo-Christian and secular documents with a plaque that explicitly identifies our legal system as one that embodies Judeo-Christian values to be a definitive endorsement of Judaism and Christianity. Furthermore, the placement of the displays and the nature of the aforementioned official ceremony would likely add to the objective observer’s perception that the state was establishing a rule of law influenced solely by Judeo-Christian principles to the exclusion of other religions. For these reasons, the Court reached a sound decision in *McCreary County v ACLU of Kentucky* by ruling that these displays violated the Establishment Clause.⁴⁶

Conversely, an objective observer would likely find the privately-funded donation of a religious display on undeveloped state grounds to not be indicative of the views of the State of Texas. Nothing about this display endorses or inhibits any specific

religion on behalf of the state. If the followers of any given religion or system of belief wished to erect a public display or publicly demonstrate on government grounds, there is no reason to believe that they would be denied the privilege to do so. Indeed, there is significant precedent for permitting public displays of specific religious beliefs by private groups.⁴⁷ Therefore, the Court's decision in *Van Orden v Perry* is also well-founded; Texas's decision to permit the Fraternal Order of Eagles to display their stone monument does not violate the Establishment Clause.

The distinction between the circumstances of these cases is critical to the overall understanding of Establishment Clause jurisprudence. There is an immense difference between a government mandate of a given religion as the state-endorsed religion and the demonstration of the various religious beliefs of its private citizens and organizations. The first would certainly be a "law regarding the Establishment of religion," whereas inhibiting the latter would be "prohibiting the exercise thereof." Therefore, it is the difference between these two cases that forms a clear precedent that balances the Establishment Clause and the Free Exercise Clause: the government can take action to maximize the opportunities for private citizens to make public statements endorsing religion—an opportunity that must be equally available to all citizens—but cannot make such endorsements itself.

"Freedom of Religion" not "Freedom from Religion"

The National Day of Prayer was codified by an Act of Congress in 1952.⁴⁸ After hearing a speech by evangelist Billy Graham, Congressman Percy Priest introduced the bill that called for a National Day of Prayer.⁴⁹ Though Reverend Graham and Congressman Priest were both Christians, the bill Congressman Priest proposed did not specify the National Day of Prayer as a day of Christian prayer. Congressman Brooks was among the supporters of the bill, and he expressed his "hope that all denominations... will join us in this day of prayer."⁵⁰ While the Senate was considering the bill, a Senate report was published which said, "it would certainly be appropriate if, pursuant to this resolution, and the proclamation it urges, the people of this country were to unite in a day of prayer each year, each in accordance with his own religious faith."⁵¹

On April 17, 1952, Congress passed the bill, which established Public Law 82-324: "The President shall set aside and proclaim a suitable day each year, other than a Sunday, as a National Day of Prayer, on which the people of the United States may turn to God in prayer and meditation at churches, in groups, and as individuals."⁵² Thirty-six years later, on May 5, 1988, Congress approved Public Law 100-307; this law specified the National Prayer to be the first Thursday in May.⁵³

Since 1952, the President has issued a proclamation calling for a National Day of Prayer every year. In 2010, President Obama's proclamation called "upon the citizens of our Nation to pray, or otherwise give thanks, in accordance with their consciences, for our many freedoms and blessings."⁵⁴

In 2010, The Freedom From Religion Foundation filed *FFRF v Obama*, in which it asserted that the National Day of Prayer violates the Establishment Clause. Founded in 1976, the Freedom from Religion Foundation seeks to "promote the constitutional principle of separation of church and state... [and] educate the public on matters of nontheism."⁵⁵ In her opinion, Judge Crabb agreed with the Freedom From Religion Foundation and declared the National Day of Prayer to be unconstitutional.⁵⁶ Judge Crabb argued that "a 'straightforward' application of the endorsement test under *Lemon* supports a finding that the National Day of Prayer violates the establishment

clause.”⁵⁷ Furthermore, Judge Crabb rejected the defendants’ argument that the National Day of Prayer is an acknowledgment of religion:

“Establishment clause values would be significantly eroded if the government could promote any longstanding religious practice of the majority under the guise ‘acknowledgement’. Any religious conduct by the government could be framed as mere ‘acknowledgement’ of religion, including the public prayers [and religious displays] the Court declared unconstitutional.”⁵⁸

Judge Crabb therefore concluded that the National Day of Prayer can be seen as promoting only Christian prayer. She added that it serves no secular purpose. For all of these reasons, she argued, the National Day of Prayer violates the Establishment Clause.

