YONSEI LAW JOURNAL

VOL.1 NO. 2, NOVEMBER 2010

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YONSEI LAW JOURNAL

VOL.1 NO. 2, NOVEMBER 2010

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YONSEI LAW JOURNAL

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ARTICLE

TRIPS, HUMAN RIGHTS, AND THE HEALTH IMPACT FUND[*]

Thomas Pogge[**]

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[*] This essay draws on chapter 6 of Aidan Hollis and Thomas Pogge, *The Health Impact Fund: Making New Medicines Accessible to All* (Oslo and New Haven: Incentives for Global Health, 2008), available at www.healthimpactfund.org. While I did write the initial draft of this chapter (in July 2008), the Health Impact Fund project is a joint effort to which many others have also contributed greatly. Aidan Hollis, especially, has been thoroughly involved in this effort and has played a key role in shaping the HIF proposal as well as the group developing it. I also want to acknowledge generous support for our work from the Australian Research Council, the BUPA Foundation, the European Commission, the Australian National University's Centre for Applied Philosophy and Public Ethics, and Oslo University's Centre for the Study of Mind in Nature.

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ABSTRACT

Is it morally permissible to impose strong patent protections where doing so prices important new medicines out of the reach of many poor people? This essay argues that doing so is not permissible and in fact a human rights violation. To become human rights compliant, the global patent regime must be complemented by an enduring institutional mechanism that effectively incentivizes the development and distribution of high-impact medicines that meet the health needs of poor people and are accessible to them. The Health Impact Fund (HIF) is designed to be such a complement. Toward the end, the essay discusses and refutes three popular arguments claiming that no such complement is needed because high prices for vital patented medicines, backed by the legal suppression of cheaper generic substitutes, do no injustice to poor people.

INTRODUCTION

One important aspect of globalization is the increasingly dense and influential regime of global rules that govern and shape interactions everywhere. Covering trade, investment, loans, patents, copyrights, trademarks, labor standards, environmental protection, use of seabed resources, production and marketing of weapons, maintenance of public security, and much else, these rules — structuring and enabling, permitting and constraining — have a profound impact on the lives of human beings and on the ecology of our planet. Given this profound impact, it is a moral imperative for those who wield power over the shaping of these rules to reflect carefully on their overall effects, especially on the background of feasible alternatives.

It is with this mindset that we should approach the adoption and ongoing implementation of the TRIPS Agreement, which adds yet another morally significant set of rules to the global scheme. These are the rules governing the development and sale of medicines worldwide. While it is left to individual states to implement TRIPS through national legislation and enforcement, the TRIPS Agreement lays down strict limits with which all states must comply. For instance, under the agreement all member states are required to offer 20-year patents for a wide range of innovations, including pharmaceutical innovations such as drugs and vaccines.

In much of my recent work, I have argued that the TRIPS regime should be supplemented by the "Health Impact Fund" (henceforth "HIF"), which would lead to wider access to essential medicines for the global poor. The present Article aims to build on this work, showing how the argument for the HIF can be grounded in a narrow and widely acceptable interpretation of internationally recognized human rights norms. The imposition of the TRIPS regime, without any supplementary mechanism to guarantee wider access to

essential medicines, is therefore not merely a failure to help the global poor; it also constitutes a large-scale human rights violation. The establishment of the HIF, or of some other feasible alternative, is necessary for wealthy countries to be in compliance with their basic human rights obligations.

The Article proceeds as follows. Part II puts forth a conception of human rights as a globally sharable minimal standard of institutional assessment based on a minimalist interpretation of internationally recognized human rights. According to this conception of human rights, the current regime can be judged, at least *prima facie*, to be violating the human rights of the global poor. However, this *prima facie* condemnation of the current regime can be ultimately vindicated only if it can be shown that there is at least one feasible alternative scheme under which the human rights of the global poor are more secure. This task is taken up in Part III, which shows how such a scheme is possible through the adoption of the Health Impact Fund. Finally, Part IV replies to three possible objections to the human rights approach as I develop it in the previous parts.

I. HUMAN RIGHTS AS A GLOBALLY SHAREABLE MINIMAL STANDARD OF INSTITUTIONAL ASSESSMENT

This Part lays out a widely shareable conception of human rights and then shows how it can be used to condemn the current institutional scheme governing the development and sale of essential medicines. Grounding the argument for the HIF in a conception of human rights rather than a broader conception of justice has both moral and strategic advantages. Morally, the arguments in favor of each of the leading conceptions of justice (such as utilitarianism and Rawls's two principles of justice) seem much more contestable than those in favor of a limited conception of basic human rights. Therefore, resting the case for the HIF on one of the leading conceptions of justice would tie the fate of the HIF to the success or failure of that conception. And strategically, even if there were decisive arguments in favor of one or another conception of justice, there is nonetheless no conception that is widely endorsed across regions and cultures. From a strategic standpoint, then, the implementation of the HIF is more likely to be successful if it can be grounded in widely and publicly recognized human rights norms.

There is indeed a widespread and enduring consensus on the high moral priority of certain fundamental human rights. To be sure, human rights constitute very minimal requirements, and most would reject the view that anything that does not violate human rights is therefore permissible. By adopting a human rights standard, I do not endorse this view but merely commit myself to the converse: anything that does violate human rights is therefore impermissible.

What, then, is the content of these minimal, widely recognized human rights requirements? Human rights have come to be understood as entailing counterpart duties to *respect*, *protect*, and *fulfill*.[1] On this understanding, it would not be difficult to show that adding the HIF to the current regime would be a great advance in terms of protecting and fulfilling human rights – especially in regard to social and economic human rights as formulated, for example, in the 1966 International Covenant on Social, Economic and Cultural Rights which expands upon Article 25 of the 1948 Universal Declaration of Human Rights:

> Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care.[2]

In order to make this conception of human rights truly shareable among different regions and cultures, it will be necessary to limit it in two further ways.

First, affluent countries might reject the notion that their duties with regard to human rights require them to "protect" and "fulfill" these rights. They may recognize human rights only in the narrow sense where the only duties these rights entail are duties to respect, that is, duties not actively to violate human rights. I do not endorse this view. But in keeping with the stated goal of relying only on a widely shareable conception of human rights, I work with this narrow understanding of human rights throughout.

Understood in this way as a negative duty, the duty to respect human rights constrains how agents — principally governments, but also corporations, military units, rebel groups and

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[1] This idea goes back to HENRY SHUE, BASIC RIGHTS (1980). It was refined in THE RIGHT TO FOOD (Philip Alston & Katarina Tomaševski eds.,1984) and in FOOD AS A HUMAN RIGHT 169-74 (Asbjørn Eide, Wenche Barth Eide, Susantha Goonatilake & Joan Gussow eds.,1984). This account then found its way into Article 15 of General Comment 12 (*see* ECONOMIC AND SOCIAL COUNCIL OF UNITED NATIONS, SUBSTANTIVE ISSUES ARISING IN THE IMPLEMENTATION OF THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS: GENERAL COMMENT 12 (1999), *available at* www.unhchr.ch/tbs/doc.nsf/0/3d02758c707031d58025677f003b73b9?Opendocument), adopted by the UN Committee on Economic, Social and Cultural Rights in 1999, which reads as follows: "The right to adequate food, like any other human right, imposes three types or levels of obligations on States parties: the obligations to respect, to protect and to fulfill. In turn, the obligation to fulfill incorporates both an obligation to facilitate and an obligation to provide. The obligation to respect existing access to adequate food requires States parties not to take any measures that result in preventing such access. The obligation to protect requires measures by the State to ensure that enterprises or individuals do not deprive individuals of their access to adequate food. The obligation to fulfill (facilitate) means the State must pro-actively engage in activities intended to strengthen people's access to and utilization of resources and means to ensure their livelihood, including food security. Finally, whenever an individual or group is unable, for reasons beyond their control, to enjoy the right to adequate food by the means at their disposal, States have the obligation to fulfill (provide) that right directly. This obligation also applies for persons who are victims of natural or other disasters."

[2] Universal Declaration of Human Rights art. 25 (1), Dec. 10, 1948, UN Doc A/810 at 71 (1948).

other organized collective agents — may treat human beings. The human-rights violating treatment in question may involve direct action: as when a government terrorizes opposition candidates and voters, or tortures prisoners. In other cases, human-rights violating treatment is more indirect, involving the design and imposition of social rules, as when discriminatory burdens are imposed by law on certain minorities, or when a government policy systematically deprives some group of its livelihood. In such cases, it is in the first instance the rules or policies that violate human rights. But in the final analysis these violations are committed by those who formulate, interpret, and enforce these rules and policies and by those on whose behalf the former are acting. It is this latter notion of respecting human rights in the design and imposition of social rules that can be appealed to in criticizing the current TRIPS regime and in advocating for the HIF. Those who impose the TRIPS regimes commit an ongoing violation of the human rights of the global poor.

As mentioned above, there is a second dimension in which human rights can be given a wider or narrower understanding. The demand that social rules must be human-rights compliant is often interpreted to entail that a state realizes a particular human right only if it explicitly incorporates this right into its laws or constitution. So interpreted, the demand has been rejected by many, most prominently by appeal to "Asian values."[3] This rejection involves the thought that human rights promote individualism or even egoism, lead persons to view themselves as Westerners — as atomized, autonomous, secular, and self-interested individuals ready to insist on their rights no matter what the cost may be to others or to society at large.

Once again, I do not endorse this rejection. Yet, in order to present as broadly-based an argument as possible, I appeal here to human rights in a narrower, more widely sharable sense. This sense can be explicated as follows: There are various basic goods that are essential to a minimally worthwhile human life. All human beings ought to have secure access to these goods. Insofar as is reasonably possible, social rules should then be so designed that the human beings subjected to them have secure access to these essentials. This is what human rights require. The assertion that there is a human right to a minimally adequate food supply entails then that, insofar as reasonably possible, social rules must be formulated so that all human beings have secure access to a minimally adequate food supply. This assertion does not entail that human beings must have a legal right to a minimally adequate food supply. If a state is so organized that its citizens have secure access to food even without a legal right thereto, then this state is fully compliant with the human right as I understand it.

This understanding of human rights is not subject to the usual critique based on Asian values. Rather, it accommodates this critique by accommodating its central point:

[3] JOANNE BAUER & DANIEL BELL, THE EAST ASIAN CHALLENGE TO HUMAN RIGHTS (1999).

human rights leave each state free to decide how to achieve secure access to their objects. Some societies may choose to do this through legal rights and legal institutions; others may do this through a communal ethos of virtue and solidarity. So long as people really have secure access to the objects of their human rights, both models, and others as well, are fully human-rights compliant in the narrow sense I invoke.

Before turning to ask whether the current TRIPS-based legal regime violates human rights, I briefly mention a third possible narrowing of the proposed human rights framework that I believe should not be accepted: While national laws can violate human rights, some may hold, international rules and treaties cannot in principle do so. But this is not a plausible limitation. Imagine a state that has made it legally permissible to assault those who join a labor union. Such a law is a clear-cut violation of the human right to life, liberty and security of person. This human right violation would not disappear were it the case that the state in question concluded an international agreement that commits it to the offensive legislation. On the contrary, the fact that several states jointly commit themselves to the offensive legal permission can only heighten their responsibility. With the agreement, each state remains fully responsible for the human-rights-violating character of its own national legislation and assumes in addition some responsibility for the contractually mandated human-rights- violating laws that other treaty members are imposing within their territories. States that bind one another to the imposition of human-rights-violating rules become accomplices in one another's human rights violations. Human rights therefore constrain the design of international rules and treaties no less than that of national legislation. This conclusion is firmly endorsed in the Universal Declaration of Human Rights:

> Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.[4]

Again, I use the doubly narrow understanding of human rights in interpreting this Article. It then requires that any national and international order must be shaped so that it does not deprive human beings subjected to it of secure access to the objects of their human rights. In a world of sovereign states, it may not be possible to design international institutional arrangements that effectively guarantee secure access. For this reason, it makes sense to require merely that the international order must be such that secure access *can* be fully realized. The international order must not obstruct the realization of human rights. It must not, for instance, undermine either the capacity or the willingness of national governments fully to realize human rights. A design of the international order fails to be human-rights compliant insofar as it foreseeably gives rise to an avoidably large number of

[4] Universal Declaration of Human Rights, *supra* note 4, art. 28.

governments that lack either the means or the motivation to realize human rights.

The preceding account of human rights, then, represents the narrowest plausible account that is consistent with internationally recognized human rights norms. With this account on hand, we may turn to ask whether the current scheme of national and international rules governing the development and sale of medicines worldwide violates human rights. Does the current scheme deprive human beings subjected to it of secure access to the objects of their human rights?

There seems to be at least a good *prima facie* case for claiming that the current regime does indeed violate human rights in this way. Due to the current TRIPS regime, many people lack secure access to the medicines they need. Often, these medicines are known and available, but nonetheless not accessible to the poor on account of their high prices. There are generic producers willing and able to manufacture these medicines and to sell them at much lower prices. But these firms are legally barred from doing this by patents that governments are issuing in accordance with their obligations under the TRIPS Agreement. This agreement blocks mutually advantageous sales of life-saving medicines at low prices. By blocking such sales, it causes the deaths of many poor people and deprives many more of a standard of living that is adequate for their health. (The very high mark-ups on patented medicines may render inadequate an income that would be adequate if the needed medicine were available at a lower price.) Therefore, it might be claimed, the current regime is violating the human rights of poor people worldwide by undermining their secure access to health and survival.

A defender of the current regime, however, might dispute this conclusion by emphasizing its benefits. Here the most significant benefit, which can also be cast in human rights terms, is the future availability of important medicines that would not have existed if strong patent protections had not been extended into the less developed countries. This benefit can be appealed to by pharmaceutical companies, which can say: "If we did not fully exploit our patent privileges, we would not have the money to undertake many of the research projects we are now engaged in. And there would then be fewer important medicines coming off patent in the future, fewer good medicines that will protect poor people in the future. Some poor people suffer and die now because of the high prices we charge under patent protection. But more poor people will be saved in the future, after expiration of the patents that enabled us to finance the innovation. And the cost is necessary for realizing the greater gain: we simply cannot develop new medicines that future poor people will be able to obtain at generic prices unless we keep raising money by charging high prices for medicines still under patent protection."

While pharmaceutical companies can plausibly make this argument under the current scheme, the question before us is whether there is an alternative scheme that guarantees more secure access to health and survival, and specifically, whether a scheme is

possible in which future research projects can be financed without pricing poor people out of the market for essential medicines. If this were the case, then the imposition of the current TRIPS regime would constitute a large-scale violation of the human rights of the global poor. The following Part III will show the HIF to be a feasible complement to the TRIPS regime that guarantees the global poor greater access to essential medicines at very little cost to wealthy countries. It is on the background of this feasible alternative scheme – combining TRIPS with the HIF – that the current regime can ultimately be condemned as a massive violation of the human rights of the global poor.

II. THE HEALTH IMPACT FUND AS A FEASIBLE COMPLEMENT

A. BASIC ELEMENTS OF THE HEALTH IMPACT FUND

Financed primarily by governments, the Health Impact Fund is a pay-for-performance mechanism that would offer innovators the option to register any new medicine or, under certain conditions, also a traditional medicine or a new use of an existing medicine. The scheme would supplement but not replace the current patent regime. That is, innovators would have the option, but are under no obligation, to register a given innovation under the new scheme; they may instead choose to register the innovation under the traditional patent regime. An innovator choosing to register a product under the HIF scheme would undertake to make it available, during its first 10 years on the market, wherever it is needed at no more than the lowest feasible cost of production and distribution. The innovator would further commit to allowing, at no charge, generic production and distribution of the product after these ten years have ended (if its patents on the product have not yet expired). In exchange, the registrant would receive, during that 10-year period, annual reward payments based on its product's health impact. The reward payments would be part of a large annual pay-out, with each registered product receiving a share equal to its share of the assessed health impact of all HIF-registered products in the relevant year. If the HIF were found to work well, its annual reward pools could be scaled up to attract an increasing share of new medicines.

The HIF would have two major benefits. First, it would foster the development of new high-impact medicines — also against diseases concentrated among the poor, such as tuberculosis, malaria, and other tropical diseases, which are now neglected because innovators cannot recover their R&D costs from sales to the poor. The option of an alternative reward based on global health impact would transform heretofore neglected diseases into some of the most lucrative pharmaceutical R&D opportunities. Second, the HIF would also promote access to new medicines by limiting the price of any registered

product to the lowest feasible cost of production and distribution. And in addition, the HIF would motivate registrants to ensure that their products are widely available, perhaps at even lower prices, and that they are competently prescribed and optimally used. Registrants would be rewarded not for selling their products, but for making them effective toward improving global health. In sum, the HIF would (1) significantly increase pharmaceutical research and development of treatments primarily affecting the global poor; and (2) it would make these new treatments as widely available as possible to the global poor.

If some pharmaceutical R&D were financed through tax-funded HIF rewards, much of the cost would be borne by affluent populations and people — just like today. But there are important differences. First, innovators make no profit from the sale of their medicine as such — they profit only insofar as this medicine is actually made effective toward improving patient health. Thanks to this new incentive, patients would realize greater therapeutic benefits from the medicines they receive. Second, in order to profit from serving affluent patients, innovators do not need to exclude poor patients. On the contrary, they would profit equally from serving poor patients, too, at the same low price. Health gains achieved for any patients — rich or poor — would contribute equally toward the innovator's bottom line.

The HIF will provide optimal incentives only if potential registrants are assured that the rewards will actually be there in the decade following market approval. Core funding of the HIF is therefore best guaranteed by a broad partnership of countries. If governments representing half of global income agreed to contribute just 0.02 percent of their gross national incomes (20 won of every 100,000), the HIF could get started with USD 6 billion annually. This is a reasonable minimum because the high cost of developing new medicines requires large rewards, because volatility of the reward rate should be kept low, and also because the health impact assessment costs should not absorb more than about 10 percent of the HIF budget.

The HIF can be seen as an ongoing competition among innovators that ranges over all countries and all diseases, with firms earning more money if their product has a larger impact on health. Health impact can be measured in terms of the number of quality-adjusted life years (QALYs) saved worldwide. The QALY metric is already extensively used by private and state insurers in determining prices for new drugs, so employing it in calculating HIF rewards would not be a significant departure from existing practice. Taking as a benchmark the pharmaceutical arsenal before a registered medicine was introduced, the HIF would estimate to what extent the new medicine has added to the length and quality of human lives. This estimate would be based on data from clinical trials, including pragmatic trials in real-life settings, on tracking randomly selected medicines (identifiable by serial numbers) to their end users, and on statistical analysis of sales data as correlated with data

about the global burden of disease.[5] These estimates would necessarily be rough, at least in the early years. But so long as any errors are random, or at least not exploitable by registrants, HIF incentives would be only minimally disturbed.

With the HIF so designed, innovators would choose to register those products that could reduce the global burden of disease most cost-effectively. Products with the largest health impact would make the most money — creating exactly the right incentives for innovation. And because the HIF would be an optional system, the rate of reward is certain to be reasonable. If rewards were too high, new registrants would enter and reduce the uniform reward rate (money per QALY). If profits were too low, the reward rate would naturally increase as firms would choose, for more of their new products, to forego HIF registration in favor of exploiting their patent-protected pricing powers. Competition would ensure that registered products are rewarded at a rate that is profitable for innovators and maximizes the effect of the HIF.

To be certain that the HIF is cost-effective relative to other public health expenditures, one can stipulate a maximum reward rate; if one year's funds are not fully used, the remainder can be rolled over into future years. To reassure potential innovators, one can also add some protection against unreasonably low rewards.[6]

B. COMPARING THE PROPOSED TRIPS+HIF SYSTEM WITH THE CURRENT REGIME

By working together to implement the HIF, while retaining the TRIPS Agreement and its benefits, the world's governments can take an important step toward freeing the poorer three-quarters of humanity from their imprisonment in a cycle of mutually reinforcing poverty and ill health, while also benefiting the fourth quarter — those who are relatively wealthy. No government will want to create the HIF unilaterally. But it can easily be created by a group of states even if others choose not to participate. Many of the richer states could afford to create it on their own. And every country, no matter how small or how poor, can publicly declare its commitment to start or join a partnership of countries ready to underwrite the HIF. The feasibility of the HIF is also enhanced by the fact that it requires no radical overhaul of the current TRIPS regime. In other words, I am not

[5] We are currently working on a study about the potential role of cell phone technology in distributing and monitoring the distribution of HIF-registered products. This technology is amazingly cheap and widely used even in the poorest countries. Patients could use their phone to pay for medicines and then also use this phone to report excessive prices or to answer questions about their experience with the product. Such random interviews could provide evidence about how much of a specific medicine was actually consumed in some specific geographical area and what health gains per unit were thereby achieved.

