COLUMBIA UNIVERSITY
UNDERGRADUATE LAW REVIEW

VOLUME VI · ISSUE 1 · FALL 2011

THE COLUMBIA UNDERGRADUATE LAW REVIEW

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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,

On behalf of the Executive Board, Editorial Board, and Business Board of the *Columbia Undergraduate Law Review*, it is my pleasure to present to you the Fall 2011 issue of the *CULR*. The publication of this edition is the culmination of another semester of diligent work by our entire staff as well as the authors whose papers are featured. We are certain that the more intensive paper solicitation, selection, and editing processes that have been implemented over the past several months have resulted in a diverse collection of the most engaging undergraduate scholarship on legal issues presently available. As an organization, we have developed by leaps and bounds over a relatively short period and I have every confidence that this progress will continue unabated for semesters to come.

This fall marked our second semester actively seeking essays and we continued to grow the network of professors, department administrators, and pre-law societies we rely on to ensure that the Editorial Board selects from the highest quality papers written at undergraduate colleges across the country. We received dozens of papers this semester and once again found ourselves in the fortunate position of having far more papers that deserved publication than could possibly be printed in this issue. After much debate, we settled on a slate of essays featuring insight into U.S. law, international law, historical legal issues, and legal theory.

Shayna Stern opens this edition with "The Personal is Political," arguing that victims of domestic violence in the United States suffer discrimination within the criminal justice system based on gender and racial factors. Andrew Norwich continues the issue's discussion of the U.S. legal system, tracking how punitive damages awarded in civil courts began punishing defendants solely for the wrong inflicted upon the plaintiff, then began punishing for the public wrong, and have now reverted back to their historical role. Taylor Purvis argues in "*Washington v Glucksberg*: Threatening Constitutionally Recognized Liberty" that the state ban of physician assisted suicide must be held unconstitutional.

This edition's focus then shifts to international legal issues as Rebecca Salk contends that the Responsibility to Protect Doctrine, agreed upon at the United Nations 2005 World Summit, must be applied consistently and effectively in order for international law to maintain legitimacy. Aubrey Jones concludes this semester's issue with a case study of the Israeli and German trials of John Demjanjuk, a former Ukrainian national accused of war crimes and crimes against humanity, to assess problems associated with prosecuting former Nazis.

We are proud to publish the result of this semester's efforts. We hope that you enjoy the essays.

Sincerely,

Ross Bruck
Editor in Chief

December 2011
Columbia University in the City of New York

"The Personal is Political": The Legal Justice System's Treatment of Domestic Violence Victims from 1970 until Today

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Abstract

Domestic violence and spousal abuse are concepts that Congress, the judicial system, and society constantly redefined throughout American history. Historians who have traced the trajectory of these changes during the twentieth century focus only on how the law officially treated domestic violence victims or how the courts dealt with defendants in abuse cases. Largely left unexamined has been the victims' experience in the court and in the hands of law enforcement, especially among immigrant and minority women; in other words, how women were unofficially treated. This paper argues that despite changing legal codes and official government policies regarding domestic violence in the seventies and eighties, victims of domestic violence continued to suffer discrimination within the criminal justice system based on gender and racial factors. Traditional notions of gender and the institutions of marriage effectively skewed society's perceptions of domestic abuse and thus influenced the criminal justice system's treatment of and perspective on female victims of this type of violence. Furthermore, a comparison between the legal treatment of domestic violence victims in the seventies and eighties and their treatment today reveals that while society now generally accepts domestic violence as a legitimate and punishable crime, immigrant women continue to suffer discrimination at the hands of the criminal justice system.

"The Personal is Political": The Legal System's Treatment of Domestic Violence Victims from 1970 until Today

In 1986, Dong Lu Chen, a farmer from Canton, China immigrated to the United States to join his brother's family. Chen, along with his wife and two teenage children, eventually settled in Brooklyn, New York. A year later, on September 7, 1987, Mr. Chen accused his wife of having an adulterous relationship with another man, and when she did not explicitly deny having an affair, Mr. Chen proceeded to brutally bash his wife's skull in with a hammer and left her to die on the floor of their bedroom. When the couple's son found his mother's bloody corpse, the state charged Mr. Chen with second-degree murder and eventually brought his case to the New York Supreme Court in December of 1988.[1]

After a five-day, non-jury trial, Justice Edward Pincus downgraded Dong Lu Chen's charge of second-degree murder to manslaughter. Although the charge carries up to fifteen years in prison, the court only sentenced Mr. Chen to five-year's probation for the brutal beating and murder of his wife. In sentencing Mr. Chen, Pincus relied heavily on the testimony of expert witness Burton Pasternak, a professor of anthropology at Hunter College in New York City. Pasternak testified that in Chinese culture, adultery is an "enormous stain" that reflects negatively on the "aggrieved husband." Pincus reasoned that because of Mr. Chen's background and his culture's emphasis on manhood and its denunciation of adultery, Mr. Chen was more susceptible

to "cracking" under the circumstances.[2] The court rationalized Mr. Chen's violence against his wife, portrayed the abuser himself as a victim of his wife's actions, and essentially ignored the true victim, Mrs. Chen.

Dong Lu Chen's case and Justice Pincus's consequent decision set off an abundance of criticism among women's organizations and Asian-American groups. It also revealed several problems with the Department of Justice treatment of domestic violence at that time. By letting Mr. Chen off with a mere probationary sentence, the justice system effectively announced that batterers who killed their wives could escape prison time if judges could attribute their behavior to their cultural background during sentencing.[3] The Department of Justice trivialized the suffering of abused women and essentially considered crimes against these women to be minor by using cultural factors to determine a husband's guilt. Furthermore, this case was an ominous sign for all immigrant women that the United States criminal justice system would not provide refuge from domestic abuse.

Dong Lu Chen's case is just one of many in the long, tumultuous, and often invisible history of domestic violence in the United States. Domestic violence and spousal abuse are concepts that Congress, the judicial system, and society constantly redefined throughout American history. As early as 1920, spousal abuse was illegal in all fifty states. However, state institutions, such as law enforcement and the judicial system, did little to enforce these laws. Generally, society considered domestic violence a private matter, and even when the criminal justice system did intervene, it merely played a brief role as mediator between the conflicting parties. Not until the seventies did domestic violence become a political issue for the state to address. Historians who have traced the trajectory of these changes in the twentieth century focus only on how the law officially treated victims of domestic violence or how courts dealt with defendants in abuse cases. Largely left unexamined has been the victims' experience in the court and in the hands of law enforcement, especially among immigrant women.

This paper will argue that despite changing legal codes and official government policies regarding domestic violence in the seventies and eighties, victims of domestic violence continued to suffer discrimination within the criminal justice system based on gender and racial factors. Traditional notions of gender and the institutions of marriage effectively skewed society's perceptions of domestic abuse and thus influenced the criminal justice system's treatment of and perspective on female victims of this type of violence. Furthermore, a comparison between the legal treatment of domestic violence victims in the seventies and eighties and their treatment today reveals that while society now generally accepts domestic violence as a legitimate and punishable crime, immigrant women continue to suffer discrimination at the hands of the criminal justice system.

Historiography

The current historiography of domestic violence in the United States is limited. Because American laws did not even consider domestic abuse to be a crime until the 1970s, historians, sociologists, and criminologists devoted little attention to the topic until after that time.[4] The research that does exist from the seventies and eighties often focused on broader issues related to gender and devoted little attention to important subgroups of female victims. For example, there is little information regarding the relationship between race and domestic violence. The First National Family Violence Survey (NFVS), conducted by sociologists Murray Straus and Richard Gelles in 1975,

concentrated on samples of white families. Straus and Gelles also used small samples of African-American and Hispanic families but no Asian-American families; thus, the survey's population sample did not represent the true racial composition of the United States' population. Furthermore, the First NFVS ignored class, socio-economic status, and intra-group differences.[5]

Similarly, the first scholarly work on domestic violence by Del Martin focused primarily on gender and the women's movement but ignored racial differences among women. In her book, *Battered Wives*, published in 1976, Martin offers her own comprehensive perspective on domestic violence at the dawn of the women's rights movement. She discusses notions of marriage, characteristics of abusers and victims, the legal system, and avenues that were open to abused women. Additionally, Martin suggests areas where society should change in order to improve the lives of and outlooks for battered women. Martin's strengths lie in the breadth of ideas and topics that she covers; however, like other investigations from the period, she treats all victims of domestic violence the same and fails to address factors related to how a victim's race or nationality might relate to their legal treatment in America.[6]

Since the nineties, scholars have tried to correct these shortcomings by looking at the role of race and nationality in contemporary domestic violence cases. In 1992, Rachel and Russell Dobash published *Women, Violence and Social Change*, which examines the role that social movements, such as the women's movement and the civil rights movement, played in the development of domestic violence as a significant legal issue. The Dobashes argue that the state plays a significant role in domestic violence cases and should be instrumental in revolutionizing the justice system's treatment of domestic violence as a crime. Their treatise addresses factors beyond gender within the history of domestic violence, including the manner in which race determined how society viewed victims and perpetrators of domestic abuse in the seventies and eighties. The Dobashes recognize that minority women often experience double discrimination: first as women and second as individuals of color.[7]

Natalie J. Sokoloff's *Domestic Violence at the Margins*, a collection of readings, follows the Dobashs' example and explores how race, class, gender, and culture relate to domestic violence. In her introduction, Sokoloff argues that domestic violence literature under represents "women at the margins" and researchers should address the cultural perspectives that are unique to women from "diverse racial, ethnic, socioeconomic backgrounds as well as sexual orientations and immigrant statuses." Sokoloff's volume is a perfect example of the sort of topics that historians, criminologists, and sociologists must study within the field of domestic violence; however, it only addresses the modern situation for groups "on the margin" and fails to track the historical treatment of these groups.[8]

More recently, "Lost in Translation: Domestic Violence, 'The Personal is Political,' and the Criminal Justice System" by Kimberly D. Bailey explores the history of domestic violence, the influence of the women's rights movement, and problems with the interaction between victims and the criminal justice system. She recognizes the limitations of the criminal justice system and the role that different factors, including race and immigrant status, play in the system's treatment of abuse victims. Yet, like Sokoloff, Bailey does not address these issues in a historical sense, but rather, through their prevalence in the contemporary criminal justice system.[9]

Taking a different route in the investigation of race and domestic violence, Ricardo Carrillo and Jerry Tello's collection of essays, *Family Violence and Men of Color*, discusses the prevalence of child and spousal abuse within minority populations,

with a specific focus on men. Many of the authors in this collection argue that there are certain cultural factors that make minority men more susceptible to committing acts of violence within the family. The main purpose of this collection is to provide a resource for more culturally effective means of intervention in domestic violence cases. Unfortunately, the primary weakness of Carrillo and Tello's compilation is that it seems to make the mistake of delegitimizing the seriousness of the violence committed within these minority groups and diminishes the suffering of the abused.[10]

Much of the existing scholarly material on domestic violence falls into three distinct categories: origins of the debate about domestic violence in the seventies with a focus on gender, analysis of domestic violence and the criminal justice system today, and study of racial factors in relation to domestic violence, with a focus on the abuser rather than the victim. However, there is little research on the history of the treatment of domestic violence victims by criminal justice institutions, let alone on the role that immigration status might play in this discriminatory treatment. In this paper, I hope to fill this gap by exploring the experiences of minority, and especially immigrant, victims of domestic violence within the judicial system.

Traditional Notions of Gender Roles and Marriage and Perceptions of Domestic Violence, *1970-1990*

At the beginning of the 1970s, women experienced a very different world than they do today. Society practiced an exaggerated form of patriarchy in which in which "males, just by virtue of being males, ha[d] more privilege than women d[id] in society."[11] Patriarchal inspired behavior had important implications for gender roles and the institution of marriage for all women, regardless of race, class, or immigration status. According to Professor Katherine MacKinnon, "the law sees and treats women the way men see and treat women," so the law essentially gave men privilege and power and relegated women to second-class citizenry.[12]

Accepted gender roles in the seventies legitimized domestic violence, and left women little power to end their own abuse. The most basic and accepted difference between men and women was their physical disparity. Activist Susan Brownmiller in 1975 argued that "by anatomical fiat… the human male was a natural predator and the human female served as his natural prey."[13] Nature created men to be violent, so their exhibition of this disposition within the home was perfectly acceptable. These patriarchal values enforced judicial passivity in addressing legal oppression of women, and essentially allowed judges to disregard violence against women within the home.[14] Moreover, social norms that gave men power over women prevented domestic abuse issues from gaining prominence. Domestic violence received little or no attention in public polls and surveys between the years 1970 and 1989, which further illustrates how unimportant the issue was for policymakers and others who relied heavily on public opinion.[15] Lastly, formal definitions of "violence" did little to help women escape their abuse through employment of the criminal justice system in this earlier period. As women's studies scholars Jalna Hammer and Mary Maynard argue in *Women, Violence and Social Control*, legal definitions of "violence" are the least inclusive of all such definitions. Legal definitions do not cover many of the acts that are perpetrated against women and often disregard certain actions that many women would consider to be violent. On the other hand, women tend to define "violence" more broadly because these definitions come from actual experience.[16] Thus, because the law in the 1970s was so narrow in defining what constituted actual violence, women continued to suffer due

to the lack of legal grounds for action. Ultimately, the legal system loosely discriminated against victims of violence based on perceptions of their role as women, and the system failed to provide them with any avenue to escape their abuse.

Structures and practices within the institution of marriage also defined perceptions of domestic violence and negatively influenced victims' treatment. In practice, society considered marriage a private family matter and something with which the state should not interfere.[17] Furthermore, common law gave the husband power to "correct" his wife, so it was widely believed that common law would naturally sanction violence within the household.[18] This privacy and acceptance of violence left husbands license to treat their wives as they wished, without any threat of punishment or retribution by higher authorities. In addition, the backlash against the women's rights movement in the seventies and the defeat of the equal rights amendment illustrate the conservative ideology that was present during the decade.[19] This ideology and distaste towards the women's movement reinforced women's subordinate roles within marriage and allowed for the continued mistreatment of domestic abuse victims by the criminal justice system.

However, that is not to say that the law always disregarded victims of abuse. In 1971, the Rhode Island Supreme Court ruled that men did not have the right to beat their wives and in 1984, United States Attorney General Benjamin Civiletti called for a Department of Justice task force to submit the first report in American history evaluating the "scope and impact of domestic violence in America."[20] Despite these legal precedents and official attention to domestic violence during the period, law enforcement and the court system still tended to unfairly treat victims of domestic abuse.

General conceptions of gender and domestic violence affected female victims' experiences with law enforcement and the judicial system. Police considered violence within the home to be a private, family issue. As a result, police officers viewed domestic battery complaints primarily as an annoyance.[21] In 1978, the United States Commission on Civil Rights found that police officers considered arrest to be too drastic a remedy in cases of domestic violence. Instead, law enforcement might tell the abusive husband to "cool off" or assist the wife in leaving.[22] In most cases, police officers acted in a peacemaking capacity rather than as an arresting authority.[23] In effect, the police were unwilling to recognize the woman as a victim of crime and failed to sufficiently protect her. Furthermore, police also acted on the presumption that an abused woman would not press charges, and law enforcement neglected to inform women of the available legal options to address their abuse. By failing to educate women of their rights, police offenders further abetted women's victimization. Even if the officer who came to the home did arrest the husband and press charges, superiors would often drop the charges later.[24] In her introductory testimony for a consultation on battered women sponsored by the Commission on Civil Rights, Del Martin provided an exceptional summation of law enforcement's treatment of abused women during the seventies. She stated that police officers tended to define violence in terms of effect, such that "in the absence of blood and visible injury, they are apt to discount the wife's report of her husband's brutality."[25] In addition to being unwilling to interfere in issues within the family unit, law enforcement was quick to deny allegations of abuse in the absence of obvious signs. Thus, the law enforcement branch of the criminal justice system overlooked and disregarded victims of abuse due to the belief in the privacy of "marital disputes" and reluctance to consider domestic violence as a serious crime.

Inappropriate judicial attitudes toward victims, insufficient sentences for abusers, and unwillingness to enforce official legal codes also illustrated the system's

failure to adequately treat female victims of domestic abuse. Researchers conducted studies of the Philadelphia court system in the late sixties and early seventies on judicial attitudes toward female victims of rape, which included rape within marriage.[26] They found that the judges' attitudes were less impartial than was commonly expected and assumed, and the judges were highly skeptical of victims' allegations. When asked about the legitimacy of rape claims, many judges responded, "[r]ape is the easiest crime to allege and the hardest to prove."[27] While this contention may be true, judges disregarded the validity of most rape allegations by essentially declaring *all* such claims to be unfounded. In effect, judges placed the burden of proof heavily on the victim. Judges also saw domestic abuse as a simple conflict between lovers, which effectively ignored a victim's suffering. Further, judges were "unwilling to undermine the dominant role of the husband in a marital relationship," which ensured that the abuse would continue in the face of judicial ambivalence.[28]

Judicial sentences for abusers also illustrated the criminal justice system's mistreatment of domestic violence victims, as sentences seldom equaled the seriousness of the offenses. In 1978, the United States Commission on Civil Rights found that judicial sentences for husbands who abused their wives often never matched those sanctions for similar violence against strangers.[29] By categorizing the significance of a violent act based on whether the abused woman had a relationship with the abuser, the legal system essentially downgraded the woman's suffering simply because she knew her attacker. In her essay on judicial attitudes toward wife abuse, scholar Laura L. Crites cites a wide range of examples of lenient sentencing and even punishment for the women in domestic abuse cases. An analysis in 1982 of the twenty most serious domestic abuse cases in the Denver District Court showed that the most common sentence was a $25 dollar fine for the husband.[30] Similarly, a court in Phoenix, Arizona released a man who had "severely assaulted, kicked in the head, and robbed his wife" under the promise that he would appear in court for his trial, while his wife was imprisoned under the guise of "protective custody."[31] Even though the husband would stand trial, the court's decision reinforced power imbalances and continued to victimize the woman because the system confined her to a jail cell while it set her abuser free.

Even in the early eighties, when many states had passed protective order legislation for abused women, judges neglected to enforce the law. For example, a New Hampshire judge refused to sign a restraining order despite requirements for protective orders stipulated in the state's 1981 Protection of Persons From Domestic Violence Law.[32] Furthermore, many judges avoided blaming males for violence towards their wives by issuing "mutual orders of protection," which prohibited both the husband *and* wife from harming each other. One New York family court judge denied a woman a restraining order despite her husband's admission that he had beaten her for eighteen years. Instead, the judge ordered that the couple attend counseling.[33] Pennsylvania judges also resisted enforcing their state's version of the Protection From Abuse Act. Judges for the Court of Common Pleas often told weekend judges not to sign protective order petitions to the point where even police officers became frustrated with the situation.[34] Judicial disregard for state law and attempt to avoid condemning wife abuse was especially disconcerting, considering efforts made by legislators to legally protect women from domestic abuse. Ultimately, despite changes in official policies toward domestic violence, female victims were helpless in the hands of an unsympathetic and skeptical judicial system.

While the criminal system treated all female domestic violence victims poorly, minority and immigrant women were especially susceptible to mistreatment. In fact, non-Caucasian women received *double* discrimination as victims of domestic abuse, first as women and second as a racial or ethnic minority.[35] In the context of the turmoil and revolution surrounding the aftermath of the civil rights movement, race became an important factor in the legal system's action.[36]

The racial issue was most evident in the reporting aspect of an abuse case, even before the case came to the attention of law enforcement or the court system. Stereotypes about racial minorities in the seventies often dissuaded or completely prevented victims from reporting their abuse. Activist and scholar Angela Davis argued that "the image of black women in our society is that they are chronically promiscuous, loose, and whores."[37] Thus, African-American women would be less likely to report any abuse they suffered in order to prevent the perpetuation of this stereotype. This stereotype also often caused the criminal justice system to ignore their complaints altogether. Furthermore, in this period Americans discriminated against racial minorities and immigrants of certain nationalities in all areas of daily life, not just through the criminal justice system. By reporting a case of domestic abuse, minority and immigrant women would implicate their husbands. Thus, minority women were less likely to report their abuse because they knew society would further condemn their racial group as a whole for the wrongdoing.[38] In addition, many women of color were afraid that law enforcement officers would unnecessarily harass their male family members if they were to report a case of domestic violence.[39] Thus, racial stereotypes and misconceptions about non-white communities throughout American society prevented minority victims from reporting their abuse because they feared further oppression and discrimination.

Race and nationality issues also affected the manner in which women received treatment for abuse. Many international cultures more rigidly adhere to traditional family values, so it is even more difficult for an abused woman to leave her husband. This cultural emphasis on kinship was foreign to most Americans, so there tended to be a lack of cultural sensitivity in domestic violence shelters. For example, there was little accommodation in domestic violence refuges for the different languages, foods, and customs of minority and immigrant women.[40] The lack of special attention paid to these victims may have prevented women from reporting their abuse because they did not expect the shelter to help them sufficiently, even if they did seek help. This failure of the domestic violence support system reinforced the mistreatment of minority domestic violence victims and set these women's experiences apart from the relatively better treatment of white abuse victims.

Despite the lack of attention paid to abused minority and immigrant women on a national scale, there were efforts at the end of the seventies to increase the support available to these women. In 1976, San Francisco Bay area women founded *La Casa de Las Madres*, the first battered women's shelter specifically for women of color. In 1977, the Rosebud Sioux Reservation in South Dakota founded the White Buffalo Calf Woman Society, which was the first non-profit organization dedicated to advocacy on behalf of Native American women who were victimized within the home.[41] Despite these inclusive measures, the support system still fell quite short. These grassroots organizations were founded by the minority groups, and not by legal precedent or official requirements, evidencing the lack of widespread support for these victims. Furthermore, these organizations were not available nationally at the time, illustrating the lack of resources available for minorities and immigrants. The lack of resources and

advocacy for immigrant victims prevented women from reporting and revealed weaknesses in the treatment of domestic violence victims based on race and immigrant status.

Immigration law also contributed significantly to the neglect of domestic abuse victims abroad who hoped to find safety by migrating to the United States in this earlier period. Historically, United States immigration law has been especially restrictive toward women of color. Up until 1980, admittance of refugees was largely based on a foreign policy that rarely permitted domestic abuse victims to emigrate unless their admission served a larger political purpose. Hopeful female immigrants also had to fear the impact of "the doctrine of coverture" on United States immigration procedures. "Coverture" is a concept in which the law considers a married woman to be under the protection of her husband. Immigration officials often only allowed women into the United States with their husbands, which posed problems for abused women hoping to leave their partners.[42] The legal system's treatment of abused immigrants reflected the larger culture's insensitivity toward domestic violence and further illustrated the system's inability to adequately address domestic violence for immigrants.

Discrimination against domestic violence victims due to factors related to race or nationality was extremely evident in the court system during the seventies and eighties. Many judges would legitimize violence by a "man of color" by placing the abuse outside of the husband's control. In the Dong Lu Chen case, Justice Pincus attributed the husband's violence to cultural factors outside of his "sphere of motivation."[43] In a case involving a Pakistani couple in New Jersey, the judge reasoned that the man's abusive behavior was probably "in accordance with his cultural beliefs," and rescinded the wife's restraining order against her husband.[44] While a certain culture may imbue men with more power than women, this power imbalance should in no way allow a man to harm his wife. This sort of thought process not only relieves the husband of any true responsibility for his actions but also victimizes the abused wife, as she must continue to suffer from the violence without any help from authorities. Furthermore, some minority women, and in particular African-American women, were more likely than Caucasian women to fight back against their abusers.[45] The criminal justice system saw women who fought back as less deserving of protection by the state because they "violate[d] social definitions of the passive…victim."[46] Discrimination against women who defended themselves against their abusers further illustrates the legal system's inability to protect non-White women from domestic violence. Ultimately, the court system left minority victims helpless because it did not believe their predicament justified attention.

Furthermore, the manner in which courts viewed the victims also affected minority and immigrant women. The prejudices that judges retained against certain racial minority or immigrant groups often made their way into a judgment about a case. For example, a study of rape cases in the Philadelphia court system showed intense racial overtones in the judges' discussion of African-American victims. Many judges referenced the "chaotic lifestyles and attitudes of ghetto dwellers," viewed African-American women as "vindictive," and referred to the women with derogatory terms, including "Negro," "nigra," or "colored."[47] Because judges had prejudices against African-American women, they were more likely to dismiss these women's cases. Furthermore, by citing stereotyped lifestyle and personality characteristics, judges found a way to blame the victim for her own abuse, as if she invited or deserved the violence.

The political and social climate of the seventies and eighties was resistant to change and unwilling to meet progress of past movements. The civil rights and

women's rights movements gained prominence and achieved success almost a decade earlier, but social attitudes did not change as quickly. Minority and immigrant groups did not feel the advances made in the name of women's rights equally, as they did not receive the same treatment as their white counterparts. Furthermore, American society did not consider domestic abuse to be of vital importance, so it did not receive attention equal to other violent crimes.