There are many flaws in the argument presented by the Freedom From Religion Foundation and Judge Crabb. One need not look further than the Freedom From Religion Foundation’s name and mission statement to begin to identify principles that are not in accord with the constitutional definition of religious freedom. The statement explains that the foundation seeks to promote the “separation of church and state” and “nontheism.”⁵⁹ In an April 30, 2010 press release, the foundation called Judge Crabb’s decision a “victory” in “its campaign to get religion out of government,” and affirmed that this decision was an advancement of the foundation’s mission.⁶⁰ Though this statement is undoubtedly true, the Foundation’s mission statement clearly contradicts the very constitutional principles that it claims to be seeking to uphold. The Constitution seeks to protect every citizen’s freedom of religion, not his freedom from religion.

Despite Judge Crabb’s opinion, it seems clear that a “straightforward” application of the Endorsement Test proves that the National Day of Prayer is indeed constitutional. The question is not what Judge Crabb, the Freedom from Religion Foundation, or any other individual with a given religious preference thinks of the Day of Prayer; rather, it is what an objective observer perceives to be the intention of the Day of Prayer.⁶¹ It is easy to eliminate the possibility that an objective observer would consider the National Day of Prayer to be a disapproval of religion, since it encourages prayer. Additionally, contrary to Judge Crabb’s findings, it also does not endorse religion, where endorse is defined within the confines of the Establishment Clause. In order for an objective observer to perceive a government action as endorsing religion, it is reasonable to assume that a specific religion must be specified as the religion of choice, and that adherence to this specific religion is obligatory or very strongly encouraged. However, the National Day of Prayer, both in the codified law and in practice, has proven to not endorse a specific religion. Given that the law states that individuals “may turn to God in prayer and meditation at churches, in groups, and as individuals,” there is little to suggest that a certain type of prayer or meditation is being endorsed over another.⁶² Statements by members of Congress involved with the legislation frequently reiterated their intentions for interfaith appeal. Furthermore, in practice, it is even clearer that no specific religion is being endorsed. An objective observer would certainly consider President Obama’s request for “citizens of our Nation to pray, or otherwise give thanks, in accordance with their consciences, for our many freedoms and blessings,” to not be an endorsement of any specific religion.⁶³ Furthermore, “giv[ing] thanks” is certainly a viable alternative for those who wish to participate but do not wish to pray; all possible religious views are included in this

statement, which is consistent with the view that the National Day of Prayer does not violate the Establishment Clause. An individual's inclination to pray at all, and the manner in which he does so, does not constrict his ability to adhere to the principles of the National Day of Prayer, as explained by President Obama.

The Freedom from Religion Foundation wishes to promote "nontheism" in government; however, a government action endorsing "nontheism", or atheism, is doing so in violation of the Establishment Clause and would clearly fail the Endorsement Test.⁶⁴ Similarly, Judge Crabb's argument that a request for prayer endorses religion in general as if it were a single entity and discriminates against non-religion is not completely accurate and not grounds to find the National Day of Prayer to fail the endorsement test. However, as previously suggested, a preference of non-religion or "nontheism" is indeed a violation of the Establishment Clause because "that would be preferring those who believe in no religion over those who do believe."⁶⁵ Indeed, it is fair to say that every American has religious beliefs; the belief that there is no supreme being and therefore no need for prayer or worship is itself a religious belief. Therefore, to promote "nontheism" would be to endorse a set of religious beliefs and discriminate against others.

Most importantly, there is nothing obligatory about the National Day of Prayer. There is no legal obligation for individuals to pray, attend a religious ceremony, or otherwise participate in any way. This is what distinguishes the National Day of Prayer, which should be deemed constitutional, and the teaching of creationism/intelligent design in public schools as science alongside evolution, which should be and is deemed unconstitutional.⁶⁶ As Judge Jones explains, "ID [intelligent design] aspires to change the ground rules of science to make room for religion, specifically, beliefs consonant with a particular version of Christianity".⁶⁷ Public school students cannot abstain from participating in science classes without consequences, making the learning of religious precepts mandatory under such a law. Teaching impressionable students that a single religion's belief is science to the explicit exclusion of all others is inarguably a government endorsement of a specific religion. This contrasts greatly with the National Day of Prayer, which does not require any prayer, and the decision of whether to pray and how to do so is left to the discretion of each individual.