[6] AIDAN HOLLIS & THOMAS POGGE, THE HEALTH IMPACT FUND: MAKING NEW MEDICINES ACCESSIBLE FOR ALL, 19–20 (2008).

advocating that HIF replace the TRIPS Agreement, but that it be added as a supplement to the current TRIPS regime.

This is then the central moral question we face: is it morally permissible to continue to impose the existing global patent regime, given that we have the known option of complementing this regime with the HIF? Is it morally permissible for any state to reject creation of the HIF in favor of the current regime?

Answering this question requires discussing what difference the HIF would make. The most important consequences of creating the HIF can be brought under three headings: Innovation, Price, and Last Mile.

1. INNOVATION

The HIF would mitigate the long-standing problem of incentivizing the development of new medicines that would have large health impacts but small profits under the current regime — because of impoverished markets, for instance, or because of inadequate protection from competition (as in the case of new uses). With the HIF in place, all diseases that substantially aggravate the global burden of disease would come to be among the more lucrative pharmaceutical research opportunities. Without losing any of their present opportunities to cater to the health needs and fads of the affluent, pharmaceutical companies would have additional opportunities to develop new medicines against heretofore neglected diseases, and they would be given an incentive to do so with an eye to prioritizing the diseases they can fight most cost-effectively. The notion of cost-effectiveness relevant here relates a familiar notion of cost to a rather unfamiliar notion of benefit. Costs comprise the large fixed costs of bringing a new medicine to market (research, patenting, testing, and obtaining regulatory approval) plus the variable costs of production, distribution, and marketing. Benefit is the assessed global health impact attributable to the new medicine. Given similar costs across the various plausible target diseases, firms will concentrate on researching the diseases against which the largest health impact can be achieved. These will include HIV/AIDS, tuberculosis, malaria, and various other tropical diseases — such as dengue fever, leprosy, trypanosomiasis (sleeping sickness and Chagas disease), onchocerciasis (river blindness), leishmaniasis, Buruli ulcer, lymphatic filariasis, and schistosomiasis (bilharzia) — in regard to which the present arsenal of pharmaceutical interventions is woefully inadequate.

2. PRICE

HIF-registered medicines will be available worldwide at very low prices, usually

even below prices currently charged for comparable generic medicines.[7] HIF registrants will be obliged by contract to sell their products everywhere at no more than the lowest feasible variable cost[8] and will, in the case of the most therapeutically effective products, have an incentive to choose even lower prices.[9] Some such cheap HIF-registered medicines would not have been developed but for the HIF. But there will be other cheap registered medicines that could have been profitably developed even without the HIF. In these latter cases, the innovating firm is choosing to forgo patent-protected high prices in favor of registering its product with the HIF because it expects to profit more from health impact rewards than through mark-ups. In such cases, the HIF would not bring the medicine into existence, but would still make a huge difference to its price during its years under patent. Products priced by a profit-maximizing monopolist are always marked up to the point where some cannot afford them. When economic inequalities are vast (as they are today on the global scale as well as in many developing countries), then the profit-maximizing price may exclude a large majority of potential buyers.[10] When the products are important new medicines, the aggregate harm suffered by this excluded majority can be staggering. Because registration would be especially attractive for such high-impact drugs, the HIF would greatly mitigate this harm resulting from the current exclusion of a majority of humankind from medicines that can be manufactured very cheaply.

3. LAST MILE

Poor people's access to vital medicines is currently obstructed by various obstacles other than price, such as lack of local availability of a medicine, lack of available knowledge and information about diseases and their remedies, lack of refrigerators or electricity, lack of medical personnel or diagnostic equipment, and gross negligence,

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[7] This would be so because most markets today display only a very imperfect competition among generic producers, because large sales volumes of HIF-registered medicines would lower production costs per unit, and because HIF-registrants would often benefit from selling even below their own cost.

[8] On how to define the lowest feasible cost, see Aidan Hollis, *The Health Impact Fund and Price Determination*, IGH Discussion Paper no. 1 (2009), *available at* www.yale.edu/macmillan/igh/files/papers/DP1_Hollis.pdf.

[9] They will want to do this so long as the marginal financial gain, arising mainly from the HIF reward for the additional health impact facilitated by the lower price, exceeds the marginal loss from the price reduction, that is, (expressed in a differential inequality) so long as

$\delta Q(R+p-c) > Q\delta p$.

Here Q stands for the consumed quantity of the medicine, R for the average HIF reward per unit sold, p for the sales price per unit, and c for the marginal cost per unit. The HIF will probably impose not merely an upper, but also a lower price limit in order to deter frivolous use and waste (which might result in environmental damage). If the condition stated in the inequality holds all the way down to this lower limit, then the registrant will earn most by choosing this lowest permissible price for its product.

[10] Sean Flynn, Aidan Hollis & Mike Palmedo, *An Economic Justification for Open Access to Essential Medicine Patents in Developing Countries*, 37 J.L. MED. & ETHICS 2,184-208 (2009).

incompetence and corruption in the health systems of many poor countries. Many governments of such countries have shown themselves unable or unwilling to address these obstacles. Inability is often a matter of lack of resources as when a poor country's government lacks the funds to train and retain local doctors and nurses. Unwillingness is typically due to a lack of democratic accountability which allows rulers to stay in power and prosper even while the poorer segments of their country's population are decimated by malnutrition and disease. HIF registrants are much better positioned than the very poor to respond to such government failures. Given the incentive to make their registered medicine competently available to as many poor patients as they can cost-effectively reach, such registrants would — presumably in collaboration with one another and with locally operating national and international governmental agencies and non-governmental organizations — provide knowledge, information, expertise, training and funds to help maintain basic health infrastructure wherever they can profitably do so. Such registrants may also bring the pressure of publicity to bear on governments that obstruct health improvements for their poor compatriots. To be sure, these are tasks that other governments, media, NGOs and private citizens can and should also tackle. But more effort than presently expended is clearly needed, and profit-oriented companies can make an important contribution.

This Part III, showing the benefits of the HIF as a supplement to the current TRIPS regime, completes the human rights argument. Appealing to human rights that governments themselves have repeatedly recognized as binding constraints, the argument shows that, if a HIF-like complement to the current regime is feasible, then implementing it is morally required for the sake of realizing the human rights of the global poor. Under the existing international order, these human rights are not realized, as the poorer majority of the world's people lack secure access to a standard of living adequate for their health and well-being due to the imposition of the TRIPS regime, unsupplemented by a mechanism such as the HIF. One factor preventing secure access is the suppression of the trade in generic versions of important new medicines. The possibility of adding the HIF to the current global order shows that much of the present human rights deficit is avoidable. Maintaining the current regime without the HIF constitutes a massive violation of the human rights of the global poor. So long as there will be poor people in this world — whether in poor or rich countries — who are unable to obtain medicines at patent-protected high prices, the current regime will gravely harm, and kill, many of them. If governments continue to impose and enforce the current regime nonetheless, they are thereby violating the human rights of these innocent people.

III. ADDRESSING POTENTIAL OBJECTIONS TO THE HUMAN RIGHTS ARGUMENT

This Part puts forth three possible objections to the human rights argument and offers rebuttals to each of them.

A. FIRST OBJECTION: THE POOR ARE DOOMED ANYWAY

The first objection to the human rights argument is that with or without the HIF, the poor would be doomed anyway. Therefore, the failure to implement the HIF alongside TRIPS does not constitute a human rights violation. Along these lines, representatives of pharmaceutical companies often argue that high prices do not explain why so many poor people are excluded from advanced medicines. Rather, it is claimed, most of those who lack access to essential medicines would still lack access even if these medicines were not patented in their country. This is so because the health systems in many poor countries are in very bad condition, making it highly unlikely that the right medicine would be prescribed, dispensed, and consumed, and also because many of these patients are so poor that they would find it difficult or impossible to pay for the needed medicine even at the cost of production. That this is so is made evident by the fact that poor people often lack access even to the cheap off-patent medicines they need.

Introducing into the less developed countries high pharmaceutical prices protected by much strengthened patent protections is therefore doing little, if any, harm. It is not substantially worsening the situation of poor people who are in any case doomed to suffer, without health care, from many diseases. It therefore does not constitute a human rights violation.

By way of reply, these claims are only partially true. The much lower prices typical of generic medicines would expand access substantially, most obviously among poorer people in the more affluent countries. And even in the poorest countries, low prices of high-impact medicines would greatly magnify the capacities of government health systems, of international organizations such as UNICEF, of NGOs and of various initiatives such as PEPFAR, GAVI, and GFATM.[11] The resources of all these agents and agencies — insufficient to meet the huge health needs of the global poor — would stretch much farther if they could buy medicines generically rather than at patent-protected high prices.

Moreover, the objection is morally troubling. Its central thought is that a barrier that prevents people from protecting themselves is morally acceptable — that is, may be interposed and need not be removed — so long as there is another barrier that is also

[11] UNICEF is the United Nations Children's Fund. PEPFAR is US President's Emergency Plan for AIDS Relief. GAVI is the Global Alliance for Vaccines and Immunisation. GFATM is the Global Fund to Fight AIDS, Tuberculosis and Malaria.

preventing them. The problem with this idea is that it symmetrically justifies — and thereby helps perpetuate — both barriers: "if each of two barriers is sufficient to prevent a person from saving her life, then there is nothing wrong with either barrier." Or, for the sequential case here at issue: "there is nothing wrong with erecting a further barrier excluding the poor from access to vital new medicines when this barrier adds little to the harm done by already existing barriers." This is a very strange morality indeed.

According to it, a barrier that is objectionable on account of the harm it inflicts becomes unobjectionable in the presence of a second barrier that has the same effect.
An obvious alternative to this bizarre idea is that no such barrier is acceptable, and that governments ought to remove all of them, or at least those that are their responsibility. This would imply, for example, that the governments of affluent countries should not impose asymmetrical global trading arrangements that benefit their wealthy citizens, but at the expense of preventing many poor populations from participating in global economic growth and thereby reaching minimally adequate levels of income and wealth. More to the point, wealthy countries should not pressure or induce the governments of poor countries to collect monopoly rents for their pharmaceutical companies from poor populations suffering from heavy disease burdens. And they should allow poor countries to build effective health systems rather than raid these countries for doctors and nurses who were trained there at great cost to the local population, which is urgently in need of their services. The HIF is designed to meet these obligations by helping to remove the institutional barriers that stand between poor people and the medical care they need. The HIF makes new medicines available to everyone at variable cost and it also provides incentives to the registrants of such medicines to promote their effective use.

To sum up, the first objection to the human rights argument fails on three counts. First, it is factually incorrect that high prices for patented medicines make no difference to the health situation of patients worldwide. Second, it is not morally permissible gravely to harm other people so long as they would suffer a similar harm in any case. A barrier that prevents people from obtaining life-saving medicine from willing generic suppliers is not acceptable merely because there is another barrier that has the same effect. Third, other last-mile barriers, which all-too-often exclude poor people even from cheap generic medicines, are likewise avoidable effects of institutional arrangements and, like the price barrier, would be greatly reduced by the HIF.

B. SECOND OBJECTION: APPEALING TO THE PRINCIPLE OF "VOLENTI NON FIT INIURIA"

Moral criticisms of the current global pharmaceutical patent regime, and of other global institutional rules claimed to be unfavorable to the poor, are often rejected as

inconsistent with a proper recognition of the sovereignty of states. Thus it might be argued that all states governed by the requirements of TRIPS have freely signed up to these requirements, without the promise of the HIF. Any complaint on their behalf against the current TRIPS regime is thereby preempted. As the venerable legal precepts states, *volenti not fit iniuria* — no injustice is being done to those who consent.

There are three individually sufficient responses to this objection. First, a customary retort to the *volenti* defense points to the highly unequal bargaining power and expertise of the national delegations that negotiated the WTO Treaty. Most countries were excluded from the drafting of the treaty (the so-called Green Room negotiations) and many of them lacked the expertise to evaluate the extremely long and complex treaty text they were then offered: "Poor countries are also hobbled by a lack of know-how. Many had little understanding of what they signed up to in the Uruguay Round. That ignorance is now costing them dear."[12] With regard to many less developed (and even a number of affluent) countries, there are then serious questions about whether the consent they gave was free and well-informed.

Second, even if a state's consent to the TRIPS Agreement was well-informed and freely given, it is still problematic to appeal to such consent in order to rebut the charge that the current regime violates human rights. This is so, because human rights are the rights of individual human beings, and TRIPS received the consent of governments, not of individuals. Not all governments are democratically elected or responsive to the interests of the people they rule. Among the signatories of the TRIPS Agreement were, for instance, the Nigerian government headed by Sani Abacha, the SLORC military junta of Burma/Myanmar, the Indonesian government controlled by Suharto, Zimbabwe's government under Mugabe, and the government of Congo/Zaire headed by Mobuto Sese Seko. As this list illustrates, many of the consenting governments ruled by force and did not represent, or show much concern for, the will or interests of the people they ruled. Insofar as they gave free and informed consent, it was driven by their own personal interests and therefore cannot be claimed to stand for the consent of their fellow citizens. It therefore makes no sense to contend that an international regime cannot possibly be violating the human rights of the citizens of Nigeria because Sani Abacha once consented to this regime. Those who manage to acquire and hold power in a country, by whatever means, do not thereby become entitled to waive the human rights of the people they are subjecting to their rule.

But third, even if we were to assume that the consent of a state's ruler could stand in for the consent of the state's citizens, this still would not preclude the existence of a human rights violation. This is because the appeal to consent is supposed to justify imposition of the regime upon people who were children or unborn at the time the consent was given.

[12] Editorial, *White Man's Shame*, ECONOMIST, September 25, 1999, at 89.

Thus, even if every adult citizen of every participating country had given free and informed consent to the TRIPS Agreement at its adoption in 1994, these consenters could not thereby have waived the human rights of their children. Nor could they have waived the human rights of all the people born in these countries since that time — today's children, who are bearing a disproportional share of the global burden of disease (about half the avoidable deaths each year are of children under age 5).

Fourth and finally, on the predominant understanding of human rights, these rights are inalienable, meaning they cannot be waived or relinquished at all. One main rationale for such inalienability is the need to protect people against losing their human rights protection through fraud, blackmail, manipulation, threats or inducements.[13] If human rights are indeed inalienable, then the appeal to consent cannot undermine in even a single case the charge that the current regime violates human rights.

I have raised four mutually independent replies to the objection that an appeal to consent can shield the current regime from the challenge that it violates the human rights of those whom it deprives of access to vital medicines at competitive prices. If even one of these objections is valid, then the appeal to consent fails so to shield the regime.

C. THIRD OBJECTION: THE LIBERTARIAN APPEAL TO PROPERTY RIGHTS

Opponents of the human rights argument might attempt a third objection, rooted in the libertarian moral tradition which goes back to John Locke and advocates strong rights to freedom and property. This tradition endorses and invokes the narrow understanding of human rights according to which the only duties these rights entail are duties to *respect* human rights. In other words, there is no positive duty to protect and fulfill human rights, but only a negative duty not actively to violate such rights. The objection to the human rights argument — resonating in current debates about the TRIPS Agreement and especially well-received in Anglophone countries — is then that affluent populations are not violating any negative duties. Affluent populations who refuse to share their wealth, including essential medicines, with poor people are not human rights violators, even when their refusal foreseeably causes human rights to go unfulfilled. Such people are not actively harming the poor, but merely failing to help them. They are not failing to respect the human rights of the global poor, but merely failing to protect and fulfill them. The same is true of affluent people who refuse to fund the development of new medicines that others need for health or survival. When affluent people pay for the development only of medicines they need themselves while declining to pay for the development of medicines needed by the poor, then they are merely failing to fulfill human rights, not violating them.

[13] THOMAS POGGE, REALIZING RAWLS 49-50 (1989).

The following two subsections examine in more detail these two claims of the libertarian objection and show how they can be refuted.

1. LIBERTARIANISM DOES NOT SUPPORT INTELLECTUAL PROPERTY RIGHTS

What lies behind the libertarian objection is the idea that property owners are entitled not to share what they own even with poor people whose human rights will remain unfulfilled as a result. To be meaningful, this entitlement must include the entitlement actively to defend their property against those who would take it (even for the sake of fulfilling human rights). Owners are entitled to protect their property against theft, with walls, doors, and locks — and even with force if need be. Such protection of property must often be active, as when an owner physically prevents poor people from stealing his food. Still, such an owner does not violate human rights, because he is merely blocking interference from others, not interfering with them. He is merely protecting his right not to help.

Owners entitled to protect their property are also entitled to authorize others to do so — for example, the police. And the police are then entitled actively to prevent attempts to steal even when such attempts aim to fulfill human rights. In this way, the creation and enforcement of legal property rights can be defended: such a regime for protecting property should not count as violating human rights even if, as a result of its suppression of theft, human rights remain unfulfilled.

The last step in the libertarian objection to the human rights argument posits that what holds for physical property also holds for intellectual property: a system of rules that defends intellectual property should not count as violating human rights even if, as a result of the suppression of theft, human rights remain unfulfilled. The current regime is precisely such a system. It suppresses trade in generic versions of new medicines and may thereby cause the deaths of poor patients who cannot gain access to the medicine they need because of its patent-protected high price. Even if this suppression of theft of intellectual property is sometimes active, it constitutes no violation of human rights, but merely a failure to fulfill human rights by redistributing the wealth of shareholders in pharmaceutical companies or by leaving their property unprotected.

The libertarian objection, however, succeeds only if the legal framework of intellectual property rights imposed by the TRIPS Agreement can itself be defended. The TRIPS Agreement gave pharmaceutical innovators legal rights they did not have before: rights to strong 20-year patent protection in the less developed WTO member countries. The creation of these new property rights cannot be defended by appeal to these same legal property rights. This would be a circular argument. The defense can succeed only if it justifies the creation and enforcement of legal property rights by appeal to independently

existing moral or natural property rights. It is only because innovators have a moral right to the fruits of their creative efforts that it is permissible to use legal rights and law enforcement to defend their possession of these fruits even when such defense leads to misery and death of innocent people.

To see how the libertarian objection presupposes such moral or natural property rights, imagine a government passing and enforcing a new law that makes the president's son the owner of all unowned water. As people run out of water, its price shoots up, and soon there is only one person from whom water can legally be bought or received. The rich buy what they need from this man, and the poor suffer and die. Clearly, the law in this story is grossly unjust. Libertarian thinkers would join in its rejection because that law cannot be justified as protecting the man's legitimate property rights. When the law came into being, this man had no special claim to the water not owned by others and hence no claim to have others be excluded from it.

A contrasting scenario, and one that libertarians might well approve, is one where the government passes and enforces a law that recognizes those who plant and harvest food as the owners of this food, so that one can acquire food grown by others only by buying (or receiving) it from them. People who run out of food buy more from others, if they can. But if they lack the money to do so, they suffer and die. In this case the law arguably does not violate human rights because it merely defends antecedently legitimate property rights. Perhaps human rights would be better fulfilled if those without money and food were legally free to help themselves to food grown by others. But the suppression of such acquisitions counts as merely a failure to fulfill human rights, not as an active violation — on the libertarian assumption that the growers of food have a moral claim to this food, and a claim to withhold it from others: claims that the law merely recognizes but does not create.

The philosopher Robert Nozick has explicitly extended this line of thought to justify excluding poor people from medicines. He imagines a medical researcher who invents new highly effective medicines whose composition no one else knows. Nozick affirms that this researcher is entitled to withhold the medicine from others, even if their lives are at stake. To explain this entitlement, he writes: "A medical researcher … does not worsen the situation of others by depriving them of whatever he has appropriated. The others easily can possess the same materials he appropriated; the researcher's appropriation or purchase of chemicals didn't make those chemicals scarce in a way so as to violate the Lockean proviso." [14] The Lockean proviso here alludes to a principle Nozick adapts from John Locke. This principle allows people to acquire natural resources — by appropriation or through gift or exchange — provided they leave "enough and as good" for others. Each person's acquisition of raw materials must be consistent with a like acquisition by others.

[14] ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 181 (1974).

Because the production of drugs tends to require only small amounts of ingredients, it easily fulfils this condition in nearly all cases.

To be sure, by keeping all the medicine to himself, Nozick's researcher is not leaving enough and as good *medicine* for them. But he is not required to do so, because this medicine is his own product and would not exist but for his labor. By producing this medicine just for himself, the researcher is not taking anything away from others. He is merely failing to let them participate in his invention by sharing with them either his medicine or his knowledge. By declining to help them, the medical researcher is acting within his moral rights; and a legal system cannot be faulted for recognizing and protecting these rights.

Suppose next that Nozick's medical researcher is willing to share with others — at a price. Because he is the only one who knows how to make the medicine and because this medicine is highly useful, affluent people are willing to pay a high price. The medical researcher therefore charges a high price, reckoning that he will make more money by selling dear to a few than by selling more cheaply to many. Nozick affirms, once again, that the medical researcher is within his rights to act in this way. It is his medicine to keep or to sell as he pleases.