Current Notions of Gender Roles and Marriage and Perceptions of Domestic Violence, *1990- Present*

Much has changed with regard to domestic violence in the United States since that period. In 1990, United States Senator Joseph Biden introduced the first Violence Against Women Act (VAWA), and on September 13, 1994, VAWA was signed into law with bipartisan support. The act "requires a coordinated community response" to violence against women, "strengthens federal penalties for repeat sex offenders and includes a rape shield law," and "allows victims to seek civil rights remedies to gender-related crimes."[48] With regard to domestic violence, VAWA includes "full faith and credit provisions," which require that all states and territories honor protection orders issued by other states and territories, and "legal relief" for battered victims, which makes it difficult for an abuser to use immigration law to prevent their victim from reporting the abuse or seeking outside help.[49] Since the passage of the VAWA, there has been a marked shift in how the criminal justice system addresses domestic violence and the legitimacy attached to the issue.[50]

Notions of gender roles and positions within marriage are vastly different from those that existed in the seventies, and these differences have a major impact on society's views on domestic violence against women. To begin with, there is now greater equality between men and women. The increase of women in the workforce since the fifties explains this shift, as well as women's entrance into traditionally male-dominated markets, such as law and medicine.[51] Women are free to leave the home when they wish and there is no legal obligation for a woman to tie her livelihood to a man. This change in gender roles has important implications for women, because the law now sees them as legitimate and equal members of American society. As a result, the justice system takes their rights and complaints more seriously.

The institution of marriage has also changed since the seventies, which has significant implications for social views on domestic violence. Today, society considers marriage to be a more equal partnership between a man and a woman, rather than an institution in which a wife is dependent upon her husband. The traditional dichotomy in which husbands occupied the economic sphere and wives occupied the domestic sphere is deconstructed; since the seventies, there has been an increase in the female labor force participation rate and a decrease in women's singular focus on the home.[52] Furthermore, both men and women get married at an older age, choosing first to become successful on their own.[53] Because women are now more widely viewed as equal members of society, their abuse is more alarming and therefore less accepted by society in general. Since the eighties, divorce rates have also risen sharply.[54] Women face fewer obstacles to ending an unwanted marriage because divorce is so common. Thus, the criminal justice system is generally more accepting of battered women who want to leave a marriage due to violence at home.

Modern gender roles and definitions of marriage help shape today's perceptions of domestic violence and the way in which the criminal justice system treats

victims of abuse. Women's rights influenced the passage of the VAWA, which in turn gave domestic violence victims legal recourse in addressing their abuse. There are also non-profit organizations and government agencies that are devoted to helping the female victims of domestic abuse. For example, in 1995, President Clinton appointed Bonnie Campbell to be the first director of the newly created Violence Against Women Policy Office within the Department of Justice. That same year, the Department of Justice created the Violence Against Women Grants Office to oversee certain functions, including funding of battered women's shelters and training programs to aid police officers in handling domestic abuse cases.[55] Both offices still exist today under the Department of Justice's Office of Violence Against Women, and their presence reveals a changing perspective on domestic violence – and gender-related violence in general – as a real and legitimate problem.

In addition to the creation of government agencies and the allocation of public funds to fight domestic violence, there are numerous non-profit organizations devoted to aiding domestic violence victims and improving their experience within the criminal justice system. Since the passage of VAWA, domestic violence shelters, victim help guides, and treatment resources have proliferated across the United States.[56]

VAWA also revamped the criminal justice system's response to domestic violence and treatment of abuse victims. The act made, and continues to make, its most significant impact through grants. The Violence Against Women Grants Office oversees training programs to increase police and court officials' sensitivity toward domestic violence victims, and the Department of Justice runs additional grant programs that promote arrest policies, which encourage police officers to arrest abusers at the scene. The Grants Office also offers special training for prosecutors who work with domestic violence cases. Additionally, victims benefit directly from the Civil Legal Assistance to Victims Program, which grants funding to provide legal assistance for victims of gender-related crimes.[57] The provision of funding and special attention for domestic abuse cases paid by VAWA reveals an attempt to improve the criminal justice system's treatment of victims and an acknowledgement that gender-based crimes are legitimate crimes.

Race and Nationality: Limited Progress

The criminal justice system has also made immense strides in its consideration of immigrant victims. VAWA provides legal relief for battered immigrant women and later versions of the law expanded immigrants' access to this relief. For example, it provided for the Culturally and Linguistically Specific Services program, which works to enhance the services and resources available to minority victims.[58]

The legal system has also made progress in the manner in which the law treats current immigrants and foreign women who may immigrate in the future. VAWA allows abused immigrants to "self-petition" into the country; this stipulation marks a dramatic difference between contemporary immigration law and older laws that required women to emigrate through their husband or an established resident, who may have been abusive.[59] This new provision prevents women from being forced to stay in abusive relationships simply to be allowed to remain in the country and reveals the legal system's progressive attitude toward immigrant victims of violence.

Additionally, there are certain conditions under which a foreign individual can obtain asylum – and eventually a green card – in the United States if he or she can demonstrate "a well-founded fear of future persecution" based on race, religion,

nationality, political opinion, or social group membership. Over the past decade, the United States government has begun to acknowledge that domestic violence can also be a basis for asylum in certain cases.[60] The United Nations High Commissioner for Refugees (UNHCR) is an international organization that works through its regional office in the United States to help the American government and non-government organizations with domestic violence-based asylum claims.[61] UNHCR representatives in Washington argue that domestic violence victims are a "particular social group" that can seek asylum in the United States as stipulated by United States and international refugee law.[62] This acceptance illustrates once again that the legal system has committed itself to better treatment of immigrant victims of domestic violence.

Despite legal advances, certain subgroups of women continue to receive subpar or discriminatory treatment. Some judges tend to have less respect for women who seem to be members of a minority group or appear to have an ethnic or immigrant background, which negatively influences how the judges act in court. In general, however, racial discrimination is not as common or apparent as immigrant discrimination, perhaps because it is less socially acceptable today than it was in the seventies. Instead, they often subversively attribute the violence to immigrant status. For example, in 2010 a Montgomery County, Maryland district court judge asked an estranged couple to identify their country of origin. The husband responded, "El Salvador," and the judge exclaimed, "Figures!" implying that the husband and wife's nationality fully explained their domestic violence problem.[63] Such shortsightedness on the part of the judge shifts the blame from the abuser to the abused.

Furthermore, there are issues with translation for immigrant or minority petitioners who do not speak fluent English.[64] Many judges do not ask petitioners or respondents if they completely understand court processes or decisions. A judges' lack of follow-up negatively affects victims because the husband could potentially fall back into patterns of abuse if he does not understand the implications of a trial. Sometimes, petitioners will appeal for a translator, but judges may react negatively to these requests. Such a decision victimizes the petitioner by increasing her helplessness and refusing her the aid she needs as a non-English speaker. Even when victims do receive a translator there can still be problems, as many translators can be "bullies," "inappropriate," or "not well-trained."[65] In a Los Angeles case, a Korean-speaking advocate observed a Korean interpreter add his own opinion to his translation. Further, the translator sided with the abusive husband and "encourage[ed] the victim to forgive her abuser and return home."[66] This sort of treatment on the part of a court-appointed official is demeaning toward the victim, and delegitimizes her suffering. Often a lack of resources forces victims to use unqualified or non-professional interpreters, which can result in disastrous miscommunication. A Chinese-speaking lawyer in a Massachusetts court overheard a translator misinterpret a woman's recollection of her husband's statement, "I want you dead," as "He scolded me."[67] Significant mistranslations effectively deny non-English speaking women a fair trial and diminish the quality of the criminal justice system's treatment of immigrant victims.

Recommendations and Conclusion

Activists, scholars, and journalists agree that the current treatment of immigrant women in domestic violence cases needs further improvement. In order to remedy the criminal justice system's shortcomings, new programs and policies should address issues specifically related to immigrants. Counties should require judicial

review of family court judges in order to hold them accountable for the quality of proceedings and prevent situations in which judges are disrespectful toward victims or respondents based on nationality.[68] Furthermore, increased judicial review can help establish a universal standard for all judges in all United States family, so immigrants will not be penalized if they live in an area with a particularly poor family court judge. Additionally, policymakers need to address issues related to court interpreters, because these translators serve as a victim's voice in court if she cannot speak English or cannot speak English well. Training programs should not only teach interpreters to work with people in general but also to work with victims of domestic abuse specifically. Domestic abuse cases tend to be more shocking and may be difficult for certain interpreters to handle; if the interpreter knows ahead of time what to expect, he or she may avoid speaking inappropriately or incorrectly in court or could refrain from participating in the case altogether. Moreover, state governments should mandate that all non-English speakers receive translators, whether or not the non-English speaker asks for such aid, in order to increase the quality of communication between the judge, the victims, and the respondents and to prevent situations in which judges refuse to provide an interpreter. Finally, provision of trained translators will increase efficiency and minimize the length of a trial, thus maintaining the victim's emotional stability and financial resources.[69]

Since the seventies, the criminal justice system has made enormous strides in its treatment of domestic violence victims. Spousal abuse is more widely viewed as a serious crime and policymakers have incorporated such abuse into official policies. However, while legal codes fully address the issue, the criminal justice system has yet to catch up completely. Some judges continue to discriminate against immigrant victims, and inconsistent court procedures do little to make the experience easier for abused women. It is clear that although there has been much improvement in our culture's handling of this very important issue, we still have a long way to go if we want to ensure justice and uphold equal protection of the law.

Endnotes

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[2] Celestin Bohlen, "Holtzman May Appeal Probation For Immigrant in Wife's Slaying" *The New York Times*, B3, April 5, 1989.
[3] Marianne Yen, "Refusal to Jail Immigrant Who Killed His Wife Stirs Outrage: Judge Ordered Probation for Chinese Man, Citing His 'Cultural Background'" *The Washington Post*, A3, April 10, 1989.
[4] Edna Erez, "Domestic Violence and the Criminal Justice System: An Overview," *The Online Journal of Issues in Nursing* (2002), http://www.nursingworld.org/MainMenuCategories/ANAMarketplace/ANAPeriodicals/OJIN/TableofContents/Volume72002/No1Jan2002/DomesticViolenceandCriminalJustice.aspx.
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[6] Del Martin, *Battered Wives* (Volcano Press, Inc. 1976).

[7] R. Emerson Dobash and Russell P. Dobash, *Women, Violence and Social Change* (Routledge 1992).
[8] Natalie J. Sokoloff, *Domestic Violence at the Margins: Readings on Race, Class, Gender, and Culture* (Rutgers University Press 2005).
[9] Kimberly D. Bailey, "Lost in Translation: Domestic Violence, 'The Personal is Political,' and the Criminal Justice System," 4 *Journal of Criminal Law and Criminology* 100, 1255-1300, (Fall 2010).
[10] Ricardo Carillo and Jerry Tello, eds, *Family Violence and Men of Color* (Springer Publishing Company, Inc., 1998).
[11] Sheryl J. Grana, *Women and (In)Justice* 2 (Allyn & Bacon 2002).
[12] id at 21
[13] Susan Brownmiller, *Against Our Will* 16 (Simon and Schuster 1975).
[14] Judith A. Baer, *Women in American Law* 28 (Holmes & Meier Publishers, Inc. 2002).
[15] I made this conclusion based on the lack of results I found in the iPoll database (http://webapps.ropercenter.uconn.edu/CFIDE/cf/action/ipoll/). I used a variety of search terms, including wife-beating, domestic violence, family violence, domestic abuse, and wife abuse, and restricted the search to the years 1970-1990. "Wife-beating" and "domestic abuse" yielded zero results. "Domestic violence" yielded two results, but they referred to questions about domestic problems with violence in the United States, as opposed to abroad. "Family violence" yielded two results; the only related result dealt with teenagers beating their grandparents. "Wife abuse" yielded four results. This latter set of polls revealed that a majority of people thought that wife abuse was a problem that the government should deal with, but most people did not actually know someone who had been abused.
[16] Sheryl J. Grana, *Women and (In)Justice* 134 (Allyn & Bacon 2002).
[17] id at 137
[18]Judith A. Baer, *Women in American Law* 265 (Holmes & Meier Publishers, Inc. 2002).
[19] Karen Oppenheim Mason and Yu-Hsia Lu, "Attitudes toward Women's Familial Roles: Changes in the United States, 1977-1985," 1 *Gender and Society* 2, 39-57 (March 1988).
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[21] Sheryl J. Grana, *Women and (In)Justice* 137 (Allyn & Bacon 2002).
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[24] Judith A. Baer, *Women in American Law* 267 (Holmes & Meier Publishers, Inc. 2002).
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[28] Laura L. Crites and Winifred L. Hepperle eds., *Women, The Courts, and Equality* 46 (SAGE Publications, Inc. 1987).
[29] id at 43
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[37] id at 50
[38] Sheryl J. Grana, *Women and (In)Justice* 146 (Allyn & Bacon 2002).
[39] R. Emerson Dobash and Russell P. Dobash, *Women, Violence and Social Change* 52 (Routledge 1992).
[40] Sheryl J. Grana, *Women and (In)Justice* 147 (Allyn & Bacon 2002).
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[42] "The History of the Violence Against Women Act," *United States Department of Justice*, online at http://www.ovw.usdoj.gov/docs/history-vawa.pdf (visited March 30, 2011).
[43] Shamita Das Dasgupta, "Women's Realities," in *Domestic Violence on the Margins*, ed. Natalie J. Sokoloff (Rutgers University Press 2005), 61-62.
[44] R. Emerson Dobash and Russell P. Dobash, *Women, Violence and Social Change* 53 (Routledge 1992).
[45] Shamita Das Dasgupta, "Women's Realities," in *Domestic Violence on the Margins*, ed. Natalie J. Sokoloff (Rutgers University Press 2005), 56.
[46] Kimberly D. Bailey, "Lost in Translation: Domestic Violence, 'The Personal is Political,' and the Criminal Justice System," 4 Journal of Criminal Law and Criminology 100, 1289-1290, (Fall 2010).
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[48] Duncan Chappell, Robley Geis, and Gilbert Geis eds., *Forcible Rape: The Crime, the Victim, and the Offender* 168 (Columbia University Press 1977).
[49] Rape shield laws prevent offenders from using victims' sexual history against the victim during a rape trial.
[50] "The History of the Violence Against Women Act," *United States Department of Justice*, online at http://www.ovw.usdoj.gov/docs/history-vawa.pdf (visited March 30, 2011).
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[53] Betsey Stevenson and Justin Wolfers, "Marriage and Divorce: Changes and their Driving Forces," *National Bureau of Economic Research: Working Paper Series* 1 (National Bureau of Economic Research March 2007).
[54] Id at 5
[55] id at 2
[56] "The History of the Violence Against Women Act," *United States Department of Justice*, online at http://www.ovw.usdoj.gov/docs/history-vawa.pdf (visited March 30, 2011).
[57] Id.; Laurie Duker, interview by Shayna Stern, March 8, 2011.
[58] Id
[59] Id.; "Grants to Enhance Culturally and Linguistically Specific Services for Victims of Domestic Violence, Dating Violence, Sexual Assault, and Stalking*," United States Department of Justice*, online at http://www.ovw.usdoj.gov/culturally-specific.htm (visited April 6, 2011).
[60] Jennifer Rogers, interview by Shayna Stern, March 28, 2011.
[61] Id
[62] Regional Office for the United States and Caribbean, *Asylum Advocates Focus on Domestic Violence* 2 (UNHCR September 1999).
[63] Bemma Donkoh, "Domestic Violence in the Context of the Refugee Definition," *United Nations High Commissioner for Refugees* (July 28, 1999), online at http://cgrs.uchastings.edu/documents/media/unhcr_dv.htm.
[64] Laurie Duker, interview by Shayna Stern, March 8, 2011.
[65] Petitioner is the legal term that refers to the victim of abuse who brings the domestic violence case. Respondent refers to the abuser.
[66] Laurie Duker, interview by Shayna Stern, March 8, 2011.
[67] Nancy K.D. Lemon, "Access to Justice: Can Domestic Violence Courts Better Address the Needs of Non-English Speaking Victims of Domestic Violence?" *Berkeley Journal of Gender* 46, *Law & Justice* 21 (2006).
[68] id at 45-46.
[69] Laurie Duker, interview by Shayna Stern, March 8, 2011.
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Back to the Future: The Supreme Court's Due Process Mission to Revert Punitive Damages to Their Traditional Role: An Overview and Its Effects

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Abstract:

Punitive damages are penalties imposed in civil courts in order to punish and deter reprehensible conduct. Tracing their existence back hundreds of years, the application of these damages has historically been to vindicate the plaintiff while punishing the defendant solely for the wrong inflicted upon the plaintiff. Starting around the 1980s, however, an interesting phenomenon occurred: courts moved away from using punitive damages to vindicate solely the private wrong and instead began imposing punitive damages to punish a defendant for the public wrong – the potential harm done to all of society. As the scope of the harm to be punished broadened, so too did the award sums. As awards sums surged into the multimillions, the Supreme Court took notice and, in a series of cases, progressively limited the size of punitive damages awards by using the Constitution's Due Process Clause. The culmination of the Supreme Court's punitive damages jurisprudence was the 2008 case *Philip Morris USA v Williams*. In ruling that juries cannot consider harm to "strangers to litigation" when determining a punitive damages award sum, the Court effectively reverted punitive damages back to their historical role. In doing so, however, the Court nevertheless undermined the punitive effect the damages have in their modern-day imposition due to the disjunction between the harms punitive damages traditionally addressed and the harms they must address today.

I. Introduction

Once considered an "obscure feature of American tort law," punitive damages have recently entered the mainstream due to incredibly large award amounts. In their modern usage, punitive damages are jury-imposed penalties whose purpose is to punish reprehensible conduct and deter its future occurrence. Punitive damages are extra-compensatory in the sense that they do not seek merely to redress the harm committed against the plaintiff, but rather can be imposed at the discretion of a jury in order to punish what is determined to be particularly reprehensible behavior. These damages have traditionally been imposed to punish the defendant for the individual harm inflicted on a plaintiff. Starting around the 1980s, however, an unusual phenomenon occurred: courts moved away from the typical usage of punitive damages and began to allow juries to punish defendants for the "total harm" their conduct caused – harm inflicted not only upon the plaintiff, but also for potential harm to all of society.[1] The side effects of this shift are obvious. As the punishable harm broadened significantly, so too did the size of punitive damages awards and the frequency with which they were awarded.[2] This, combined with the fact that juries had nearly unlimited discretion when determining awards amounts, helped punitive damages sums skyrocket into the multimillions of dollars.[3] Considering these astonishing award sums, which in many cases

"[bore] little relation to the alleged injury,"[4] the Supreme Court began examining punitive damages and the validity of large sums under the Constitution's Due Process Clause, which protects the rights of "procedural" and "substantive" due process. Procedural due process requires the government to follow appropriate procedures when its agents decide to deprive any person of life, liberty, or property, whereas substantive due process can bar the government from taking certain actions regardless of the fairness of the procedures.

Beginning in the 1996 case *BMW v Gore*, the Supreme Court began stamping its judicial foot on the size of punitive damages awards through the use of procedural and substantive due process. In doing so, the Court has reverted punitive damages back to the role they have traditionally played: punishing defendants only for harm inflicted on the plaintiff. The Supreme Court's progressive limitation of the size of punitive damages awards sums culminated in their 2008 *Philip Morris USA v Williams* decision, which held it unconstitutional for defendants to be punished for potential harm inflicted on nonparties to litigation. *Williams* has had important theoretical and practical implications on punitive damages. Theoretically, the decision reaffirmed the historical conception of punitive damages as punishment for private wrongs. In addition, considering that punitive damages are now typically levied on wealthy corporations, the Supreme Court's limitation of such awards calls into question the efficacy and usefulness of punitive damages to meaningfully punish and deter a defendant – and other potential defendants in similar situations.

This article seeks to explore the implications that the Fifth and Fourteenth Amendment's Due Process Clause has on the size of punitive damages awards. Specifically, this article traces the Supreme Court's application of the Clause to cases involving large punitive damages awards. In order to provide relevant background information, Part II of this Article first distinguishes between the nature of private and public wrongs and the way these wrongs are addressed in the courts in order to provide a solid foundation for an adequate punitive damages analysis. Second, this section sets out a brief history of the role punitive damages have played in civil courts over the years, from their conception in the early eighteenth-century to the present day. This section also discusses the Due Process Clause in order to provide the proper framework for understanding the Supreme Court's recent punitive damages jurisprudence.

Part II then builds on this discussion by analyzing relevant Supreme Court cases, focusing particularly on the Court's use of substantive measures to curb punitive award amounts. This section culminates with a discussion of the "revolutionary" 2008 case *Philip Morris USA v Williams*. Part III moves on to theoretically justify the Court's decision in *Williams* while also arguing that the Court's jurisprudence has significantly reduced the punitive role of punitive damages, calling into question the usefulness of the doctrine in the present-day due to the disjunction between the wrongs punitive damages have traditionally addressed and the wrongs they must address now. This section concludes by noting that the future of the doctrine of punitive damages will rely on the Supreme Court's interpretation of a key exception made in *Williams*. Part IV very briefly revisits many key points of this Article and reiterates that although the Court came to the correct ruling in *Williams*, its decision will have the impact of reducing the punitive function of punitive damages in the future.

II. Understanding Punitive Damages

Before juxtaposing the historical and the modern conception of punitive damages, it is first necessary to distinguish between the nature of private and public wrongs.

A. Distinguishing Between Public and Private Wrongs

Our legal system distinguishes between private and public wrongs. Private wrongs – also referred to as "torts" – are legal wrongs against the rights of an individual. Private wrongs can only be redressed in the civil courts by the harmed individual.[5] The method of redressing this individual harm is through a civil suit in which a jury may award the plaintiff damages for harm suffered. The purpose of recovering damages in such a suit is to make the plaintiff whole again – as if the tort never occurred in the first place.[6]

Public wrongs – more commonly known as "crimes" – are wrongs committed against society. Unlike the civil law, the criminal law is not concerned with redressing individual harm. Rather, the purpose of a criminal proceeding is to "protect and vindicate the interests of the public as a whole" by punishing the perpetrator for his actions.[7] Courts continually remind us that "we must remember that a criminal offense is an offense against the sovereign state, and not against an individual."[8]

Aiding to blur the distinction between private and public wrongs is the fact that crimes and torts often overlap,[9] and in "our common parlance, we speak of the individual as the 'victim' of the crime, and in our casual thought we tend to think of the criminal law as punishing the defendant for what he did to the individual victim."[10] However, this conception of the criminal law is inaccurate. Crimes and torts are viewed and treated as distinct legal wrongs, with different ways the courts address these wrongs. It is necessary to keep this fundamental distinction in mind while moving forward into an analysis of punitive damages.

Punitive damages represent an interesting twist of the criminal and civil law, as they are handed down in the civil court, yet they are unlike other damages in that that they do not seek merely to make the plaintiff whole again. Rather, they are extra-compensatory in the sense that they can be imposed on top of compensatory damages. Also, punitive damages serve the traditionally criminal roles of punishment and deterrence, which of course seems unusual in the civil courts. Given the "quasi-criminal" role of punitive damages combined with the above brief discussion of private and public wrongs, one simple question arises: *How* can punitive damages serve as punishment in the civil courts? The answer to this question depends on which wrong punitive damages punish – the private or the public. Examining the history of punitive damages shows glaring disjunctions in the way courts have answered this question. Understanding the Supreme Court's recent punitive damages jurisprudence requires a brief yet instructive overview of the historical origins of punitive damages – from their offshoot of "exemplary" damages in the seventeenth-century all the way to the present-day conception of these damages as a means to punish defendants.

B. The Disjunction Between Past and Present Conceptions of Punitive Damages

In the early eighteenth century, English courts routinely awarded excessive judgments in cases in which no tangible loss had occurred. Later in the 1700s, though, higher courts extended their authority and began reviewing verdicts awarded by lower courts for excessiveness.[11] Needing a rationale to explain the excessive sums, lower courts invented "exemplary"[12] damages.[13] Thus, these damages were "not created for an

expressed purpose, but rather arose as an after-the-fact effort to justify unreasoned and seemingly dubious practices." These damages served in part to compensate plaintiffs for "intangible" or "moral" harm – immeasurable harms that included wounded feelings and mental suffering that were not legally compensable at the time.[14] Indeed, Thomas Colby notes that exemplary damages were awarded "exclusively in cases that involved insult to the honor and dignity of the victim."[15]

Numerous courts emphasize the compensatory function of punitive damages. The Texas Supreme Court, for example, stated in 1885 that, "it is most likely true that the whole doctrine of punitory or exemplary damages has its foundation in a failure to recognize as elements upon which compensation may be given many things which ought to be classed as injuries entitling the injured person to compensation."[16] In *Detroit Daily Post v McArthur*, exemplary damages were awarded "to make reparation for the injury to the feelings of the person injured," on the basis that an injury inflicted voluntarily is "often the greatest wrong that can be inflicted, and injured pride and affection may, under some circumstances, justify very heavy damages." Exemplary damages, in essence, filled a compensatory void in the law, awarding plaintiffs heavy damages for their mental suffering.