Since the clear distinction between *Van Orden v Perry* and *McCreary County v ACLU of Kentucky* has already been made, it is helpful to use that distinction to demonstrate why the National Day of Prayer is more like the display in *Van Orden*. In the case of *Van Orden*, the display in question did not obligate any acknowledgement by private citizens; it is a display in a park that does not attempt to influence an objective observer's perception of the government's stance on a specific religion. This is much like the National Day of Prayer; the acknowledgement of religion is optional, and there is no explicit endorsement of a specific religion. This is strikingly different than the display in *McCreary County*, in which the government endorsed one set of beliefs over all others and directly stated their superior standing in the American justice system.

Conclusion: Invocation is not Endorsement:

There is no debating that the Establishment Clause prohibits government endorsement of religion. However, the invocation of a religion, religions, or ideologies is not necessarily indicative of the endorsement or establishment thereof. It is certainly within the limits of the Establishment Clause to invoke religion in a way that accommodates all religious beliefs and practices. By doing so, Justice William O.

Douglas explained that “we guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary.”⁶⁸

As *FFRF v Obama* demonstrates, there will always be tension between competing religious beliefs. Countless religious groups with divergent views on numerous political issues have made the assumption that government should be functioning in complete accord with their beliefs and must reject what they consider to be offensive. Unfortunately, this constant tension is not likely to change. However, as has been demonstrated above, the role of the government in this struggle is clear:

“The government must be neutral when it comes to competition between sects. It may not thrust any sect on any person. It may not make a religious observance compulsory. It may not coerce anyone to attend church, to observe a religious holiday, or to take religious instruction. No more than that is undertaken here.”⁶⁹

This raises the question: “What precepts can lawmakers follow to ensure that their laws abide by the Establishment Clause?” To find an answer, lawmakers can look to the letter President James Madison sent to Edward Livingston, in which he wrote that he was careful to make all laws concerning religion “absolutely indiscriminate, and merely recommendatory.”⁷⁰ Indeed, President Madison’s guidelines were followed by those who created the National Day of Prayer in that the government has the right to “appoint particular days for religious worship throughout the State, without any penal sanction enforcing the worship.”⁷¹

There are bound to be numerous challenges in Establishment Clause jurisprudence in the future; President Obama and the Justice Department have announced that they will appeal the *FFRF v Obama* decision, and there will be numerous other unpredictable cases.⁷² However, despite those who do not acknowledge it, there is clear precedent for judges and justices to follow: in order for a law to adhere to the Establishment Clause, the law must be perceived by an objective observer as an act through which the government is not seeking to establish or discriminate against any set of religious beliefs, to inhibit the free exercise of any set of religious beliefs, either by exclusion or by explicit threat of punishment for free exercise, and all observation of religious principles must be rendered voluntary.

Endnotes

Freedom from Religion Foundation v Obama., No. 08-cv-588-bbc, 2010 U.S. Dist (W.D. Wis), 13.

² Philip Hamburger, “Against Separation”. *The Public Interest*, 177, Spring 2004.

³ Thomas Jefferson, Letter to the Danbury Baptist Association. 1802.

⁴ U.S. Const., amend I.

⁵ U.S. Const., amend I.

⁶ *Board of Education of Kiryas Joel Village School Dist. v Grumet*, 512 U.S. 687, 703 (1994).

⁷ *Van Orden v Perry*. 545 U.S. 677, (2005), 2.

⁸ L Scott Smith, “Religion, Politics, and the Establishment Clause: Does God Belong in American Public Life?” 10 *Chapman Law Review*, 299 (2006).

⁹ Hamburger, 177-178.