Committed to a human-rights perspective, one might disagree with Nozick that property rights trump even the right to life. One might say that, when lives are at stake, society may confiscate the researcher's medicine and even compel him to make more or to share his knowledge. I do not dispute that a convincing response along these lines can be constructed and that this response can be worked up into a formidable challenge to the libertarian defense of the current regime governing the development and sale of pharmaceuticals. Here I formulate, however, a different and more broadly based response that, for the sake of the argument, accepts the libertarian endorsement of strong property rights that entitle the medical researcher to act as he does. To be sure, I do not myself endorse this premise. But by doing so for the sake of argument, I can make a more effective response to libertarians by showing them that even their own paradigmatic commitments do not support the current regime against the human rights critique.

The current global pharmaceutical patent regime is different from Nozick's story in one respect that is very important within the libertarian frame of thought. In the real world, innovators assert not merely *physical* property rights in product *tokens* they create, but also so-called *intellectual* property rights in abstract product *types* as well. Given this distinction, it can be shown that, far from supporting intellectual property rights, libertarian thinking is in fact inconsistent with them.

Consider a simple example. Once upon a time, a clever woman took a piece of her wood and shaped it into a wheel. She then attached this wheel to a large basket and, with this primitive wheelbarrow, greatly eased her agricultural labor. Seeing her invention at

work, others were eager to have such wheelbarrows too. The inventor can make additional wheelbarrows for sale, of course. But she will find it hard to charge exorbitant prices, because people can just make their own wheelbarrows or pay someone other than the inventor to produce them. In contrast to Nozick's imagined medical researcher, the wheelbarrow inventor cannot commercialize her invention without spreading the knowledge of how to reproduce it. (And this, of course, is the actual situation with regard to medicines today: what one company develops and tests at great cost, another firm can cheaply re-engineer.)

Suppose the inventor of the wheelbarrow now has the bright idea to claim ownership not merely of any wheelbarrows she herself constructs, but of the very type wheelbarrow. She is setting forth this idea not as a proposal for the consideration of all, but rather asserts it as a natural right. Just as all persons have a natural, pre-institutional right not to be murdered (and perhaps to own the food they have grown), so all persons have a natural, pre-institutional right to "intellectual property" in their inventions — regardless of others' consent.

If there were such a natural right, independent of any and all human laws and conventions, then our inventor would have the right to prohibit the making and using of wheelbarrows by other persons anywhere; anyone intending to make or acquire a wheelbarrow would be required to bargain with her for her authorization. The natural right would have analogous implications for medicines. And one might then say that the TRIPS Agreement has not given rise to new constraints on the production, sale and use of medicines but has merely (partially) recognized natural constraints that existed all along and incorporated these constraints into the international legal framework. It would still be true, in a sense, that the adoption, implementation and enforcement of this agreement has taken something away from generic manufacturers and also from the poor patients who were benefiting from the availability of generic medicines at competitive market prices. But what it took away would never have been, morally speaking, theirs to begin with. Even in the absence of patents, it was wrong for generic manufacturers to supply cheap drugs to poor patients without the innovator's authorization. What the TRIPS Agreement has taken away, then, is the opportunity to commit moral crimes — theft, counterfeiting, piracy — crimes whose legal recognition and suppression has finally been extended to nearly all countries around the world.

But is there really such a natural right of inventors not to have their inventions copied without their authorization? In order for the libertarian objection to the human rights argument to succeed, the answer must be yes. But within a libertarian frame of thought, such a natural right is deeply puzzling. Before the invention, all were free to build wheelbarrows with their own hands, wood and reed, without anyone's permission. Yet as soon as someone actually does this, the freedom of the others supposedly disappears —

displaced by the need to bargain with the inventor for her permission. Why should anyone, by doing something creative with her stuff, be able unilaterally to limit what all the rest of us can do with our stuff? Why should one person be able unilaterally to impose new constraints on your conduct and property?

The woman can answer that your erstwhile freedom to make wheelbarrows was not worth much in advance of her invention. And she can add that, even with the encumbrance she insists upon, her invention still makes you better off than you would otherwise be by giving you the new option of making a wheelbarrow after buying her authorization.

This answer has a certain plausibility — but not within a libertarian frame of thought. Libertarianism is based on the values of freedom, property, and consent. It cannot permit someone to impose an exchange upon you, no matter how beneficial this exchange may be for you. So the innovator has no right, without your permission, to deprive you of a right even if she gives you something much more valuable in return. No matter how great a benefit she may have foisted upon you, she is not entitled to divest you, without your consent, of your freedom to make wheels and wheelbarrows with your own hands and materials. As Nozick forcefully insists, even the voluntary acceptance of large benefits that were conferred on the express understanding of reciprocation does not create any obligations to reciprocate.[15]

Libertarianism is the philosophical tradition most friendly to natural property rights, taking them to be absolute constraints on the design of social institutions. Even if lives could be saved by taxing every affluent citizen a dime a year, doing so would still be morally intolerable — or so Nozick asserted. This status of rights to freedom and property as absolute constraints is inconsistent with "intellectual" property rights which would permit people unilaterally to place new limits on the freedom of others and (in particular) on what they may do with their property. The fact that others have pioneered a new dance or dish or gadget or medicine gives them no right to restrict what you may legitimately do with your body and property. So long as you have violated no rights in learning about the invention and have not contracted otherwise, you are within your rights when you try to copy their dance (with a willing partner) or try to reproduce their dish, gadget or medicine from materials you legitimately own. Others may try to keep their invention secret from you, of course, and share it only with those who promise not to share it farther. But if you,

[15] Nozick endorses this central commitment of libertarian thought, for example, in the context of his critique of H. L. A. Hart's principle of fair play: "Suppose some of the people in your neighborhood (there are 364 other adults) have found a public address system and decide to institute a system of public entertainment. They post a list of names, one for each day, yours among them. On his assigned day (one can easily switch days) a person is to run the public address system, play records over it, give news bulletins, tell amusing stories he has heard, and so on. After 138 days on which each person has done his part, your day arrives" (*See* R. Nozick, *supra* note 16, at 93). Nozick concludes about this case that, however much you may have enjoyed the efforts of the others, you are under no obligation whatever to staff the public address system.

having made no such promise, chance upon the invention, you are free to try to reproduce it.

The discussion of the libertarian objection leads then to a surprising conclusion. Libertarian thought does not merely fail to vindicate intellectual property rights but actually condemns them. From a libertarian point of view, the enforcement of intellectual property rights is expropriation which, as others keep inventing things, increasingly limits what you may do with your property. Far from supporting a natural right to intellectual property that could override the freedom to reproduce the inventions of others, the libertarian tradition defeats such a right and vindicates the rights of generic producers and their customers. They may transact with one another on mutually acceptable terms provided only that they are not bound by any voluntary contract to refrain from such activity. Restricting their activities through the imposition of intellectual property rights violates their natural rights to do with their property as they wish.

Of course, I do not endorse libertarian thinking and the priority it gives to property rights. Rather, I think that human laws and conventions should be designed and reformed in light of a broader range of human needs and interests among which those recognized in the main human rights documents are of greatest weight. On this view, the question of intellectual property rights should be treated instrumentally. Intellectual property rights should be instituted and fine-tuned, maintained or abolished so as best to realize human rights (and other human needs and interests). I support intellectual property rights as embedded in a scheme including the TRIPS Agreement combined with the HIF because I believe that they would serve important human ends better than any feasible alternative (including the abolition of all intellectual property rights).

Some defenders of intellectual property rights share this instrumental view. With them we must examine the empirical facts in order to ascertain in what contexts such rights do more harm than good, in what contexts they can be helpful, and how they should best be specified and embedded in the contexts in which they are helpful. Other defenders of intellectual property rights insist that such rights are natural rights and therefore must be instituted everywhere regardless of consequences. This kind of thinking resembles and appeals to the libertarian tradition. But, on closer inspection, it can find no home there. Libertarianism indeed rejects the instrumental perspective. But it pre-empts the question of intellectual property rights in the opposite direction: the ordinary physical property rights that libertarians hold sacrosanct are inconsistent with any powers on the part of others unilaterally to place limits on how a person may use her own body and property. According to libertarianism properly understood, the thieves and pirates are not those who reproduce an invention without permission, but those who use state power to suppress owners' free use of their property in order to extort payments from such owners. The libertarian objection, then, if it is meant to defend the current intellectual property regime from the human rights argument, does not succeed.

2. THE NEGLECT OF DISEASES OF THE POOR CAN NOT BE DEFENDED BY LIBERTARIAN PRINCIPLES

In this subsection I will show that the neglect of diseases primarily afflicting the poor cannot be defended by libertarian principles because it is the indirect result of historical violations of libertarian principles themselves.

Libertarians do not find problematic as such the fact that very poor people cannot obtain basic necessities while rich people have vastly more than they need. They would argue that affluent people are entitled to use what they legitimately own as they see fit, and that it would be wrong for the state, or anyone else, to compel them to give some of their assets to the poor.

Likewise, libertarians would not find problematic the fact that a highly uneven distribution of income and wealth can influence the priorities of pharmaceutical research (note 11). If those interested in anti–hair loss products are disposed to pay much more than those in need of a medicine against Chagas disease, then profit-oriented pharmaceutical companies will target their research on hair loss in preference to Chagas. In this way, diseases concentrated among the poor come to be systematically neglected. Not only do libertarians not find this problematic, they would also oppose taking money from the rich in order to support research into the diseases of the poor even when such research would lead to medicines that poor people need for their health and survival. Owners have rights in the full use and enjoyment of their property; they must not harm others, but they are not required to help them. Furthermore, not only is it the case that the wealthy are not obligated to help fund research into neglected diseases, but it might also be said that the HIF itself, which requires that a portion of the taxes of citizens of wealthy countries fund research into neglected diseases, violates the libertarian rights of the rich to full use and enjoyment of their property.

In responding to this challenge, I again accept, for the sake of the argument, central libertarian commitments in order to formulate a response that may convince those who find themselves in sympathy with libertarian sentiments.

The present setting of research priorities would be supported by overridingly strong property rights if the existing distribution of these rights had a morally sound pedigree of the sort libertarian theorists envisage. But without such a pedigree, the existing huge economic inequalities in *de facto* ownership have little or no justificatory force. Imagine for a moment a human world whose economic distribution resembles ours, but whose inhabitants have just sprung into existence. In this fictional world, the more powerful impose on the rest an institutional order that reserves for themselves the vast majority of wealth, thereby leaving a non-consenting three-quarters of humankind with insecure access to the most basic necessities. Libertarian thought does nothing to legitimate the economic

advantages of the rich in this world. Their greater possessions are founded on mere assertion backed by the use or threat of force.

Are existing property rights in our world well founded? Consider today's highly unequal global economic distribution.[16] Which factors determine who ends up where in this economic hierarchy? It turns out that citizenship and income class at birth determine about 80 percent of people's economic position,[17] which is hardly surprising given that gross national incomes per capita vary between USD 140 and 87,070.[18] Libertarians would not find such great international differences disturbing as long as they had accumulated, say, through differential diligence and thrift compounding over generations. But the huge inequalities in our world did not accumulate in such a benign way. The social starting positions of the poor and of the affluent have emerged from a single historical process that was pervaded by massive, grievous wrongs. The present circumstances of the global poor are significantly shaped by a dramatic period of conquest and colonization, with severe oppression, enslavement, even genocide, through which the native institutions and cultures of four continents were destroyed or severely traumatized. The present circumstances of the affluent are shaped by the same historical process. Some of the countries that give their citizens a great headstart today owe their very existence to genocide and ethnic cleansing. These undeniable historical facts undermine the libertarian thought that existing holdings have a moral standing that exempts them from claims based on human rights.

The historical crimes just mentioned play no role in the human rights argument I have formulated. They serve merely to undermine one particular reply to this argument. The human rights argument is forward-looking. Whatever human history may have been like, we should now structure national and international rules — including those governing the development and distribution of new medicines — so that at least human rights (and perhaps important other human needs) are fulfilled insofar as this is reasonably possible. When rules are known to be associated with an enduring massive human rights deficit that

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[16] To illustrate. At currency exchange rates, the poorest half of world population, 3,400 million, have less than 3 percent of global household income (data supplied by Branko Milanovic of the World Bank); the most affluent 30,000 (0.01%) people in the United States have 2 percent (based on Emmanuel Saez & Thomas Piketty, *Income Inequality in the United States 1913–1998*, 118 Q. J. ECON. 1, 1-39 (2003), as updated in "Tables and Figures Updated to 2007 in Excel Format," August 2009, Table 3, *available at* http://elsa.berkeley.edu/~saez/pikettyqje.pdf). At currency exchange rates, the poorest two-thirds of the world's population had in the year 2010 about 4 percent of global private wealth, while the top half percent had 35.4 percent (from Credit Suisse Research Institute, *Global Wealth Report* (Zurich: Credit Suisse Group AG, 2010) p.5).

[17] BRANKO MILANOVIC, GLOBAL INEQUALITY OF OPPORTUNITY (2008), *available at* http://siteresources.worldbank.org/INTDECINEQ/Resources/Where8.pdf.

[18] WORLD BANK, WORLD DEVELOPMENT REPORT 2010 378-79 (2010), available at http://go.worldbank.org/ZXULQ9SCC0. The extremes are occupied by Burundi and Norway, respectively. The average across all low-income countries is given as $524 versus $39,345 across all high-income countries (*Id*. at 379).

is avoidable by modifying these rules, then it is unjust — a violation of human rights — to maintain the former. In particular, it would be a violation of human rights to insist on the perpetuation of the current regime when the option of supplementing TRIPS with the HIF is known to be available.

A potential libertarian objection to this argument would be that such a human rights fulfilling regime requires resources and that these resources are simply not morally available. The needed resources are owned by people or nations who are entitled to refuse to contribute them to solving others' problems. Affluent countries are free to contribute to the HIF if they like, but they are equally free, morally, to retain what they own — even when their doing so will leave human rights massively unfulfilled.

My response to this reply is that, even if it is indeed always permissible to refuse to contribute to the fulfillment of human rights by sharing what one legitimately owns, the actual history of existing holdings does not confer upon them, according to libertarian principles, the moral standing that the reply requires. Given the actual course of history, affluent people and nations cannot have the kind of confidence in the full legitimacy of their holdings that would entitle them to decline to contribute a few hundredths of one percent of their income toward making our newly globalized pharmaceutical patent regime much more responsive to the health needs of poor people, whose starting positions make them victims of the same unjust past that gives the affluent such vastly superior starting positions.

CONCLUSION

The preceding Part IV has refuted some popular objections to the human rights argument in some detail. I could go on refuting less prominent objections for many more pages — a great deal of human inventiveness is expended on rationalizing the advantages of the affluent. Leaving this task to others or to future work, I conclude by reiterating that the human rights argument is straightforward. Its central point is that wealthy countries must not continue to impose a pharmaceutical innovation regime that is known to be associated with a massive human rights deficit if this deficit is reasonably avoidable through a feasible modification of that regime. This Article has shown that creating the HIF is a feasible modification that would avoid (depending on the amount of its funding) at least a substantial portion of this human rights deficit.[19] Continuing to impose the current regime on the background of this available alternative violates the widely recognized human rights of those whose access to vital medicines it jeopardizes.

[19] *See also* Hollis and Pogge, *The Health Impact Fund*, chapters 7–9.

KEYWORDS
Access to Medicines, Economic Inequality, Generic Medicines, Health Impact Fund, Human Rights, Intellectual Property Rights, Last-Mile Problem, Quality-Adjusted Life Years, Patents, Pharmaceutical Innovation, TRIPS Agreement

Manuscript received: Oct. 25, 2010; *review completed*: Nov. 09, 2010; *accepted*: Nov. 12, 2010.

WHAT'S *LOVING* GOT TO DO WITH IT?: EMBODIED DISSENTS TO 'THE IMPASSABLE' IN OCTAVIA E. BUTLER'S *KINDRED*

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ABSTRACT

June 12, 2007, marked the fortieth anniversary of Loving v. Virginia, the United States Supreme Court case decided on June 12, 1967 that made American laws against inter-racial relationships a violation of the Fourteenth Amendment of the U. S. Constitution. The historical perspective on Loving v. Virginia fits within the national narrative of liberal progress: thanks to the progress of liberal democracy, the U. S. overcame the era of de jure and de facto segregation in the public schools (Brown v. Board of Education [1954]) and in the private spaces of the bedrooms. The Civil Rights and Voting Rights Acts, the emergence of Martin Luther King, Jr. as a Nobel Peace Prize laureate, and the installation of Thurgood Marshall as the first African-American justice of the U. S. Supreme Court spoke to the realization of King's "Dream" of racial equality and justice for many. Against the

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black-and-white version of this textbook historicism, some artists and intellectuals have begun to raise questions about this Civil Rights narrative and the law. Legal scholars, influenced by European political thought and African-American social critique, have deployed critical race theory to examine the silent narratives operating in and guiding formal laws and mores. Using literary methodology, critical race theorists work to expose the silent narratives—alternative histories, if not outright contradictions to the progress narrative—that are even elided by progressives. If legal scholars have turned to literature, might not artists use narrative to read and pass judgment on race-based law? African-American and European-American writers, since the early nineteenth century, have done just this; indeed, some of the best writing by African Americans occurred after the U. S. Supreme Court rendered its infamous Plessy v. Ferguson (1896) decision, a landmark case that made "separate but equal" national law. Octavia E. Butler's Kindred (1979), a novel that examines a post-Loving inter-racial relationship, is worth re-examining in light of the fortieth anniversary. This paper, using literary analysis, cultural study, and critical race theory, examines the paradoxes Kindred foregrounds, most notably the role of technological progress—emblematized by the spy-glass, the extension of the Western explorer's putatively objective gaze—as a site of racial myopia and distancing. This analysis reveals that not only does Butler dissent to Virginia's past miscegenation law and the trial judge's decision, but the present post-Civil Rights era comforts of a middle class whose orientation toward progress makes them take for granted the heroic/epic myth-making performances underlying the U.S. Constitution and modernity.

INTRODUCTION: THE LEGACY OF *LOVING V. VIRGINIA*

It is not often in America that the magnum opus of a writer and its subject "boomerang" out of history, to quote Ralph Ellison, into the present. With the passing of Octavia E. Butler, a great American writer and creator and Afro-feminist-futurist novelist, our reflections on her oeuvre coincide with a landmark anniversary that shapes her most studied and taught novel. Her passing, on February 24, 2006, and the forty-year anniversary of the United States Supreme Court case, *Loving v. Virginia*,[1] decided on June 12, 1967, gives occasion to consider the interlocking questions of race, gender, and history

[1] *Loving v. Virginia*, 388 U.S. 1; 87 S. Ct. 1817; 18 L.Ed.2d 1010 (1967).

intertwined in Butler's own form of novelistic jurisprudence, *Kindred*.[2] Considered by some to be a historical novel or neo-slave narrative, by others to be a feminist novel, and by others a work of "speculative fiction" because of the time travel motif,[3] it is clear that *Kindred* is all of these and more, hence its perennial appeal for scholars and students. At the center of all of this is the provocative inter-racial relationship which, throwing together two "races" considered opposites by many Americans even today, happens to be following a well-heeled (trans) script questioned and then judged, literally, by the nation's High Court: inter-racial marriage laws, "natural" and man-made. Butler's death, the fortieth anniversary of *Loving*, the abiding racial divides in American cultural practices and its public and private places that are far less uncomfortable and incendiary than miscegenation,[4] and the rise of critical race jurisprudence, leads us to ask a serious question: In light of the inter-racial developments since then, particularly in terms of black-white marriages, which now comprise 7% of all marriages in the U.S.,[5] have we come far enough? Can we all get—are we all, really, getting—along?[6] Taking a soulful note from Tina Turner—"What's

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[2] OCTAVIA E. BUTLER, KINDRED (1988).

[3] But Butler, a McArthur Genius grantee and recipient of several Hugo and Nebula Awards, was not interested in writing a utopian, sci-fi novel here. Though the plot is driven by the device of time travel, with H.G. Wells seemingly lurking in the background and pointing toward the heavens and distant vistas, Butler is adamant that because there is "absolutely no science in it," KINDRED is not a sci-fi novel (Frances M. Beal, *Black Women and the Science Fiction Genre: Interview with Octavia Butler*, BLACK SCHOLAR, Mar.–Apr. 1986, at 14). Instead, Butler used meticulous primary research, including trips to Maryland, the historical background for the California present, and her famed craft as a storyteller to stage a story aimed right at that "impassable gulf" the Virginia trial judge, and folks on both sides of the color and gender lines, would and still hold sacrosanct.