Aside from merely performing a compensatory function, exemplary damages also performed the function modern punitive damages play: punishment. Early courts articulated that exemplary damages serve "the purpose not only of compensating the plaintiff for intangible wrongs but also of punishing the defendant for his misconduct."[17] Eventually, the compensatory function of these damages waned as the scope of compensable harms broadened to include immeasurable, noneconomic harm. Rather than fading away completely, the punishment function of exemplary damages remained.[18] Rebranded as "punitive," these damages served only to punish the defendant.[19] As Colby states, "the judicial rhetoric drifted from the notion of compensating the insult to punishing the insult,[20] or more generally punishing the injury, but remained centered throughout on the insult or injury to the plaintiff."[21] Even during this shift, however, punitive damages were meant to address solely the private wrong.[22] Courts were adamant that punitive damages were meant to address the private wrong in order to deflect criticisms that they were unconstitutional:

> Why did nineteenth-century courts declare punitive damages as punishment for private wrongs? That conception was well-grounded in the emerging understanding of the unique nature and role of punitive damages, but the courts did not coalesce around it or articulate it clearly until they were forced to do so to deflect constitutional attacks – in particular, to deflect the argument that, to avoid constitutional double jeopardy, punitive damages should not be allowed where the defendant's conduct was also punished as a crime. The rejoinder to that argument that prevailed in the courts was that there was no double jeopardy violation because the defendant was not being punished twice for the same offense. Each punishment was for a distinct legal wrong – the criminal punishment for the public wrong to society, and the civil wrong for the private wrong to the plaintiff. … *If punitive damages had been understood at the time as punishment for public wrongs, the courts would have struck them down*.[23] [my emphasis added]

Indeed, nineteenth-century courts regularly stated that "the damages allowed in a civil case by way of punishment have no necessary relation to the penalty incurred for the wrong to the public," but are instead imposed solely to punish "for the wrong done to the individual."[24] As another court explained: "Considered as strictly punitory, the damages

are for the punishment of the private tort, not of the public crime."[25] History clearly demonstrates that courts understood punitive damages as a civil penalty addressing solely the private wrong.

Despite the deep historical conception of punitive damages being used to address the private wrong, a shift occurred – a shift which courts gave little or no thought – which fundamentally changed the nature of punitive damages, at least for a while.[26] The traditional purpose of punitive damages as vindication and punishment for the private wrong gave way to the notion that punitive damages could be used to punish for all public harm, leading Colby to note that the "modern theoretical account of punitive damages for public wrongs is deeply at odds with the actual doctrine of punitive damages."[27] Considering the shift from punishing private wrongs to punishing public wrongs, Prosser and Keeton wrote that the modern conception of punitive damages is "anomalous" because "the ideas underlying the criminal law have invaded the field of torts."[28]

Various courts during this time explicitly preserved the account of punitive damages as punishment for public wrongs. In 2001, the Eleventh Circuit Court of Appeals stated "punitive damages serve the collective good by deterring a public wrong and punishing egregious wrongdoing on the part of the defendant; the award is measured to reflect, not the wrong done to a single individual, but the wrongfulness of the conduct done as a whole"[29] A 2002 Ohio court noted that "[t]he plaintiff remains a party, but the de facto party is our society, and the jury is determining whether and to what extent we as a society should punish the defendant."[30] Before the *Williams* case made its way up to the United States Supreme Court, the Oregon Supreme Court bluntly stated that there was "nothing wrong with punishing harm to nonparties."[31]

The United States Supreme Court has even upheld the notion that punitive damages function to punish the public wrong, perhaps most clearly in *TXO Production Corp. v Alliance Resources*.[32] In *TXO*, the Court upheld a 526:1 ratio of punitive to compensatory damages (the punitive damages award amount was 526 times the amount of compensatory damages) on the basis of the actual harm, potential harm to the plaintiff, and the "possible harm to other victims that might have resulted if similar future behavior were not deterred" of the defendant's fraud scheme.[33] A few years later, the Supreme Court stated that punitive damages "serve the purposes as criminal penalties," which is "to punish the public wrongs on behalf of society."[34] As recently as 2008, Justice Stevens in his *Williams* dissent passionately defended the notion that punitive damages are allowed to punish the public wrong. He stated, "[t]here is no reason why the measure of the appropriate punishment for engaging in a campaign of deceit in distributing a poisonous and addictive substance to thousands of cigarette smokers statewide should not include consideration of the harm to those 'bystanders' as well as the harm to the individual plaintiff."[35]

This role shift of punitive damages resulted in a number of issues which legal scholars and jurists have been forced to address. Because of the blurring of criminal and civil law, questions regarding the constitutional validity of such awards in civil courts are especially pertinent. As one commentator stated, if punitive damages are meant to punish defendants on behalf of society, then "why are they constitutional?"[36] Wouldn't the imposition of such a punishment in the civil court undermine the wide-ranging and specific constitutionally guaranteed protections to criminal defendants, including heightened burden of proof? Furthermore, astonishing awards sums seemed arbitrary, thus invoking potential Due Process issues with dubious award sums based nearly entirely on the discretion of a given jury.

C. The Due Process Clause and Punitive Damages Awards

The Due Process Clause of the Fifth and Fourteenth Amendments to the United States Constitution provides that "no state shall deprive any person of life, liberty, or property, without due process of law."[37] The purpose of this clause is to protect citizens from arbitrary state action: "due process requires adequate notice of the conduct that is to be punished as well as notice of the severity of any resultant punishments."[38] Due Process protects two distinct categories of rights: procedural and substantive.[39] Procedural due process "require[s] the government to follow appropriate procedures when its agents decide to 'deprive any person of life, liberty, or property.'"[40] Procedural rights relating to the imposition of punitive damages include safeguards such as judicial review[41] and the right to *de novo* appellate review of the trial court's determination that the award was not excessive.[42]

The concept of substantive due process goes beyond that of procedural due process in that it can "bar certain government actions regardless of the fairness of the procedures used to implement them."[43] Substantive due process is concerned with preventing governmental oppression and with protecting fundamental individual rights from governmental interference. In essence, it ensures that the government is justified in taking an action against an individual when attempting to deprive that person of life, liberty, or property.[44] In terms of punitive damages, theoretically a jury could follow the proper procedural safeguards set in place to ensure a valid award amount but the amount could nevertheless be struck down as unconstitutional on substantive grounds. The Court has traditionally relied on procedural due process as opposed to substantive due process.[45]

Prior to 1996, the Supreme Court routinely upheld the Due Process constitutionality of large punitive damages awards on procedural grounds: Award sums imposed within the proper constitutional framework were treated with a presumption of validity.[46] As the sums continually grew to massive amounts, though, the Court began it would soon address the burgeoning punitive damages problem. In the 1986 case *Aetna Life Insurance Co. v Lavoie*, for example, the Court stated that constitutional challenges to punitive damages awards raise "important issues which, in an appropriate setting, must be resolved."[47] A few years later, in the 1989 case *Browning-Ferris Industries, Inc. of Vermont v Kelco Disposal*, the Court noted it would address "another day" the "precise question" of "whether due process acts as a check on undue jury discretion to award punitive damages in the absence of any express statutory limit."[48] While suggesting it would soon tackle the issue, the Court also reaffirmed the use of traditional procedural safeguards. In its final pre-*Gore* punitive damages case, *Honda Motor Co. v Oberg*,[49] the Court noted that punitive damages "pose an acute danger of arbitrary deprivation of property" and also addressed the issue of dubious award amounts by saying "the rise of large, interstate and multinational corporations has aggravated the problem of arbitrary awards and potentially biased juries."[50]

D. Tackling the Issue: "Grossly Excessive" Punitive Damages Awards

Two years after hinting once again that punitive damages raise important due process issues which needed to be addressed, the Court got its chance in the 1996 case of *BMW v Gore.*[51]

1. BMW v Gore

In *Gore*, the plaintiff, Dr. Ira Gore, filed a suit for fraud against the car manufacturer after learning from a third-party that the "new" car he had recently purchased had been damaged and repainted without his knowledge.[52] At trial, BMW divulged that it was company policy to repair then sell damaged cars without notifying the dealership or the eventual buyer of the repair so long as the costs of the repair was three percent or less than the retail price of the vehicle.[53] At the end of trial, an Alabama jury awarded Gore $4,000 in compensatory damages and $4 million in punitive damages, which is what the plaintiff requested.[54] BMW appealed the award amount, and the Alabama Supreme Court ultimately reduced this punitive award down to $2 million and issued a remitter on the basis that the award sum was improperly calculated by being based on similar instances in other jurisdictions.[55] The United States Supreme Court granted review to clarify the "standard that will identify unconstitutionally excessive awards of punitive damages."[56]

In a 5-4 majority, the Supreme Court found that the $2 million punitive damages award sum was "grossly excessive" and therefore unconstitutional. Writing the opinion for the majority, Justice Stevens noted that the excessiveness of a punitive damages award must be assessed in reference to a state's legitimate interest, thus "the federal excessiveness inquiry appropriately begins with an identification of the state interest that a punitive award is designed to serve."[57] Though the Court agreed that Alabama had a legitimate interest in punishing and deterring BMW's fraud, it concluded that the state did not have a legitimate interest in punishing BMW's "lawful conduct" in other states.[58] Punishing potentially lawful conduct in states outside of Alabama's jurisdiction, the Court determined, represents "a due process violation of the most basic sort."[59] The Court then turned to the issue of whether the punitive damages award was excessive in reference to Alabama's interest in punishing unlawful conduct which took place in its own jurisdiction.[60]

In assessing the excessiveness of the $2 million awards sum and award sums to come, the Court crafted three "guideposts to use when determining the reasonableness of a punitive damages award.[61] These guideposts are: (i) "the degree of reprehensibility [of defendant's conduct];"[62] (ii) "the disparity between the harm or potential harm . . . and [the] punitive damages award;"[63] and (iii) "the differences between this remedy and the civil penalties authorized or imposed in comparable cases."[64]

The Court called the reprehensibility guidepost "the most important indicium of the reasonableness of a punitive damages award."[65] Reprehensibility is determined on a "sliding scale" of conduct. Physical crimes, for example, are more reprehensible than crimes which are purely economic. Using this guidepost, the Court determined that BMW's behavior was not so reprehensible as to justify the $2 million penalty[66] because the harm inflicted was solely economic,[67] their nondisclosure policy did not affect the performance of their vehicles,[68] they did not act maliciously,[69] and because BMW was not a recidivist.[70]

Articulating the second guidepost – the ratio guidepost – the Court reasoned that punitive damages awards must bear a "reasonable relationship" to the actual or potential harm of the defendant's conduct.[71] While refraining from setting down a definite standard[72], the Court nonetheless suggested extremely large sums – such as the 500 to 1 ratio of punitive to compensatory damages in this case – "[raise] a suspicious judicial eyebrow"[73] and may "cross the line into the area of constitutional impropriety."[74]

The third guidepost "reflects the notion that substantial deference should be given to legislative judgments concerning appropriate sanctions for similar acts when determining whether a punitive damage award is excessive."[75] Creating these guideposts

represent the first time the high Court dabbled in the substantive realm of the Due Process Clause when ascertaining the reasonableness of a punitive damages award. Thus, "even though the state court used presumptively valid procedures," the Court nonetheless struck down the award sum as being "grossly excessive" in light of punitive damage objectives and the protections offered under the Due Process Clause.[76] The Court concluded by stating that "we are fully convinced that the grossly excessive award imposed in this case transcends the constitutional limit."[77]

2. *Expanding Gore: State Farm Mutual Automobile Ins. Co. v Campbell*[78]

Campbell developed out of mishandled lawsuit brought against State Farm policy holder Curtis Campbell by two drivers involved in a vehicle accident.[79] Despite evidence showing Campbell's unsafe driving was responsible for the accident, State Farm refused to settle claims and contested liability.[80] During this time, State Farm made numerous assurances to the Campbells, stating both that they were not liable and that their assets were safe.[81] Despite these reassurances, a Utah jury returned a judgment against Campbell for the amount of $185,849 – $135,849 more than the Campbell's policy limit.[82] State Farm initially refused to cover this excess liability.[83]

After the judgment was returned to Campbell, State Farm's previously positive attitude changed dramatically. Mr. Campbell was forced to obtain separate counsel to appeal the verdict. During this time, however, Campbell brought an action against State Farm for bad faith, fraud and intentional infliction of emotional distress. The trial court granted State Farm's request to split the trial into two phases with two different juries.[84] The jury in the first phase of the trial found State Farm's refusal to settle Campbell's claims unreasonable; in the second phase, the jury considered State Farm's liability for fraud and intentional infliction of emotional distress. In this second stage the Campbells introduced evidence covering a twenty-year period that showed "fraudulent practices by State Farm in its nationwide operations."[85] Indeed, the jury was encouraged to punish State Farm for "what it's doing across the country" as opposed to just the harm inflicted on Mr. and Mrs. Campbell.[86] At the conclusion of the second phase of the trial, a jury secured a judgment in Campbell's favor for $2.6 million in compensatory damages and $145 million in punitive damages.[87] The trial court reduced these figures down to $1 million in compensatory and $25 million in punitive damages.[88] However, on appeal the Utah Supreme Court reinstated the original sum awards by using the *Gore* guideposts to determine that State Farm's behavior was sufficiently reprehensible to warrant the $145 punitive damages award.[89]

After granting certiorari, the Supreme Court in a 6-3 decision[90] once again held that the punitive damages award imposed was grossly excessive and thus unconstitutional. Calling the case "neither hard nor difficult,"[91] the Court held the $145 million punitive damages award "an irrational and arbitrary deprivation of the property of the defendant."[92] The Court spent the first portion of its opinion airing concern over "imprecise" and "vague" punitive damages procedures still resulting in large awards sums, stating that "it is well established that there are procedural and substantive constitutional limitations on these awards."[93] The Court then moved on to assess the case in light of the *Gore* guideposts.

First turning to the reprehensibility guidepost, the Court expanded on the analysis set forth in *Gore*. The Court ruled that the Utah Supreme Court erred in finding that State Farm's conduct was especially reprehensible because the court took into consideration other dissimilar acts by State Farm and conduct which took place in other

jurisdictions.[94] Just as in *Gore*, the Court reaffirmed that a state does not have a legitimate interest in punishing a defendant for out-of-state conduct that is unlawful where it occurred, even stating that a jury must be instructed that it may not use this evidence in the calculation of damages.[95] Setting the stage for *Williams*, the Court noted that due process does not allow a court to "adjudicate the merits of other parties' hypothetical claims against the defendant under the guise of the reprehensibility analysis."[96] Although the Court recognized that juries may consider out-of-state conduct as pertinent to a jury's assessment of a defendant's reprehensibility,[97] the Court determined that a jury cannot punish a defendant for conduct which does not have a "nexus to the specific harm suffered by the plaintiff."[98] As the Court stated, "the reprehensibility guidepost does not permit courts to expand the scope of the case so that a defendant may be punished for any malfeasance, which in this case extended a 20-year period."[99]

Moving on to the ratio guidepost, the Court refrained once again from setting a "bright-line ratio which a punitive damages award cannot exceed," but nevertheless stated "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process."[100] Building and refining *Gore*, the Court noted two exceptions to this general rule: when especially egregious conduct results in a small compensatory damages award; and "[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee."[101] Thus, in cases when compensatory damages are quite large, a punitive damages awards sum may need to be equal in dollar amount to the compensatory damages awarded in order to satisfy due process.

The Court applied the third guidepost – the comparable penalties guidepost – solely in terms of civil penalties, noting that criminal penalties are of "less utility" as a reference point for determining an appropriate punitive damages award.[102]

The Court's *State Farm* decision ultimately clarified and built off of the guideposts set forth in *Gore*. One scholar notes that "the decision clarified many of the issues that had plagued consistent application of the Gore guideposts" by refining post-verdict review standards and suggesting that juries must be instructed on substantive punitive damages limitations before calculating an awards sum.[103] Most important for the purposes of this article, however, is the Court's clear focus on limiting the harm defendants can be punished for. Breaking away from the "common practice"[104] of using the total harm of a defendant's conduct to determine an appropriate punitive damages award, the Court strongly expressed that punitive damages should only be awarded to "vindicate the rights of the plaintiff" – not hypothetical nonparties who may have also been injured by the defendant's egregious conduct.[105] This ruling paved the way for its 2008 *Williams* decision.

3. Philip Morris USA v Williams

Philip Morris USA v Williams represents the latest chapter of Supreme Court punitive damages jurisprudence.[106] Mayola Williams, the widow and representative of the estate of her deceased husband, Jesse Williams, filed a suit against the tobacco company Philip Morris seeking compensatory and punitive damages for negligence and fraud.[107]

Jesse Williams had been a user of Philip Morris tobacco products since the early 1950s and was diagnosed with smoking-related lung cancer, which a jury found to be the primary cause of his death.[108] Though his family pleaded with him many times to quit smoking for health reasons, Jesse continued smoking because "he had heard on television that cigarettes do not cause cancer," and because he believed "the cigarette companies

would not sell cigarettes if they were as dangerous as his family claimed."[109] When he learned he had cancer, Jesse Williams stated, "those darn cigarette people finally did it. They were lying all the time."[110]

At trial, Williams argued that Philip Morris encouraged "the impression that there was a genuine controversy and continuing controversy" regarding the potential ill-effects of cigarette smoking.[111] Williams further argued that this publicity was fraudulent because of reports highlighting the connection between smoking and lung cancer, and because Philip Morris "knew that there was no legitimate controversy about the health effects of smoking and that the defendant itself had no doubt cigarette smoking carried serious health risks, including the risk of lung cancer."[112] In closing arguments, counsel for the plaintiff urged the jury to punish Philip Morris for not only the harm caused to Jesse Williams, but to all other Oregon smokers who may have been injured.[113]

After the trial, the jury found in favor of Williams on negligence and fraud grounds.[114] They awarded $21,485.50 in economic damages and $800,000 for each claim in non-economic damages.[115] No punitive damages were awarded with regards to the negligence claim; however, the jury awarded $79.5 million in punitive damages on the fraud claim.[116] This award was later reduced by the trial court to $32 million because it was "excessive under the United States Constitution."[117] Both parties appealed to the Oregon Court of Appeals.[118]

On appeal, the Oregon Court of Appeals reinstated the original punitive damages award sum.[119] The Court rejected Philip Morris' claims that (1) the trial court failed to instruct the jury not to punish Philip Morris for harm to nonparties and that the "award should bear a reasonable relationship to the harm caused to Williams"; and (2) that the trial court's instruction that the maximum amount that the jury could award was $100 million was flawed.[120] In reinstating the original $79.5 million punitive damages award sum, the Court evaluated Oregon's criteria for assessing whether a punitive damages award is justified given the facts of a case.[121]

Next, the Appeals Court sought to examine whether the award sum was excessive under either state or federal law.[122] Using evidence introduced by Williams to support the punitive damages claim, the court found sufficient evidence to support the original awards sum.[123] This evidence included examples of the "egregious conduct" of Philip Morris, part of which involved a forty-year publicity campaign designed to encourage use of the company's tobacco products while casting doubt on scientific research showing a connection between use of their products and adverse health effects, including cancer.[124] Philip Morris sought review from the Oregon Supreme Court, which was denied.[125] But, the United States Supreme Court granted certiorari, vacated, and remanded the case "in light of *State Farm Mut. Automobile Ins. Co. v Campbell*."[126] On remand, the Court of Appeals once again concluded that it had been correct in reinstating the original awards sum, justifying its decision by declaring that Philip Morris' behavior was highly reprehensible.[127]

The Oregon Supreme Court then agreed to review two issues pertaining to the case: whether the trial court's denial of Philip Morris' requested jury instruction was appropriate, and whether the original punitive damages award violated the Due Process Clause of the Fourteenth Amendment.[128] The court agreed with the trial court and the court of appeals that Philip Morris' requested jury instruction was incorrect, and also concluded that the punitive damages award sum was not "grossly excessive" under the Gore guideposts.

The United States Supreme Court granted certiorari to review two issues presented by Philip Morris: (1) its "claim that Oregon has unconstitutionally permitted it

to be punished for harming nonparty victims; and (2) whether Oregon had in effect disregarded 'the constitutional requirement that punitive damages be reasonably related to the plaintiff's harm.'"

Philip Morris re-characterized and reordered its questions presented: (1) Whether the Oregon courts deprived Philip Morris of due process by permitting the jury to punish Philip Morris for harm to non-parties; and (2) Whether, in considering a claim that a punitive award is unconstitutionally excessive, a court may disregard the constitutional requirement that punitive damages be reasonably related to the plaintiff's harm whenever it concludes that (i) the jury could have found the defendant's conduct to be highly reprehensible and (ii) the conduct could come within the statutory definition of a crime.[129] With respect to the first question, Philip Morris argued that the Oregon Supreme Court's decision would allow juries to punish defendants for harm to non-parties, thus focusing attention on the multiple punishment problem.[130] On the second question, Philip Morris argued that, because the second Gore guidepost – the ratio between punitive and compensatory damages – was not met, the punitive damages award violated due process and thus could not be upheld.[131]

Williams countered Philip Morris's argument by contending that the large punitive damages award was justified given the tobacco company's high level of reprehensibility. Moreover, Williams argued that punitive damages are allowed to punish a defendant for harm caused even to nonparties because punitive damages are designed to punish the conduct rather than compensating for the plaintiff's harm. Therefore, according to Williams, it was entirely proper for the jury to consider the harm inflicted upon nonparties when determining the punitive damages award.[132] Williams also argued that the multiple punishments problem – mentioned above – was "little more than a hypothetical possibility" and thus not an issue in the case.[133]

In a 5-4 decision, the Supreme Court reversed the ruling of the Oregon Supreme Court and vacated the $79.5 million punitive damages award sum.[134] Justice Breyer, writing the opinion for the majority, noted that procedural due process "forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent, i.e., injury that it inflicts upon whose who are, essentially, strangers to the litigation."[135] The Court articulated two reasons for this holding: first, punishing the defendant for harm to nonparties precludes the defense of presenting individualized defenses for each of the nonparties. Second, permitting the court to punish for all potential wrongdoing "would add a near standardless dimension to the punitive damages equation."[136] In essence, Philip Morris's due process was violated because the tobacco company had no chance to defend itself against the claims of other Oregon smokers who may have been harmed from Philip Morris's products.

Despite stating clearly that juries cannot take into account potential harm to nonparties when determining the size of a punitive damages awards, the Court qualified its ruling by stating that evidence of harm can be introduced by the plaintiff in order to determine the level of reprehensibility of a defendant's actions. Evidence of such harm would, of course, increase the level of reprehensibility and could result in an enhanced punishment. Anthony Sebok and other scholars note that this exception is fundamentally at odds with the Court's rationale for holding that Philip Morris's due process was violated because the jury was instructed to punish harm inflicted upon all potential nonparties.[137]

III. Effects of *Williams* and the Future of Punitive Damages

The Supreme Court's decision in *Williams* has been the subject of much critical scholarly attention. Scholars both in support and in opposition of the ruling have stated that the Court's opinion was "misguided," "incomplete," and even "schizophrenic," in its reasoning. Most of this scholarly attention has focused on the Court's exception to its rationale for ruling: that a jury may not punish the defendant for the harm it caused to nonparties to litigation, but it can consider such harm when determining the level of reprehensibility of a defendant's conduct, and thus a proper punitive damages award. Nevertheless, the Court's decision has real theoretical and practical considerations for the future of punitive damages.

A. Theoretical Considerations: Justifying Williams

The most obvious implication of the *Williams* decision – and of course the cases which preceded *Williams* – is the theoretical restoration of the traditional, historical conception of punitive damages as a means to punish the individual wrong. In its most unequivocal language to date, the Court put an end to punitive damages as a private tool used to vindicate the public; in essence, it has taken the public wrong out of the punitive damages equation. In doing so, the Court has effectively addressed many of the Due Process concerns noted in Part III of this Article. Removing the public wrong diminishes the size and removes the arbitrary nature of some punitive damages sums. Some scholars, however, have pointed to the Court's exception, as stated above, as hinting that Court's may still consider public harm in the punitive damages calculation. Colby addresses this concern in clear fashion:

> The reprehensibility inquiry does not examine the reprehensibility of the defendant's conduct in the abstract. Rather, once we recognize that punitive damages may serve as punishment only for the private wrong to the plaintiff, it follows that the only "reprehensibility" that matters is the reprehensibility of the private tort - the degree of reprehensibility of the defendant's wrongful disregard of the plaintiff's rights. Whether the defendant's conduct harmed or threatened harm to the general public is generally irrelevant to the reprehensibility of the private wrong; it is relevant only in determining the reprehensibility of the public wrong, which is not at issue in punitive damages cases. Still, if the fact that the defendant also harmed other individuals illuminates the degree of reprehensibility of the wrong done to the plaintiff, then it might be relevant and admissible in a punitive damages case.[138]

The Court's decision should indeed preclude juries from punishing for the public wrong, despite the exception to the rule's rationale. Thus, this decision, though theoretically important in order to maintain the constitutional integrity of punitive damages, will have implications on their modern-day application.