- ¹⁰ *Everson v Board of Education of the Township of Ewing*. 330 US 1 (1947), 16.
- ¹ *Kitzmiller v Dover*, 400 F. Supp. 707 (2nd District PA, 2005), 138.
- ² Results retrieved Thursday, January 06, 2011 on NYT.com website.
- ³ Hamburger, 180.
- ⁴ id
- ⁵ *Lemon v Kurtzman* 403 U.S. 602 (1971).
- ⁶ *Daniel v Waters*, 515 F.2d 485 (6th Circuit, 1975).
- ⁷ *Stone v Graham*, 449 U.S. (1980).
- ⁸ *Perry Education Association v Perry Local Educator's Association*, 422 U.S. 922 (1975).
- ⁹ *Lynch v Donnelly*, 465 U.S. 668 (1984).
- ²⁰ *Edwards v Aguillard*, 482 U.S. 578 (1987).
- ²² *Employment Division v Smith*, 494 U.S. 872 (1990).
- ²³ *Employment Division v Smith*, 166. Citing *Reynolds v United States*, 98 U.S. 145 (1879).
- ²⁴ *Employment Division v Smith*, 169.
- ²⁵ *FFRF v Obama*, 5.
- ²⁶ *FFRF v Obama*, 19.
- ²⁷ Hamburger, 189.
- ²⁸ *McCreary County v ACLU of Kentucky*, 545 U.S. 844 (2005).
- ²⁹ *Van Orden v Perry*, 545 U.S. 677 (2005).
- ³⁰ Linda Greenhouse, "Justices Allow a Commandments Display, Bar Others" *The New York Times*. June 28, 2005.
- ³¹ *Van Orden v Perry*, 12.
- ³² *Van Orden v Perry*, 2.
- ³³ *Van Orden v Perry*, 2.
- ³⁴ "Who We Are", Fraternal Order of Eagles Facts, The Fraternal Orders of Eagles. <http://www.foe.com/about-us/facts.aspx> (visited November 29, 2010).
- ³⁵ *Van Orden v Perry*, 11.
- ³⁶ *Van Orden v Perry*, 4-8.
- ³⁷ *Van Orden v Perry*, 10-12.
- ³⁸ *McCreary County v ACLU of Kentucky*, 34.
- ³⁹ *McCreary County v ACLU of Kentucky*, 1.
- ⁴⁰ *McCreary County v ACLU of Kentucky*, 2-4.
- ⁴ *McCreary County v ACLU of Kentucky*, 2.
- ⁴² *McCreary County v ACLU of Kentucky*, 4.
- ⁴³ id
- ⁴⁴ *McCreary County v ACLU of Kentucky*, 11. Citing *Epperson v Arkansas*, 393 U.S. 97, 104 (1968).
- ⁴⁵ Greenhouse.
- ⁴⁶ "CONSTITUTIONAL LAW — ESTABLISHMENT CLAUSE — MIDDLE DISTRICT OF PENNSYLVANIA HOLDS THAT THE TEACHING OF INTELLIGENT DESIGN VIOLATES THE ESTABLISHMENT CLAUSE." 119 *Harvard Law Review*, 260 (2006).
- ⁴⁷ *McCreary County v ACLU of Kentucky*, 22-33.
- ⁴⁸ See *Perry, Lynch, County of Allegheny v ACLU* 492 U.S. 573 (1989).
- ⁴⁹ *FFRF v Obama*, 6.
- ⁵⁰ *FFRF v Obama*, 6.

⁵ *FFRF v Obama*, 7.

⁵² Cited in *FFRF v Obama*, 8.

⁵³ Cited in *FFRF v Obama*, 8.

⁵⁴ *FFRF v Obama*, 8.

⁵⁵ Barack Obama, Presidential Proclamation, April 13, 2010.

⁵⁶ Mission Statement, Freedom from Religion Foundation. Online at <http://ffrf.org/faq/about-the-foundation/what-is-the-foundations-purpose/> (visited November 29, 2010).

⁵⁷ *FFRF v Obama*, 37.

⁵⁸ *FFRF v Obama*, 38.

⁵⁹ *FFRF v Obama*, 33.

⁶⁰ Mission Statement, Freedom from Religion Foundation. Online at <http://ffrf.org/faq/about-the-foundation/what-is-the-foundations-purpose/> (visited November 29, 2010).

⁶¹ “FFRF goes after ‘Day of Prayer’ in the Home Turf of the Christian Right”. Press Release, Freedom from Religion Foundation. April 30, 2005.

⁶² *Lynch v Donnelly*, 688-670.

⁶³ Cited in *FFRF v Obama*, 8.

⁶⁴ Barack Obama, Presidential Proclamation, April 13, 2010.

⁶⁵ Mission Statement, Freedom from Religion Foundation. Online at <http://ffrf.org/faq/about-the-foundation/what-is-the-foundations-purpose/> (visited November 29, 2010).

⁶⁶ *Zorach v Clauson*, 343 US 306 (1952), 314.

⁶⁷ See *Kitzmiller, Epperson, McLeon v Arkansas* 529 F. Supp. 1255, 1258-1264 (ED Ark. 1982), *Edwards*.

⁶⁸ *Kitzmiller v Dover Area School District*, 29.

⁶⁹ *Zorach v Clauson*, 343 US 306 (1952), 313.

⁷⁰ *Zorach v Clausen*, 314.

⁷¹ James Madison, “Letter to Edward Livingston.” July 10, 1822.

⁷² *id*

⁷³ “Judge Rules National Day of Prayer Unconstitutional”. *USA Today*, April 16, 2010.