[4] The criminal justice disparities are too well known to rehearse here, except to note that even the right-leaning High Court has effectively, through the case of *Baze v. Rees*, 128 S. Ct. 34; 168 L. Ed. 2d 809; 2007 U.S. LEXIS 9066; 76 U.S.L.W. 3154 (2007), entered into the question of the constitutionality—the fairness and cruelty under the Eighth and Fourteenth Amendments—of lethal injection as a form of capital punishment. With subsequent decisions to stay executions in Texas and Mississippi, some considered the Supreme Court to have established a "moratorium" on death penalty cases. *See, e.g.*, Death Penalty Information Center, *Lethal Injection: National Moratorium on Executions Emerges After Supreme Court Grants Review* (Mar. 18, 2008) <http://www.deathpenaltyinfo.org/article.php?did=1686>; Linda Greenhouse, *Supreme Court Stays Execution in Sign of a Broader Halt*, N.Y. TIMES, Oct. 30, 2007 <http://www.nytimes.com/2007/10/30/us/31cnd-exec.html>. Beyond this, and contra widespread sentiment that a larger Black middle class meant a lessening of the income gap and segregation, recent reports—e.g., "Brown at 50: King's Dream or Plessy's Nightmare" (2004) by the Civil Rights Project at Harvard, and a study conducted by the Pew Charitable Trust's Economic Mobility Project (2007)—indicate that since the ending of federally sanctioned public school segregation in 1954, the income and residential gaps between Black and White families have not closed.

[5] At the time of the fortieth anniversary of *Loving v. Virginia*, on June 12, 2007, to be precise, according to statistics kept by the United States Census Bureau.

[6] I allude to Rodney King's remarks, made on May 1, 1992, the third day of the Los Angeles riots, which began after the acquittal of four white L.A. police officers, who were captured on video repeatedly beating a handcuffed King on March 3, 1991, following a high-speed car chase. The verdict, seen as racially motivated, led to widespread rioting that lasted for several days. King, who appeared in public before television news cameras to appeal for calm, asked the plaintive question that is symbolic, simple, and ironic in its folkish

love, what's love got to do with it. What's love, but a second-hand emotion?"[7]—I would like to start a re-examination of this "dark" matter, up close and personal, ecstatic and muscular, body to sweaty body, with a violently romantic and heavily racialized re-articulation of the question sounding, I believe, the very essence of Butler's *Kindred*: "What's *Loving* got to do with it?"

I. CRITICAL-OPTICAL PRECEDENT: *LOVING*, *PLESSY*, AND *DRED SCOTT*

Chief Justice Earl Warren, writing for the majority in the waning days of his Court's juridical vigor, answered that at the outset of *Loving v. Virginia*, which declared the unconstitutionality of anti-miscegenation laws then on the books in the commonwealth and fifteen other states. Chief Justice Warren narrated the germane statements of fact:

> "In June 1958, two residents of Virginia, Mildred Jeter, a Negro woman, and Richard Loving, a white man, were married in the District of Columbia pursuant to its laws. Shortly after the Lovings returned to Virginia and established their marital abode in Caroline County. At the October Term, 1958, of the Circuit Court of Caroline County, a grand jury issued an indictment charging the Lovings with violating Virginia's ban on interracial marriages. On January 6, 1959, the Lovings pleaded guilty to the charge and were sentenced to one year in jail; however, the trial judge suspended the sentence for a period of 25 years on the condition that the Lovings leave the State and not return to Virginia together for 25 years. He stated in an opinion that: 'Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.'"[8]

Over the next seven years the case, advanced under the theory that the Virginia ban violated the Fourteenth Amendment, wound its way through the bowels of Virginia's state courts, and the procedural intricacies of a class action filed in the federal court for the eastern district of Virginia, and eventually arrived before the gavel of the Warren Court. That was December 12, 1966.

This period in America, of course, was critical. The Civil Rights Movement was in full swing, on the strength of Martin Luther King, Jr., the Black Power Movement stood in counter-poise, galvanized by the death of Malcolm X, national guard and U.S. Army troops

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insight, and widely quoted for that reason: "People, I just want to say, you know, can't we all get along?" The televised broadcast of the attack, the riots, and King's appeal, followed by the lack of real changes, begs the question of how we should view the mass mediated form of the optical image.

[7] TINA TURNER, *What's Love Got to Do With It*, *on* PRIVATE DANCER (Capitol Records 1984).

[8] *Loving v. Virginia*, 388 U.S. 2-3; 87 S. Ct. 1819; 18 L.Ed.2d 1012-13 (1967).

were in tense stand-off, and at the center of it was the natural law as invoked by the Virginia trial judge. That ancient relicthe fount for the deep racial divide in fact and theory, makes *Loving v. Virginia*, and the interracial loving at its core, a critical-*optical* case.

It is critical-optical because the natural law precedent applied by the Virginia trial judge, Judge Leon Bazile, implies a vast racial distance as natural as continental divides and ocean depths, as ancient as Edenic origins, as eternal as the future, and as obvious as a mere casual gaze. The founding theory for Judge Bazile's ruling, consecrated by "Almighty God," amounts to the precedent of sacrosanct distance: a spatial distance oceans-wide and -deep; an ontological distance predicated on the racial divide; and, of course, the temporal distance, which reaches twenty five years into the Lovings' future (until 1984 if Judge Bazile had his way), far into an ancient, immutable past existing since time out of mind and, just as appropriately, into the hallowed annals of American jurisprudence, including the landmarks of the United States Supreme Court.

Justice Henry Billings Brown, writing in 1896,[9] measured the distance against the body of Homer Adolphus Plessy, a seven-eighths white Louisiana Creole who sought to challenge Louisiana's separate but equal doctrine, a policy then common around the nation. Justice Brown, turning the body of Homer Plessy into an iconic, ironic reversal of America's late-nineteenth century fascination with Homer's *Iliad* and "white supremacy," rationalized the epic, racial distance as he closed his opinion: "Legislation is powerless to eradicate racial instincts or to abolish distinctions based upon physical differences. . . . If one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane."[10]

Chief Justice Roger Brooke Taney's rhetorical strategies in his 1857 majority opinion in the *Dred Scott*[11] decision are both revealing and exemplary. His encyclopedic jurisprudence, remarkable less for its length and detail than the fact that Dred Scott's appeal sought review on very narrow grounds,[12] rests upon a national, constitutional foundation set in "a perpetual and *impassable barrier* . . . between the white race and the one which they had reduced to slavery, and governed as subjects with absolute and despotic power" (emphasis mine).[13] Taney's opinion operates with the simultaneity of an ancient racial

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[9] *Plessy v. Ferguson*, 163 U.S. 537; 16 S.Ct. 1138; 41 L.Ed. 256 (1896).
[10] *Id.* at 551-52; 1143; 261.
[11] *Dred Scott v. Sandford*, 60 U.S. 393; 15 L.Ed. 69 (1857).
[12] Dred Scott sought review for incorrect jury instructions. The first matter addressed by Taney was the scope of review, his rule of law disagreeing with a narrow interpretation, thus enabling him to include that "a writ of error always brings up to the superior [appellate] court *the whole record of the proceedings* in the court below." *Id.* at 403; 700 (emphasis mine). Of course, Scott's counsel would have found himself suddenly having to argue, before the Court, the entire case on short notice, if any. He would not have failed to realize that not only was he unprepared, but their antislavery cause now faced an adverse ruling meant to stamp, *ad infinitum*, an "impassable barrier" into national jurisprudence.
[13] *Id.* at 399-403, 427-30; 699-700, 710-11.

barrier, which barred Dred Scott from federal courts for want of citizenship, and, more importantly, an immutable fact Taney meant to operate far into the future. That future precedent operated against Scott's two daughters, the oldest born in a jurisdiction that did not recognize slavery, and against all of "the negro African race, at that time [of the constitutional convention] in this country, or who might afterwards be imported, who had then or should afterwards be made free in any State."[14]

The distance itself becomes a curious species upon further examination. Though immutable and absolute, it implies a performance that is also its self-negation. Imagined and defined, predicated on its permanency and retreat from the *terra incognito*, the distance is to be traversed, penetrated, explored, colonized, conquered, and staked as *terra firma*. An impassable, absolute distance that is not, and that is even its opposite, is not simply a contradiction in terms. More than a question of perspective, one has to ask whether it is logical and rational at all. Perhaps, if the problem is Cartesian, the mind perceives and imagines from afar while a free-ranging body, using the technologies of the mind, the critical-optics, performs the unimaginable, the unthinkable. At any rate, European's racial imaginary and the racial imagery informing juridical narrative, not surprisingly, are enshrined in the critical power of the optical, namely discovery and its refined optic, the spy-glass.[15]

II. THROUGH A SPY-GLASS DARKLY: THE RACIALIZED GAZE AND OPTIC TECHNOLOGY

The spy-glass—also known as field glass, glass, and even telescope[16]—is one of the technological emblems closely associated with this distance in our imaginary. The captain's

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[14] *Id*. at 409; 702.

[15] One of the best and earliest instances of this is Chief Justice John Marshall's opinion in *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543; 5 L.Ed. 681 (1823), a case of ejectment in which, essentially, an American citizen sought to remove the Piankeshaw and Illinois, two American Indian tribes, from land he supposedly obtained through sale and grant. The Court found in favor of the Piankeshaw and Illinois, a deceptive outcome, and worth rhetorical study by literary scholars and their students, because of Marshall's jurisprudence and structuring of the case. The holding (outcome) of the case, which rests upon the rule of law "that the Indian inhabitants are to be considered merely as occupants, to be protected, indeed, while in peace, in the possession of their lands, but to be deemed incapable of transferring the absolute right to others," like the plaintiff, is a footnote to the ranging extent of the case. Marshall's historicizing, a carefully crafted *apologia* for European principles of Creator-sanctioned rights of conquest, pivots on the powerful, optical imagery of his narrative, to wit: "discovery of this immense continent," "the tribes of Indians inhabiting this country were fierce savages," and "the country [was] a wilderness." *Id*. at 573, 590-92; 688, 692-93.

[16] According to the OXFORD ENGLISH DICTIONARY, spy-glass, "Also spyglass. [f. SPY *v.* + GLASS *n.*[1] 10. Cf. SPYING-GLASS.]," is "1**.** A telescope; a field-glass." The OED documents the historical context of its usage, thus suggesting its role in past exploration, adventure, and conquest, to wit:

spy-glass materializes the contradictions of this distance, and invokes the gaze of explorers (Christopher Columbus, Hernando De Soto, Ponce de Leon, among others) who, from or on behalf of far Spain, for example, used spy-glasses to espy "India," and then from the New World, to espy the broad and wonderfully distant, teeming, and uncultivated lands they were "civilizing." The trope here is appropriate for the critical distances—geospatial, racial, and developmental—it implies: if people are so far apart, they are but poorly seen, and, even with the power of the Enlightenment's telescopic vision, but seen through a veil darkly that de-individualizes and circumscribes them. Bodies, seen from these distant horizons or shores, are but specs or specters, or static bodies, that are small and ripe for interpolation into a natural order and the laws of civilization arising therefrom.

Laws, indeed, for contrary to the "justice is blind" axiom of black-letter positivism, the very opposite reality obtains. This is true, particularly in American jurisprudence where, contra the axiomatic objectivism of law, as Michael Hames-García notes in *Fugitive Justice: Prison Movements, Race, and the Meaning of Justice*,[17] "material relationships defined beyond legal consideration are crucial to the functioning of law," and "include which law school the lawyer attended and how well he or she knows the judge."[18] Law, then, maintains its putative coherence through a juridical necromancy that dissolves patently real conflicts of interests and subjective investments on the slippery grounds of inconsequence. The critical judgment on the contradictions between a "blind" justice system that privileges a pigmentocracy that, still today, makes justice disproportionately punitive for minorities, is nothing new, of course, even when the artistic form bearing it is. Before Harriet Jacobs' penned her chapter on "The Fugitive Slave Law,"[19] or Frederick Douglass blasted slave catchers as "bloodthirsty kidnappers" and related the experience of being a form of property valuated in a probate sale in which he and other slaves held "the

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> **1706** E. WARD *Wooden World Diss.* (1708) 11 He's never without a swinging large Spy-glass. **1753** *Phil. Trans.* XLVIII. 227 Turning the little end of a spy-glass, it appeared something like the ruins of Palmyra. **1814** SCOTT *Diary* 31 Aug. in *Lockhart* (1837) III. viii. 252 The whole, as seen with a spyglass, seems ruinous. **1840** MARRYAT *Poor Jack*ng2057 xxi, A telescope, or spy-glass, as sailors generally call them. **1875** W. MCILWRAITH *Guide Wigtownshire* 50 Here with a spy~glass one may discern the entrance to Dirk Hatterick's cave.

In the context of Butler's KINDRED and much of her craft, the pastness and presentness of the spy-glass are contiguous. Hence, Afro-futurist writers like Nalo Hopkinson and Walter Mosley, among others, and scholars like Sandra Govan articulate Afro-futurism as a narrative against the colonization of future worlds. *See* Sandra Govan *The Insistent Presence of Black Folk in the Novels of Samuel R. Delany*, 18 BLACK AMERICAN LITERATURE FORUM 43 (1984); Nalo Hopkinson & Gregory Rutledge, *Talking in Tongues: An Interview with Science Fiction Writer Nalo Hopkinson*, 33 AFRICAN AMERICAN REVIEW 589 (1999); and, Walter Mosley, *Black to the Future*, N.Y. TIMES, Nov. 1, 1998 (late ed.), at 32.

[17] MICHAEL HAMES-GARCÍA, FUGITIVE THOUGHT: PRISON MOVEMENTS, RACE, AND THE MEANING OF JUSTICE (2004).

[18] *Id*. at 74-75.

[19] HARRIET JACOBS, INCIDENTS IN THE LIFE OF A SLAVE GIRL 147-51 (2001).

same rank in the scale of being" as farm animals,[20] David Walker's *Appeal* trenchantly unveiled the racialized predispositions and foundations of America's chattel jurisprudence.[21] Today, the "rap" sheet on racial injustice frequently inspires the percussion-driven, bass-vocal thematics of rap lyricists, so much so that legal scholar Paul Butler posits a "hip-hop theory of punishment" as a viable lens from which to advance a bottoms-up reform of the criminal justice system.[22]

Ralph Ellison's metaphorization of and satire against the limits and vagaries of such racially based judgment, his "optic white" brand of Liberty Paints,[23] takes on deeper meaning when materialized and deployed by those grappling with the real, brutally violent racial terrains of American slavery and "the nadir" of colonialism succeeding it. Herman Melville, writing in the mid-nineteenth century, used the spy-glass of his protagonist, Amasa Delano, captain of the American merchant ship, *The Bachelor's Delight*, as the optical disembarkation for his novella, *Benito Cereno*. Melville's story, which explores the consequences of these distances against the actual backdrop of a slave mutiny, begins with the limitations, and contradictions, of sight:

> The morning was one peculiar to that coast. Everything was mute and calm; everything gray. The sea, though undulated into long roods of swells, seemed fixed, and was sleeked at the surface like waved lead that has cooled and set in the smelter's mold. The sky seemed a gray surtout. Flights of troubled gray fowl, kith and kin with flights of troubled gray vapors among which they were mixed, skimmed low and fitfully over the waters, as swallows over meadows before storms. Shadows present, foreshadowing deeper shadows to come.
> *To Captain Delano's surprise, the stranger, viewed through the glass*, showed no colors, though to do so upon entering a haven, however uninhabited in its shores, where but a single other ship might be lying, was the custom among peaceful seamen of all nations. . . .

It might have been but a deception of the vapors, but the longer the stranger was watched the more singular appeared her maneuvers. Erelong it seemed hard to decide

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[20] FREDERICK DOUGLASS, THE NARRATIVE OF THE LIFE OF FREDERICK DOUGLASS, AN AMERICAN SLAVE, WRITTEN BY HIMSELF 35-36; 73 (1997).

[21] DAVID WALKER, DAVID WALKER'S APPEAL, IN FOUR ARTICLES; TOGETHER WITH A PREAMBLE, TO THE COLOURED CITIZENS OF THE WORLD, BUT IN PARTICULAR, AND VERY EXPRESSLY, TO THOSE OF THE UNITED STATES OF AMERICA (3rd ed. 1830) *in* THE NORTON ANTHOLOGY OF AFRICAN AMERICAN LITERATURE 228-38 (Henry Louis Gates, Jr. & Nellie Y. McKay eds., 2004).

[22] Paul Butler, *Much Respect: Toward a Hip-Hop Theory of Punishment*, 56 STAN. L. REV. 983 (2004).

[23] *See* RALPH ELLISON, INVISIBLE MAN 199-205 (1995). No court of law or manmade optic is involved, but Ellison's narrative relies upon the racial scrutiny sanctioned by pre-*Brown*, Jim Crow-era jurisprudence and mores, along with the false-eye optics of the Brotherhood (Brother Jack) and, through the transformation of his protagonist with a hat and a pair of shades, the shaded optics of the folk-inspired charlatan, Rhinehart, a preacher, numbers runner, and pimp.

whether she meant to come in or no—what she wanted, or what she was about. The wind, which had breezed up a little during the night, was now extremely light and baffling, which the more increased the apparent uncertainty of her movements. (italics added)[24]

Melville uses the captain's spy-glass to stage its insidious distortions of the body as a consequence of the distance it mediates. With the "her" of this strange ship performing the race and Otherness, Melville reveals how the contradictions of the distance are manifest. Against the premise that the spy-glass negotiates the distance objectively, truthfully, Melville routes his imagery through Captain Delano's American eyes to establish two observations: first, the grayness and the vapors foreground the indeterminacy borne by this distance, rendering "her" features and actions vague; and, second, this indeterminacy creates *more* distance between Captain Delano's objective, optically enhanced vision, and its target. She—the Other—becomes smaller.

What happens to the body through this distance? As a matter of principle, it becomes larger and closer, vaguer and more indefinite, and even smaller. The consequences in fact, according to Melville, are horrific: The story unfolds, of course, to reveal a slave mutiny, only latently countenanced by Captain Delano, whose distance from the diminutive leader, suggestively named Babo, and the violent deaths visited upon the slave purchaser and much of the crew, ends as the violent consequences of the distance almost crashes into his lap. The coda for the story is an extract from the actual deposition—an extended narrative almost violent in its departure from the narrative story, the discontinuity calling attention to the law as much as the substance of the deposition—and the sentence befalling *both* of them. Babo, "the black," is convicted and executed by the law. Though Melville privileges the mind here,[25] restaging a mind-body split we have problematized for its masking of the embodied violence, what we "see" is an horrific denuding of Babo's violent assertion of his total humanity. Following the "gibbet[ing]" and incineration of his body, the excruciating destruction of his mind-body first, he is then deployed, in the mass medium of open-air square, to fulfill the visual corpus motivating the law: "for many days, the head, that hive of subtlety, fixed on a pole in the plaza, met, unabashed, the gazes of the whites, and across the Plaza looked towards St. Bartholomew's church."[26] Three months later, a coda to this visual enactment, Benito Cereno "follow[ed] his leader" into death.

Thus, the distance opening the story is interpolated into the legal narrative, and consecrated by the laws of God, Melville suggests, as understood by Spain and the other Christian nation-states. Of equal significance is sight, technological and illogical, which

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[24] HERMAN MELVILLE, BARTLEBY AND BENITO CERENO 37-38 (1990).

[25] Melville foregrounds Babo's mind when he prefaces his narrative by stating that "As for the black — whose brain, not body, had schemed and led the revolt, with the plot — his slight frame, inadequate to that which it held, had at once yielded to the superior muscular strength of his captor, in the boat." *Id.* at 103. Inseparable to this episode is, of course, "the superior muscular strength of his captor."

[26] *Id.* at 103-04.

becomes precedent for jurisprudence. Through the impassable gulf, Babo's body becomes distorted through this distance: he is race (the ultimate Other), he is *res* (Latin for a "thing,"[27] the object of property rights), and hence a living *corpus juris*, or "body of law," subject to the violent workings of a distant jurisprudence.