B. Practical Effects: Diminishing the Punitive Nature of Punitive Damages

Although reverting punitive damages back to their historical – and indeed constitutionally permissible – role as punishment for private wrongs, the Court's decision in *Williams* nevertheless will have real effects on their modern-day imposition. The Supreme Court's punitive damages jurisprudence scales back the punitive function of the damages. This is due to the obvious disjunction between the harm punitive damages have historically addressed and the harm they address today. Michael Rustad notes that, "Nearly every eighteenth and early nineteenth century case arose out of a one-on-one

intentional tort, usually between neighbors or members of the community."[139] Punitive damages have traditionally addressed harms on a much smaller scale than the harms which punitive damages are often imposed in today.[140] Rustad further notes that, dating back to 1989, all of the Supreme Court's punitive damages cases dealt with various forms of corporate malfeasance resulting in group injury,[141] some forms of malfeasance which have been discussed in Part III of this Article: products liability, consumer fraud, and bad insurance settlement practices.

Considering the disjunction between the harms punitive damages once addressed and the harms they now must address, many practical questions arise with regards to the future punitive impact of punitive damages. Most bluntly, just how useful will punitive damages prove to be in the future? Can very limited punitive damages amounts truly punish wealthy defendants for truly reprehensible conduct? Rustad notes that the current Court's "model of individuated retributory justice is unrealistic in modern era and incomplete when it comes to describing the actions of large corporations."[142] Thus, although the harms have changed drastically from the early days of punitive damages, the rationale for limiting punishment to only that which was inflicted on the plaintiff remains, despite corporations having the ability to inflict massive harms to the public.[145] Severely limited punitive damages awards amounts will have a minimal punitive and deterrent effect on large, wealthy corporations in the future. Yet, punitive damages can only address the private wrong, theoretically precluding large and seemingly arbitrary awards amounts that were typical prior to the Supreme Court's crackdown. Thus, moving forward, it is of paramount importance to ascertain the true effect punitive damages have on punishing and deterring reprehensible conduct. If punitive damages prove ill-suited for effectively punishing and deterring egregious forms of corporate malfeasance, for example, then there may be no point in accepting the doctrine of punitive damages any longer.

Ultimately, the ability of punitive damages to punish – and thus the effectiveness of the doctrine itself – will hinge on the Supreme Court's future interpretation of the exception to the *Williams* rule, which precludes juries from directly punishing a defendant for harm to nonparties, yet allows juries to consider "evidence of harm" to nonparties in determining the level of reprehensibility. Given that the level of reprehensibility is weighted heavily in the punitive damages equation, this exception would seem to leave the door open to large punitive damages awards. Yet, the Court's insistence on a very close punitive damages to compensatory damages ratio indicates that the size of punitive damages will be held in close check in the future.

IV. Conclusion

Throughout their long history, punitive damages have played numerous roles in civil courts. Traditionally, these damages have been imposed to punish a defendant for egregious conduct against his fellow man. In the decades leading up to the *Williams* case, however, the notion that punitive damages could be imposed to punish for "total harm" –potential harm inflicted upon society – became commonplace. In turn, awards amounts sums skyrocketed and the Supreme Court subsequently began assessing the constitutionally of such large damages amounts, continually crafting substantive due process measures to curb the amounts. This assault on large awards sums culminated in the Supreme Court's 2008 *Philip Morris USA v Williams* decision, which stated that harm to nonparties cannot be included in the determination of a punitive damages awards sum –

but that this harm may be considered in determining the reprehensibility of a defendant's conduct. In ruling as such, the Court effectively reverted punitive damages back to the role they have traditionally played: punishing defendants solely for harm their conduct caused to the plaintiff. This decision has called into question the usefulness of the punitive damages doctrine to punish wealthy defendants – a usefulness which depends on the Court's future interpretation of its key exception in *Williams*.

Endnotes

*I would like to thank Regina Robson, J.D., for providing me with both the inspiration and the opportunity to write this Article. I also thank her for the helpful guidance, insightful commentary, and unwavering support she provided me throughout the writing process.

[1] Numerous scholars have referred to the conception of punitive damages as taking into account the "total harm" of the defendant's conduct. *See e.g.*, Thomas C. Galigan, Jr., "Disagregating More-Than-Whole Damages in Personal Injury Law: Deterrence and Punishment," 71 TENN. L. REV. 117, 127 (2003); Rachel M. Janutis, "Reforming Reprehensibility: The Continued Viability of Multiple Punishments of Punitive Damages After *State Farm v Campbell*, 41 SAN DIEGO L. REV. 1465, 1466 n.2 (2004).

[2] Many scholars have noted the relatively recent surge in punitive damages cases. *See e.g.*, David G. Owen, "Punitive Damages in Products Liability Litigation," 74 MICH. L. REV. 1257, 1261 (1976); Richard A. Seltzer, "Punitive Damages in Mass Tort Litigation: Addressing the Problems of Fairness, Efficiency and Control," 52 FORDHAM L. REV. 37, 48-49 (1983). Courts have also noted the increase in awards sums. *See e.g., Pac. Mut. Life Ins. Co. v Haslip*, 499 U.S. 1, 61-62 (1991) (O'Connor, J., dissenting) ("Recent years . . . have witnessed an explosion in the frequency and size of punitive damages awards. . . . The amounts can be staggering. . . . Medians as well as averages are skyrocketing, meaning that even routine awards are growing in size.").

[3] Up until 1976, the largest punitive damages award was $250,000. See Michael I. Krauu, "Punitive Damages and the Supreme Court: A Tragedy in Five Acts," *Cato Supreme Court Review* 315-335. (2007).

[4] Thomas H. Dupree, Jr., "Punitive Damages and the Constitution," 70 LOUIS. L. REV. 421 (2010) (noting the problems of "uncertainty and unfairness" implicit with awarding punitive damages).

[5] *See* Dan B. Dobbs, The Law of Torts §2, at 4 (2000) (noting that the "purpose of tort liability" is "primarily to vindicate the individual victim and the victim's rights).

[6] *See* Gail Heriot, An Essay on the Civil-Criminal Distinction with Special Reference to Punitive Damages, 7 J. Contemp. Legal Issues 43, 47-48 (1996).

[7] W. Page Keeton *et al*., Prosser and Keeton on the Law of Torts § 2, at 7 (5th ed. 1984).

[8] Ex parte Galbreath, 139 N.W. 1050, 1051 (N.D. 1913). This idea traces back to Cesare Beccaria, who argued that "the true measure of crimes is ... harm to society." Cesare Beccaria, "On Crimes and Punishments and Other Writings" 24 (Richard Bellamy ed.,Richard Davies & Virginia Cox trans., Cambridge Univ. Press 1995) (1766).

[9] Justice Posner discusses this overlap: "Crimes and torts frequently overlap. In particular, most crimes that cause definite losses to ascertainable victims are also torts: the crime of theft is the tort of conversion; the crime of assault is the tort of battery – and the crime of fraud is the tort of fraud." Colby follows this discussion up by noting that this overlap "does not create redundancy," as crimes and torts are distinct legal wrongs, invading the rights of separate victims. *United States v Bach*, 172 F.3d 520, 523 (7th Cir. 1999).

[10] Thomas B. Colby, "Clearing the Smoke from *Philip Morris v Williams*: The Past, Present, and Future of Punitive Damages, 118 YALE L.J. 392 at 425 (2008) (noting the distinction between the criminal and civil law).

[11] Thomas Colby, "Beyond the Multiple Punishment Problem: Punitive Damages as Punishment for Individual, Private Wrongs," 87 MINN. L. REV. 583 at 615 (2003).

[12] Scholars often use the terms "exemplary" and "punitive" to mean the same thing. As Redish and Mathews note: "Over the years, scholars and jurists tend to blur the concepts of punitive and exemplary damages, thereby undermining the key conceptual differences between the two." This seems to be the case here. See Martin H. Redish & Andrew L. Mathews, "Why Punitive Damages Are Unconstitutional," 53 EMORY L.J. 1, 16 (2004).

[13] Id at 14. Redish and Mathews use the 1763 decision of *Wilkes v. Wood* to show that plaintiff was awarded "exemplary damages." (citing 98 Eng. Rep. 489 (C.P. 1763)).

[14] Id (noting that "Courts at this time coined the term 'exemplary damages' to refer to large awards that 'served the purpose … of compensating the the plaintiff for intangible wrongs. . . .). *See* also *supra* note 11 at 614 (noting "the courts justified punitive damages as additional compensation for mental suffering, wounded dignity, and injured feelings. – harms that were otherwise not legally compensable at common law.").

[15] Id at 613 (citing Dorsey D. Ellis, Jr., "Fairness and Efficiency In the Law of Punitive Damages, 56 S. Cal. L. Rev. 1, 12-19 (1982)).

[16] *Id.* at 618 (citing *Stuart v W. Union Tel. Co.*, 18 S.W. 351, 353 (Tex. 1885); See also Edward C. Eliot, Exemplary Damages 29 AM. L. REG., 570, 572 (presently titled U. PA. L. REV.)("The difficulty of estimating compensation for intangible injuries, was the cause of the rise of this doctrine … . When the early judges allowed the jury discretion to assess beyond the pecuniary damage, there being no apparent computation, it was natural to suppose that the excess was imposed as punishment."); *Bixby v Dunlap*, 56 N.H. 456, 463 (1876)(noting that punitive damages arose in an "endeavor to bring … considerations within the grasp of the law" of "compensation for the wounded feelings, the offended pride, [and] the outraged sense of decency").

[17] Note, "Exemplary Damages in the Law of Torts," 70 HARV. L. REV. 517, 519 (1957).

[18] *See supra* note 12 at 15 (noting that "[p]unitive damages appear to have developed as an offshoot of exemplary damages).

[19] Id (stating that "punitive damages, then, unlike its exemplary ancestor, served the unadorned goal of [punishment]").

[20] *See supra* note 11 at 619 (citing *e.g.*, *Chi., St. Louis & New Orleans R.R. v Scurr*, 59 Miss. 456, 465 (1882) (speaking of "exemplary punishment for ... insult"); *Duncan v Stalcup*, 18 N.C. 440, 442 (1836) ("The jury are [sic] permitted to punish insult by

exemplary damages."); *Merest v Harvey*, 128 ENG. REP. 761, 761 (C.P. 1814) ("Juries are permitted to punish insult by exemplary damages.").
[21] Id at 619
[22] Id at 619
[23] *See supra* note 10 at 420
[24] *Hendrickson v. Kingsbury*, 21 Iowa 379, 391 (1866)
[25] *Brown v. Swineford*, 44 Wis. 282, 288 (1878).
[26] *See supra* note 11 at 586 (noting that "many courts – giving the matter little or no thought – have explicitly endorsed the principle that the defendant should be punished not only for the harm it caused to the plaintiff, but also for the harm that it caused to others").
[27] *Id.* at 609 (noting the modern view of punitive damages being distinct from the actual doctrine of punitive damages).
[28] *See supra* note 10 at 430 (citing W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 2, at 9 (5th ed. 1984)). Colby's note: For a sophisticated argument that this invasion is theoretically unjustifiable, see Ernest J. Weinrib, Punishment and Disgorgement as Contract Remedies, 78 CHI.-KENT L. REV. 55, 86-93 (2003)).
[29] *See BMW v Gore*, *infra* note 38 at 584. (indicating the court may punish the defendant for the harm that it caused to all in-state consumers); *Kirkland v Midland Mortgage Co*., 243 F.3d 1277, 1280 (11th Cir. 2001) (declaring that "punitive damages serve the collective good by deterring a public wrong and punishing egregious wrongdoing on the part of the defendant; the award is measured to reflect, not the wrong done to a single individual, but the wrongfulness of the conduct done as a whole"); [1] *See e.g.,Tuel v. Hertz*, 296 So. 2d 597, 599 (Fla. Dist. Ct. App. 1974).
[30] *Dardinger v Anthem Blue Cross & Blue Shield*, 781 N.E.2d 121, 145 (Ohio, 2002).
[31] *Williams v Philip Morris Inc*., 127 P.3d 1165 at 1175.
[32] *TXO Prod. Corp. v Alliance Res. Corp*., 509 U.S. 443 (1993).
[33] *Id*. at 460.
[34] *See supra* note 10 at 413.
[35] *Id.* (citing *Philip Morris USA v Williams*, 127 S. Ct. at 1067 (Stevens, J., dissenting)).
[36] *See supra* note 10 at 395.
[37] U.S. CONST. amend. V; U.S. CONST. amend. XIV, §1. The phrase "due process of law" is not exclusive to a proceeding in a court, but also includes the "kind of procedures … which is suitable and proper to the nature of the case, and sanctioned by the established customs and usages of the courts." Ex part Wall, 107 U.S. 265, 289 (1883); *Public Hearing House v Coyne*, 194 U.S. 497, 508 (1904).
[38] *BMW of N. Am., Inc. v Gore*, 517 U.S. 559, 574 (1996).
[39] *See* Erwin Chemerinsky, Constitutional Law: Principles and Policies 545 (3d ed. 2006).
[40] *See supra* note 19 at 400 (citing *Daniels v Williams*, 474 U.S. 327, 331 (1986) (quoting U.S. Const. amend. XIV, §1).
[41] *Honda Motor v Oberg*, 512 U.S. 415 (1994).
[42] *Cooper Indus., Inc. v Leatherman Tool Group, Inc.* 532 U.S. 424 (2001).
[43] *Daniels v Williams*, 474 U.S. at 331 (1986) (quoting U.S. CONST. AMEND. XIV, §1).

[44] *See* Shiela B. Scheuerman & Anthony J. Franze, "Instructing Juries on Punitive Damages: Due Process Revisited After Philip Morris v. Williams," 10 U. PA. J. CONST. L. 1147, 1151 (2008) (noting a distinction between the concept of procedural due process and substantive due process).
[45] *See supra* note 10 at 401. "Substantive due process, with its nominally oxymoronic nature and its dubious history of judicial overreaching, is the black sheep of constitutional rights. It operates in the murky shadows of *Lochner v New York*, the poster child for the evils of 'judicial activism.' Partially ashamed of the substantive due process doctrine's very existence, the Court often struggles mightily to keep it confined to those shadows, out of the light of public and academic scrutiny."
[46] *See e.g. Pac. Mut. Life Ins. Co. v Haslip*, 499 U.S. 1, 17 (1991) (noting that common procedures were not "so inherently unfair as to deny due process and be per se unconstitutional."); see also *TXO Production Corp. v Alliance Resources Corp*. 509 U.S. 443 (1993) (stating that punitive damages judgments handed down according to well-established procedures are "entitled to a strong presumption of validity.").
[47] 475 U.S. 813, 828-29 (1986)
[48] 492 U.S. 257, 264, 276-77 (1989)
[49] *Honda Motor Corp. v. Oberg*, 512 U.S. 415 (1994).
[50] Id at 431-32
[51] 517 U.S. 559 (1996)
[52] Id at 563-65
[53] Id at 563
[54] Id at 565
[55] *Id.* at 567 (citing *BMW of N. Am., Inc. v Gore*, 646 So.2d 619, 627 (Ala. 1994), *rev'd*, 517 U.S. 559 (1996)). "The Court found that the jury improperly computed the amount of punitive damages by multiplying Dr. Gore's compensatory damages by the number of similar sales in other jurisdictions."
[56] Id at 568
[57] Id
[58] Id at 568, 568-74
[59] Id at 573 n.19
[60] Id at 574
[61] Id at 574
[62] Id at 575
[63] Id at 581
[64] Id at 583
[65] Id at 575
[66] Id at 580
[67] Id at 576
[68] Id
[69] Id
[70] Id at 576-79
[71] Id at 580
[72] Id at 585-86
[73] Id at 583 (quoting *TXO*, 509 U.S. at 481) (O'Connor, dissenting).

[74] Id at 581
[75] Tyler C. Schaeffer, Punitive Damages & Due Process: Trying to Keep Up With the United States Supreme Court After *Philip Morris USA v. Williams*, 73 MO. L. REV. 627 (citing *Gore*, 517 U.S. at 583.).
[76] Id at 629 (noting that the Supreme Court struck down the punitive damages award in *Gore* on substantive grounds despite "presumptively valid" procedures used by the Oregon state court).
[77] *See supra* note 67.
[78] *State Farm Mut. Auto. Ins. Co. v Campbell*, 123 S. Ct. 1513 (2003).
[79] Id at 1517
[80] Id
[81] Id at 1518 (quoting *State Farm Mut. Auto Ins. Co. v Campbell*, 65 P.3d 1134, 1142 (Utah 2001)).
[82] Id
[83] Id
[84] Id at 1518
[85] Id at 1519
[86] Id at 1522
[87] Id at 1522, 1519
[88] Id
[89] Id at 1519 (citing *State Farm*, 65 P.3d at 1153-54)
[90] Justice Kennedy delivered the opinion of the Court. He was joined by Chief Justice Rehnquist, and Justices Stevens, O'Connor, Souter, and Breyer. Note: Chief Justice Rehnquist shifted from his *Gore* dissent to the majority opinion here.
[91] Id at 1521
[92] Id at 1526
[93] Id at 1519
[94] Id at 420-24
[95] Id. at 1522
[96] Id. (noting that the Utah Supreme Court overly broad punitive mission can be summed in its acknowledgment that "the harm is minor to the individual but massive in the aggregate.").
[97] Id at 1522
[98] Id
[99] Id at 1524
[100] Id
[101] Id
[102] Id at 1526
[103] Anthony Franze & Sheila B. Scheuerman, "Instructing Juries on Punitive Damages: Due Process Revisited After *State Farm*," 6 U. PA. J. CONST. L. 423 at 498 (2004).
[104] Id at 499 (noting the "common practice" of using the total harm of a defendant's conduct to determine a punitive damages award).
[105] Id
[106] Not including the Supreme Court's recent ruling in *Exxon Shipping v Baker*, which held that a ratio of no more than one-to-one between compensatory and

punitive damages is appropriate in maritime cases. 554 U.S. 471 (2008). The effects of this holding in non-maritime cases is unclear; interestingly, though, the decision is not surprising given the Court's routine hints (and rulings) at ensuring a very close compensatory-to-punitive awards ratio.

[107] 48 P.3d 824, 828 (Or. Ct. App. 2002).

[108] Id at 829

[109] Id

[110] Id

[111] Id at 833

[112] Id

[113] *Philip Morris USA v Williams*, 127 S. Ct. 1057, 1061 (2007); Petition for Writ of Certiorari, at 2, Williams S. Ct. 1057 (No. 05-1256).

[114] *See supra* note 107 at 828.

[115] Id

[116] Id

[117] Id

[118] Id

[119] Id at 843

[120] Id at 837-38

[121] These seven criteria are: (a) The likelihood at the time that serious harm would arise from the defendant's misconduct; (b) The degree of the defendant's awareness of that likelihood; (c) The profitability of the defendant's misconduct; (d) The duration of the misconduct and any concealment of it; (e) The attitude and conduct of the defendant upon discovery of the misconduct; (f) The financial condition of the defendant; and (g) The total deterrent effect of other punishment imposed upon the defendant as a result of the misconduct … . Id. at The Court found that each of these criteria supported a punitive damages award against Philip Morris. *Id.* at 840.

[122] Id at 838-39.

[123] Id at 836-37 (citing *Parrott v Carr Chevrolet, Inc*., 17 P.3d 473, 477 (Or. 2001)). The Oregon Supreme Court decided Parrott after the jury in Williams had reached its decision; therefore, the trial court did not have the benefit of the Court's Parrott analysis to consider in its determination to issue a remittitur. *Id.* at 836 n.16. The Parrott criteria are: "(1) the statutory and common-law factors that allow an award of punitive damages for the specific kind of claim at issue; (2) the state interests that a punitive damages award is designed to serve; (3) the degree of reprehensibility of the defendant's conduct; (4) the disparity between the punitive damages award and the actual or potential harm inflicted; and (5) the civil and criminal sanctions provided for comparable misconduct[.]" Id. at 836 (alteration in original) (quoting Parrot, 17 P.3d at 484) (internal quotation marks omitted).

[124] Id at 832-33

[125] *Williams v Philip Morris, Inc.*, 127 P.3d 1165, 1171 (Or. 2006).

[126] Id

[127] Id The court noted the "defendant used fraudulent means to continue a highly profitable business knowing that, as a result, it would cause death and injury to large numbers of Oregonians." Id. at 143.

[128] *Williams v Philip Morris Inc*., 127 P.3d 1165-72 (Or. 2006).

[129] Brief for the Petitioner at I, *Philip Morris*, 549 U.S. 346 (No. 05-1256), 2006 WL 2190746, at *I.
[130] Id at 10 ("This Court has squarely held that '[d]ue process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant.' That is because '[p]unishment on these bases creates the possibility of multiple punitive damages awards for the same conduct . . . .'" (citation omitted) (quoting State Farm Mut. Auto. Ins. Co., v.Campbell, 538 U.S. 408, 423 (2003))).
[131] Brief for the Petitioner, supra note 88, at 27- 28.
[132] Brief for Respondent at i, *Philip Morris*, 549 U.S. 346 (No. 05-1256), 2006 WL 2668158, at 35-44.
[133] Id at 45
[134] *Philip Morris USA v Williams*, 549 U.S. 346, 352 (2007).
[135] Id Chief Justice Roberts and Justices Kennedy, Souter and Alito joined Breyer to form the majority. Id. at 348.
[136] *See Williams*, 127 S. Ct. at 1063. With regards to the second question, the Court asked: "How many such victims are there? How seriously were they injured? Under what circumstances did injury occur? The trial will not likely answer such questions as to nonparty victims. The jury will be left to speculate. And the fundamental due process concerns to which our punitive damages cases refer – risks of arbitrariness, uncertainty, and lack of notice – will be magnified."
[137] Anthony J. Sebok, "Punitive Damage: From Myth to Theory," 92 IOWA L. REV. 957, 999 (2007).
[138] *See supra* note 10 at 465-466.
[139] Michael L. Rustad, "Symposium: Crimtorts: The Supreme Court and Me: Trapped in Time With Punitive Damages," 17 Widener L.J. 783, 812 (2008).
[140] Id (citing Michael Rustad & Thomas Koenig, *The Historical Continuity of Punitive Damages: Reforming the Tort Reformers*, 42 AM. U. L. REV. 1269 (2003) (citing cases demonstrating that punitive damages was a remedy deployed in intentional torts cases mediating
conflict in the local community)).
[141] Id at 804
[142] Michael L. Rustad, "Symposium: Crimtorts: The Supreme Court and Me: Trapped in Time With Punitive Damages," 17 Widener L.J. 783, 812 (2008).
[143] Id (citing Michael Rustad & Thomas Koenig, *The Historical Continuity of Punitive Damages: Reforming the Tort Reformers*, 42 AM. U. L. REV. 1269 (2003) (citing cases demonstrating that punitive damages was a remedy deployed in intentional torts cases mediating
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[144] Id at 804
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U.S. CONST. amend. XIV, §1

Washington v Glucksberg: Threatening Constitutionally Recognized Liberty Interests

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Abstract

In the United States, terminally ill patients do not have a constitutionally guaranteed right to physician-assisted suicide (PAS). According to the U.S. Supreme Court decision in *Washington v Glucksberg,* 521 U.S. 702 (1997), states are not required to provide citizens with access to PAS. The purpose of this paper is to describe and ultimately challenge the U.S. Supreme Court decision in *Washington v. Glucksberg.* First, the Court's two-part test for determining whether the Due Process Clause of the Constitution protected a right to PAS was incorrect in its emphasis on, and analysis of, the historical tradition of assisted suicide. Under this two-part test, rights that are protected under the substantive due process clause must be historically grounded in legal tradition and critical for upholding liberty and justice. Even if the Court had found a historical basis for banning PAS, PAS was still critical for upholding liberty and justice and thus satisfied the Court's own second criteria.

Yet even if the Court refused to recognize PAS as a fundamental liberty interest protected by the Due Process Clause, the Washington State ban on PAS must still have been "rationally related to legitimate government interests." I argue, however, that the Washington State ban on PAS was *not* rationally related to three legitimate government interests: protecting the mentally ill, preventing the abuse of vulnerable groups, and prohibiting euthanasia. As it did not implicate these significant state interests, the Washington State ban on PAS must ultimately be held as unconstitutional.

Introduction

In 1997, the U.S. Supreme Court gave a ruling on physician-assisted suicide that fundamentally altered aid-in-dying policy in the United States. Although several U.S. states have decided to legalize the practice for terminally ill patients who meet strict clinical criteria, the U.S. Supreme Court decision in *Washington v Glucksberg,* 521 U.S. 702 (1997), prevented states from being required to provide citizens with access to physician assistance in suicide, a practice in which medical doctors prescribe lethal medications to a patient, and the patient self-administers the medication. The purpose of this paper is to describe and ultimately challenge the U.S. Supreme Court decision in *Washington v Glucksberg,* which held that the Washington State ban on physician-assisted suicide did not violate the Due Process Clause of the U.S. Constitution. I first summarize the facts and holding of *Washington v Glucksberg.* Then, I argue that the Court's two-part test for determining whether the Due Process Clause of the Constitution protected a right to physician-assisted suicide was incorrect in its emphasis on, and analysis of, the historical tradition of assisted suicide. Even if the Court's test were to be applied—despite the weaknesses of relying on historical tradition—physician-assisted suicide *would* satisfy the second criterion of the Court's test, as the practice protects liberty and justice and is indeed "implicit in the concept of ordered liberty."[1] For these reasons, physician-assisted suicide *is* a fundamental liberty

interest protected by the Due Process Clause, and thus the Washington State ban on physician-assisted suicide violated the Fourteenth Amendment of the U.S. Constitution.