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NOTES

Spring 2011 is the first time that the Columbia Undergraduate Law Review has publishes a Notes section. Typically, Notes sections of law school law reviews contain pieces written by law students that may be shorter than those found elsewhere in the journal. But because CULR already gathers student-written articles, the Notes section serves a unique purpose: it turns legal commentary fully on the perspective of the pre-law undergraduate student. The “Law in Practice” essay, which discusses an undergraduate’s experience with the law, is the first piece to conform to the mold of the Notes section. This essay is intended to showcase how internships or extracurricular activities have taught college students practical lessons about the American legal system, lawyers’ day-to-day lives, and the road to law school. We hope that you find this piece helpful and instructive.

Law in Practice: Organizing a Nonprofit

*Andrew Heinrich
Columbia University*

At the beginning, the idea was simple: two years into college, I felt a strong desire to return the tutoring that I had loved doing in high school and that I had found more fulfilling than any other activity. But the most outstanding aspect of my previous tutoring was that it surpassed mere homework help—it was a strong mentoring relationship. I wanted to be matched with a high school sophomore so that my mentee and I could develop a strong bond over the rest of his or her high school career. Because I knew that other Columbia students felt the same way, I decided to expand my venture to a larger pool of potential mentors. In 2010, I began the search for volunteers.

While I had mulled over the idea of Project Rousseau for a long time, I had thought only about the program’s substance until fall 2010, a few months before the program launched. Currently, Project Rousseau matches college students one-to-one with high school students who are in the same stages of their respective educations (ninth graders with college freshmen, tenth graders with college sophomores, etc.), so that each mentee has one mentor for his or her entire high school career. The goal of the program is to maximize high school students’ potential to thrive in a college environment and to give every mentee the opportunity of a college education.

As I rallied more interested college students in fall 2010, the group of mentors grew and Project Rousseau started to become a reality. But now I faced the question of the still undeveloped program’s legal status. Structuring the program as a public charity was something I had never even considered. However complicated the legal ramifications, the choice to become a nonprofit was essential. Nonprofit status optimizes our ability to help our students; it enables us to fundraise for textbooks, college scholarships, and special events, to found and expand other chapters, and to continuously evolve to create innovative ways to provide for our students. As a public charity, we are able to pursue new initiatives, and are no longer dependent on funding from any governing body. Ultimately, this allows us to find new donors.

As defined in Section 501(c)(3) of the Internal Revenue Code, a public charity is an organization that receives money for a specific publicly supported purpose and that possesses an active fundraising program. This stands in contrast to a private foundation,

which works to support other charities or to support its own program. Additionally, whereas a private foundation collects most of its money from one family or corporation, a public charity is sustained by varied sources of tax-deductible monetary contributions, such as the government, the general public, other charities, and corporations.

Once the decision to incorporate was made, I had considered hiring a lawyer to file all of the paperwork for us. Yet as a new nonprofit organization, we did not have the resources to hire professional help. In turn, I began to investigate the process of incorporation online. First, we needed to obtain a certificate of consent from the New York State Education Department, as do all New York nonprofits that intend to contribute to the field of education. In order to do so, one need only print out a form easily accessed via the department's website, and then provide an attached mission statement. Then, we needed to incorporate with the New York State Department of State, which in part governs all New York State-registered corporations, profit and nonprofit alike. Our next step was to set up business savings and checking accounts. Finally, we had to file for 501(c)(3) standing with the Internal Revenue Service.

As it turns out, the process is not as convoluted as it might sound. Despite the pages of forms, numerous required attachments, and the ever-present warning that an attorney should be consulted, there are no excessively overwhelming hurdles to students who wish to begin nonprofits. Until filling out Form 1023 to file for 501(c)(3) approval, everything was, in fact, done by students without so much as even consulting an attorney. Within a few days of learning about the process, undergraduate students were independently filling out articles of incorporation and writing bylaws. As odd as it may sound, one need not know the "legalese" taught in law school legal writing courses to write the relevant bylaws for a student nonprofit. All one really needs is good, sample bylaws to use as a reference for learning some basic legal jargon. Otherwise, almost everything is fairly intuitive, and can be successfully completed from putting in the required time, practicing caution, and not diverging from the directions.

What had begun as a group of Columbia students eager to make a difference in high school students' lives was becoming an elucidating, hands-on legal education. Whether it was learning the difference between not-for-profit corporations and nonprofit organizations, learning how to craft language in the bylaws, or experiencing corporate paperwork firsthand, every aspect of the process proved to be a valuable learning experience. To everyone reading this who has a passion for advancing a cause, Project Rousseau is proof that this passion and willingness to educate oneself on the legal process is all one needs to start a new nonprofit corporation.

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