Though American slavery ended, along with the exploratory adventures, as trans-Atlantic and continental economies, but the telescope's tempo-spatial use found new worlds to conquer and colonize as the nineteenth century matured. Pauline Hopkins' *fin de siècle* serial novel, *Of One Blood; or, The Hidden Self*,[28] deploys the spy-glass *in media res*. Instead of a foundational optic enabling enlightened exploration, it functions as a sci-fi, post-slavery, colonizing optic used by Reuel Briggs and Charles "Adonis" Vance on their African expedition to find ancient Ethiopian treasure. Briggs, an epical figure in mind and body who has been passing for white in the elite milieu of Harvard University's medical school, and the "jolly countenance[d]" and Napoleon-quoting Vance,[29] rehearse the African colonization then afoot by numerous Western European nation-states. Provocatively represented by Hopkins as raiders of the ancient African city of Meroë, Briggs and Vance become modern explorers whose relationship to Mother Africa is as telescope-wielding rapists. At his first sight of "Africa whose nudity is only covered by the fallow mantle of the desert," Vance is "full of delight" as he "turned to his friend [Briggs] offering him a telescope."[30]

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[27] For this res/race locution, I draw upon legal and lay denotations, to wit: "res (rēz). (Latin.) The thing. The real thing. A transaction. An affair. The subject matter of a trust in a sense of the property held under trust. The subject matter of an action in the sense of the property or status involved" (BALLENTINE'S LAW DICTIONARY 1099 3rd ed. 1969); and "res (rās, rēz) *n.*, *pl.* res [L. *res*, a thing: see REAL[1]] *Law* 1. a thing; object 2. matter; case; point; action" (WEBSTER'S NEW WORLD DICTIONARY, 2nd college ed. 1986).

[28] PAULINE HOPKINS, OF ONE BLOOD; OR, THE HIDDEN SELF (2004). Hopkins' novel appeared in the November, December, and January 1902-1903 issues of the *Colored American Magazine*, which she then edited.

[29] "'From the heights of yonder Pyramids forty centuries are contemplating you,'" Vance intones as he contemplates the pyramids (Hopkins 106). In collapsing the distance between Vance and Napoleon, Hopkins satirizes the objective, scientific optic of a French scientist and the American, N. Robinson, who gives an account of his behavior to American readers in "The Colossal Statues of Egypt and Asia" (1884):

> On the occasion of my first visit to the Sphinx a French scientific party was engaged in taking photographs and measurements of her very serene highness. They had rope ladders and grapnels, and every description of portable climbing apparatus. One little fellow, all mustache, succeeded in gaining a coigne of vantage in the parting of the Sphinx's hair, and from that stony valley proceeded to harangue his companions, lugging in the famous Napoleon's "From the heights of yonder Pyramids forty centuries are contemplating you," etc. This was admirably done, and the grimaces of the eloquent Gaul outvied in ugliness the countenance of the once gracious-countenanced Sphinx" (90).

See N. Robinson, *The Colossal Statues of Egypt and Asia*, FRANK LESLIE'S POPULAR MONTHLY, Jan.–June 1884, at 90-95.

[30] HOPKINS, *supra* note 28, at 76.

Vance's and Briggs' telescopic sight, which Hopkins foregrounds here, is marked by the myopic designs of adventurers whose viewpoints simultaneously create twin movements toward and away from the objects of their gaze. Contrary to the laws of physics at work in this instance, which putatively enhance their vision, Hopkins underscores the instability of sight enabled by Western modernity: Briggs, staring at the "nudity" telescoped into his modernized perspective, recoils at the racial difference he "vividly" associates with the Moorish landscape of Tripoli, Lybia, their North African entry point; Vance, drawn toward the exotic "delight" that "'promises,'" he claims, "'to be better than anything Barnum'" ever offered audiences, later finds the reality, exemplified by baggage handlers, to consist of "a horde of dirty rascals" whose "signaling, gesticulating, [and] speaking at once" is more than capable of discomfiting "a civilized man."

Vance's "jolly" Barnum (and Bailey) circus references here and elsewhere, a form of clowning in its own right, operates as Hopkins' parodic treatment of his life and sweeping indictment of the fantasies circuses traffick. Stripped of the jolly whiteface Vance voices, Barnum here signifies a materialized performance resulting from telescopic distortions. Indeed, its meaning scopes out as metaphor for a form of cultural production with deep religious, economic, epistemological, and legal significance. The "separate but equal" doctrine of *Plessy* rendered, for Hopkins and other black intellectuals, the Supreme Court deliberations little more than a supreme "circus," albeit with very real and horrific results. In a climate where race women's and men's in-sight, a Du Boisian "second sight" for sure, essentially represents the totality of substantive influence they can exercise, their parodic narrative offers them their only legal sword. Hames-García, drawing upon Bakhtin's concept of "carnival," makes just this point as he expounds on "courtroom and carnival": the "universal laughter of carnival—directed at 'all and everyone'—as characteristic of 'grotesque realism,'" offers up the "carnival (courtroom circus)" as a satirical strategy "mocking the court and the legal system."[31]

The tenuous connection between the supreme law of the land and a circus atmosphere is substantiated by Hopkins' limning of Vance here and in the early parts of the novel. As the pampered son of a prominent Boston attorney, and yet presumably someone with privileged knowledge of the law who is most repulsed by the dynamic, free-moving African culture about him, Vance ventriloquizes Hopkins' critique of the exotic optics Barnum capitalizes upon. Barnum's "greatest show on earth" collapses cultural and capitalistic economies often steeped in a fantasmagoric reality featuring fetishistic performances of Orientalized and American-Africanized imaginings.[32] The circus

[31] HAMES-GARCÍA, *supra* note 17, at 56; 71.

[32] Here I draw upon Edward Said's concept of Orientalism, and Toni Morrison's definition of "American Africanism," both representing the European/American racialized imaginary. *See* EDWARD SAID, ORIENTALISM (1994), and TONI MORRISON, PLAYING IN THE DARK: WHITENESS AND THE LITERARY

collapses the farscape into a commodified package which offers close-up, living artifacts contained for one's viewing pleasure—provided, of course, one pays the proper license, or fee, for entrance. Vance's Barnum reference, then, functions as a metonym for the expropriation of Africa's treasures by the "many illustrious explorers," Hopkinson explains, lured to the northern African gateway to riches and *terra incognito*, the translation of such into eye-catching, titillating entertainment for the American bourgeoisie, the reification of Otherness to be explored, captured, and displayed for the Christian/Enlightenment project, and, of course, private property of the circus owners who license out viewing contracts to the public of means.[33]

Passing judgment on European/American nation-states' racists aetiology, which Enlightenment-era slavery and post-slavery colonization exacerbated, Hopkins and Melville argue that the distances distorts everyone and all relationships, inter- and intra-racially. And yet, the distance evident in an eighteenth-century slave mutiny and late nineteenth- and early twentieth-century colonization continued well into post-modernity as Judge Leon Bazile passed judgment on two kindred souls, the Lovings. The trial judge's opinion in 1958 shows how deeply situated this distance remained in the nation's imaginary. The consequences are, indeed, interracial, for what's lost in this "impassable gulf" is a failure of human and humane—global—vision. The problem I have set out for you is a simple one: How can the distance, distortions, and dysfunctions giving rise to the deep-set Laws be eradicated, or at least fundamentally undermined?

I think the proper starting place is the body in relationship to other bodies, and narrative—particularly fictional—manifestations of the body. After all, the distance is itself a fictional—mythological, in grossest terms—creation of the body, and even with legal progress—e.g., *Brown v. Board of Education*, *Loving v. Virginia*—the axiom that you cannot legislate morality shows the vitality of racial mythology. Clearly, a narrative capable of providing a counter-mythology that interrogates the prevailing mythos and closes the distance is in order.

Critical race theory, according to Imani Perry, is one such tool, for it has the capacity to conjoin legal critique and literary production to formulate a belletristic jurisprudence at once more logical, ethical, and consistent than its blackletter counterpart. In her 2005 law review article, "Occupying the Universal, Embodying the Subject: African American Literary Jurisprudence,"[34] Perry foregrounds the tenets of critical race theory—centralization of black subjectivity to provide insights into Western jurisprudence, highlighting the role of narrative in constructing a useful critical foundation, and

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IMAGINATION 6-8 (1992).

[33] *Id*. at 76-81.

[34] Imani Perry, *Occupying the Universal, Embodying the Subject: African American Literary Jurisprudence*, 17 CARDOZO STUD. L. & LIT. 97 (2005).

challenging Western constructs of the self situated in Cartesian dualism—because it enables, she argues, African-American authors to create narratives of dissent predicated on the body as the locus of judgment against American jurisprudence past and present. Perry advances her trope of "sympathetic occupation" to suggests that "when a person with whom the [white] reader identifies encounters the abuses, contradictions, or inequities of American racial politics, the [vicarious] occupation has transformative potential for the racial philosophies of the reader."[35] This happens, she maintains, because of the denial of universal subjectivity to African Americans through the racialization of the mind and body. Her goal, consonant with Du Bois', when he articulated double-consciousness, the split of the African-American being into American and "and "Negro,"[36] is the erasure of the distance between the mind and body, whiteness and blackness, by evoking a response of sympathy in her reader.

Although one could problematize Perry's mind-body dilemma, and sympathy, as she acknowledges, has limits, Perry's use of literature to assault the law's racialized jurisprudence through "sympathetic occupation" provides a compelling methodology for intertextual readings between prevailing U. S. precedent, African-American texts, and social context. For instance, one might profitably read the U.S. Constitution, the Fugitive Slave Law of 1850, and biblical constructions alongside Harriet Jacobs' *Incidents in the Life of a Slave Girl*—one of Jacobs' chapters is named "The Fugitive Slave Law," in fact. Charles W. Chesnutt's *The Marrow of Tradition* (1901) introduces its protagonist, Dr. William Miller, in an episode that restages the circumstances of *Plessy v. Ferguson*, the Supreme Court's 1896 elevation of "separate but equal" into national jurisprudence, and its arbitrariness,[37] to which Associate Justice John Marshall Harlan fervently dissented. *Brown v. Board of Education* (1954), along with normative Civil Rights efforts, is excoriated in *The Autobiography of Malcolm X*.[38] In each of these, interracial sexual relationships have definitive and indispensable significance to the plot: her liaison with Mr. Sands allows Jacobs to foil her adulterous owner, Dr. Flint; the fictional marriage of Sam Merkell and Julia Brown, a slaveholder and his former bondwoman, is one of two primary conflicts in Chesnutt's retelling of the Wilmington race riot; and, Malcolm X's relationship with the pseudonymous Sophia eventually lands him in prison and christens his rebirth. I would argue that these couplings—illicit, unnatural, and even masochistic—foreshadow an

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[35] *Id.* at 99.
[36] W. E. B. DU BOIS, THE SOULS OF BLACK FOLK 11 (1999); Perry, *supra* note 34, at 99-100; 104-06.
[37] CHARLES W. CHESNUTT, THE MARROW OF TRADITION (1993).
[38] MALCOLM X & ALEX HALEY, THE AUTOBIOGRAPHY OF MALCOLM X 247; 277 (1995), for example, where Malcolm X says "nine Supreme Court judges," using "trickery and magic," "told Negroes they were desegregated—Hooray! Hooray!—and at the same time it told whites 'Here are your loopholes,'" and blames "'integration'-mad Negroes" and "'token-integrated' Negroes" for accepting integration, "a foxy Northern liberal's smokescreen."

African-American literary jurisprudence directed at the corpus of the problem.

So what novel, then, responds to the jurisprudence and explicit distances and implicit distortions of Judge Bazile's 1959 decree resulting in *Loving v. Virginia*? And that also directs itself to the other reactionary extremes that hold, as Malcolm X did for a time, all whites to be "blonde-haired, blue-eyed devils," that, indeed, the distance between whiteness and blackness was "impassable?"

III. BUTLER'S *KINDRED*: EMBODIED DISSENT TO THE "IMPASSABLE GULF"

I can think of no better text than Butler's *Kindred*, a time-travel[39] and historical novel set in 1976 California and early antebellum Maryland, using an inter-racial couple, Edana and Kevin Franklin, to dissent to the impassable gulf of race, gender, class, and ideology. Starting just before the country's bicentennial on June 9, 1976, which happens to be Edana's twenty-sixth birthday, she finds herself—and later Kevin—transported from California back to slave-era Maryland, where they soon realize that she is drawn to Rufus Weylin, the son of a slaveholder. The paradoxes—Edana is a dark-complexioned woman, Kevin is nearly an albino; Rufus is Edana's distant relative; Edana's existence depends on his relationship to another woman, Alice Greenwood-Jackson, who resembles Edana; Edana is fiercely independent, almost militant, and yet is also a slave; Edana is a writer married to a successful writer, both living the America Dream in California, while acquiring literacy was a desperate gamble for many slaves seeking to enter the Promised Land—allow Butler to use the body of her protagonist, the bodies formed through interpersonal relationships (marriages, friendships, blood relations), and, yes, the reader's body, to examine and critique the distance. Butler's novel, which collapses the distance, closes with less violence than Melville's and Hopkins' novels, but violent it is nevertheless: Rufus dies at the hands of Edana, who stabs him to prevent him from raping her; Edana loses her left arm in the exchange, and perhaps her privileged life and budding career; and, Kevin, objective, skeptical, and judgmental in the early part of the novel, bears an ugly, jagged scar on his forehead. The time travel over and the novel set in 1976 once again, the epilogue sends a recovering Edana and Kevin on a quest from California to Maryland in

[39] Despite the tempo-spatial paradoxes motivating her plot, "Butler is silent on the mechanics of time travel," notes Robert Crossley in his introduction. Unlike the "literal truth" of time travel based in scientific rigor, such as H.G. Wells' THE TIME MACHINE (1895), Crossley argues that Butler's use of time travel as a "fantastic given" and "irrestable psychohistorical force" that "leaves the reader uneasy and disturbed by the intersection of story and history rather than comforted by a tale that 'makes sense.'" Crossley implies, and I fully concur, that time travel here is a metaphor, serving as "the vehicle that looms behind every American slave narrative, the grim death-ship of the Middle Passage from Africa to the slave markets of the New World," and the "slave market" of Dana's 1976 California. *See*, Robert Crossley, *Introduction* to OCTAVIA E. BUTLER, KINDRED ix-xxv, x-xi (1988).

search of the Weylins' residence and the past. Their failure to close the distance, to recover people and places they and we have come to know, is doubly relevant: it makes us, as readers, feel the loss of people whom we have come to care for as extensions of Edana and our reading persona, a discontinuity Butler metaphorizes as Edana's amputated arm; and, secondly, it leaves the distance as a reminder to contemporary readers whose privileged lives are situated on the violent precedent, and proprietary relations, of the "impassable gulf."

Between the opening dilemma and the closing absence, borne upon Butler's device—her own spy-glass—of time and space travel, *Kindred* contains numerous strategies that undermine the mythologies and dysfunctions of racial distance. Butler begins her project through three bedrock *dissents*: from the laws sanctioning anti-miscegenation statutes and, importantly, majoritarian practices; from the understandable, but still problematic, polarized opposition that is simply a manichean reflection; and, finally, from the middle ground, ostensibly a habitation in the Promised Land, but actually the mythic American Dream house supported by constitutional laws implicated in the distance.

A. BUTLER'S FIRST DISSENT: TRADITIONAL RACE- AND CLASS-BASED DISCRIMINATION

Not surprisingly, the first implicates the racial jurisprudence of Judge Bazile, which is predicated on the Constitution, of which he is an arbiter, and the laws of God, which he considers, as have many others, coextensive. Butler's response—appropriate considering the sure failure of post-*Loving* precedent, just as *Brown v. Board of Education* (1955) devolved into Chief Justice Warren's nigh-toothless precedent of "all deliberate speed"[40]—is the construction of a marital body extreme in its pairing, even for California: Kevin "was an unusual-looking white man, his face young, almost unlined, but his hair completely gray and his eyes so pale as to be almost colorless"; Edana, who is, her aunt "always said[,] . . . a little too 'highly visible,'" can pass as a nineteenth-century "boy" because of her "height" and "contralto voice"; they are, in the words of Buz, their former supervisor who is a drunkard and racist, "'Chocolate and vanilla porn.'"[41] In post-*Loving* 1976 it may no longer be constitutionally valid to declare, as Rufus does when Edana reveals their marriage, "'Niggers can't marry white people,'"[42] but the sacrosanct seal of the law supporting Judge Bazile is. In addition to his "chocolate and vanilla porn" sententia, Buz adjudges their relationship as "poor-nography" (starving artists and black-white loving) while another employee, a woman, labels them as "'the weirdest-looking couple'

[40] *Brown v. Board of Education*, 349 U.S. 294, 301; 75 S. Ct. 753, 757; 99 L. Ed. 1083, 1106 (1955).
[41] BUTLER, *supra* note 2, at 56; 171.
[42] *Id.* at 60.

she had ever seen."[43]

Literary critic Nancy Bentley's study of how nineteenth-century affect—"intimate feeling" in this case—shaped law and literature provides, in her anatomy of nineteenth-century views toward marriage and miscegenation, an explanation that accounts for its twentieth-century continuity. The context for the following quote is her argument that the fear of interracial relationships was not sex, property inheritance, or the production of "mongrel" children, but intimacy in marriage that presupposed, *a priori*, full humanity consecrated by the highest order and consolidated in the law:

> To the extent that black-white couples demonstrated normative feelings of intimacy by seeking to marry, the dominant society was confronted with apparent evidence that such couples possessed the same feeling that broadly authenticated the sphere of law itself. The dilemma prompted an increasingly strenuous effort on the part of American law to disavow any sign of black-white marital desire. A North Carolina court described, in an 1877 decision, the prospect of interracial marriage as "revolting," a juridical sentiment it underscored as crucial proof despite its concession that this was "[not] the common sentiment of the civilized and Christian world." It was not sufficient for courts to declare such marriages criminal; the motive or desire for marriage - the legitimizing feeling - was the real crux of the issue. Thus, courts, litigants, and white observers bear witness to their own disgust and distress at black-white unions, for in doing so, they offer their own juridical feeling - a lawful "revulsion" - as the only definitive evidence to counter the evidence of interracial marital desire. Interestingly, the disavowal of such marital feeling at times extended even to representations of interracial intimacy. In addition to their prohibitions on marriage, several states added statutes banning any publication of "general information, arguments, or suggestions in favor of social equality or of intermarriage between whites and Negroes," on penalty of fines, or imprisonment, or both.[44]

In other words, God's law—the laws of nature, the natural law—simply did not recognize the black body as a nubile equivalent, and any black-white marital body—the symbolic body formed by the consent and vows of the couple—was, and remains, illicit, unnatural, revolting, poor-nographic.

Butler's pairing of these two kindred writers and souls, in spite of all their stark differences, goes right to the genesis of the problem: the natural distance assumed in the creative act, and the blueprint for the procreative act that reproduces God's original intent.

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[43] *Id*. at 54; 57.

[44] Nancy Bentley, *Legal Feeling: The Place of Intimacy in Interracial Marriage Law*, 78 CHI.-KENT. L. REV. 773, 781-82 (2003).

B. BUTLER'S SECOND DISSENT: MILITANT EGO AND HISTORICAL MYOPIA

The second dissent echoes the first in that it focuses on the polarized reaction to the mainstream laws and practices including, but not limited to, miscegenation. Edana's aunt and uncle dislike the very idea of white-black marriage; Butler expands this revulsion to interracial marriage to sweep into her project a group whose extreme response to racism also defines the distance and its effect. She made this evident in a 1997 interview with Charles H. Rowell as she explained the inspiration for *Kindred*:

> When I got into . . . Pasadena City College, the black nationalist movement, the Black Power Movement, was really underway with the young people, and I heard some remarks from a young man who was the same age I was but who had apparently never made the connection with what his parents did to keep him alive. He was still blaming them for their humility and their acceptance of disgusting behavior on the part of employers and other people. He said, "I'd like to kill all those old people who have been holding us back for so long. But I can't because I'd have to start with my own parents." When he said *us* he meant black people, and when he said *old people* he meant older black people. That was actually the germ of the idea for *Kindred* (1979). I've carried that comment with me for thirty years. He felt so strongly ashamed of what the older generation had to do, without really putting it into the context of being necessary for not only their lives but his as well.
> I wanted to take a character . . . back in time to some of the things that our ancestors had to go through, and see if that character survived so very well with the knowledge of the present in her head. Actually, I began with a man as main character, but I couldn't go on using the male main character, because I couldn't realistically keep him alive. So many things that he did would have been likely to get him killed. He wouldn't even have time to learn the rules—the rules of submission, I guess you would call them—before he was killed for not knowing them because he would be perceived as dangerous. The female main character, who might be equally dangerous, would not be perceived so. She might be beaten, she might be abused, but she probably wouldn't be killed and that's the way I wrote it. She was beaten and abused, but she was not killed. That sexism, in a sense, worked in her favor.[45]

Butler's explanation leads me to two observations. First, the anger—the *righteous* indignation is legitimate—this fellow felt was so potent that his hatred has driven out perspective. His hatred of the people obscures his love of humanity and justice. The distance has so distorted him that he—at least his virulent ideology—takes for granted the humanity of the preceding generations, including his own parents. He has adjudged all of them as abetting Uncle Toms and Aunt Jemimas. This militant had internalized an

[45] Charles H. Rowell, *An Interview with Octavia E. Butler*, 20 CALLALOO 47, 51 (1997).

intra-racial hatred that, in substance and tone, is no different from racism proper. It is about *Loving*—pun intended—because, as we have seen from too many revolutions turned dictatorships, that many revolutionary leaders are not motivated by a profound sense of justice and humanity, but a selfishness—Where is *my* apple pie and American Dream?—cloaked in the guise of indignation about race and the other -isms. The two are virtually indistinguishable when the distance and distortions are so vast and potent, respectively. Only the passage of time, and changing of the guard, can expose many of these *sans-culotte*- Caesars.