Even if physician-assisted suicide were not recognized as a fundamental liberty interest protected by the Due Process Clause, the Constitution still requires that the Washington State ban on physician-assisted suicide be "rationally related to legitimate government interests."[2] In creating the ban on PAS, Washington State articulated three legitimate government interests that were threatened by PAS: protecting the mentally ill, preventing the abuse of vulnerable groups, and prohibiting euthanasia. Although the Court identified seven legitimate state interests that Washington State had in outlawing physician-assisted suicide, the Court opinion focuses only on the three most compelling interests protected by the Washington State ban. I argue that the ban on physician-assisted suicide does not rationally protect these three interests. First, legalizing physician-assisted suicide does not make depressed or mentally ill persons more susceptible to committing suicide, and thoughtful physician-assisted suicide legislation will ensure that all terminally ill patients are screened for mental illness. Second, physician-assisted suicide does not prey on other vulnerable groups of society such as the poor or minorities, as all available evidence from Oregon's experience with legalized physician-assisted suicide indicates that patients of the program are typically white and well-educated. Third, legalizing physician-assisted suicide will not lead to euthanasia. An analysis of the Dutch legal and social tradition of aid-in-dying regulation and the Oregon physician-assisted suicide program demonstrates that Washington State had no reason to fear a slippery slope toward voluntary or involuntary euthanasia. Therefore, even if physician-assisted suicide had not been recognized as a constitutional right protected by the Due Process Clause, the Washington State ban did not rationally relate to significant state interests and should thus be held as unconstitutional.

Summary of *Washington v Glucksberg*

Washington v Glucksberg was a 1997 U.S. Supreme Court case that considered whether the Washington State ban on physician-assisted suicide, which made aiding in a suicide a felony, violated the Fourteenth Amendment of the U.S. Constitution.[3] The petitioners in the case were Washington State and its Attorney General, and the respondents were four Washington State physicians, Harold Glucksberg, Abigail Halperin, Thomas A. Preston, and Peter Shalit. These four physicians argued that they would consider writing a lethal prescription for their terminally ill patients if the practice were legal in Washington State. The respondents claimed that the Fourteenth Amendment protected a liberty interest for competent, adult, terminally ill patients to seek physician assistance in suicide.[4] They also argued that the principles underlying the constitutional right of a competent person to withdraw life-sustaining treatment found in *Cruzan v Director, Missouri Department of Health*, 497 U.S. 261 (1990), could also apply to the decision to commit suicide by ingesting a lethal medication.[5] Respondents further claimed that *Planned Parenthood of Southeastern Pennsylvania v Casey*, 505 U.S. 833 (1992), recognized a Supreme Court tradition of using the Due Process Clause of the Fourteenth Amendment to respect "personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education."[6] Respondents cited the Court's opinion in *Planned Parenthood of Southeastern Pennsylvania v Casey* that the liberties protected under the Due Process Clause "involve the most intimate and personal choices a person may make in a lifetime."[7]

The Supreme Court in *Washington v Glucksberg* held that the Due Process Clause of the Fourteenth Amendment did not suggest a fundamental right to physician assistance in suicide, and the Court upheld the Washington State ban on physician-assisted suicide. The Court outlined a two-part test to determine whether physician-assisted suicide could be protected under a substantive due process right.[8] First, physician-assisted suicide must be a historically important part of the Anglo-American legal tradition. The Court then sketched the history of suicide and assistance in suicide under Anglo-American common law, noting that courts had prohibited both suicide and assistance in suicide since the fourteenth century.[9] The Court explained that suicide was eventually decriminalized in the United States not out of acceptance of suicide, but in an attempt to destigmatize a decedent's family. Despite Oregon's legalization of physician-assisted suicide, the Court maintained that U.S. states continually prohibit assistance in suicide and that most legislative attempts at the state level to legalize physician-assisted suicide or euthanasia had been rejected.[10]

The Court then found that the second standard for determining whether physician-assisted suicide could be protected under a substantive due process right also failed. This second criterion states that rights protected under the Due Process Clause must be "implicit in the concept of ordered liberty" so that "neither liberty nor justice would exist if they were sacrificed."[11] The Court held that denying citizens the right to assistance in suicide did not threaten public order, as evidenced by the overwhelming majority of states that continued to outlaw the practice, and that not all personal and intimate decisions could be protected under substantive due process. Respondents argued that *Planned Parenthood of Southeastern Pennsylvania v Casey* protected all decisions essential to personal autonomy under the Due Process Clause.[12] The Court, however, noted that simply because "many of the rights and liberties protected by the due process clause sound in personal autonomy does not warrant the sweeping conclusion that any and all important, intimate, and personal decisions are so protected."[13] Thus, the Due Process Clause did not protect a fundamental liberty interest in physician assistance in suicide.

Finally, the Court explained that the Constitution still required the Washington State ban on physician-assisted suicide to be "rationally related to legitimate government interests."[14] It found that the various interests in outlawing physician-assisted suicide were undoubtedly legitimate and that a ban on physician-assisted suicide would ensure the protection of these interests.[15] The Court recognized seven legitimate state interests implicated in banning physician-assisted suicide. These were protecting and preserving human life, preventing suicide, protecting the depressed and mentally ill from committing suicide, upholding the integrity of the medical profession, protecting vulnerable populations from coercion and abuse, preventing the vulnerable from being stigmatized, and preventing a rapid descent into euthanasia. The Court reaffirmed these interests as compelling reasons to outlaw physician-assisted suicide, and held that the Washington State ban on physician-assisted suicide was rationally related to maintaining and upholding these legitimate state interests. By a 9-0 vote in favor of Washington, the Court reversed the decision of the *en banc* Ninth Circuit Court of Appeals and upheld the ban on physician-assisted suicide in Washington State.[16]

Re-evaluating the Usefulness and Accuracy of the Court's Historical Analysis

The Supreme Court's historical test is not a convincing standard for determining whether the Due Process Clause protects a liberty interest in physician-assisted suicide. While considering historical precedent is an important feature of Anglo-American

jurisprudence, historical trends cannot always be deemed infallible. For example, abortion was criminalized in U.S. states until 1967, when Colorado passed legislation relaxing the standards for obtaining an abortion. Then, despite nearly two centuries of prohibition of abortion and an overwhelming tradition in U.S. states since the Civil War to outlaw all but therapeutic abortions, the U.S. Supreme Court found in *Roe v Wade,* 410 U.S. 113 (1973), that the right to privacy "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[17] To be certain, considering historical context can be a useful indication of public sentiment and helps to prevent judges from engaging in politically motivated judicial activism. However, history cannot simply serve as a trump card used to deny citizens a right to physician-assisted suicide.

Moreover, the Supreme Court's historical analysis failed to consider an abundance of recent historical evidence in favor of permitting physician-assisted suicide. Historical tradition, after all, must also include recent history. The Court itself considered legislation that arose in 1997 as evidence that physician-assisted suicide was not grounded in the nation's history.[18] However, the Court overlooked the significance of Oregon's legalization of physician-assisted suicide in 1994 and did not examine the prior movements leading up to the Oregon Death With Dignity Act, which suggested a widespread public desire to legalize the practice. For example, after the 1976 New Jersey Supreme Court case of *In the Matter of Karen Quinlan,* 355 A.2d 647 (N.J. 1976), recognized the right of a competent patient to refuse life-sustaining treatment, a number of national "right-to-die" organizations were created that supported assistance in suicide for terminally ill patients.[19] Patients had begun to recognize the potential burdens of high-tech medical care at the end of life, and a "right-to-die" sentiment emerged from this fear of onerous medical treatment. In 1967, Chicago human rights lawyer Luis Kutner created the first living will, which allowed patients to declare their wishes for end-of-life care years before their deaths.[20] Kutner had witnessed a close friend's painful death, and through this living will, he hoped to promote "the rights of dying people to control decisions about their own medical care."[21]

By 1991, under the Patient Self Determination Act (PSDA), Medicare and Medicaid-funded healthcare facilities were required to inform patients about their right to create a living will or advanced directive.[22] This "right-to-die" movement culminated in the 1994 Oregon Death with Dignity Act, a citizens' initiative that legalized physician-assisted suicide in Oregon State, passed with 51 percent of the vote.[23] Despite an attempted repeal of the law in 1997, 60 percent of Oregon voters chose to uphold the Act. Although the desire to legalize physician-assisted suicide could be viewed as a phenomenon limited to the state of Oregon, opinion polls conducted in the 1990s demonstrated that a majority of Americans were in favor of allowing doctors to aid a terminally ill patient in ending his or her own life. In 1990 the National Opinion Research Center found that 60 percent of sampled Americans "felt that a person with incurable disease has the right to end his or her life" and that 72 percent "felt that doctors should be able to end the lives of the hopelessly ill at the request of the patient."[24] A 1991 national poll conducted by Harvard and the *Boston Globe* found that out of 1311 respondents, 64 percent supported physician-assisted suicide and voluntary euthanasia for terminally ill patients.[25] While these statistics could not be read as proof of the need to legalize physician-assisted suicide, such evidence suggests that prohibiting physician-assisted suicide was not something particularly rooted in recent history.

Prohibiting Physician-Assisted Suicide Does Threaten Liberty and Justice

When applying the second test for determining a substantive due process right—that the right in question must be "implicit in the concept of ordered liberty" so that "neither liberty nor justice would exist if they were sacrificed"—the Court in *Washington v Glucksberg* failed to consider the threats to liberty and justice that occur in denying terminally ill patients physician-assisted suicide.[26] This is not to suggest that any intimate and personal decision can be protected by the Due Process Clause of the U.S. Constitution. Rather, physician-assisted suicide has unique and substantial implications for personal liberty and justice that suggest it should be considered among those decisions that are protected by the Constitution. After all, some terminal patients' pain cannot be controlled by medication alone. Moreover, even patients whose pain is adequately controlled suffer in burdensome, dehumanizing, and undignified ways.[27] Without a right to choose physician-assisted suicide, these patients are denied the justice of dying a comfortable and dignified death. Furthermore, these patients do not have the liberty to decide for themselves their manner of death—a decision central to personal autonomy. Indeed, as the Supreme Court stated in *Planned Parenthood of Southeastern Pennsylvania v Casey*, "[a]t the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."[28] While individuals never have full control over the circumstances surrounding their deaths, patients who are suffering from intractable pain that cannot be controlled with medication must at least be guaranteed a comfortable death. Since banning physician-assisted suicide threatens personal liberty and justice, physician-assisted suicide *is* a fundamental liberty interest that is protected by the Due Process Clause. Thus, the Washington State ban on physician-assisted suicide is unconstitutional.

Legalizing Physician-Assisted Suicide Will Not Threaten Depressed or Mentally Ill Persons

Even if there were no reasons supporting a due process right to physician-assisted suicide, the Court erred in submitting that Washington's ban on physician-assisted suicide was rationally related to the legitimate government interest of protecting depressed and mentally ill patients.[29] Thoughtful and measured legislation regulating physician-assisted suicide does not threaten depressed or mentally ill populations, as the Court contended. The Court cited a New York Task Force study, which "expressed its concern that, because depression is difficult to diagnose, physicians and medical professionals often fail to respond adequately to seriously ill patients' needs."[30] These concerns of the Task Force are legitimate. After all, in 2009, none of the 59 Oregon patients who died by physician-assisted suicide under the Oregon Death With Dignity Act were referred to a psychiatrist by their attending or consulting physician.[31] However, this problem could be avoided by embracing a heightened standard that requires that every patient undergo a mandatory independent psychiatric evaluation before obtaining lethal drugs. These psychiatric evaluations must differentiate a patient's potential symptoms of depression from a competent decision to end his or her life. Concerns about depressed and mentally ill patients are appropriate, but thoughtful state or federal legislation can ensure that these vulnerable groups are protected.[32]

To create a system that further protects patients even more from abuses, a second piece of legislation could be put into place. States which seek to legalize physician-assisted suicide could consider forming pre-authorization committees that become involved in a patient's physician-assisted suicide process from the very first request for lethal medication. These committees would follow patients from the initial

written or oral request to the patient's self-administration of the lethal medication. Currently, the Oregon Department of Human Services only monitors patients once they have obtained prescriptions for lethal medication.[33] The Board has no authority to prevent a patient from proceeding with the suicide, and can only recommend legal action against a physician after the patient has already died.[34] Pre-authorization committees would help mitigate this problem, ensuring that *before* a patient utilizes physician-assisted suicide, he or she is screened for mental illness, has given both oral and written consent, and is mentally competent. If any of these safeguards had not been fulfilled, or if the patient was suspected by committee members of suffering from a mental illness, the committee would have the legal authority to prevent the physician from writing a prescription for lethal medication until all requirements had been met.[35]

Physician-Assisted Suicide Will Not Lead to Coercion or Abuse of the Poor or Minorities

The Court in *Washington v Glucksberg* also recognized Washington State's interest in protecting other vulnerable populations, such as minorities or those living in poverty. However, all available evidence from the Oregon physician-assisted suicide program suggests that patients who choose physician-assisted suicide are not from these vulnerable groups. A 2009 summary of the Oregon program revealed that 98.3 percent of participants were white, 48.3 percent of participants had a bachelor's degree or more, and 98.7 percent of patients had some type of health insurance.[36] These statistics show that racial minorities do not tend to use physician-assisted suicide services, and that those patients who do use them are educated as wells as arguably less susceptible to coercion or abuse.[37] While the summary report did not publish the socioeconomic statuses of the patients, these numbers suggest that most were from more affluent backgrounds. Participants in the Oregon program tended to be "pragmatic, matter-of-fact persons who have always been in control of their lives…and want to name the day…when they are finished, when life has served them, and enough is enough."[38] Although these could be circumstances unique to Oregon, it seems unlikely that Washington, a neighboring state with similar demographics, would have a dramatically different experience with legalizing physician-assisted suicide.[39] Thus, banning physician-assisted suicide in Washington does not rationally relate to protecting vulnerable groups from abuse.

Legalizing Physician-Assisted Suicide Will Not Result in the Practice of Euthanasia

Finally, the Court failed to provide a compelling argument that legalizing physician-assisted suicide would ultimately lead to euthanasia, in which physicians directly administer lethal medications to patients. The Court explained that Washington State had a legitimate interest in preventing euthanasia that could result from allowing physician-assisted suicide.[40] The Court grounded this "slippery-slope" explanation in the example of the Netherlands, citing a 1990 study that found 1,000 instances of euthanasia performed in the Netherlands "without an explicit request" from the patient.[41] However, these fears ignore the unique cultural and legal history of the Netherlands in forming its physician-assisted suicide and euthanasia laws. Dutch law allows "voluntary euthanasia as well as assisted suicide…[and] the medical profession in Holland makes no moral or ethical distinction between the two."[42] Moreover, Dutch law regarding physician-assisted suicide and euthanasia, which began in 1973 through prosecutorial discretion and was formally decriminalized under specific guidelines in 2001, has never recognized a legal

distinction between the two acts.[43] In comparison, the United States, including Oregon, clearly recognizes a legal difference between physician-assisted suicide and euthanasia. In Oregon, there have been no reported abuses of the law and no evidence to suggest that legalizing physician-assisted suicide has led to either voluntary or involuntary euthanasia.[44] There is no indication that legalizing physician-assisted suicide in Washington, in an American legal tradition that recognizes the distinction between physician-assisted suicide and euthanasia and holds the latter to be manslaughter, would lead the state down a slippery slope to euthanasia. Thus, the Washington State physician-assisted suicide ban is not rationally related to a legitimate state interest in preventing euthanasia.

Conclusion

This paper has described the facts and holding of the U.S. Supreme Court case *Washington v Glucksberg,* 521 U.S. 702 (1997). In *Washington v Glucksberg,* the Court held that the Due Process Clause of the U.S. Constitution did not guarantee a right to physician-assisted suicide and thus that the Washington State ban on the practice was constitutional. This paper argued that contrary to the Court's analysis, physician-assisted suicide *does* pass the Court's own two-part test for determining whether an asserted fundamental liberty interest is protected by the Due Process Clause. For this reason, the Fourteenth Amendment does extend a liberty interest to physician-assisted suicide for terminally ill, competent adult patients.

I then showed that the Court did not adequately demonstrate that the Washington State ban on physician-assisted suicide was rationally related to upholding legitimate state interests. Legalizing physician-assisted suicide does not put depressed or mentally ill citizens more at risk for committing suicide, and careful legislation can guarantee that all patients considering physician-assisted suicide are screened for mental illness. Moreover, legalizing physician-assisted suicide will not lead to the abuse or coercion of vulnerable populations such as minority groups or the poor. Finally, Washington State has no reason to fear a descent into voluntary or involuntary euthanasia, based on an analysis of the Dutch physician-assisted suicide and euthanasia experience and results from the Oregon physician-assisted suicide program. Thus, even if physician-assisted suicide is not acknowledged as a right protected under the Due Process Clause of the U.S. Constitution, the Washington State ban cannot be seen as a rational means to protecting significant state interests and should for this reason be held unconstitutional.

Although *Washington v Glucksberg* established that there was no constitutional right to physician-assisted suicide, Washington State ultimately legalized physician-assisted suicide through a citizens' initiative. On November 4, 2008, Washington passed Initiative 1000, legalizing physician-assisted suicide by 58 percent to 42 percent.[45] The Washington Death with Dignity Act has provisions that are almost identical to the Oregon Death with Dignity Act: patients must be terminally ill, mentally competent adults who are also Washington residents.[46] Patients must make both written and oral requests for the lethal medication; written requests must be accompanied by two witness signatures, and the oral requests must be made multiple times, at least 15 days apart. Patients must also be seen by a consulting physician to confirm the terminally ill diagnosis. If either the attending or consulting physician has concerns that the patient is suffering from depression, he or she must refer the patient for counseling before the lethal medication can be prescribed.[47]

Montana is the third U.S. state to legalize physician-assisted suicide, but unlike Oregon and Washington, it did so through a Montana Supreme Court decision. A 2009 Montana Supreme Court case, *Baxter v Montana*, held that physician-assisted suicide was not in violation of public policy. Moreover, the Court decided that the legal right recognized in Montana that allows patients to withhold or withdraw life-sustaining treatment also "confers on terminally ill patients a right to have their end-of-life wishes followed, even if it requires *direct* participation by a physician through withdrawing or withholding treatment."[48] The Court also held that doctors who aid in a patient's suicide cannot be prosecuted, as long as the patient was mentally competent and had voluntarily requested assistance in suicide.[49] The Court did not however, choose to ground physician-assisted suicide in a constitutional right to privacy. Because the Court did not appeal to a constitutional right to physician-assisted suicide, a number of anti-physician-assisted suicide organizations in Montana are seeking to implement a legislative ban against the procedure.[50] Oregon, Washington, and Montana, through either ballot initiatives or and state Supreme Court legislation, have legalized physician-assisted suicide for terminally ill state residents and have implemented policies with strict clinical and legal regulations in place to prevent abuse.[51] Since *Washington v Glucksberg* refused to recognize a constitutional right to assisted suicide, it will now be left to individual U.S. states to decide whether to permit physician assistance in suicide.[52]

Endnotes

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[2] Id at 312.

[3] Id at 308-309

[4] Id at 309.

[5] Id at 310-311; Stephen R. Latham, "End of Life Care, Part I" (lecture, William L. Harkness Hall, Yale University, February 22, 2011).

[6] Orentlicher, *Bioethics and Public Health Law,* 310-311.

[7] Id

[8] Latham, "End of Life Care, Part I," February 22, 2011.

[9] Orentlicher, *Bioethics and Public Health Law,* 309.

[10] Latham, "End of Life Care, Part I," February 22, 2011; Orentlicher, *Bioethics and Public Health Law*, 309-310.

[11] Orentlicher, *Bioethics and Public Health Law,* 310.

[12] Id at 311.

[13] Id at 312.

[14] Id

[15] Id at 313

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[24] Diane E. Meier, "Doctors' Attitudes and Experiences with Physician-Assisted Death: A Review of the Literature," in *Physician-Assisted Death,* ed. James M. Humber et al. (New Jersey: Humana Press, 1994), 12.

[25] Id

[26] Orentlicher, *Bioethics and Public Health Law,* 310.

[27] Id at 331

[28] Id at 311

[29] Id at 312

[30] Id

[31] "2009 Summary of Oregon's Death with Dignity Act," Oregon Department of Human Services (March 2010), http://www.oregon.gov/DHS/ph/pas/docs/year12.pdf.

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[32] Id at 150

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[34] Purvis, "Comfort in the Face of Death."

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Multilateral Force: The Future for Humanitarian Intervention and the Responsibility to Protect

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Abstract

Although the United Nations reinforced the importance of humanitarian intervention with their agreement upon the Responsibility to Protect Doctrine at the 2005 World Summit, the international community has remained passive in the face of mass atrocities. This passivity is often attributed to the lack of political will to participate in humanitarian interventions, but the international community also faces the complex problem of collective action. It remains unclear who ought to intervene, and the significance of the international community's response to humanitarian crises is ever increasing. In order for the international community to have any success in aiding others in humanitarian crises, and for international law to continue to maintain its legitimacy, the Responsibility to Protect Doctrine must be applied consistently and effectively. Thus, it is necessary to identify who has a duty to take action. In his work, *Humanitarian Intervention & The Responsibility to Protect*, James Pattison develops a set of criteria to determine who ought to intervene. He argues that the most legitimate interveners are obligated to intervene. Pattison concludes that while this force is likely to be multilateral, it is not necessary that it be. Given the current understanding of Responsibility to Protect, I find Pattison's criteria to be well founded, but aim to demonstrate that it requires the use of multilateral force.

1: The Responsibility to Protect and the Problem of Who Should Intervene

1.1: The Problem and Why It Matters

In the spring of 2004, reports of violence in the region of Darfur spread across America and Western Europe. These reports initially triggered advocacy campaigns and calls for action within the international community. However, over the next six years, much of the world looked on as over 300,000 people were killed and more than 2.7 million were displaced from their homes.[1]

In the midst of this violence, the UN agreed upon the "Responsibility to Protect Doctrine" (R2P) at the 2005 World Summit. This doctrine describes the international community's responsibility to act in the limited circumstances of "genocide, war crimes, ethnic cleansing and crimes against humanity."[2] Darfur provided the international community with its first opportunity to put R2P into action. However, most assessments by non-governmental organizations and scholars today maintain that the international response to Darfur was a failure. Human Rights Watch specifically blamed the world's leaders for failing to abide by their promises to "never again" sit back while a possible genocide took place.[3]

While the failure of R2P can no doubt be attributed to many things, among these is the failure of the doctrine to address the pivotal issue of who ought to intervene. Is the UN the only international agent who can exercise the responsibility to protect? Additionally, who ought to intervene if the UN should fail to do so?

The international community must answer these questions in order to have an efficient response system that protects people in serious danger. Moreover, the ripple effects of inaction in extreme cases can have significant negative implications for the entire international community given the interconnected nature of the world today. A state that is unable or unwilling to put an end to atrocities within its own territory is likely to be the kind of state that is also unable or unwilling to put a stop to terrorism, weapons proliferation, drug and human trafficking, the spread of health pandemics and other global risks.[4]

In an attempt to better understand who ought to intervene, James Pattison evaluates which qualities of interveners are morally significant in his book *Humanitarian Intervention and the Responsibility to Protect.* I aim to demonstrate the legitimacy of Pattinson's criteria according to the current understanding of the R2P doctrine. However, due to the significance placed on an intervener's likelihood of success, it is necessary that the intervener be a multilateral force, rather than a unilateral force.

1.2: Humanitarian Intervention and the Demands of R2P

Humanitarian intervention stems from the idea that certain crimes are so monstrous that they require governments to step in and put a stop to them. Although humanitarian intervention can be explained in a variety of ways, I will use Pattison's definition: "Forcible military action by an external agent…with the predominant purpose of preventing, reducing, or halting an ongoing or impending grievous suffering or loss of life."[5]

R2P extends beyond humanitarian intervention in that it involves three responsibilities: the responsibility responsibilities to prevent, to react, and to rebuild.[6] The doctrine also attempts to specify when the international community is required to act. First, it is stated that the responsibility to protect transfers to the international community only when national authorities fail to protect their populations. As mentioned above, the scope of permissible action is further limited to the cases of "genocide, war crimes, ethnic cleaning and crimes against humanity."[7] It was also decided that responding to one of the above-mentioned crises should not be a "fall-back responsibility" of the international community; states should only be prepared to act "on a case-by-case basis."[8] Finally, it is significant to note that any action taken is required to be collective and authorized by the UN Security Council.

1.3: Pattison's Account

As stated previously, Pattison is concerned with identifying which qualities of interveners are morally significant. Once he creates an account of these qualities, he is able to assess whether an intervener is "legitimate". Pattison then argues, "Any intervener that possesses an adequate degree of legitimacy according to this account will have the right to intervene (given that there is also just cause and they are engaged in 'humanitarian intervention')".[9] He goes on to assert that the intervener that is the *most* legitimate then has a duty to intervene.[10]

Pattison considers five broad categories that might contribute to legitimacy, defined as "morally justifiable power"[11]: 1) the moral significance of Security Council authorization, 2) the moral significance of the intervener's effectiveness—specifically, "local external effectiveness, global external effectiveness, and internal effectiveness"[12] 3) the moral significance of the intervener's conduct, 4) the moral significance of an

intervener's "internal representativeness" as well as "external local representativeness,"[13] and 5) the moral significance of humanitarian motive.