The latent significance of Butler's inspiration problematizes an easy dismissal of Black nationalism, for Edana's militant feminism closes the gender gap. Edana is a modern, liberated black woman, an aspiring fiction writer, who has transcended the old nativism and married Kevin Franklin, a white liberal novelist, and both are living the American Dream in the western, utopian space of California. Situated in the post-Civil Rights, post-Black Power, and the surging Women Right's era, Dana—forget the diminutive her "E" connotes—may be a struggling writer, one "working out of a slave market,"[46] but her wit is sharp enough to assay the Marxist dilemma of alienated labor and parry the sexist, but sensitive, expectations of Kevin, then en route to becoming her partner on terms set by Dana. She will not type his manuscripts, she will not move into his apartment and become a ward dependent on his welfare, she will not handle his correspondence, and she will not even surrender her independence to him to declare her independence from the temporary employment agency, what the "regulars [like her] called a slave market."[47] As one of the temp agency's best employees because she was meticulous, a trait handy for taking inventory, a writer, and a person confident enough in herself to overlook the bumbling racist-sexisms of Buz, her supervisor, Dana's racial *savoire faire* was sharp, her sense of modern entitlement sharper, and her post-*Roe v. Wade* acumen the sharpest yet. Quite appropriately, then, *Kindred* is told as Dana's I-narrative and her-story, as the reader is pulled on this incredible and not-so-incredible time warp with a very reliable narrator armed with all the trappings of a modern woman. Butler locates violence within class stratification, here paired with Dana's feminism to comment, it would seem, on the brand of individualism it entails.

C. BUTLER'S THIRD DISSENT: MIDDLE-CLASS WINDFALLS

The third dissent, then, are the house and its trappings appurtenant that, materially, distance and inoculate Dana and Kevin from the effects of the Old South, Bible Belt, and Urban Jungle. By moving away from their apartment in Los Angeles to a new home in

[46] BUTLER, *supra* note 2, at 53.
[47] *Id.* at 52.

Altadena, in the suburbs, they represent, especially from Dana's perspective, the consolidation of the American Dream, West Coast utopia, and promises of possibility—literary, but cinematic with Hollywood looming close, socio-economic, and familial. The opening lines of the novel—"I lost an arm on my last trip home. My left arm. And I lost about a year of my life and much of the comfort and security I had not valued until it was gone"[48]—establishes her lost arm as a traumatic emblem that challenges the notion of "home" as a place of "comfort and security" and the fruit of one's own labor. Indeed, "home" begs the question, "Which home?" The answer, beginning and ending in the Altadena suburbs, is her past and present home. They are the same, the "trip" between them an everyday occurrence, the sickness that Dana encounters when she moves through space and time foreshadowing the "urge to vomit" she subsequently feels when she watches a slave brutally beaten by patrollers on her second "trip" to Maryland—the whip came "down across the back of the black man. The man's body convulsed, but the only sound he made was a gasp. . . . Then the man's resolve broke. He began to moan–low, gut-wrenching sounds torn from him against his will. Finally he began to scream. . . . 'Please, Master,' the man begged. 'For Godsake, Master, please . . .'"[49] Dana admits to having "seen people beaten on television and in the movies"—but that was just entertainment.

The bi-directionality of Dana's travels de-materializes the difference between past and present violence as the novel progresses. Butlerian time is broad *per force*, for it spans 1976 to 1812, 1815, 1819, and so on, present to past. The return trips, however, bear the burden of Butler's narrative argument, for the trip from 1812 to 1819 back to 1976 is not from the past to the present, but it's the past as present, and the present as future. It is, simply, the present (a real but receding early antebellum and bicentennial America) gazing into the future, a temporal range meeting the laws of the "impassable gulf" pace for pace, moment for moment, person for person, deed for deed. Memory and future possibility collapse into a troubled present as Butler plants the seeds she'll nurture later in the mysteries of her very first lines, which ask a pointed question to frame her frame story: how much of our comfort is coextensive with this violence?

Dana's first trips answer this question, and expose Butler's last dissent, which implicates equitable principles of restitution and, arguably, the legal doctrine known as "fruit of the poisoned—or poisonous—tree." Used on connection with the Fourth Amendment protection against unlawful search and seizure, the "fruit of the poisoned tree" prevents prosecutors from introducing evidence—no matter how valuable—obtained by the police illegally. The theory is that all the fruit of that original illegality grows from its roots, and all is therefore excluded. One of the various exceptions to this rule, among numerous ones, recognizes the validity of evidence that would have been discovered anyway because

[48] *Id.* at 9.
[49] *Id.* at 36.

its nature or location is obvious. Another "exception" to this rule, and more appropriate to Butler's third dissent, is connected to the concept of restitution as a measure of damages. Once the wrong or liability has been legally established, a party suffering direct pecuniary loss is entitled to recover the windfall the defendant received as a result of wrongdoing. Evidence, of almost any nature, is admissible to establish the "fruit" of the wrongdoing for the purpose of determining damages.[50] The roots of the crime that bear fruit, of course, is also a natural outgrowth of Dana's—and everyone's—genealogical tree, her very body existing as an enfleshed, evidentiary exhibit of the fruits of the founding illegality. Thus, although the protagonists, Dana and Kevin, are at a far remove from the past, Butler clearly has in mind the notion of a windfall benefitting the middle class, suburban dreamers whose "comfort and security," in significant part, provides the narrative of and metric for progress.

It is significant that Dana's first trip occurs as they are unpacking in Altadena, putting away on the various bookshelves, a conspicuous status symbol of Enlightenment and materialized subjectivity, the "many books" they own, and ends, once she has saved Rufus, with Kevin giving her a "large towel" that "comforted [her] somehow."[51] The second temporal-spatial leap occurs, hours later, during an even more conspicuously consumptive moment: she has just "showered, washed away the mud and brackish water, put on clean clothes, combed [her] hair," and started to eat the delivered food—Kevin "called out for chicken and shrimp"—when, everything "calmer, the kitchen began to blur" and she "felt the sick dizziness"[52] Immigration and Chinese coolies—and food—germinate here, providing yet more evidence of the subtle, comfortable and secure violence Butler has in mind. Moreover, Altadena, still an unincorporated town in Los Angeles County, originally belonged to a Native American tribe—the Hahamongna, also known as Gabrielinos—before Spanish colonization in the eighteenth century, and became a hub for working- and middle-class blacks who were disallowed residency in Los Angeles. The coming of the railway in the 1880s, largely through Chinese labor made possible the expansion of Altadena as a suburb of Los Angeles for the wealthy.

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[50] Civil law, of course, recognizes this principle of restitution. Criminal law does too. For example, 18 U.S.C. ch. 96, Racketeer Influenced and Corrupt Organizations (RICO), §1963(a), requires that the defendant "shall forfeit to the United States (1) any interest he has acquired or maintained in violation of §1962, and (2) any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over, any enterprise which he has established, operated, controlled, conducted, or participated in the conduct of, in violation of §1962." This criminal forfeiture is expanded by §1964, which permits civil remedies by other parties, public and private. Thus, under section "(c) Any person injured in his business or property by reason of a violation of §1962 of this chapter may sue therefore in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee."

[51] BUTLER, *supra* note 2, at 12-13; 15.

[52] *Id.* at 18-19.

I won't belabor this except to say that "comfort" and "security," combined with Altadena's racial history, become overdetermined markers of Butler's final dissent, which she steadily replaces with *dis*comfort. The fruit of her labor and Kevin's, their Altadena home, loses its materiality and reality as Dana increasingly realizes how much of the distance and violence shape her present. This places perspective on Dana's opening remarks that she lost "much of the comfort and security I had not valued until it was gone": both she and Kevin must pay the price in full for their progress, though it appear high and thus unconscionable. They are implicated in, according to Nell Irvin Painter, an historian assessing the damages of slavery, particularly on black women, a "fully-loaded cost accounting."[53]

IV. BUTLER'S JUDGMENT: DECOUPLE EPICAL AND CONSTITUTIONAL PERFORMANCES

Through these dissents—extremes of anti-miscegenation law and majoritarian practice, a quasi-pathological reaction to it, and the comfort and security of the ex-urban generation—Butler can vigorously eradicate the distance and its consequences. Where else is there to hide? I suspect Butler realizes that the Laws and their material, anticipatory forms need to be placed in a more fluid or hot space, to permit malleability and sight unmediated by spy-glasses, or suburban trappings, for that matter. After all, Butler's Ur-dissent is not to Judge Bazile or the Pasadena black radical, or suburbia, but the Constitution. Its adoption is the ultimate act of the national Fathers. The distance recognized by the Constitution—Three-Fifths Clause and the like—internalizes and democratizes the "impassable gulf." The distance becomes both legal and epical. It is this age of the Fathers that forces Mikhail Bakhtin, in his classic essay, "Èpos i roman" ("Epic and Novel"),[54] to qualify his own argument that the Heroic Age, Age of the Epic, that which existed at an absolute distance and time away from us, gave way to modern, real time and the psychological depth of the novel. He says, "It is possible, of course, to conceive even 'my time' as heroic, epic time, when it is seen as historically significant; one can distance it, look at it as if from afar (not from one's own vantage point but from some point in the future), one can relate to the past in a familiar way (as if relating to 'my' present). But in so doing we ignore the presentness of the present and pastness of the past; we are removing ourselves from the zone of 'my time,' from the zone of familiar contact

[53] Nell Irvin Painter, *Soul Murder and Slavery: Toward a Fully-Loaded Cost Accounting*, *in* U.S. HISTORY AS WOMEN'S HISTORY: NEW FEMINIST ESSAYS (Linda Kerber et al. eds., 1995).

[54] Mikhail Mikhailovich Bakhtin, *Èpos i roman* [*Epic and Novel: Toward a Methodology for the Study of the Novel*], *in* THE DIALOGIC IMAGINATION: FOUR ESSAYS (Michael Holquist ed. & Caryl Emerson et al. trans., University of Texas Press, 1994) (1941).

with me." Bakhtin finishes this thought by arguing that, "In a patriarchal social structure the ruling class does, in a certain sense, belong to the world of 'fathers' and is thus separated from the other classes by a distance that is almost epical,"[55] but I'd like to expand upon this and yet dissent to his genealogical break between epic and novel. George Washington, man and myth, enables me to do this.

Washington embodies the Heroic Age and its transition to and continuity with a modern democracy. It is his 6' 2" body—the average Virginian was 5' 6"—and elite status that enters the Constitution as the "Commander in Chief" of Article II, Section 2. He is as absolute and inaccessible as an Heroic Age icon, such as Achilles, the authorization of the Law, and yet as accessible as a Father who is stern but loving in his protection of hearth and home. His C(c)onstitution carries with it two images. The first is the mythos created by Mason Locke Weems, in the popular bio-mythological *The Life of Washington* (this work, first published in 1800, gave us the myth of the cherry tree),[56] which portrayed young Washington as one of "extraordinary strength," like his father, who could "throw a stone across Rappahannock"—it is now "no easy matter to find a man, now-a-days, who could do it"; and, "as to running, the swift-footed Achilles could scarcely have matched his speed."[57] The second image, an icon among American iconography, is represented by Gilbert Stuart's 1796 portrait, *George Washington*, and Emanuel Leutze's 1851 painting, *Washington Crossing the Delaware*, the latter of which memorializes the statesman-Father as a forward-gazing, mature hero who, obviously, needs no spy-glass.

To challenge this confluence of the Law and Epic, Butler starts her dissent at the beginning, with the body of the law de-materialized, rendered fluid, and hot. The epic performance, American and African, provide interesting insights into Butler's plot. In Mali, during the septennial Kamabolon ceremony, a five-day, spring-time festival, the roof of a sacred building is removed and restored to symbolize the return of Sunjata, the African epic figure best known to westerners. While the roof is off the kamabalon, Malian society is, according to linguistic anthropologist Jan Jansen, fluid, "hot," and unstable. During this period, and because of the vulnerable state, taboos are strictly enforced. Auditors have been beaten and hospitalized for violating these taboos.[58] Whereas the Kamabolon ceremony

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[55] *Id.* at 13-15.

[56] MASON L. WEEMS, THE LIFE OF WASHINGTON 19 (Marcus Cunliffe ed., Harvard-Belknap Press 1999) (1800).

[57] *Id.* at 20-21.

[58] *See* Jan Jansen, *Hot Issues: The 1997 Kamabolon Ceremony in Kangaba (Mali)*, 31 THE INTERNATIONAL JOURNAL OF AFRICAN HISTORICAL STUDIES 253 (1998) and *The Sunjata Epic—The Ultimate Version*, RESEARCH IN AFRICAN LITERATURES, Spring 2001, at 14. Space does not permit me to dilate on this matter, but the state-building and –destroying power of epic-heroic figures, recognized by the harsh strictures enforced during the Kamabolon, is part of a performative economy parallel to American state-making, reification, and policing during election cycles and national crises. Assuming the social contract to be "hot" and fluid, with epical energy uncontained, the adoption of the United States Constitution (1789), its four-year

ends with the re-telling of the epic of Sunjata, the figure attributed with founding the Malian empire, with society cooling and concretizing as a reinforced *status quo ante*, the desired end, Butler uses the fluidity as a tool to examine America's epic, legal performance and debunk the myth of the "impassable gulf."

In this period of foundation-building, it is easy enough to understand why and how Butler deploys the fluidity. The first three chapters are entitled "The River," "The Fire," and "The Fall," the biblical and elemental providing the backdrop for Butler's episodic structure, which allows Butler to tell the story but also, in Homeric fashion, use well-placed digressions to draw numerous parallels and paradoxes that reveal the connections between humans, and the distortions that create interesting paradoxes. Of course, Dana is the focal point. With her short-cropped hair and pants, she is literally a wo/man from her first trip onward, a critique on gender oppression that eventually evolves into a critique of a feminist privilege, Butler suggests, Dana—who doffs her pants and dons a simple dress for the first time in the novel—has not yet earned. After she is whipped and stripped of the final privileges in "The Fall," Dana the writer becomes Dana the house servant and cook, and her superiority complex to Aunt Sarah, whom she belittled as a "mammy" figure, the "house-nigger, the handkerchief-head, the female Uncle Tom,"[59] returns full circle when she is forced into the same role on behalf of a slave, Alice, more resistant than she. Her quick disappearances evoke stereotypical labels, such as "smoke" and "spook," from Rufus—who says to her, "'Disappeared? You mean like smoke?' Fear crept into his expression. 'Like a ghost?'"—before, moments later, he explains that his mother likens her miraculous saving of himself, fated to drown unless she made her first trip, to "'the Second Book of Kings.'"[60] Dana is not just queenly, but epical in an Afro-Hebraic manner associated with the equivalency between traditional epics, for, as John W. Roberts notes:

> By transforming the biblical saga into an heroic tradition based on values guiding actions traditionally associated with the African epic heroic tradition—redefined as Christian religious values—enslaved Africans were able to embody in their spirituals a conception of the actions of biblical heroes as the most advantageous for protecting their identity and values. . . .[61]

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re-performance in which the "commander-in-chief" is renewed, the post-9/11crisis articulated as a "War on Terror," renewed interest in the Founders and American epic heroism, including rhetoric that transforms citizens into "Reds" and "soldiers" into "warriors," and Patriot Act I and II surveillance matters implicating privacy, academic freedom, and warrantless searches, *inter alia*, establish a powerful, "post-modern" corollary to policing evident in the "pre-modern" Kamabolon.

[59] BUTLER, *supra* note 2, at 145.

[60] *Id*. at 23-24.

[61] JOHN W. ROBERTS, FROM TRICKSTER TO BADMAN: THE BLACK FOLK HERO IN SLAVERY AND FREEDOM 110; 150-53 (1990).

Dana's role as "spook" and as "King," as a trickster and hero, or epic trickster, a paradoxical reality that spans the widest range of possibility as a transgressor par excellence—we are talking about the Law—is a key heuristic.

Yes, Dana has literacy, the privilege of which Butler critiques by using her encyclopedic aesthetic to expose Dana's hubris, but she also has talent as a writer of fiction, as evidenced by her placing a story with *The Atlantic*. Among other things, their creative talent enables Dana and Kevin to share "a kindred spirit."[62] Dana's talent, manifest in her diction, first, and then literacy, frightens Tom Weylin, who is barely literate himself. Dana literally and figuratively challenges the natural order: she is not supposed to have this talent as a res/race, and it is this very talent, in the form of literacy, which fosters slave revolts. But it also fosters a paradoxical revolt, for this very same Tom Weylin becomes attracted to her. The human closeness between them, exposed by Butler already, masks itself as an economic, contractual, master-slave transaction. He makes an offer to Dana to buy her, to liberate her from the misguided thinking of Kevin—"'I could buy you. Then you'd live here instead of traveling around the country without enough to eat or a place to sleep'" —and start giving her, and the "kindred" she produces, a growing number of issues that make them sing nineteenth-century equivalents of "What's love got to do with it?" Tom Weylin's willingness to use cowhide to chastise his own son—Rufus is an old Thracian slave name—and, despite their wide differences, his physical resemblance to Kevin—who tells an incredulous Dana, "'This could be a great time to live in'"[63]—reveal just how close all these characters are, but for the privileges of social and legal happenstance.

V. WHAT'S LOVING GOT TO DO WITH IT?

So what has *Loving* got to do with it, and *Kindred* got to do with *Loving*? Dana's reflections on her relationship to Rufus, during her second trip, perhaps define it best: "Not that I really thought a blood relationship could explain the way I had twice been drawn to him. It wouldn't. But then, neither would anything else. What we had was something new, something that didn't even have a name. Some matching strangeness in us that may or may not have come from our being related."[64] Here, Butler's use of "kindred" is associational and inclusive, and not founded on a notion of Being subject to cold, distant logic. Indeed, it does not even have a name. The "impassable," in this fluid, primordial state, before the word, before the canons, simply does not exist.

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[62] BUTLER, *supra* note 2, at 57; 112.
[63] *Id.* at 91; 97.
[64] *Id.* at 29.

Of course, in placing before you Butler's dissents, I have no illusions. *Kindred* is just a novel, its socio-aesthetics competing with many others then and now. Likewise, as those who have read many cases can attests, or those who know even if they have not, dissenting opinions are not the law, and tend to be highly creative, emotive, and even bombastic counter-narratives. Most of them are interesting to read, if, for no other reason, you have time.

But I am heartened by the insightful prescience of one considered by many to be the greatest dissenter of the United States Supreme Court, Associate Justice John Marshall Harlan, whose dissent in *Plessy v. Ferguson* became the script for *Brown v. Board of Education*. After all, Harlan argued in 1896, in response to the majority:

> it seems that we have yet, in some of the States, a dominant race – a superior class of citizens, which assumes to regulate the enjoyment of civil rights, common to all citizens, upon the basis of race. The present decision, it may well be apprehended, will not only stimulate aggressions, more or less brutal and irritating, upon the admitted rights of colored citizens, but will encourage the belief that it is possible, by means of state enactments, to defeat the beneficent purposes which the people of the United States had in view when they adopted the recent amendments of the Constitution. . . . The destinies of the two races, in this country, are indissolubly linked together, and the interests of both require that the common government of all shall not permit the seeds of race hate to be planted under the sanction of law. What can more certainly arouse race hate, what more certainly create and perpetuate a feeling of distrust between those races, than state enactments, which, in fact, proceed on the ground that colored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens?[65]

Melville's story anticipated Harlan's sentiments, represented by Babo's head, silent in dissent and gazing upon the sacred, Christian resting places of his enslavers, and the walls of St. Bartholemew's church. Hopkins, writing in the immediate constitutional penumbra created by *Plessy*, concluded her novel with a sobering, *Blood*-y judgment of its aftermath on the three tragic mulatto siblings whose account drives the plot: one, a beautiful singer of "sorrow songs," is poisoned by her brother; this brother, victim of a baby-swap, is compelled to commit retributive suicide; and, the third, a modern epic figure in mind and body who returns as an Ethiopian king, has to watch, in passive dissent, as Western Europe colonized Africa. Butler, post-*Brown* and post-*Loving*, likewise reminds us that unheeded, deferred dissent to the Law could become internecine destruction built, literally, into the very walls of our comfort and security, which increasingly distance us from one another, and against our present and future wholeness.

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[65] *Plessy v. Ferguson*, 163 U.S. 560; 16 S.Ct. 1147; 41 L.Ed. (1896).

What's *Loving* got to do with it? Everything, according to Butler's *Kindred*.

KEYWORDS
Octavia E. Butler, Kindred, Loving v. Virginia, Race, Impassable Gulf, Miscegenation, Critical Race Theory, Spy-glass, Natural Law, Epic

Manuscript received: Sep. 30, 2010*; review completed;* Nov. 07, 2010*; accepted;* Nov. 12, 2010.

THE LEGAL ISSUES ON ENVIRONMENTAL ADMINISTRATIVE LAWSUITS UNDER THE AMENDMENT OF ACLA IN JAPAN

Yuichiro Tsuji*

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It is a great honor to write in this law journal. I would like to thank Professor Eubong Lee for her comments and assistance.

ABSTRACT

The Constitution is a tool that creates a common stage upon which people may live together without conflict. For the creation of these rules, a government is established, which exercises power derived from the supreme law. In Japan, when there is a conflict, people are given two legal options to seek remedy. One is a civil law approach, and the other is a common law approach. In the civil law approach, the parliament passes a law that includes abstract and general texts. This law is created to apply to the general public and abstract cases. The elected representatives of the parliament are required to work to protect the interests of the people.

The other option is the common law approach. In these cases, the court is expected to fill in any gaps in the text of the statutes. The Court exists in order to provide access to justice to people who cannot compete equally in the politicized processes of parliament. Judges provide remedy for the minority damaged by pollution, and protect their right to vote and their right to free speech. The court is an important resource for the less powerful.

In Japan, the idea of environmental rights is divided into private or individual and public or group rights. The public's environmental rights are achieved in the legislature and enjoyed by the general public. Individual or private environmental rights are achieved in court and enjoyed by individuals. Japanese court should discuss how much environmental right renders the protection of the environment for the sustainable society.

Although the representatives selected by the people work for the people, the political process does not work to produce the best outcome, like a market providing the best price for goods. Politicians are often controlled by interest or pressure groups. However, their actions might not be adequately explained by economic theory. They may in fact, work for the people who could potentially support them in the future. For example, politicians can work to preserve the environment for future generation, recognize the limited resources of nature, and protect the sustainability of nature.

Parliamentary representatives are primarily motivated by the possibility of their re-election. They work for interest groups and powerful people who will support them during electoral races. The political process does not work perfectly. However, with the increased awareness of the voters, representative may begin to work for future generations.

In the judiciary, the eligibility to bring a lawsuit, which is called standing, is the biggest issue in an environmental public interest lawsuit. The court reviews whether or not the plaintiff has standing to seek litigation. In the Odakyu case, the Supreme Court said that a healthy living environment protected from the noise and vibration caused by the railroad was, in fact, a legal interest of the neighboring people.

As for the ACLA, the legislature reflected the decision of the court. Even after the plaintiff was successful in meeting the requirements of administrative measure and standing, the court's review was considered discretionary. In the Monju and

the Odakyu case, the Supreme Court held the validity of this discretion. The Court said that the factors of magnitude and disposition of the city facilities was decided based on the technology and policy of the administrative agency. The Court's review was therefore limited to the standard of abuse of discretion.
A statute is a compromise or adjustment of the interests of various stakeholders. The standard or level reflects the nature of the compromise. The level may be too strict or too lenient in some cases. The government is obligated to execute statutes. There is a need to revise existing statutes or pass new statutes that legitimate administrative measures. The reason we need the Court is because statutes are imperfectly adjusted.
Democracy is not a perfect system. We know that there are worse systems than the existing system, but have not found a better system. Legislature does not work effectively because of the collective action in the political process. The courts are bound to the text of the law, and the formal procedure. Judges need to render a decision between adverse parties informal judicial proceedings. Dispute regarding environmental pollution cost time and money.
The decisions and statutes do not constitute a perfect system because they are the production of human beings. As humans are imperfect, their creations are not perfect. It is important to assess the advantage and disadvantage of judiciary and parliament. By using the imperfect system but improving the existing system, the people can reach a sustainable society for the future. We need to be vigilant to find the purpose and method to achieve the purpose.

I. COMMON LAW AND CIVIL LAW APPROACH IN JAPANESE LAW

A. BASIC APPROACH

People have various perspectives about how to live their lives. They have their own values, which are based on their perspectives on love, religion, consumerism, wealth, achievement, and human relationships. Different people feel differently about these issues. If two people are free to pursue their own happiness, they could come into conflict with each other and fight over the ownership of particular possessions or resources. Because both parties are in good faith pursuing their own happiness, the conflict appears impossible to resolve. Such a situation may be called a conflict of happiness.[1]

The Constitution is a tool that creates a common stage upon which people may live together without conflict. According to the Constitution, people must set aside, to some extent, their individual interests – that is, their freedom as an individual to chose what to seek and how to live their own lives. Ceding some of their individual interests, people

[1] Max Weber, *Wissenschaft als Beruf*, (Reclam Philipp Jun. 1995). Yasuo Hasebe, *Kenpo toha Nanika* (Japanese) (Iwanami-Shinsho 2006).

discuss what rules are required to enable the group to live together peacefully. This is the reason that the Constitution is the supreme law of the land.[2]

For the creation of these rules, a government is established, which exercises power derived from the supreme law. The Japanese Constitution grants powers to three branches of government: the legislative, executive, and judicial branches.[3]It also regulates public officials who work for the government. The Constitution does not teach how to live, or what is the best way to live.

In Japan, when there is a conflict, people are given two legal options to seek remedy. One is a civil law approach, and the other is a common law approach. In the civil law approach, the parliament passes a law that includes abstract and general texts. This law is created to apply to general people and abstract cases. The elected representatives of the parliament are required to work to protect the interests of the people.

The other option is the common law approach. In these cases, the Court is expected to fill in any gaps in the text of the statutes.[4]The Court exists in order to provide access to justice to people who cannot compete equally in the politicized processes of parliament. Judges provide remedy for the minority[5], and protect their right to vote and their right to free speech. The court is an important resource for the less powerful. In the pollution conflict known as the *Minamata* case, the parliament did not work well to protect the interests of the victims. They were too vulnerable.

B. HOW JAPANESE ENVIRONMENTAL LAW DEVELOPED

Japanese environmental law has developed civil law and common law approaches to seek an ideal balance of responsibility. In the Japanese Constitution, Article 25[6] provides that all people shall have the right to maintain the minimum standards of a wholesome and cultured life, in all of its spheres. Moreover, the State shall endeavor to promote and extend to its citizens social welfare and security, and attend to public health.

From the perspective of Japanese legal professionals, this Article is understood as an abstract right, which means that Article 25 has a legal norm. However, we need to pass a

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[2] Supreme law of a land in NIHONNKOKU KENPO [CONSTITUTION] (1946), art. 98.
[3] NIHONKOKU KENPO [CONSTITUTION], art. 41 (legislative branch), art. 65(executive branch), art. 76 (judicial branch).
[4] For the interpretation of text and practical reasoning model of statutory interpretation, William Eskridge, Philip Frickey and Elizabeth Garrett, *Legislation* (West 2001), 804. Also, Stephen Breyer, *Active Liberty* (Random House, Inc. 2005), 1-34. Antonin Scalia & Bryana, Garner, *Making Your case* (Thomson/West 2008), 39-56. Scalia, *A Matter of Interpretation*, (Princeton University Press 1997).
[5] John Ely, *On Constitutional Ground* (Princeton University Press).
[6] NIHONKOKU KENPO [CONSTITUTION], art. 25 para.1 (Japan) All people shall have the right to maintain the minimum standards of wholesome and cultured living. Para.2 In all spheres of life, the State shall use its endeavors for the promotion and extension of social welfare and security, and of public health.

statute to enable bringing a lawsuit to court. Without a statute realizing the norm of Article 25, plaintiffs cannot take action.[7]

In Japan, the Environmental Basic Act, "*KankyoKihonHou,*[8]"which was revised from the Basic Act for Environmental Pollution Control, "*KogaiTaisakuKihonhou,"*[9] does not incorporate specific environmental rights. Only the duties of local governments and the central government are stipulated.

This is not the case in Thailand. Indeed, in this respect, one might consider the Thai constitution more developed than its Japanese counterpart. In Article 57[10]of the Thai Constitution, environmental law was stipulated as a human right. There is no possibility of interpreting environmental rights as just a policy. Further, the right to receive information and express one's opinion is included in its text, making it a requirement to hold public hearings. It would be interesting to know whether an interested person or foreign expert could also attend.

Article 66[11] of the Thai Constitution stipulates a community right. Article 67 prohibits anyone from infringing on the community's right to protect its valuable resources. Thus, by virtue of this provision made in their Constitution, Thai communities are eligible to bring a lawsuit to court.

However, in Japan, the Constitution stipulates no such environmental right. We therefore need statutes that would enable plaintiffs to take legal action in court. In Japan, the idea of environmental rights is divided into private or individual and public or group rights. The public's environmental rights are achieved in the legislature and enjoyed by the general public. Individual or private environmental rights are achieved in court and enjoyed by individuals.

In Thailand, environmental public rights are stipulated and individuals have a right to preserve his or her culture. Community rights are attained through the aggregation of the individual rights of each community member. Thus, individual plaintiffs may bring

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[7] SAIKO SAIBASHO [Sup. Ct.] May 24, 1967, Showa 39 (gyou tsu) no.14,
87 SAIKO SAIBANSHO MINJI HANREISHU [MINSHU] 497.
This case is called Asahi case in Japan.

[8] Kankyo Kihonho [Basic Environmental Act], Law No. 91 of 1993.

[9] Kogai Taisaku Kihonho [Basic Act of Environmental Pollution], Law No. 93 of 1993 This act is abolished now.

[10] Section 57. A person shall have the right to receive information, explanation and justification from a government agency, State agency, State enterprise or local government organization before permission is given for the operation of any project or activity which may affect the quality of the environment, health and sanitary conditions, the quality of life or any other material interest concerning him or a local community and shall have the right to express his opinions on such matters to the concerned agencies for their consideration.

[11] Section 66. Persons assembling as to be a community, local community or traditional local community shall have the right to conserve or restore their customs, local wisdom, arts or good culture of their community and of the nation and participate in the management, maintenance and exploitation of natural resources, the environment and biological diversity in a balanced and sustainable fashion.

lawsuits to court in an attempt to revoke licenses granted to polluting businesses on the basis of the claim that they need to recover the ideal environmental status for the public good and because it is necessary for the preservation of his or her culture.

Thailand and Japan have very different judiciaries. In Japan, the judiciary is understood to be the institution in which citizens seek to protect their private interests through the confirmation of their individual rights.[12] It is the stage upon which a conflict between a plaintiff and a defendant is resolved. Therefore, this is the forum in which plaintiffs attempt to claim their individual (private) environmental rights.[13] Although sometimes cases involving environmental public rights are brought to the Court, they are generally dismissed on the basis of the plaintiff's lack of standing Even if the plaintiff's standing was accepted, the discretionary power of the administrative branch is widely respected.

C. HISTORY OF JAPANESE ENVIRONMENTAL LAW

Civil law and common law do not stand alone. They complement each other. In my view, ideal statutes cannot exist without a decision by a court. Powerful individuals, interested groups, and political organizations can compromise statutes by pressuring members of Parliamentary Committees. However, a court is expected to ask whether or not a statute is complete. To explain this premise more clearly, I will introduce the history of Japanese environmental civil and administrative law.

1. PRE-WAR TO POST WAR TO 1950S

In the prewar days, there was no legal system to regulate industries, require preventive measures and assess fines for damages caused by the industrial revolution.[14] In the *Osaka Alkali case,*[15] tort law was used to provide a remedy. The Osaka Alkali Company emitted sulfuric acid gasses, which damaged the rice and wheat crops grown throughout the region. In response, farmers and landlords brought a legal action seeking damages against the company. The Osaka High Court recognized negligence on the part of the company, which impacted their "duty of care" to foresee damages. The old Supreme Court accepted the predictability of damage, but said that if a defendant ran a reasonable facility, there was no negligence. Thus, the old Supreme Court established two standards to hold businesses

[12] Koji Sato, *Kenpo* (Seirin Shoin 1995), 619 Saibanshohou [Law of the Court], Law No. 59 of 1947, art.3.
[13] Distinction between private right model and public right model, Richard Fallon, Jr, Daniel Meltzer, David Shapiro, *The Federal Courts and the Federal System* (Foundation Press 2003), 67-.
[14] The industrial revolution after the Sino-Japanese War of 1894-95.
[15] DAISHIN [Great Court of Judicature] Dec. 22, 1916, Taisho 5 (oh) no.816, 22 DAIHAN MINROKU 2474 (Japan). This case is called *Osaka Alkali Case* in Japan.

responsible for damages due to negligence. One was the foresee ability of damage, and the other is the management of a reasonable facility.

The *Osaka Alkali case* is now criticized on the basis that the Court emphasized the rights of business too much by narrowing the scope of negligence.[16] In other words, if we follow this decision, damage would not be recognized even in a case where a defendant polluted the region. Only in the case of a lack of a reasonable facility would a finding of environmental damage be upheld.[17]

Even though various conflicts and serious damages were recognized, a comprehensive remedy and systematic reforms were not provided at that time. Even in the postwar era, fundamental reforms were not provided.[18]

2. RAPID ECONOMIC GROWTH

In the period from the early 1950s to the early 1970s, pollution cases became more severe. Rapid economic growth (*KodoKeizaiSeichou*)proceeded without hindrance from measures designed to protect the environment. For example, the first pollution regulation act, Two Water Quality Acts, *Suishitsu Ni Hou*[19], adopted a "designated area" system. That is, only designated areas were regulated.

In this system, various interest groups prevented sites from becoming designated areas. Even when an area was designated, only that specific area was subject to regulation, and not other surrounding polluted areas.

However, things were about to change. The Basic Act for Environmental Pollution Control, "*KogaiTaisakuKihonHou"* was enacted in 1967. In 1970, the section of the text that called for "harmony (*Chowa*)," that is, harmony between the negative effects of pollution and the positive effects of business prosperity, was deleted. In 1971, the Environmental Agency was created. During this period, four major cases, including the *Itai-itai*[20], and *Minamata* cases[21] upheld the rights of victims.

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[16] Yasutaka Abe & Awaji Takehisa, *Kankyo Hou* (Yuhikaku books 2006), 350.

[17] After being remanded to the Osaka high court, the high court held against the defendant by saying that Osaka Alkali didn't provide a reasonable facility.

[18] However, ordinances in Tokyo in 1949 and Yokohama in 1953 were passed at local governmental levels.

[19] Kokyo you suiki no suisthitu no hozen ni kansuru houritsu, Law No. 181 of 1958. Kojou Haisui tou no kiseini kansuru houritsu, Law No. 182 of 1958. These two statues were abolished.

[20] Nagoya Koto Saibansho [Nagotya High Ct.] Aug.9, 1972, Showa46 (ne) no. 103, 120, 137. 280 HANREI TAIMUZU [HANTA] 182 (Japan). This case is called *Itai-Itai case* in Japan.

[21] Kumamoto Chiho Saibansho [Kumamoto Dist. Ct.] March 20, 1973, Showa 44 (wa) No. 522, No.45 (wa) 814, No.46 (wa) 322,419,548,No.47 (wa) 427, 294 HANREI TAIMUZU [HANTA] 108 (Japan). This case is called *Kumamoto Minamata disease case* in Japan.

3. FROM 1970 TO 1980

In late 1970s,the development of environmental law began to slowdown. The turning point occurred when the *Osaka International Airport case*[22]reached the Supreme Court. Osaka International Airport was constructed in 1937 as the second airport in the Osaka area. After the war, the U.S. army confiscated the airport. After returning it to the Japanese government in 1958, the airport was renamed Osaka International Airport. In 1964, a jet landing was approved, and in 1970,a jumbo jet landing was approved.

In 1969 and 1970, 264 people who lived near the airport brought a civil action against the government as the manager of the airport. They argued that the airport caused excessive noise, air pollution from exhaust gases, and disturbing vibrations. The plaintiffs asked the Court to place restrictions to prevent take offs and landings between the hours of 9pm and 7am and to exclude any other use of the airport facility.

The Supreme Court's decision upheld the government's right to operate the airport for three reasons.

First, the plaintiffs' complaint requested an injunction to prevent the government from managing the airport. Thus, it was not appropriate to use a civil action.

Second, the plaintiffs asked for a specific and clear airport noise standard to be applied in the plaintiffs' region. According to the Court, this argument was too abstract to specify a cause of action.

Third, even if this case was heard by the Court, because of the public character of the airport, civil law blocks the injunction argument.

Following this case, injunction arguments against public facilities such as highways, streets, railroads, and airports, were denied. During the late 1970s, many cases were brought to the courts but pollution from nitrogen dioxide (No2) and Suspended Particulate Matter (SPM) was not reduced. On the contrary, in areas located near public roads, pollution became more severe.[23]

4. AFTER THE 1990S

After the *Chiba district case,* [24] in which the Court held a private company responsible for environmental damage, joint tort law cases were disputed. In the *Nishi*

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[22] Saiko Saibansho [Sup.Ct.] Dec.16, 1981, Showa 51(oh) no.395, 35 SAIBANSHO MINJI HANREISHU [MINSHU] 1369 (Japan). This case is called *Osaka International Airport case* in Japan.

[23] By 1978, the environmental standard regarding nitrogen oxides (NOx) had been lowered.

[24] Chiba Chihou Saibansho [Chiba Dist. Ct.] Nov. 17, 1988, Showa 50 (wa) no. 322, Showa 53 (wa) no. 275, 689 HANREI TAIMUZU [HANTA] 40(Japan).
This case is called *Chibagawa tetsu air pollution case* in Japan.

Yodogawa first case[25] and *Kawasaki first case,*[26] which were heard in a region where private companies had not developed industrial complexes, companies lost the cases.

The High Court's ruling on National Road 43[27] overruled *the Osaka International Airport* case, and the injunction argument came to be accepted.

This shift applied to more than airports and public roads. In a case that sought a temporary injunction for a waste disposal site, the notion of a personal right to live peacefully was developed. By claiming a personal right, the injunction was accepted.[28]

In the *Minamata state compensation case,*[29] the Osaka High Court ruled against the government. The Supreme Court held that after 1960, the government broke the law by not exercising its authority to uphold the Two Water Quality Acts *Suishitsu Ni Hou*. The Court held that Kumamoto prefecture was unreasonable in not exercising its power provided by the regulation adopted by the prefecture.[30]

In the *Kunidachi Apartment House case,*[31] the Court ordered the removal of a maximum height regulation by finding that the right of scenery was protected. The court held that the scenery added to the value to the land.

During this period, we see that in Japanese civil law, remedies and the prevention of damages to human life and health were emphasized in several decisions.

II. FOUR MAJOR CASES

In the 1960s, public organizing spearheaded by residents against pollution began. These localized social movements produced leaders in local governments. In the regions where public movements were strong, the civil approach was effective. On the other hand, in regions where public movements were weak, victims were isolated and decided to bring a lawsuit to court.

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[25] Osaka Chihou Saibansho [Osaka Dist. Ct.] March 29, 1991, Showa 53 (wa) no. 2317 761 HANREI TAIMUZU [HANTA] 46 (Japan). This case is called *Nishi Yodogawa case* in Japan.

[26] Yokohama Chiho Saibansho [Yokohama Dist. Ct.] Jan. 25, 1994, Showa 58 (wa) no. 317, Showa 60 (wa) no. 100, Showa 57 (wa) no. 107, 845 HANREI TAIMUZU [HANTA] 105 (Japan).This case is called *Kawasaki dai ichiji case* in Japan.

[27] Osaka Koto Saibansho [Osaka High Ct.] Feb. 24, 1982, Showa 61 (ne) no. 1599, Showa 61 (ne) 1553, Heisei 3 (ne) no. 1545, 49 SAIKOSAIBANSHO MINJI HANREISHU [MINSHU] 2409. This case is called *Route 43 case* in Japan.

[28] Sendai Chiho Saibansho [Sendai Dist. Ct.] Feb. 28, 1992, Heisei 2 (yo) no. 252, 789 HANREI TAIMUZU [HANTA] 107 (Japan). This case is called *Marumochi machi haikibutsu shori jiken* in Japan.

[29] Saiko Saibansho [Sup. Ct] Oct. 15, 2004, Heisei 13 (oh) no. 1194, Heisei 13 (oh) no. 1196, Heisei 13 (ju) no. 1172, Heisei 13 (ju) no. 1174, 58 SAIKO SAIBANSHO MINJI HANREISHU 1802 (Japan). This case is called *Minamata confirmation of illegal inaction case* in Japan.