Furthermore, Pattison's legitimacy is scalar in that it can be achieved at varying degrees. While an intervention by an intervener with an adequate degree of legitimacy is morally acceptable, we should strive to have an intervener that has more than an adequate degree of legitimacy. The closer an intervener is to being fully legitimate, the more likely the use of power is to be morally justified. Consequently, none of the qualities are sufficient on their own to satisfy an adequate degree of legitimacy, but they can be added in varying combinations to contribute to the intervener's adequacy. In short, the 'most legitimate' actor would possess these qualities in greater measure than any other.[14]

In terms of "just cause," Pattison feels that the bar for humanitarian intervention should be set high. His main reason is qualitative: he suggests that basic rights must be violated, such as the right to physical security, whereas "the violation of other, non-basic rights, such as the right to a fair trial" is not sufficient.[15] This idea is similar to that which others have drawn about the difference between "pro-democratic" intervention and humanitarian intervention. Pro-democratic interventions undertaken to promote or restore democracy are not legitimate on this account.[16] His second reason is quantitative: the situation needs to be serious enough so that the intervener has the opportunity to do enough good to outweigh the harm that the intervention will cause.[17] Therefore, Pattison limits just cause for humanitarian intervention to the large-scale loss of life due to planned action or neglect, and large-scale ethnic cleansing brought about through "killing, forced expulsion, or acts of terror or rape."[18]

2: Exploring Pattison's Criteria

2.1: Representing the international community without Security Council authorization

Although authorization from the Security Council is emphasized in the R2P doctrine, Pattison makes a strong argument that it is unnecessary. Authorization from the Security Council does "no more than establish the minor, instrumental contribution of an intervener's legality to its legitimacy."[19] Furthermore, perhaps the best reason for not including Security Council authorization as a determining criterion of legitimacy is that it is problematic to insist upon it. Former UN Secretary-General Kofi Annan illustrated this point when describing the Rwandan genocide:

> Imagine for one moment that, in those dark days and hours leading up to the genocide, there had been a coalition of states ready and willing to act in defense of the Tutsi population, but the council had refused or delayed giving the green light. Should such a coalition then have stood idly by while the horror unfolded?[20]

Given examples such as this, it seems unconscionable to wait for authorization instead of taking action that could potentially save the lives of many.

However, Pattison does acknowledge that there may in fact be some positive effects of authorization. Security Council authorization ensures that interventions are necessary and valuable due to the fact that multiple parties with diverse interests and opinions will weigh in on the issue. This contributes to the perceived legitimacy of an intervener. The more legitimate an intervener is perceived to be, the greater the chances are that they will be supported by the international community, as well as by those subjected to the intervention.[21] Support from the international community is likely to increase the effectiveness of the intervention because the interveners may receive

financial backing, or other resources, for example, from those who support them. Moreover, with official Security Council backing, the acting agent is less likely to face resistance from those in the state where the intervention is taking place.[22]

Still, even though perceived legitimacy can influence the success of an intervention, there is not conclusive evidence that authorized interventions have been more effective than non-authorized interventions.[23] In addition, while Security Council authorization in a perfect world might be a decision that is valuable because in principle it is composed of varying interests and opinions, in reality, this is often not the case. It is doubtful that the Security Council can constrain the most powerful states' decisions. China, France, Russia, the UK, and the US have permanent membership and veto power. While there are also ten non-permanent members with voting power, these members are easily overpowered by the permanent members, who can essentially do as they please given their veto powers. This means that decisions often lack the balance that they are ideally supposed to have.[24] Furthermore, a veto by a single permanent member can prevent the opinions of the majority on the Council from being implemented. For example, during the 1994 Rwandan genocide, "the United States sent out strong signals that it might veto any Security Council resolution that would increase or even hold constant the size of the UN force in Rwanda…Under U.S. pressure, the Council instead reduced the force's size." [25]

As such, since the positive effects of authorization are too small to play a significant role in the development of criteria, Security Council authorization is not a necessary condition for an intervener's legitimacy. Consent of others is not insignificant, but authorization specifically from the Security Council, should not be a primary concern.

Representativeness can and ought to be achieved in other ways. Pattison argues that an intervener must have both "internal representativeness," and "local external representativeness," internal representativeness meaning that an intervener must "reflect, in its decision-making, its citizens' opinions on the proposed intervention." [26] It is important that the intervener represents citizens' opinions due to the involvement of military force and the high moral stakes involved.[27] Among other resources, the citizens of the state provide the personnel for the army, and many of them are likely to be casualties. Thus, their opinions ought to be reflected in the decision on intervention.[28]

An immediate objection is that it seems to contradict Pattison's own idea that soldiers in humanitarian intervention must be voluntary and regular. If soldiers are in fact voluntary, it does not follow that the citizens can decide what assignments those soldiers partake in. The soldiers have already committed, and assented to the political will. It is also questionable to consider soldiers to be the resources of regular citizens. Moreover, given the diversity of opinions about resources in a state, it is unlikely that an intervener will ever be a true representative of its people. This can especially be seen in the U.S., where policymaking is "sticky", and getting consensus to change policy can be difficult.[29]

Pattison responds to the previous concern by pointing out that it is important for individuals to have a voice, and for the government to respond.[30] Furthermore, and perhaps more importantly, an intervener with internal representativeness is likely to have increased effectiveness. This is so because when the general public supports an intervention, the intervener is likely to commit more resources to the cause, and take greater risks in order to be more in order to be effective. As such, internal representativeness a significant moral factor in determining legitimacy, but not a necessary factor for legitimacy, "as long as the intervener is able to make up in other ways the loss of legitimacy"[31] that would come from being internally representative.

The idea of local external representativeness is that the intervener must represent the opinions of those in the political community that are subject to the intervention. Pattison acknowledges that it can be difficult to assess the opinions of those subject to humanitarian intervention, but it is not impossible. He advocates this need for local external representativeness in two ways. First, he says that the intervener should represent the opinions of those subject to its intervention because those individuals are likely to be burdened by intervention; and second, he maintains that the opinions of those subject to the intervention are valuable in themselves. One might object that those subject to the intervention do not know what is best for them, and therefore local external representativeness could possibly be problematic. However, this type of thinking is paternalistic. Regardless of whether or not those subject to intervention really know what is best for them in the long term, this does not make their opinions invaluable.

Moreover, as is the case with internal representativeness, an intervener who is a local external representative is more likely to be effective as well.[32] Not only does consent ease sovereignty concerns, but it makes it much easier for peacekeepers to go about their duties, as there is less resistance and a higher degree of perceived legitimacy.[33] Given the difficulty of obtaining unified consent, representativeness can be a significant factor of determining legitimacy, but it is not a necessary one.

2.2: Ensuring an Effective Outcome

Pattison argues that effectiveness is the primary determinant of an intervener's legitimacy. He defines this as the "Moderate Instrumentalist Approach."[34] The approach consists of three types of effectiveness. The first is "local external effectiveness," which means that the intervener must be successful at handling the humanitarian crisis, and furthermore preventing its recurrence.[35] The other two types of effectiveness are significant, but they are not as important for an intervener's legitimacy as local external effectiveness.[36] The second type is "global external effectiveness," which is whether the intervener promotes the "enjoyment of human rights in the world at large."[37] For example, the intervener's actions should not destabilize neighboring states, nor create power struggles that ultimately lead to further conflict.[38] The third type of effectiveness is "internal effectiveness." Since humanitarian intervention is likely to be a costly endeavor for the intervener's citizens, an intervener's internal effectiveness is dependent on the consequences for its own citizens.

The argument for effectiveness is largely a consequentialist one. Pattison's definition of a just cause involved an extreme measure of suffering, such that the intervener could achieve an adequate amount of good. Thus, effectiveness is tied to just cause, and plays a large role in the cost-benefit analysis of an intervention. It makes sense that the intervention should prevent more suffering than it causes overall, and that interveners ought to be concerned with consequences.

Although what it means to be successful in cases of humanitarian intervention is often debated, this does not imply that it is wrong to require legitimate actors to be effective. For example, it has been argued that NATO's intervention in Kosovo was not truly a humanitarian success; "[R]uptured lives, the burnt villages, the civilian casualties, the revenge killings, the complete and absolute polarization of Albanian and Serbian communities"[39] – these were all after effects that some consider to have negated any success. As a result, it is difficult for anyone to say if the intervention was effective, and therefore it seems unreasonable to require an intervener to have a debated, ambiguous quality. Nevertheless, a lack of general agreement about what it means to be effective

does not remove the imperative that an intervener is effective. Rather, a positive effect in the context of a particular case ought to be desired, regardless of the specifics of the effects.

2.3: The Significance of Jus in Bello Principles

A force that is more likely to conduct itself in a way that will cause the least additional harm ought to be preferred. Consider a case in which an intervener would be effective in tackling the humanitarian crisis at a low cost to the neighboring states, as well as to its own citizens, but they would have to torture people, and burn homes in the process. This case demonstrates that effectiveness itself should not be the sole determinant of an intervener's legitimacy. The extreme means necessary to undertake the intervention must be limited.[40] According to Pattison, there are specific "external *jus in bello*" principles, as well as "internal *jus in bello*" principles that interveners should follow. *Jus in bello* principles refer to the limits on conduct during war, versus jus ad bellum, which limits the reasons for engaging in warfare. The external principles that Pattison outlines concern behavior in connection with opposing soldiers and civilians, while internal principles are rules in connection with an intervener's own soldiers and citizens.[41]

In terms of external *jus in bello* principles, Pattison proposes revising traditional just war principles of discrimination and proportionality, so that they are more restrictive. Conduct should be less aggressive than in regular warfare. More specifically, military forces must differentiate between permissible and impermissible targets, while using the least force possible against morally responsible combatants.[42] As such, military objectives must be designed to protect civilians and maintain peace, rather than defeating the enemy. He argues that these more rigorous definitions are necessary given that the military operation has humanitarian aims.[43]

If the intervener has a humanitarian purpose, it would be wrong for them to take action that is inconsistent with that purpose. Moreover, following the principles of external *jus in bello* is likely to help the intervener succeed in a complete intervention, which includes the responsibility to prevent, react and rebuild.

Pattison's ideas regarding internal *jus in bello* are broken up into two principles. The first principle states that it is only "regular, volunteer soldiers that can be justifiably used for humanitarian intervention."[44] In essence, this means that soldiers should not be forced to participate in a humanitarian intervention against their will. The second principle of internal *jus in bello* that Pattison requires is that an intervener cares for the soldiers fighting on its behalf. Since the soldiers fighting will be voluntary, the intervener has a special responsibility to them. This not only means interveners should provide their soldiers with adequate equipment so that they face the least amount of harm possible, but Pattison posits that it also means giving soldiers "special treatment", such as "looking after their families if they are injured in action."[45] Given the extreme sacrifice the soldiers are making, it does not seem wrong to require the intervener to abide by these principles, since they are using the soldiers, and putting these soldiers at risk.

However, the use of regular, volunteer soldiers can be objectionable in itself. Military theorist Baron Carl von Clausewitz described war as "an act of policy,"[46] which means that the purpose of the military is to serve the state's interest as defined by its leaders of the state. Therefore, if the political leadership claims a humanitarian intervention is in the interest of the state, soldiers will have an obligation to participate. However, some argue that an exception is made in the case of altruistic ventures. In these

cases, a soldier has the right to opt out of service, since it was not exactly what they signed up for. The situation seems different when the state asks its troops to risk their lives for a cause not explicitly in the state's interest.

Nevertheless, Pattison is able to adequately respond to the previous objection. He points out that a soldier's contract is not limited to defense of the state's interests, and further that soldiers should expect to take part in humanitarian operations, given their historical frequency.[47] States often invoke ideas of "nobility, honor and sacrifice" in relation to military service,[48] and use rhetoric such as "advancing human rights, freedom, and democracy…rather than simple national defense"[49] in order to justify involvement in military operations. Due to the common usage of these terms, it seems that soldiers should already know when they enlist in the military that they may be asked to sacrifice for a cause that is not explicitly a national interest. This common knowledge justifies the use of regular, volunteer soldiers in humanitarian interventions. Additionally, the use of those terms implies that the state owes something to the soldiers who are sacrificing. As such, it follows that Pattison is correct in requiring states to give those soldiers "special treatment." Consequently, it follows that Pattison's evaluation is reasonable.

2.4: Mixed Intent and Motives Are Acceptable

One worry about humanitarian intervention in general is that it is a way for dominant countries to fulfill their self-interests under the guise of altruistic motives. However, Pattison argues that intent and motives do not need to be strictly humanitarian. Humanitarian intent, according to Pattison, is the intervener's "purpose of preventing, reducing, or halting the humanitarian crisis."[50] While intent is important, neither intent nor the underlying motive for the humanitarian act have to be humanitarian for an intervener to be legitimate.[51] An intervener who lacks humanitarian intent is morally problematic, but an intervener with humanitarian intention is not necessarily a legitimate one.[52] As a result, this should not be considered a determining factor of an intervener's legitimacy. Because it is difficult to conceive of an intervener who is legitimate in all other aspects, but who lacks a humanitarian intention, this does not seem problematic.

While Francis Boyle and many others have argued that humanitarian intervention is a "joke and a fraud that has been repeatedly manipulated and abused by a small number of very powerful countries,"[53] Pattison responds to this worry by suggesting that the world has to accept the fact that humanitarian interventions will always be partially motivated by selfish aims.[54] Therefore, it would be wrong to discount interveners with mixed motives, as that would essentially discount every intervener. In addition, mixed motives do not necessarily mean an intervener will not accomplish the goals of the humanitarian effort. Whether the interveners actions are truly sincere is of little relevance; what really matters is that they act "in a manner consistent with humanitarian law," in which they do not take "military actions that could not be justified on humanitarian grounds."[55] Furthermore, it is conceivable that an intervener with at least partially self-interested motives will be more effective because they will be more committed to the cause.[56]

Thus, a fully legitimate intervener ought to be internally and locally externally representative, internally effective, globally externally effective, locally externally effective, and follow principles of internal and external *jus in bello*. The intervener who has the described qualities in fullest form is the most legitimate, and thus ought to intervene.

3: Multilateral versus Unilateral Force

Multilateral force consists of collective, cooperative action by states, as well as by non-non-state actors when necessary.[57] In contrast, unilateral force is taken to mean a single force, usually a state, acting on its own.

3.1: Multilateral versus Unilateral: on Representativeness

Multilateral force proves more effective than unilateral force. It can also best achieve both types of representativeness, beginning with internal. It is often argued that representativeness is "elusive" in a multilateral organization, since there are multiple actors and a far greater diversity of value systems.[58] Conversely, it would be much easier for a unilateral force to gauge the interests and opinions of its people. However, as described earlier, it is extremely difficult to fully represent the ideas of a nation. As such, neither a multilateral nor unilateral force will be able to achieve full internal representativeness. Still, because a multilateral force shares the burdens of intervention, and fewer resources are required from each agent, I argue that multilateral force can have lower standards for its internal representativeness since less is at stake for each agent.

A multilateral force can also best achieve local external representativeness. As noted, interveners will always be motivated by self-interest to some degree. However, a multilateral force will encompass the selfish aims of multiple agents, which means there is a higher likelihood that they will have to collaborate to achieve each aim. Thus, unlike a unilateral force, a multilateral force is likely to also consider the opinions of those subject to the intervention. A unilateral force is likely to be focused on its own aim above all others. Furthermore, because a multilateral force often includes regional organizations, it is likely that they will better understand the opinions of their neighbors subject to the intervention, as well as those of neighboring states that may be affected.[59]

3.2: Multilateral versus Unilateral: on Effectiveness

First, multilateral forces can be more locally externally effective. In humanitarian interventions, the military becomes in charge of law enforcement, food distribution, health care, and a variety of other tasks that a unilateral force is often not prepared, or trained, to do.[60] While a unilateral force may be better trained for regular warfare, it is likely to struggle in the other aspects involved in R2P. There are more tasks involved in preventing and rebuilding, than there are in reacting, and unilateral interveners often only have experience in reacting.[61] Furthermore, multilateral interveners tend to be more successful in sustaining peace for longer periods than single third-parties."[62] For example, almost 70 percent of the agreements concluded with the mediation of international organizations have been longer lived than those concluded with unilateral force.[63]

Though multilateral forces have a history of being inefficient, it is not always the case that a multilateral force is too late to make a real difference. There is generally a lengthy period of time between decision-making, forging coalitions and actually troop deployment, which can be problematic.[64] However, there is evidence that there are also benefits to late action. Multilateral forces often arrive once the conflict has already reached the peak of severity, and therefore they are likely to face less harm. Though more lives may have been lost due to the delay in the arrival of the multilateral force, it is likely that there will be fewer casualties for the intervening agent than if they had arrived during

the peak of conflict. Because of this, the multilateral force is likely to stay longer, and commit more to the cause. [65] Nevertheless, this is a flawed argument as it would mean that the humanitarian force was late to arrive on the scene and as a result had a diminished impact.

Still, those against the use of multilateral force are quick to point out that there are other factors that could render them ineffective. First, as Rebecca Hamilton argues, multilateral forces can face complex inter-operability challenges.[66] When more actors are involved in an operation, it becomes more difficult, and the likelihood of free riders increases as well. Donald Rumsfeld captured these difficulties in 2005:

> It's kind of like having a basketball team, and they practice and practice for six months. When it comes to game time, one or two say, 'We're not going to play.' Well, that's fair enough. Everyone has a free choice. But you don't have a free choice if you've practiced for all those months. So we're going to have to find a way to manage our way through that.[67]

In addition to commitment and free riding problems, multilateral forces may be less likely to practice secrecy. The more forces that are involved, the more likely it is that military plans will become shared and open, which can undermine the success of a mission. Given these concerns, it seems unlikely that a multilateral force can be relied upon in the same way as that a unilateral force can.

While those concerns may be valid, it is still possible for a multilateral force to address those concerns. Inter-operability and free riding may have been problems for past multilateral operations, but this does not mean that a new and different multilateral force cannot be created which would remedy those problems in the future. Furthermore, multilateral forces are likely to have some military advantages that unilateral forces do not. For instance, multilateral forces tend to have better access to the battlefield. Effectiveness is likely to increase since humanitarian interventions often necessitate use "of foreign bases, navigating through territorial waters of other countries, or overflying [other's] territory."[68] Because they acted as a unilateral force, the United States was unable to invade Iraq through Turkey during operation IRAQI FREEDOM, and this decreased the effectiveness of the operation, for example.[69] Therefore, the combination of allies and regional locations encompassed in a multilateral force give them an advantage over a unilateral force, which is likely to be removed from the location of the country where the intervention is taking place and far from resources.

Still, there is a further concern about the local external effectiveness of multilateral force: the "demobilization of local resistance." [70] Because multilateral organizations often have a greater perceived legitimacy, and have the stated mission of coming to the rescue when necessary, there is concern that multilateral forces will "lull victims into a false sense of security and push them to defer efforts at organizing resistance."[71] As described earlier, those subjected to the intervention play a large role in its effectiveness; without their efforts in combination with the intervener, the intervention is likely to have a very low success rate.

This previous concern seems to be an objection to the use of any intervening force in general, however. The promise of intervention from a single world superpower is just the same—if not more dangerous— than the promise of a multilateral intervener's help. Take the United States, for example, which has a reputation of "coming to the rescue." It seems that a nation in humanitarian crisis would expect just as much (if not more) from the U.S., as it would from a multilateral force like NATO. Consequently, multilateral forces are likely to be more effective overall in preventing, reacting, and

rebuilding, which are the qualities argued to be most significant in determining legitimacy.

Multilateral forces can also better achieve global external effectiveness. Unilateral forces tend to favor one side over another in the conflict (generally the side that also promotes their self-interested aims.) In contrast, multilateral forces are likely to foster a "solution that meets the interest of the disputants as well as the international community."[72] Thus, multilateral forces are less likely to harm the enjoyment of human rights in the world as a whole because they are forced to think of others. Conversely, one can imagine that a unilateral force would be more likely to take an action that could destabilize an entire region, or create a power struggle that would lead to further conflict. While this is not always the case, it is a lot less likely that a multilateral force will harm the enjoyment of human rights in the world as a whole.

Furthermore, multilateral forces are also likely to better achieve internal effectiveness than a unilateral force. The main reason for this is that multilateral forces spread the burdens of intervention among multiple agents. In contrast to unilateral forces, multilateral forces can receive financial and material resources from more than once place. Furthermore, they share the risk of human life, whereas unilateral forces incur losses on their own.[73]

Therefore, multilateral forces can best achieve all of the types of effectiveness that Pattison identifies. Given that effectiveness is the primary determinant of legitimacy, it follows that a multilateral force should be required to intervene, rather than a unilateral force. Those who remain unconvinced only need to see that multilateral force succeeds in best achieving Pattison's other criteria for legitimacy as well.

3.3: Multilateral versus Unilateral: on Conduct

Multilateral forces can best achieve Pattison's further requirements, beginning with following principles of external and internal *jus in bello*. Interveners who follow those principles "should monitor closely the behavior of their troops, investigate allegations of wrongdoing, and discipline those who violate these principles."[74] It is important to note that neither a multilateral force, nor a unilateral force will do all of these things perfectly. However, it is far less likely that a unilateral force will do these things well. Because unilateral interveners work alone, they are more likely to get away with morally questionable action. In contrast, multilateral forces are much more transparent, and therefore more likely to take responsible action.[75] Additionally, as discussed in the previous section, multilateral forces share the costs of intervention, which also means they better satisfy the internal *jus in bello* requirements.

One might object that the previous account of unilateral behavior is unfair. Some unilateral forces may be better trained, more experienced, and based on long-standing tradition. Consequently, principles of external *jus in bello* will be further emphasized among a well-trained, unilateral force. Furthermore, it seems unlikely that multilateral forces will do a better job at achieving internal *jus in bello*. Unilateral forces are likely to be able to give "special treatment" to their troops, whereas it might be more difficult for an injured NATO soldier's family to receive any support.

However even if unilateral forces are better trained, they are still apt to partake in moral wrongs, and because they are not under the scrutiny of the international community, it is likely that the principles of external *jus in bello* will be violated. In addition, we have already noted that unilateral forces will always have self-interested aims. Therefore, it is more likely that unilateral forces will develop a "do whatever needs

to be done in order to win" attitude. This is dangerous attitude, especially in that it can lead forces to violate principles of external *jus in bello*. Lastly, even though multilateral forces are less apt to provide "special treatment," they are more likely to reduce harms through burden sharing. This trumps a unilateral force's ability to provide special treatment. Thus, it follows that multilaterals can best achieve the principles of *jus in bello* that factor into legitimacy.

Therefore, multilateral forces have a higher likelihood of fulfilling the criteria that Pattison identifies for determining an intervener's legitimacy, and consequently it follows that multilateral force should intervene. Nevertheless, I do not advocate completely removing the possibility of unilateral intervention at this point in time, as it is questionable if there currently exists a multilateral force that would be able to fulfill the criteria in the ways I have described. Given my analysis, however, it is absolutely crucial that a working, legitimate multilateral force be created. In the section that follows I sketch a rough outline of what that force might look like.

3.4: The Ideal Force

My proposal is an attempt to follow the advice of Michael Walzer, who suggested that "'in practice, we should probably look for some concurrence of multilateral authorization and unilateral initiative – the first for the sake of moral legitimacy, the second for the sake of political effectiveness."[76] While this seems to point to the creation of a permanent international source, I it is unlikely that this will happen or be do not see this happening, or being successful anytime in the near future.

In a highly idealized world, I would propose what might sound like an extended UN. Any individual state, regional organization, or legitimate peacekeeping group would be invited to join. However, in joining, the members would accept that they could be "drafted," or designated to take part in a humanitarian intervention. All members would be under the umbrella of an international governing body. No member would have veto power, all member states would have two votes, and all organizations would have one vote; the purpose of this being that some states also involved in regional organizations not dominate the vote. The organization would determine which members would be most legitimate in a given circumstance, and then designate the three most legitimate interveners. If necessary, more peacekeeping organizations and interest groups could be added on to aid the designated interveners. In theory, these interveners would not always be the same, as legitimacy depends on the circumstances. Lastly, there would be negative consequences if the intervener opted out of service after it was designated. One possible consequence could be losing voting power in the organization.

Clearly, this proposal is extremely idealistic, and not necessarily realistic. It is questionable that an organization like this would have very many members in our world given the rigorous conditions of membership. However, the point is that regional organizations and peacekeeping organizations should be included, veto powers should be removed, and consequences for inaction should be imposed. A more realistic approach therefore, might simply attempt to reform the UN in these ways. It is only through the creation of a legitimate multilateral force that the responsibility to protect will ever be carried out to its full potential.

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Seventy Years Later: The Trials of John Demjanuk and the Purposes of Prosecuting Former Nazis

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Abstract

This paper uses the Israeli and German trials of John Demjanjuk, a former Ukrainian national accused of war crimes and crimes against humanity, to assess the problems associated with prosecuting former Nazis (and war criminals in general) so far after they committed their crimes, and to identify how the justice system attempts to rectify these problems. Seventy years after the Holocaust, we must re-examine our view of how we can do justice to the Nazi's victims. Our desire for revenge is unlikely to be satisfied by putting a ninety-year old man in prison. Situating Demjanjuk's trials in the historical context of the Nuremberg and Eichmann trials, this paper establishes that the Demjanjuk trial in Israel followed the historical pattern of war-crimes trials moving from traditional punishment-based jurisprudence towards the use of the criminal trial for achieving justice through commemorative and pedagogic ends. For a variety of reasons, ironically including the over-reliance on witness testimony, the Israeli trial did not succeed in establishing Demjanjuk's guilt, and thus undermined the emerging concept of the trial as a stage for pedagogy and memorial. Germany's subsequent trial of Demjanjuk attempted to rectify these mistakes. In condemning Demjanjuk, the German trial helped redeem the didactic and commemorative purposes served by Holocaust trials, and could serve as a model for future atrocity trials.

Introduction

In the 1970s, John Demjanjuk, a seemingly simple man who had been living quietly in the suburbs of Cleveland, Ohio for over twenty years, suddenly came under suspicion of the U.S. government for being a Nazi war criminal. Using information provided by the Soviet Union, the Justice Department investigated the possibility that Demjanjuk had served as a guard in Nazi death camps during World War Two. After determining that he had lied on his immigration application, Demjanjuk's citizenship was revoked. In 1986 he was extradited to Israel to stand trial as "Ivan the Terrible," a sadistically cruel guard at Treblinka. A series of mistakes by the American and Israeli justice systems led to his conviction, and the Israeli District Court sentenced him to death. The Israeli Supreme Court later acquitted Demjanjuk when doubts were raised over whether he actually served at Treblinka. Demjanjuk returned to the United States, but in 2009 was deported again, this time to Germany. He now stands trial for being an accessory to the murder of 27,900 people at the Sobibor death camp in Poland.[1]

The Demjanjuk trials offer much to the study of Holocaust and atrocity jurisprudence. Specifically, the proceedings in Israel and Germany shed light on the appropriate purposes of Holocaust trials.

It is not surprising that Germany, the perpetrator nation of the Holocaust, and Israel, home to many of the world's Holocaust survivors, have different aims in prosecuting Demjanjuk. Both trials go beyond the simple retributive goal of bringing a perpetrator to justice. On one hand, the Israeli trial sought to serve pedagogic and

commemorative functions. First, Israel meant for the trial to establish an accurate history of the Holocaust. Prosecutors designed the trial to send the message that perpetrators, even those like Demjanjuk who had not been high up in the Nazi regime, would not be allowed to live with impunity. With its focus on survivor testimony, the Israeli trial also centered on victims' rights. The trial served as a venue for survivors' memories and moral outrage to live on. The botched trial in Israel and the questionable role of the U.S. Justice Department in the prosecution of the wrong man as "Ivan the Terrible" raise questions of how effective any of these three purposes of war crimes trials (retributive, pedagogical, or victims' rights) can be when trails go wrong.

The purposes of Demjanjuk's trial in Germany differed from those in Israel. Germany's trying a ninety year old man, and a non-German at that, called into question the motives and the possible effectiveness of the trial. One potential justification for conducting the trial was that it could correct mistakes made in Israel. Lisa J. Del Pizzo claims that "the lesson of the Demjanjuk trial [in Israel] may be that it is extraordinarily difficult to bring justice to the perpetrators of the Holocaust."[2] Efrain Zuroff, a famed Nazi hunter, worried too that "governments all over the world will point to this [Israeli] trial" as an excuse not to prosecute war criminals.[3] Many scholars, such as Cheryl Karz, saw the Demjanjuk case as a signal that time had eroded the availability of reliable evidence.[4] Demjanjuk's conviction in Germany showed that though the Israeli trial may have been flawed, it is not impossible to bring perpetrators to justice, or to give justice to the victims of the Holocaust. Another important difference of the two trials was that in Germany did not charge Demjanjuk with extraordinary cruelty beyond that of other Nazi guards, but simply of being a *Wachmann* at a death camp. His conviction in the German trial served to illustrate that all cogs in the Nazi wheel should be held to some degree of legal and moral responsibility. This paper focuses on the damage done to the process of Holocaust trials, in particular to victims' rights, by Demjanjuk's Israeli trial, as well as the redemption of these non-traditional judicial goals in the German trial. This paper ultimately seeks to interpret the appropriate uses of Holocaust trials, and to assess how well the Demjanjuk proceedings fit this paradigm.

History of the Trials:

In 1952 the former Ukrainian national John Demjanjuk moved to the United States under the 1948 Displaced Persons Act. He was later granted citizenship in 1958, claiming that he had resided unremarkably in Sobibor, Poland during World War Two. Demjanjuk moved to the Cleveland area where he worked at a Ford factory, and led an unassuming life with his wife. [5] l However, speculation over Demanjanjuk arose when the Soviet Union provided the U.S. Justice Department with a list of former Ukrainians who had been captured by the Nazis during World War Two, whom the Soviets suspected of war crimes.[6]

During the course of the Office of Special Investigation (OSI) inquiry, it became apparent that Demjanjuk had lied about his actions during World War Two on his immigration application, and had thus illegally obtained U.S. citizenship.[7] The Justice Department claimed that Demjanjuk had been a guard at Treblinka, where he was known as "Ivan the Terrible" for the zealousness with which he tortured Jews.[8] The U.S. District Court used standards determined in the Supreme Court case *Fedorenko v United States* to determine whether Demjanjuk had obtained his citizenship legally, and deportation orders were issued against Demjanjuk. Before the deportation hearings could finish, the state of

Israel filed an extradition request, as Israel desired to try Demjanjuk as "Ivan the Terrible" under its 1950 Nazis and Nazi Collaborators (Punishment) Law.[9]

According to an extradition treaty between the United States and Israel signed in 1962, it was possible for the United States to extradite Demjanjuk to Israel to stand trial.[10] The standard of evidence for the extradition hearings *John Demjanjuk v Josephs Petrovsky* was fairly low, and required only that the Justice Department demonstrate probable cause that Demjanjuk was indeed "Ivan the Terrible."[11] The evidence against Demjanjuk included an identification card from Trawniki provided to the Justice Department by the Soviet Union, which showed "an obvious and striking resemblance" to Demjanjuk. Perhaps even more important to the Justice Department's case was the testimony from several Treblinka survivors who identified Demjanjuk as "Ivan the Terrible." During their investigation, the United States provided nine names, including Demjanjuk's, to the Israeli government in the hopes that Holocaust survivors residing in Israel would be able to identify him. Though the Justice Department originally suspected Demjanjuk of having served at Sobibor, witnesses identified Demjanjuk's photo as that of "Ivan the Terrible," a Ukrainian guard at Treblinka accused of operating the gas chambers and of using extreme cruelty to encourage submission. Justice Battisti concluded that this evidence amounted to probable cause of Demjanjuk's guilt. After the Sixth Circuit refused to stop Demjanjuk's extradition and denied his writ of habeas corpus upon appeal, Demjanjuk was finally extradited to Israel in 1986.[12] The possibility that Demjanjuk had also been at Sobibor was not excluded, as this was not entirely inconsistent with his having been at Treblinka.[13] The Soviet Union had provided testimony from a guard at Sobibor, Ignats Danilchenko, stating that he had served at Sobibor with Demjanjuk. However, this information was put on the back burner as the United States focused on Demjanjuk's supposed atrocities at Treblinka.[14] The image of Demjanjuk as "Ivan the Terrible" took over both the U.S. and Israeli proceedings, and Danilchenko's testimony was largely ignored.[15]

The fact remains that the United States did have evidence, including his S.S. identification card and Danilchenko's testimony, that Demjanjuk had been at Sobibor. Some claim that the United States handled this evidence recklessly, and that it intentionally kept Israeli prosecutors in the dark. On the other hand, important information such as the testimony of over forty former Treblinka guards claiming that "Ivan the Terrible" was a man by the name of Ivan Marchenko, did not become available to the OSI until after the Soviet Union fell. Thus, it is possible that the mishandling of information was more benign, and that the Justice Department was ignorant rather than passionately careless.[16] Either way, the effect was that, for several decades, the focus would not be on Demjanjuk's time at Sobibor, but on his alleged actions at Treblinka.[17]

There were, from the beginning, lingering doubts about Demjanjuk's guilt. In 1986, Patrick Buchanan, a senior advisor in the Regan administration, even wrote an article in *The Washington Post* in late 1986 that questioned Demjanjuk's status as "Ivan the Terrible."[18] Nevertheless, on February 16, 1987, a three-judge panel of the Jerusalem District Court began to hear the case of *The State of Israel v Ivan (John) Demjanjuk*. Demjanjuk was charged with four offenses: crimes against the Jewish people, crimes against humanity, war crimes, and crimes against persecuted people. Israel asserted that was the "Ivan the Terrible" who had operated the gas chambers at Treblinka, and who had engaged in unusually cruel acts during his time as a guard such as included beating and cutting Jews on their way to the gas chambers.[19]

The Israeli trial focused on two forms of evidence: survivor testimony and the Trawniki identification card that identified Demjanjuk as a member of the S.S.

Throughout the trial, Demjanjuk contended that the card was a KGB forgery, and that he had been a POW for the duration of World War Two. Despite his claims to the contrary, the court found the document to be reliable. Although it listed his place of service as Sobibor, the Israeli prosecution largely ignored this inconsistency in favor of survivor testimony which established his presence at Treblinka.[20]

Survivor testimony became the key piece of evidence in Demjanjuk's trial before the Jerusalem District Court. Five survivors testified before the court that Demjanjuk was indeed "Ivan the Terrible." Positive identifications of Demjanjuk's photograph by four Treblinka survivors who died before the time of the trial were used as additional evidence. The Jerusalem court considered the question of the reliability of survivor testimony extensively. The court ultimately stated:

> Can people who were in the vale of slaughter and experienced its horrors…forget all this?...Is it possible that someone who has experienced the terrible reality described in the indictment would remember so well the details of the actions while forgetting the perpetrators?[21]

The court decided to allow victim testimony, claiming that survivors would not forget memories of such atrocity. On the basis of this evidence, the District Court convicted Demjanjuk of all four charges on April 18, 1988 and sentenced him to death.[22]

Demjanjuk appealed his conviction and sentence. The appeals trial before the Israeli Supreme Court began May 14, 1990. Although Demjanjuk's defense provided no new evidence surrounding his status as a *Wachmann* or the Trawniki identification card that was presentedit did provide new evidence about Demjanjuk's supposed service at Treblinka. With the collapse of the Iron Curtain, the defense council had gained access to documents identifying another man, Ivan Marchenko, as "Ivan the Terrible." The defense provided summaries of the testimony of thirty-seven guards and forced laborers at Treblinka identified Marchenko as the operator of the gas chambers. [23]

The Israeli legal system affords significant protections to the accused. For Demjanjuk's conviction to stand, the prosecution needed to offer a plausible explanation for the significant body of evidence claiming that Marchenko, not Demjanjuk, was "Ivan the Terrible." The prosecution failed to do so. Because the Supreme Court of Israel found that there was reasonable doubt, Demjanjuk was acquitted of being "Ivan the Terrible" at the end of July, 1993.[24] He was not cleared of having been a *Wachmann* in the S.S., a charge based on the Trawniki identification card, as the defense brought no new evidence to bear regarding the card's authenticity. However, the State of Israel decided not to sentence or re-prosecute Demanjanjuk on the *Wachmann* charges. Several reasons were given for this surprising decision. The Court cited the fact that a re-trial could constitute double jeopardy, that trying him on different charges could be contrary to the U.S.-Israeli extradition treaty, and that another drawn out trial would not be good for the Israeli public.[25]

Upon Demjanjuk's return to the United States in 1993, the Sixth Circuit re-opened the case (*Demjanjuk v Petrovsky*) regarding his extradition order. Specifically, Demjanjuk contended that the Office of Special Investigation (OSI) had withheld exculpatory information that it had obtained before his denaturalization trial. While the Soviets had certainly not provided the U.S. Justice Department with all available information, the OSI "dealt both selectively and carelessly with the sparse evidence the Soviets did provide, allowing their own passionate belief in Demjanjuk's guilt to rule their use of evidence."[26] The Sixth Circuit found that the prosecutors with the OSI, perhaps as a consequence of their obsession, had failed to share information that should have called into question Demjanjuk's status as "Ivan the Terrible," and thus had committed

prosecutorial misconduct. In particular, the Court found that "the OSI attorneys acted with reckless disregard for their duty to the court," which amounted to "fraud on the court."[27] The Sixth Circuit therefore revoked Demjanjuk's extradition order, and later the same year his citizenship was restored.[28]

Many scholars believed that Israel's ill-fated trial would mark the end of Holocaust jurisprudence.[29] However, the U.S. Justice Department was not satisfied with this result.. In 1999, the Justice Department brought new allegations against Demjanjuk, claiming that he had been a guard at the Sobibor, Majdanek, and Flossenburg camps during the War. Justice Matia, of the U.S. District Court for the Northern District of Ohio, decided in 2002 that Demjanjuk could again be stripped of his citizenship, as he could not provide a credible alibi for his wartime activities. This judgment was affirmed by the Sixth Circuit in 2004, and in 2005 a new deportation order was issued against him.

Demjanjuk remained in the United States for several years. No other country was willing to accept him, and Demjanjuk began an exhaustive appeals process. In the meantime, Germany started to conduct its own investigation into his case. German courts today refuse to retroactively prosecute Nazi perpetrators for crimes against humanity because the German penal code did not incriminate for these crimes during the Nazi era.. Germany's only option was to try Demjanjuk for murder or accessory to murder. The difference between a murderer and an accessory to murder under German law depends on motive rather than on action. Even if Demjanjuk physically killed camp inmates while serving as a guard, "the decisive factor in distinguishing between perpetrator and accomplice was precisely this 'personal attitude toward the crime,' so that 'a person, though his act itself fulfills all the requirements of murder, may still be merely an accomplice.'"[30] Thus, Demjanjuk was charged with having been an accessory to murder, rather than with murder.[31]

Finally, in March 2009 Germany issued a warrant for Demjanjuk's arrest, charging him with 27,900 counts of accessory to murder.[32] Demjanjuk arrived in Germany in May of 2009 and, despite his ill-health, the German court system deemed him fit to stand trial. The proceedings began in November 2009. Though the trial was originally expected to last only a few months, it didn't conclude until May 12, 2011. This delay was due to disputes over the authenticity of the Trawniki document, uncertainty over handwritten letters, and testimony by deceased witnesses. Demjanjuk's failing health, and an enormously large number of defense motions.[33] However, on May 12, Demjanjuk was convicted of accessory to the murder of 27,900 individuals.[34] His conviction has the possibility of serving as an important corrective to the damage done by the Israeli trial.

Aims of the Israeli District Court Trial

The trial of John Demjanjuk became an obsession for Israel.[35] It went beyond simply bringing justice down upon a brutal killer and attempted to afford dignity to the memory of survivors in a public setting. This creation of public memory was used not only to establish the importance of victims' rights, but also to serve a pedagogical function: to teach young Israelis about the Holocaust and Nazi atrocities.[36] Israeli radio broadcasted the testimony, and students and other Israelis who flocked to the courthouse. Quickly, all hesitancy surrounding the prosecution disappeared, and Israelis became even more committed to demonstrating Demjanjuk's guilt than the Americans had been.[37]

The aims of the Israeli trial were deeply rooted in previous Holocaust trials. The Nuremberg Trial, the first of the Nazi war crimes trials, was successful on many levels. In

judging World War Two and the Holocaust, justice was not to be done simply by condemning the perpetrators to death. The prosecution team wanted to teach the world about what the Nazis had done, with evidence that could not be refuted. It taught world leaders that crimes of atrocity were not above or outside the law.[38] The legacy of this pedagogical precedent continued to the Israeli trial – allowing cameras into the court room demonstrated the lengths to which Israel was willing to go to make sure the trial reached as many people as possible.[39] Israel's trial also sought to correct Nuremberg's most severe flaws. At Nuremberg, despite honest efforts, the International Military Tribunal had misrepresented some parts of the Holocaust. One main purpose of the Nuremberg Trials was to situate the unprecedented crimes of the Holocaust inside an acceptable legal framework, and as the prosecution was principally concerned with "securing the trial's legitimacy as a matter of law," it situated crimes against humanity as a subset of war crimes and crimes against the peace.[40] In addition to this, the Allies were pressured by a lack of time and were only able to work off of incomplete evidence, leading to greater misrepresentations.[41]

Lawrence Douglas discusses the issues surrounding victims' rights, or the lack thereof, in Holocaust trials. In the Nuremberg trial, statements and testimony from victims were rarely used: Jews were rarely called to the stand and even crimes against Jews were largely wrapped up in crimes against prisoners of war or other dissidents.[42] On the other hand, documents from the perpetrators were reviewed exhaustively, and almost all witnesses called to the stand were perpetrators as well.[43] Even in his opening statement, chief U.S. prosecutor Jackson quoted Nazi documents extensively, while he did not quote victims (either Jewish or non-Jewish) at all. In the end, Douglas concludes that, if trials do have a duty to victims, then the Nuremberg trial failed on this account.

The trial of the *State of Israel v Adolf Eichmann* took the important next step of focusing on the victims' rights that Nuremberg ignored. According to Douglas, "the testimony of survivors…occupied the didactic and commemorative heart of the Eichmann trial, though its evidentiary relevance, conventionally conceived, was subject to stern challenge."[44] Eichmann's participation in atrocity was well documented. Thus, the prosecution used survivor testimony almost exclusively for didactic purposes, transforming the legal system into a "powerful forum for understanding and commemorating traumatic history."[45] Though the Eichmann trial offered this important corrective, it also necessitated the opening of old wounds, and Eichmann's death was an unsatisfying type of justice. Many people internalized Hannah Arendt's view that with Eichmann, Israelis hanged the model bureaucrat, not the manifestly evil killer they had originally imagined.[46] Many Israelis were not prepared to go through the process of reliving painful memories again with Demjanjuk.

Demjanjuk's status as a cruel guard at Treblinka contributed both positively and negatively to Israel's willingness to prosecute. On one hand, trying Demjanjuk seemed like "a debasement of precedent."[47] Israel had already tried Eichmann, one of the most powerful architects of the Holocaust. Many doubted the efficacy of Israel trying a relatively small fish in an enormous pond.[48] On the other hand, the Demjanjuk case made clear that not all evil is banal. Leon Wieseltier argues that the Eichmann trial engendered an image of Nazi perpetrators as model bureaucrats. The problem with the Eichmann trial, in his view, was that "its subject finally was not a man, but a system."[49] The Demjanjuk case offers an opportunity to paint a different picture of the Holocaust. Countless Demjanjuks participated in brutal killing on a daily basis, for "the Eichmanns could not have destroyed the Jews of Europe without the Demjanjuks."[50] Brought in on charges based on cruelty beyond that of normal guards, Demjanjuk represented the worst of the

worst, and reminded Israelis that "in the death camp machine, there were many cogs, but there were no small cogs."[51] The State of Israel decided to proceed with a trial.

The trial closely resembled the Eichmann trial as survivor testimony became the main source of evidence. Unlike the Eichmann trial, where the evidentiary relevance of survivor testimony was questionable, testimony in the Demjanjuk trial was extremely relevant to proving his guilt.[52] Beyond serving as virtually the only evidence placing Demjanjuk at Treblinka, the survivor testimony also furthered expressly didactic purposes. "At issue," claims Douglas, "was not the relevance of the testimony but the reliability of memory."[53] Although the District Court ostensibly questioned the reliability of memory, they often phrased their questions rhetorically, and made it clear that they did not doubt witness testimony. In the end, the Court decided that "it is not possible to forget the scenes of horror, the atmosphere of terror, all that took place in the extermination camp. It is impossible to forget Ivan the Terrible and his atrocities."[54] The prosecution thus used survivor testimony not only to assert Demjanjuk's guilt, but also as a "sweeping prosecutorial excursion into the history of the final solution."[55] In this way, the Demjanjuk trial sought to infuse an accurate version of history into the public memory.

At the trial, survivors not only told stories, they spoke *history*. The Court itself recognized this role, stating "We are charged with the duty to determine, through the due process of law, historical truths in regard to the events that befell our world in one of the darkest periods."[56] The establishment of history was also a way to achieve victims' rights. In the creation of public memory, the Israeli trial of Demjanjuk attempted to do justice to the stories not only of those harmed directly by "Ivan the Terrible," but to all victims of the Holocaust.[57] The courtroom served as a venue for the five Treblinka survivors to tell their stories, as well as the stories of countless survivors who have no such outlet for sharing their own experiences, and of those who died and no longer have a voice. In the process of this "collective unburdening," the Demjanjuk trial, like the Eichmann trial, came to serve as a venue for commemorative and pedagogic ends.[58]

Problems Presented by the Israeli Supreme Court's Acquittal

Many across the globe saw the initial Israeli trial as an expression of justice. The ultimate acquittal of Demajanjuk by the Israeli Supreme Court, though, was problematic as it produced a crisis for victim-centric justice. While the initial trial may have seemed to be a victory for victims' rights, the appeal highlighted some major flaws in the reliance on victim testimony in atrocity trials. During the Eichmann trial, the whole world was watching as Israel embarked on its journey to confront for the first time the evil behind the Nazi regime. To demonstrate that the prosecution was not staging a show trial, and to overcome skepticism about the efficacy of the trial, Gideon Hausner explains that "we were bound to present an overwhelming legal case to sweep away all juridical doubts, and we had to offer an immaculate factual case to establish beyond a shadow of a doubt the truth of our allegations," and to subject emotion to a juridical framework.[59]

The prosecution had a strong case against Eichmann, and with his conviction, most believed that justice had prevailed. Demjanjuk's acquittal, as opposed to helping to further heal the wounds the Eichmann trial created, tore them open anew. As a report in the *Toronto Star* argues, the Demjanjuk trial "has developed into an embarrassment to Israel, to Holocaust survivors and to Nazi hunters around the world."[60] Israel hastily tried the wrong man, and dragged survivors "yet again through a harrowing court case" which dredged up painful memories, for naught.[61] Neither Israel nor the world gained any sort of

justice from Demjanjuk's acquittal. While it remains clear that Demjanjuk participated in the Holocaust it cannot be determined whether he was "Ivan the Terrible."

That survivor testimony made up the crux of the prosecution's evidence constituted the real problem underlying the acquittal. Using survivor testimony as the basis of evidence in a Holocaust trial had seemed like a good way to afford justice to victims. Wieseltier wrote in 1987 that "it is fitting that a trial that may result in the correction of memory should turn so completely upon the reliability of memory."[62] This turned out to be a dangerous proposition. In that victim testimony was taken to be reliable, copious amounts of testimony seemed to add to the historical record in an important way. However, the witnesses in the Demjanjuk case were proven beyond a reasonable doubt to be wrong. Though it is clear that Demjanjuk participated in the Holocaust, we are almost certain he was not at Treblinka. The reliance on survivor testimony in establishing Demjanjuk's guilt thus harmed the status of victims' rights as a feasible goal of atrocity trials.[63]

It is important to recall the enormous amount of trust that the Jerusalem District Court put in the accuracy of testimony. The trial used testimony not only as an outlet of emotion, but as a way to teach history.[64] As the five Treblinka survivors did not remember their experiences accurately, the Demjanjuk case starkly illustrates the failings of human memory, and the possibility of the legal structure being used to infuse the public memory with *false* memories. The accuracy of the memory of all victims has as a result has been permanently called into question.

Many Israelis wanted to re-try Demjanjuk on charges of having been at Sobibor. Given the blunders of the first set of trials, it was perhaps a wise decision on Israel's part not to try him again.[65] However, the refusal to re-try him almost guaranteed that justice would not be served – he had been acquitted of a crime he did not commit, and he would not be prosecuted for a crime he almost certainly did commit. Israel's trial of Demjanjuk called into question everything the Eichmann trial had taught about the appropriate bounds on the role of the justice system. The failure of the didactic purposes of the trial represents an even bigger failure than the failure to convict a perpetrator of atrocity, because the failure to commemorate or to teach reverberates not just with this case but with the justice system as a whole. If this had in fact been the last Holocaust trial, the message of failure and of the inadequacy of the justice system to serve didactic and commemorative ends could have had a serious impact on the status of victims' rights when dealing with crimes of atrocity.

German Trial: Attempts to correct Israel's mistakes

There is a good chance that Demjanjuk's German trial will be the last high-profile trial of a Nazi perpetrator. **"**Given the passage of time," Katie Engelhart argues, "it may well prove to be the final major set piece in the intense six-decades-long process of bringing former Nazis to trial."[66] Some applaud the fact that the trial is being held in Germany rather than elsewhere. Christoph Burchard, a law professor at Universitat Tubingen, states that: "To have the last big Nazi trial in Germany…will show the world that Germany can do it."[67] Many people surmise that Germany's trial of Demjanjuk will bring long-delayed justice.[68] What justice is exactly in this case can be understood not in terms of run-of-the-mill criminal trials (though technically, in Germany, Demjanjuk is charged with just that – accessory to murder, not war crimes) but through atrocity trials.

The importance of the current German trial of Demjanjuk can only be understood in light of the complicated results of his Israeli trials. Engelhart points out that,

after more than sixty years, Holocaust trials in general have "lost much of their symbolic aura."[69] Demjanjuk's caseis full of symbolic potential, precisely because of Israel's failure to convict him. Given people's skepticism about the ability of Holocaust trials to continue, Germany's interest in the case against Demjanjuk signals a continued commitment to justice. Germany's decision to try Demjanjuk on new charges re-affirms Gitta Sereney's belief that "all men who became party to such awful crimes in that war, and in wars since, must be in no doubt, to the day they die, that the world not only knows and abhors what was done, but deplores them." [70] Convicting Demjanjuk, even significantly after the fact, has the potential to influence the way the world views those responsible for the Holocaust, and to finally give justice to his victims.

Nonetheless, opinions vary widely on the efficacy of trying Demjanjuk almost seventy years after the Holocaust. Some argue that "the trial of the near-decrepit John Demjanjuk -- who slumped down in his wheelchair and breathed heavily through a nasal tube …-- is bringing a once-purposeful legal process to a pathetic end."[71] The legal process can be called pathetic because, as Engelhart notes, "the current image of Demjanjuk -- aged, wheelchair-bound, and cancer-ridden -- is far removed from that of the archetypal Nazi demon of popular culture."[72] It is hard to imagine this fragile old man as a brutal Nazi guard at Sobibor, and thus his age could pose problems if we would like to consider Demjanjuk as an outlet for revenge.[73]

> On the other hand, many scholars and Holocaust victims alike don't see time as posing a problem to the pursuit of justice. Though it may be difficult to do so, The passage of fifty years is not long enough to justify abandoning the pursuit of Nazi war criminals, as the passage of time is irrelevant to determining one's criminal or moral responsibility…This duty exists not only to punish the criminals for the atrocities they committed but also to send a message that the international community will not tolerate these types of crimes.[74]

Holocaust survivors in particular don't believe that time should matter in pursuing Nazi perpetrators. A survivor states in an interview with the *Cleveland Jewish News*: "We have to take a stand against those who perpetrated the Holocaust and other genocides. Time should not be a factor in bringing them to justice."[75] The link between time and justice, however, is not as simple as this survivor would like to believe.

One of the complications in trying Demjanjuk so long after his crimes were committed is that obtaining evidence against him has become significantly more difficult. As an article in *The Wall Street Journal* notes, disputes over the authenticity of evidence, Demjanjuk's poor health, and the high number of defense motions, caused the trial moved along slowly, and Germany to face a potential "public debacle."[76] In light of the the Israeli trial, it was important that the German prosecution have an airtight case. As all witnesses who could identify Demjanjuk have died, the prosecution had to rely on myriad documents including letters and Soviet files which incriminated Demjanjuk, in addition to his Trawniki identification card. Despite the debate between the defense and prosecution over the authenticity of these documents and the defense's barrage of diversions designed to stall the trial as long as possible[77] (in early March, 2011 alone there were more than 350), the court convicted Demjanjuk as an accessory to the murder of 27,900 individuals on May 12, 2011.[78]

Though Germany had strong evidence against Demjanjuk, the trial was not without its flaws. An article in *The Ukrainian Weekly* from Jun 21, 2009 pointed out a potential problem with Germany's decision to try Demjanjuk as opposed to trying him in a more neutral state:

> Let us remember that it was German officers and German soldiers that governed the death camps of Nazi Germany – not Ukrainians like Mr. Demjanjuk. While the world ignores such instances of Nazi collaboration it watches in silence as prosecutors seek to pin the tail on the donkey in Mr. Demjanjuk's case. It is founded on the belief that anyone who was a guard at any Nazi camp was by that very fact guilty of a war crime…the Demjanjuk case is little more than a Western show trial to reinvigorate the memory of the Holocaust.[79]

It is important to note that *The Ukrainian Weekly* incorrectly asserts the foundations of the trial, stating that the trial was founded on a belief that all guards are war criminals This is wrong on two counts: first of all, the German trial deals with guards specifically at death camps, not concentration camps. Secondly and perhaps more importantly, Demjanjuk is not tried with any war crimes, but with accessory to murder. The significance of the article, however, actually arises out of its factual inaccuracies, and its overblown statement about Germany staging a show trial. *The Ukrainian Weekly* clearly views the trial as illegitimate. The trial has the potential to establish a more complete history of the Operation Reinhard concentration camps (Belzec, Sobibor, and Treblinka). As no physical evidence of these camps remains, hearing testimony from survivors of Sobibor while they are still alive is crucial to our understanding of what went on there.[80] Nevertheless, if people *perceive* the trial as illegitimate, the trial will have trouble fulfilling these didactic and commemorative ends.

That the trial is occurring seventy years after the crimes in question could also harm the trials ability to serve commemorative goals. In atrocity trials, "justice" is not simply centered on perpetrators, but also on victims. As time passes and more and more survivors pass away, it becomes even more urgent to give them justice while there is still time, and to hear their stories before it is too late. As noted earlier, the witnesses who originally identified Demjanjuk have died. However, several Sobibor survivors were called upon to testify about conditions at the camp, which will help establish a more complete historical record.[81] The testimony will also help re-establish the commemoration of victim's suffering as an important objective of atrocity trials, especially if the trial is perceived as legitimate.

While it may seem odd for Germany to try a Ukrainian instead of a German, it was not entirely bizarre. Several factors combine to legitimize the trials factual and perceived legitimacy. Because Demjanjuk is Ukrainian, and his crimes happened mainly on Polish soil, Germany's jurisdiction over the issue was questionable. Universal jurisdiction applies to crimes against humanity – not to domestic incriminations of accessory to murder.[82] According to Susanne Beck, "the applicability of German criminal law can only be based on one of the exceptions contained in StGB § 4 et seq. As many of the victims have been German nationals, one could argue that German jurisdiction is given because of StGB § 7, Par. 1. 66."[83] This exception states that Germany has jurisdiction over crimes if the victim of the crime was German, and if the crime was also considered a crime in the country in which it took place (in this case, Germany assumes that killing was a crime in Poland).[84] Thus, because some of Demjanjuk's victims were German citizens, Germany assumed jurisdiction over his case.

Beate Merk, Bavaria's state justice minister, argues that not only does Germany have jurisdiction over the case, but that "in Germany, we have a very special responsibility" to try Demjanjuk.[85] Though Demjanjuk is not German, the trial could be seen as a signal that Germany is finally taking responsibility of its Nazi past. The trial is an opportunity for Germany to "come to terms with its dark past," and to demonstrate its willingness to "accept its moral and legal responsibility to deal critically with the legacies

of National Socialism."[86] Given the time that has elapsed since the Holocaust, there are very few perpetrators left alive to try. Because the first Demjanjuk trial ended unfavorably, it is commendable that anyone was willing to try to rectify Israel's mistake. Additionally, as Sharfman points out, Germany did not act alone in carrying out the Holocaust. Trawniki trained guards were vital to Operation Reinhard. Trying Demjanjuk shows that others collaborated with the Germans. In this case, a Ukrainian collaborated to help kill almost thirty thousand Jews. He should not be spared simply because he is not German.[87]

Another point of contention in the trial is that Demjanjuk was only an ordinary death camp guard – that trying Demjanjuk may not be the best way for Germany to come to terms with its Nazi past because "he was only a minnow, a relatively insignificant cog in the Nazis' machinery of destruction."[88] However, the fact that Demjanjuk was not in the upper echelon of the Nazi regime may prove to be the reason the trial is most important. Though the German court only sentenced him to five years in prison (partially due to his advanced age), his punishment is not as important as the message his conviction sends.[89] The niece of a Sobibor victim expressed this sentiment in stating: "actually for me it's not the number of years he was given -- that wasn't important -- for me it was the fact he was found guilty of aiding and abetting mass murder at Sobibor" – that though he was only a Wachmann, he cannot live with impunity.[90]

Many members of the Jewish and world communities found Israel's disinterest in re-trying Demjanjuk for crimes committed at Sobibor completely unacceptable. A writer for the *Cleveland Jewish News* eloquently expressed her desire for Israel to re-try Demjanjuk, stating that even if he had only been an ordinary guard, he still deserved punishment. Perhaps, she says, "without fanfare and flourishes, he simply did his job. But that job was murdering men, women, and children…At the heart of darkness that that was the Holocaust, there were legions of just plain folks like Demjanjuk who would willingly carry on the most heinous of deeds."[91] Demjanjuk should be held responsible for his actions, even if he was not an important member of the Nazi party like Eichmann, or especially cruel like the real "Ivan the Terrible." His conviction at the German trial has the potential to indicate that all participants in the Holocaust share some degree of responsibility for the atrocities that occurred. This is an important lesson that the Israeli trial could never have taught.

Conclusions: Assessing the Success of the Demjanjuk Trials

While the Demjanjuk case highlighted the flaws in the ability of the legal system to do justice to victims of atrocity, it is important not to give up on trials of these perpetrators. Although it may seem as though reliance on victim testimony is dangerous in trials of such importance, it is in fact the reliance itself that makes the trials so important. As Douglas argues, in trials of atrocity, punishment does not serve the traditional Kantian idea of retribution, as no punishment can be proportional to the crime. Conviction and punishment can, however, serve pedagogic purposes, and do justice to victims.[92] With the focus of the trial so much more on victims than an ordinary criminal trial, it stands to reason that victims will be hurt more when a trial goes wrong. While we should not stop trying men like Demjanjuk, it is important to exercise restraint and extreme caution when doing so. Though emotion will be a large and important part of the trial itself, emotion should not enter into the decision to prosecute in the first place.

The fervor with which the United States and Israel insisted that Demjanjuk was "Ivan the Terrible" backfired horribly when it became immensely clear that he was not.

His acquittal called into question the ability of trials to serve a pedagogic purpose. Allegations that the original trial was a show trial suggest that victor's justice promotes its own (faulty) version of history.[93] Demjanjuk's acquittal also had the potential to do extreme damage to victims' rights. The Ukrainian-American community, including Demjanjuk himself, used the acquittal to present Demjanjuk as the true victim of the situation. Additionally, the fact that nine survivors were mistaken in their identification of Demjanjuk was problematic given the District Court's insistence that survivor testimony is accurate and reliable. The Israeli trial of Demjanjuk emphasized the gulf between history and memory, and called into question the adequacy of memory in establishing guilt. Even more than this, Demjanjuk's acquittal rendered questionable the efficacy of using the legal framework, which traditionally emphasizes the judicial system's position as a seeker of truth, as an outlet for memory.

Despite fears that the Demjanjuk trial in Israel would mark the end of trials against Holocaust perpetrators, Germany was willing to extradite Demjanjuk and try him on charges of being a *Wachmann* at Sobibor. His conviction in Germany helps turn the failure of the Israeli trial into a triumph. Having learned the dangers of moving too fast, of letting passion cloud judgment, Germany approached the gathering of evidence against Demjanjuk more cautiously than either the United States or Israel did. In addition, German prosecutors couldn't use survivor testimony to identify Demjanjuk, as all witnesses who recognized him were dead. This became a blessing in disguise. Germany's evidence against Demjanjuk was found in letters, in Soviet documents, in his Trawniki identification card, which are not degenerated by time in the same way that memories are. As a victim's relative noticed, "They did it in such great detail and ensured that there were no mistakes, and that nobody was victimized, care was taken, both for Demjanjuk and for the plaintiffs."[94] Thus, there was less of a chance that the trial would lead to another debacle like the acquittal in Israel.

Germany's caution in trying Demjanjuk may in part have stemmed from a desire not to condemn him too quickly or too strongly. Germany at once attempted to come to terms with its past while also attempting to show that it was not shunting its responsibility off onto a non-German. In convicting Demjanjuk, thus holding his accountable for his actions, Germany sought to re-establish the line between victim and perpetrator that the Israeli proceedings against Demjanjuk blurred. Out of the rubble of the Israeli trial, Demjanjuk and his defense attempted to label him a victim of the Nazis and of the Israeli justice system. In March 2011, Demjanjuk issued a statement claiming that "the nation which murdered with merciless cruelty millions of innocent people, attempts to extinguish…my life with a political show trial seeking to blame me, a Ukrainian peasant, for crimes committed by Germans."[95] In this declaration, Demjanjuk attempted to align himself with other Holocaust victims – Demjanjuk claimed to be a victim of the Nazi regime. However, as Joshua Muravchick argues, his acquittal by the Israeli Supreme Court "hardly makes him 'an innocent victim,' as his defenders would have it, much less a martyr."[96] His conviction in Germany re-asserts Demjanjuk's role as a perpetrator, an essential step in giving justice to his victims.

The German trial furthered and refined the creation of memory begun by the Israeli trials. This trial pointed to the moral and legal responsibility of even lower-level Nazis in the commission of the Holocaust. Even if Demjanjuk did not commit acts above and beyond those of his fellow guards, he still deserved to be held accountable for his assistance in the murder of 27,900 Jews. By not trying Nazi guards, the world has for too long said tacitly that while being an accessory to the murder of one man is punishable by law, being the accessory to the murder of 27,900 is not. In holding him accountable,

Germany offered an important corrective to the abstractness of the Eichmann trial. As Wieseltier argues, after Eichmann, "historians and other writers became fascinated by the distance of the killers from the killed."[97] The German trial asserted that it is unacceptable to have crimes without criminals. Germany sought to pull Holocaust victims out of anonymity and into the light of day, where the world could more clearly hear their stories.

As Wieseltier notes, there is no real fear that the Holocaust will be forgotten. Today, he argues, "the fear that the world will forget must give way to the fear that the world will remember wrongly."[98] While the victims in Demjanjuk's first trial were wrong in their identifications, the German trial searched to recover of the importance of survivor testimony. Survivor testimony allows a small window into atrocity. It is one of the only ways for the world to cope with an event so utterly incomprehensible, as hearing stories brings us as close to atrocity as we can imagine. Even more important than bringing justice down upon Demjanjuk was giving justice to Holocaust victims. However, all of the once-available witnesses against Demjanjuk have died.[99] Nevertheless, many Holocaust survivors are still alive. Survivors of Sobibor were called upon to testify in the trial, not to identify Demjanjuk, but to establish a more complete picture of the atrocities that took place in the death camp. Germany's allowing death camp survivors to tell their stories re-affirmed victim's rights as an important and legitimate goal of atrocity trials. Holocaust trials instruct and commemorate, and also answer our deepest felt desires for revenge.[100] In performing these functions, the German trial redeemed what was lost in the Israeli trial.

By condemning Demjanjuk (thus by proxy other death camp *Wachmann*) and by establishing a more complete picture of the past, victims have been afforded rights they did not receive from the Israeli trial. Sobibor survivor Thomas Blatt, who testified in the trial, stated that: "I'm not after revenge. I only seek justice. This will be important historically 200 years from now."[101] This justice will occur even though Germany chose not to punish Demjanjuk heavily. As Hannah Arendt argues, Nazi atrocity "explodes the limits of the law…for these crimes, no punishment is severe enough."[102] Justice was done not through the actual punishment imposed on Demjanjuk, but through other means. Stephan Kramer, general secretary of the Central Consistory of Jews in Germany, states: "I am not as naive as to believe that he [Demjanjuk] will spend even one day in prison - but we will get a discussion about justice in post-war Germany."[103] Kramer may turn out to be right – the court sentenced Demjanjuk to five years in prison, but he has been released pending an appeal, which could take up to a year.[104]

In cases like this, justice is done not though the Kantian idea of retribution, nor is it likely that punishment will deter future genocidaires. However, what Arendt saw as a major flaw in the Eichmann trial – its attempt to move past the traditional juridical goal of punishing an offender – may not be a flaw at all.[105] Arendt's legalist approach misses the trials "narrativist and representational potential for creating a collective memory of the Holocaust."[106] Atrocity trials force us to move beyond traditional views of justice. Justice is done instead through an establishment of history, and the commemoration of the suffering of victims. In response to Demjanjuk's conviction, Zuroff wrote: "Today's verdict is a long-awaited victory for the victims, their families and people of moral conscience."[107] Demjanjuk's conviction sent the message that death camp *Wachmanner* should not be allowed to live with impunity, and also shed light on how foreigners helped to run that Nazi machine. Though these lessons are significant, the greater success of the German trial was that it helped to redeem the didactic and commemorative purposes served by Holocaust trials, and could serve as a model for atrocity trials in the future.

Endnotes

[1] Dominik J. Schaller, "From the Editor: The Demjanjuk case – Final Justice?" *Journal of Genocide Research* 11 (2009).
[2] Lisa J. Del Pizzo, "Not Guilty – But not Innocent: An Analysis of the Acquittal of John Demjanjuk and Its Impact on the Future of Nazi War Crimes Trials," *Boston College International and Comparative Law Review* 18 (1995): 178.
[3] "Demjanjuk's Trial is turning into an Embarrassment for many Israelis," *The Toronto Star*, June 3, 1992.
[4] Cheryl Karz, "Injustice Revisited: Did Ivan the Terrible get Away Again?," *Loyola of Los Angeles International & Comparative Law Review* 16 (1994): 980.
[5] Joshua Muravchik, "Demjanjuk: A Summing-Up," *Commentary* (1997).
[6] Gitta Sereny, "John Demjanjuk and the Failure of Justice," *The New York Review of Books*, October 8, 1992.
[7] Rena Hozore Reiss, "The Extradition of John Demjanjuk: War Crimes, Universality Jurisdiction, and the Political Offense Doctrine," *Cornell International Law Journal* 20.2 (1987): 287.
[8] Annie Fung, "The Extradition of John Demjanjuk as 'Ivan the Terrible,'" *New York Law School Journal of Comparative and International Law* 14 (1993): 473.
[9] Fung, "The Extradition of John Demjanjuk as 'Ivan the Terrible,'" 480.
[10] Id
[11] Reiss, "The Extradition of John Demjanjuk," 291.
[12] Fung, "The Extradition of John Demjanjuk as 'Ivan the Terrible,'" 475.
[13] Id
[14] Sereny, "John Demjanjuk and the Failure of Justice."
[15] Sereny, "John Demjanjuk and the Failure of Justice."
[16] Id
[17] Muravchik, "Demjanjuk: A Summing-Up," 47.
[18] Patrick J. Buchanan, "Nazi Butcher or Mistaken Identity," *The Washington Post*, September 28, 1986.
[19] Del Pizzo, "Not Guilty – But not Innocent," 155-6.
[20] Id at 158
[21] Quoted in: Id at 157
[22] Id at 158
[23] Id at 160
[24] Id at 161
[25] Id at 168
[26] Sereny, "John Demjanjuk and the Failure of Justice."
[27] Quoted in: Alfred de Zayas, "Impunity for War Crimes, or Mistaken Identity?" *Rutgers University School of Law Criminal Law Forum* 6 (1995): 554.
[28] Del Pizzo, "Not Guilty – But not Innocent," 170.
[29] Fung, "The Extradition of John Demjanjuk as 'Ivan the Terrible.'" Also see: Del Pizzo, "Not Guilty – But not Innocent."
[30] Ingo Muller, *Hitler's Justice: The Courts of the Third Reich*, (Cambridge: Harvard University Press): 1992, 253.
[31] Katie Engelhart, "The Last Great Nazi Trial," *Maclean's* 122.44 (2009): 33.
[32] Id . Note, the number 27,900 is reported variously as 28,060 and 29,000 in different texts. I chose to report the lower bound, but since the number is so large the exact figure is not of enormous importance.

[33] Mary M. Lane, "Demjanjuk Trial Gets Bogged Down," *The Wall Street Journal*, March 21, 2011.
[34] Bryony Jones, "Sobibor victim's niece 'relieved' at Demjanjuk verdict," *CNN News*, May 12, 2011. http://www.cnn.com/2011/WORLD/europe/05/12/germany.demjanjuk.victim/.
[35] Sereny, "John Demjanjuk and the Failure of Justice."
[36] Id
[37] Id
[38] Lawrence Douglas, *The Memory of Judgment: Making Law and History in the Trials of the Holocaust*, (New Haven: Yale University Press): 2001.
[39] Sereny, "John Demjanjuk and the Failure of Justice."
[40] Douglas, *The Memory of Judgment*, 42.
[41] Id at 51-2
[42] Id at 77-78
[43] Id at 78
[44] Id at 196
[45] Id at 149
[46] Leon Wieseltier, "Demjanjuk in Jerusalem: So Evil isn't Banal After All," *The New Republic*, March 30, 1987.
[47] Id
[48] Id
[49] Id
[50] Id
[51] Id
[52] Douglas, *The Memory of Judgment*, 196.
[53] Id at 197
[54] Quoted in: Id at 204.
[55] Id at 203.
[56] Quoted in: Id at 203
[57] Id at 198
[58] Id at 198
[59] Id at 289
[60] "Demjanjuk's Trial is turning into an Embarrassment for many Israelis," *The Toronto Star*, June 3, 1992.
[61] Sereny, "John Demjanjuk and the Failure of Justice."
[62] Wieseltier, "Demjanjuk in Jerusalem."
[63] Douglas, *The Memory of Judgment*, 206.
[64] Id at 204
[65] Legal issues involving the extradition request, as well as concerns over the extra harm that could be done if the second trial failed, prevented a re-trial from occurring.
[66] Engelhart, "The Last Great Nazi Trial," 30
[67] Id
[68] Id at 29
[69] Id at 32
[70] Sereny, "John Demjanjuk and the Failure of Justice."
[71] Engelhart, "The Last Great Nazi Trial," 30.
[72] Id
[73] Schaller, "From the Editor: The Demjanjuk case – Final Justice?" 196.
[74] Del Pizzo, "Not Guilty – But not Innocent," 178.

[75] Marilyn H. Karfeld, "Spain, Germany May Seek Demjanjuk's Extradition," *Cleveland Jewish News*, June 27, 2008.
[76] Mary M. Lane, "Demjanjuk Trial Gets Bogged Down," *The Wall Street Journal*, March 21, 2011.
[77] Id .
[78] Jones, "Sobibor victim's niece 'relieved' at Demjanjuk verdict."
[79] Semotiuk, "The Case of John Demjanjuk: Test of our Commitment to Basic Values."
[80] Engelhart, "The Last Great Nazi Trial," 32.
[81] Susan Houlton, "Nazi Death Camp Survivor gives Testimony at Demjanjuk Trial," *Deutsche Welle*, January 19, 2010. Accessed March 12, 2011. http://www.dw-world.de/dw/article/0,,5147424,00.html.
[82] Eric S. Kobrick, "The Ex Post Facto Prohibition and the Exercise of Universal Jurisdiction over International Crimes," *Columbia Law Review* 87.7 (1987).
[83] Susanne Back, "Does Age Prevent Punishment? The Struggles of the German Juridical System with Alleged Nazi Criminals: Commentary on the Criminal Proceedings Against John Demjanjuk and Heinrich Boere," *German Law Journal* 11.3 (2010): 360.
[84] Id
[85] Quoted in: "Demjanjuk Appears in German Court," *CBCNews*, May 12, 2009, http://www.cbc.ca/news/world/story/2009/05/12/demjanjuk-germany-nazi012.html.
[86] Schaller, "From the Editor: The Demjanjuk case – Final Justice?" 196.
[87] Sharfman, "The Jewish Community's Reactions to the John Demjanjuk Trials," 33.
[88] Schaller, "From the Editor: The Demjanjuk case – Final Justice?" 196.
[89] Alan Cowell and Jack Ewing, "Demjanjuk Convicted for Role in Nazi Death Camp," *New York Times*, May 12, 2011, http://www.nytimes.com/2011/05/13/world/europe/13nazi.html?partner=rss&emc=rss.
[90] Jones, "Sobibor victim's niece 'relieved' at Demjanjuk verdict."
[91] Quoted in: Id
[92] Lawrence Douglas, "Crimes of Atrocity, the Problem of Punishment and the *Situ* of Law," Manuscript Draft. 2011.
[93] Martti Koskenniemi, "Between Impunity and Show Trials," *Max Planck Yearbook of United Nations Laws* 6 (2002).
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[96] Muravchik, "Demjanjuk: A Summing-Up," 50.
[97] Wieseltier, "Demjanjuk in Jerusalem: So Evil isn't Banal After All."
[98] Id
[99] Susan. "Nazi Death Camp Survivor gives Testimony at Demjanjuk Trial."
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[101] Quoted in: Id
[102] Quoted in: Lawrence Douglas, "Crimes of Atrocity, the Problem of Punishment and the *Situ* of Law," Manuscript Draft, 2011.
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[104] Alan Cowell and Jack Ewing, "Demjanjuk Convicted for Role in Nazi Death Camp."
[105] Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil,* (New York: Penguin Books) 1963.
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[107] Thomas J. Sheeran, "In Ohio, Divided Reactions to Demjanjuk Outcomes," May 12, 2011, http://www.newsok.com/in-ohio-divided-reaction-to-demjanjuk-outcome/article/feed/258620?custom_click=pod_headline_usnational-news

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