[30] *Id.*

[31] Tokyo Chiho Saibansho [Tokyo. Dist. Ct.] Dec. 18, 2002, Heisei 12 (wa) no. 6273. 60 SAIKOSAIBANSHO MINJI HANREISHU 1079 (Japan). This case is called *Kunidachi mansion case* in Japan.

In this section, I will briefly review four major cases. The doctrine of the *Osaka Alkali case* was modified. Unlike past cases, victims were given remedies. In the late 1970s, the environmental standard was enhanced.

A. ITAI-ITAI CASE

In this case,[32] two issues arose. One issue was whether or not Article 109 of the Mining Industry Act, *"Kogyo hou,"*[33]which stipulated strict liability, applied. The other issue was causation,which was difficult for plaintiffs to prove inpollution cases. In this case, the Court established epidemiological proof enabling plaintiffs to omit the pathological proof between cause and effect.

B. Niigata-Minamata case

In this case[34], the issue was negligence and causation. As for negligence, the Court ruled that the chemical industry was obligated to take safety measures. This obligation included preventative measures such as closing down operation under certain circumstances. Especially compared to the *Osaka Alkali case*, it was unique that the Court required the shutdown of an operation.

C. Yokkaichi case

The issue here[35] was causation in the industry complex. In the *Yokkaich*i area, many industries were aggregating various factories. It was impossible for the plaintiff to prove causation because the air pollution was emitted from the smoke of multiple chimneys in many factories. The Court categorized the relationship between the companies. This relationship included the following factors: association of capital, products, and material exchange, series of the companies, human resources, etc. If the region was home to an industrial complex, the relationship was so strong that causation was presumed. This strong presumption did not permit the defendants to disprove causation. However, if the relationship was weak, the defendants could rebut the presumption of causation.

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[32] *Itai-itai* case, *supra* note 21.
[33] Kogyoho, Law No. 289 of 1950.
[34] Niigata Chiho Saibansho [Niigata Dist. Ct.] Sep. 29, 1971, Showa 42 (wa) no. 318, Showa 42 (wa) no. 319, Showa 43 (wa) no. 447, Showa 42 (wa) no. 317, 267 HANREI TAIMUZU [HANTA] 99 (Japan). This case is called *Niigata Minamata disease case* in Japan.
[35] Tsu Chiho Saibansho [Tsu Dist. Ct.] July 24, 1972, Showa 42 (wa) no. 138, 280 HANREI TAIMUZU [HANTA] 100 (Japan). This case is called *Yokkaichi case* in Japan.

The act of emission was reviewed as a whole. If a court thought that in total, the emissions were related, the companies would be held jointly liable.

As for negligence, the Court held that the duty of care meant that the companies needed to construct the factories after investigating the quality and quantity of the emission, the location of the neighboring population, and wind and weather conditions. The Court held the companies responsible for negligence.

D. Kumamoto Minamata case

In this case[36], the issue was a clause in the in the contract between the victims and companies. The Court said that the contract was void because solatium was against public policy.

E. Common law and civil law approaches in 1950s–1980s.

In four major pollution cases, courts provided victims with ways to obtain a remedy. The traditional legal doctrines of the pre-war period were modified. The "polluter pays" principle was established, and companies could no longer use the *Osaka Alkali case* to escape liability.

However, there was still another clause that courts could use to mitigate companies' liability. It was the "harmony" clause in the statutes. For example, because the first pollution regulation act *Suishitsu Ni Hou*[37] adopted the designated area system, it was not possible to take broad, general measurements of areas before pollution occurred. In 1970, the parliament changed this attitude. The defects of existing statutes were identified. The harmony clause meant that the consideration of pollution should be harmonized with business prosperity. After 1970, the harmony clauses in statutes were abolished.

For example, in Article 1 of the Air Pollution Act, *TaikiOsenBoushiHou*[38] has several purposes.

The first is to regulate smoke, volatile chemical organic compounds, and dust produced by factories, and to dismantle constructions.

The second is to promote measurements of harmful air pollutants, and establish a tolerance level for car emissions.

The third is to conserve the living environment, and assign liability to businesses if they cause injury, and to protect the victims.

In this definition of purpose, there is no text referring to harmony.

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[36] *Kumamoto Minamata disease* case, *supra*, note 22.
[37] *Id. Supra*, note 20.
[38] Taikiosen boushiho (Air pollution act), Law No. 97 of 1968.

In environmental law, we need to be vigilant over the process of passing statutes. In the harmony clause, for example, business development was bound to the review of the court.

Although the representatives selected by the people work for the people, the political process does not work to produce the best outcome, like a market providing the best price for goods. Politicians are often controlled by interest or pressure groups.[39]However, their actions might not be adequately explained by economic theory. They may in fact, work for the people who could potentially support them in the future. They may work to preserve the environment for future generation, to recognize the limited resource of nature, or to protect sustainability of nature.

Some statutes pass as a result of a compromise between interest groups or powerful people. In the past, political power in Japanese business was so strong that during discussions in Parliamentary Committees protective statutes were made meaningless.

The statutes that provide for the sustainable development that we have today come from a notion that future generations must meet their needs, and the existing generation should not impair their ability to do that. The ideas of fairness between contemporary and future generations, and of a connection between human lives and the environment, have finally been recognized.

Parliamentary representatives are primarily motivated by the possibility of their re-election. They work for interest groups and powerful people who will support them during electoral races. The political process does not work perfectly. However, with the increased awareness of voters, representative may begin to work for future generations.

III. ENVIRONMENTAL PUBLIC AND PRIVATE INTERESTS

In this section, I will review environmental public rights. In litigations against the Japanese government, plaintiffs brought cases using the Administrative Case Litigation Act (ALCA),[40] the State Compensation Act[41], or the Local Autonomy of the Local Government Act.[42]In 2004, litigation was reformed dramatically by the Administrative Case Litigation Act.

[39] Daniel A. Farber, Philip P. Frickey, *Law and Public Choice: a critical introduction* (University of Chicago Press 1991).
[40] Gyosei jiken soshouho (Administrative Case Litigation Act), Law No. 139 of 1962.
[41] Kokka baishouho (State Compensation Act), Law No. 125 of 1947.
[42] Chihou jichiho (Local Government Act), Law No. 67 of 1947.

A. REVOCATION LAWSUIT AND NULLIFICATION CONFIRMATION LAWSUIT

Six major lawsuits are named on ACLA. These are claimsagainst the public power exercised by the administrative organs. This lawsuit has six types.

1. Revocation of the administrative measure
2. Revocation of the adjudication
3. Confirmation of nullification
4. Confirmation of illegal inaction
5. Obligating the administrative organs to act
6. Injunction, fifth and sixth are added in 2004

B. THE REVOCATION OF THE ADMINISTRATIVE MEASURE

A revocation lawsuit, *Torikesisoshou*[43] is litigation to revoke an administrative measure[44] and the execution of public power. This type of lawsuit is used in cases against the government. In environmental law, this lawsuit contests administrative measures burdening the environment. For example, the court hears lawsuits about administrative measures supporting noise by factories, or giving a business permission to manage a waste disposal site. It is called a third party lawsuit because the residents, who have no part in the agreement between the government and permitted person or entity, seek the cancellation of the government's permission. This litigation has a statute of limitations.[45]

A nullification confirmation lawsuit, *MukouKakunisoshou*[46]may occur if for some reason the plaintiff cannot access the court, for instance, if the statute of limitations has expired. Then an eligible party may bring a lawsuit to the court by arguing that the administrative measure is void.

For these two cases, the subject of the review is the administrative measure that controls the business activities of companies. The term administrative measure - *GyoseiShobun*- was defined by the Supreme Court[47]as a legal measure imposed by the government to create a right or duty, or to identify the scope of a right or duty. The Supreme Court thinks that the necessary condition of the administrative measure is to solidify by statute the specific rights enjoyed by individual people.

In this definition, just a notification—*Tsutatsu*–from a higher agency to a lower agency does not meet the definition of an administrative measure. In environmental law

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[43] Revocation lawsuit, Article 8 of ACLA.
[44] Art.3 of ACLA.
[45] Art.14 of ACLA.
[46] Art.36 of ACLA.
[47] Saiko Saibansho [Sup. Ct.] March 14, 1978, Showa 49 (gyo tsu) no. 99, 32 SAIKO SAIBANSHO MINJI HANREISHU [MINSHU] 211 (Japan). This case is called *Shufuren juice case* in Japan.

cases, the concept of an administrative plan—*GyoseiKeikaku*—is controversial. An administrative plan means that the administrative organ or agency establishes the goal of the activities of the government and the methods to achieve the goal. Many administrative plans influence subsequent acts or future permission. If an administrative plan is concrete, it is better to allow the plaintiff to bring the lawsuit from the viewpoint of preventing pollution and move for a quick solution of the dispute. The court was reluctant to permit the lawsuit, however.

In one famous case, which sought nullification confirmation of a project organizing land parcels, the Supreme Court said that the project was too general and abstract to apply to the general public and uncertain regarding changes in the rights of the stakeholders that did not meet the administrative measure.[48]

In another case, the Supreme Court upheld the administrative measure by saying that the legal effect of the planning of the second type of city redevelopment—*DainishusaikaihatcuChiiki*—[49] was that the residents in the redevelopment area had to choose whether to stay or move out, and had no way of disputing the construction permission after the construction. In the case of compulsory expropriation,[50] the Supreme Court held that business certification was a characteristic of administrative measure.

The revised Administrative Case Litigation Act did not relax the condition of the administrative measure. Article 4 of the ACLA provided for a type of party litigation to seek nullification in public law. This provision enabled people to bring a lawsuit even when government actions do not satisfy the definition of an administrative measure. Thanks to this Article, in specific cases, if the court sees the need to provide a remedy of the case, people can bring a lawsuit by arguing that the administrative plan or decision of land use is illegal and void and that there is an absence of duty and existence of right based on the premise of its decision.

C. STANDING

The eligibility to bring a lawsuit, which is called standing, is the biggest issue in an environmental public interest lawsuit.[51]The court reviews whether or not the plaintiff has standing to seek litigation. Before the revision in 2004, only those who had a legal interest

[48] Saiko Saibansho [Sup. Ct.] Feb. 23, 1965, Showa 37 (oh) no. 122, 20 SAIKOSAI MINJI HANREISHU 271 (Japan). This case is called *Koenji Aoshasin case* in Japan.
[49] Saiko Saibansho [Sup. Ct.] Nov. 26, 1992, Showa 63 (gyo tsu) no. 170, 46 SAIKOSAI MINJI HANREISHU [MINSHU] 2658 (Japan). This case is called *Dainishu saikaihatsu chiiki sitei jiken* in Japan.
[50] Nagoya Koto Saibansho [Nagoya High Ct.] Jan. 30, 1973, Showa 46 (gyo ko) no. 10, 24 GYOSEI JIKEN SAIBANREISHU [GYOSEI REISHU] 25 (Japan). This case is called *Tochi shuyou jiken* in Japan.
[51] Standing is requirement from art. 3 of Saibanshoho.

could have standing, and the scope of standing was very narrow. In 2004, as one of the legal system reforms, the ACLA was revised to expand that standing.

Before 2004, Article 9 of the ACLA provided that only those who owned "legal interest" could bring a lawsuit. The legal interest needed was to be clearly written in the text of statutes. In common law, the court once considered whether or not the statutes based on the administrative measure clearly stipulated the right or interests. The interest of business entities was emphasized, and residents were not considered a direct party in the dispute. Even though residents could bring civil litigation, the barrier of causation existed.

Since the famous *House-wives Juice* case,[52] the Supreme Court rejected the complaint because of lack of standing. In *Date thermal power generation* case,[53] the Supreme Court defined that "legal interest" was not limited to the text of the statutes,, but included interests protected by reasonable interpretation.

In the *Niigata Airport case,*[54] the Supreme Court said that the court considered decisions in light of the legal system formed by the base statutes and other statutes sharing the purposes, examining the statutes in question, and asking if administrative measure protected the individual right or not.

In the *Monju Nuclear Electric Power Generation case,*[55] *Moju* case, and *Woods Developing Permission case*,[56] the Court reviewed standing. For example, in the *Woods Developing Permission case*, permission to develop according to the City Planning Act was disputed. The Supreme Court decided whether individual interests were protected, and reviewed the case in light of the meaning and purpose of the statutes in question and the contents and character of the interests protected by administrative measure. Consequently, the Supreme Court admitted standing.

The major revision of the old ACLA in 2004 was standing. An additional clause in Article 9, section 2, expanded third party standing. This Article stipulated the factors used to interpret legal interest. Seeing the administrative measure or adjudication of the text of the base statutes, the court reads the meaning and purpose of the base statutes and the contents and character of the interests to be considered in the measure. In addition to reviewing the contents and character of the base statutes, the court needs to see the meaning and purpose of other statutes sharing the meaning and purpose with the base statutes. Lastly, the court needs to read the contents and character of the right infringed by the adjudication

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[52] *Housewives Association* case, *supra* note 48.
[53] Saiko Saibansho [Sup. Ct.] Dec. 17, 1985, Showa 57 (gyo tsu) no. 149, 583 HANREI TAIMUZU [HANTA] 62 (Japan). This case is called *Date thermal power generation case* in Japan
[54] Saiko Saibansho [Sup. Ct.] Feb. 17, 1989, Showa 57 (gyo tsu) no. 46, 43 SAIKOSAI MINJI HANREISHU 56 (Japan). This case is called *Niigata airport case* in Japan.
[55] Saiko Saibansho [Sup. Ct.] Sep. 22, 1992, Heisei 1 (gyo tsu) no. 130, 46 SAIKOSAI MINJI HANREISHU 571 (Japan). This case is called *Monju case* in Japan.
[56] Saiko Saibansho [Sup. Ct.] March 13, 2001, Heisei 8 (gyo tsu) no. 180, 55 SAIKOSAI MINJI HANREISHU 283 (Japan).This case is called *Permission of developing woods case* in Japan.

to see if it is in violation of the base statutes, and to determine the manner and extent of the infringement. These factors must be reviewed by the ACLA.

The revised ACLA has been in force since April 2005. It applies to pending cases. The Supreme Court upheld standing for the neighboring residents in the *Odakyu Railroad case*,[57] which was on appeal at that time. The lower court rejected the standing of the people who did not own real estate in the disputed area. The Supreme Court applied the revised ACLA to this case, and accepted the standing of the neighboring people in light of the Tokyo environment assessment ordinance that had been implemented.

The *Odakyu case* involves city planning and railroad business. Overhead railroads remove the need for railway crossings. Because in the morning, many Japanese trains keep running every few minutes, some railway crossings do not open for up to 30 minutes. By constructing an overhead railroad, the road was expanded and the region in front of the station was redeveloped as a part of the city planning. Much capital was invested. Being afraid that overhead railroad causes noise, vibration and blocks sunlight, the neighboring people proposed that the railroad be constructed underground and that the area over the site planted with trees.

In 1994, the Ministry of Construction of the central government gave permits to the Tokyo Metropolitan Government for city planning. The owners of the area where the overhead railroad was to be built accepted the offer to purchase their land. The problem was that the noise was already generated. The Pollution Coordination Committee judged that some residents were damaged beyond the maximum permissible limit. This meant that the construction was a matter of concern to the neighboring people. In existing law, only those who owned the side street could bring a lawsuit, and could argue only abuse of discretion of the governmental decision. The people owned the side street by the railroad, and the neighboring residents sought an injunction to revoke the permission for city planning.

The following issues were involved. First, city planning means that the government decides whether a railroad is built overhead or underground. Second, the government grants permits to businesses to implement construction such as a street or park, or to develop residential, business, and industrial areas. The court decides if a protected interest exists under Article 9, Section 2, of the ACLA or City Planning Act.

After the trial the Court admitted the standing, but the High Court rejected it, and the case was appealed. The Supreme Court admitted the standing of some residents even though they did not own the lands. According to the Court, Article 13, section 1, of the City Planning Act provided that a pollution prevention plan was stipulated in one statute and city planning was fixed by this plan. The Basic Act for Environmental Pollution Control

[57] Saiko Saibansho [Sup. Ct.] Dec.7, 2005, Heisei 16 (gyo hi) no. 114, 59 SAIKOSAI MINJI HANREISHU 2645 (Japan). This case is called *Odakyu Railroad case* in Japan.

shared the purpose of the City Planning Act. Article 66 of City Planning Act said that in implementing the city plan, the consent of the neighbors was required through meetings and hearings. The court said that the purpose and meaning of permission under the City Planning Act—*ToshiKeikakuhou*—was to prevent damage to health and life, and to secure the cultural resources within city life to preserve a comfortable environment.

The Court rejected the government's argument that neighboring people did not have standing because their interests were neither public nor private. The roster of people damaged by the noise and vibration was not limitless, but rather limited to those who lived in the areas near the construction site. The closer to the construction one lived, the more serious the damage. If the damage was continuous, the residents continuing to live there were further damaged.

In essence, the Supreme Court said that health and life environment protected from the noise and vibration caused by the railroad was, in fact, the legal interest of the neighboring people. The review of their standing involved the Tokyo Metropolitan Environmental Influence Assessment Ordinance.

D. REVIEW OF DISCRETION

After the plaintiff was successful in meeting the requirement of administrative measure and standing, the court reviews the discretion of the administrative agency. In the case that the administrative discretion is subject for review by a court, the court revokes the administrative measure if the administrative agency with the authority to exercise discretion under the statutes has deviated from, or has abused its discretion. In reviewing the discretion, the court sees if the government erred in the facts, decided by unfair purpose or motive, or violated the equal doctrine or proportional doctrine. In the case of administrative measures influencing environment, special and technical discretion of the government is a big issue.

In 2004, the ACLA enabled a plaintiff to argue their standing more easily, but the plaintiffs still needed to get past the review of administrative discretion. In the *Odakyu case*, the Supreme Court held the validity of discretion. The Court said that the factors of magnitude and disposition of the city facilities was decided from the technology and policy perspective of the administrative agency. The Court's review was limited to deviation or abuse of discretion.

E. CONFIRMATION OF ILLEGAL INACTION LAWSUIT

In the *Minamata confirmation of illegal inaction*[58] lawsuit, in order to certify *Minamata* disease, the government confronted the difficulty certifying the disease, dealing with the increasing number of the applicants, and the lack of doctors. The court said that in light of the special act to provide a rapid relief to the victims of pollution, and that because the applicant filed a document, and received no response after a reasonable period, and that it remained totally unclear when if ever the government would accept it or not, government inaction was illegal. In other words, because of the unstable status of the applicants, government inaction would be deemed illegal.

As for a special act to compensate the victims, the government was burdened to prove that a reasonable time to certify had not passed. In this case, two years was not considered a reasonable period. The inaction did not have special circumstances attached. The inaction of the governor was illegal.

Even after this case, the application proceeding was delayed. The victims asked the state for compensation. The lower court ruled for the victims. The Supreme Court remanded this case to the lower court.[59]

After October 1994, the Administrative Procedure Act(APA) was in force, and the Supreme Court showed the limitation of the administrative guidance in *Shinagawa Apartment case.*[60]The APA specified a clear rule controlling administrative guidance. The government is obligated to review the complaint if the complaint is appropriate. The government has a duty to commence the review to permit or reject except when there is a lack of documents.

In the case of the waste disposal site permission,[61] the business entity in control of the disposal site filed for permission, and the government accepted it but left it untouched. The manager of the disposal site brought a lawsuit in confirmation of illegal inaction of the government. In one disposal site case, the government rejected the permission because it lacked both the consent of neighboring residents, and the agreement with local government that were required by the guidelines. In most cases, the Court rules against the government.

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[58] Kumamoto Chiho Saibansho [Kumamoto Dist. Ct.] March 25, 1993, Showa 56 (wa) no. 666, 817 HANREI TAIMUZU [HANTA] 79 (Japan). This case is called *Minamata confirmation of illegal inaction of the government in Kumamoto* in Japan.

[59] Kyoto Chiho Saibansho [Kyoto Dist. Ct.] Nov. 26, 1993, Showa 60 (wa) no. 2585, Showa 61 (wa) no. 444, Showa 61 (wa) no. 1409, Showa 61 (wa) no. 2260, Showa 62 (wa) no. 485, 838 HANREI TAIMUZU [HANTA] 101 (Japan). This case is called *Minamata disease case in Kyoto* in Japan.

[60] Saiko Saibansho [Sup. Ct.] July 16, 1985, Showa 55 (oh) no. 309, Showa 55 (oh) no. 310, 39 SAIKOSAI MINJI HANREISHU 989 (Japan). This case is called *Shinagawa mansion case* in Japan.

[61] Chiba Chiho Saibansho [Chiba Dist. Ct.] March 28, 1990, Showa 54 (wa) no. 471, Showa 57 (wa) no. 339, Showa 57 (wa) no. 757, 739 HANREI TAIMUZU [HANTA] 79 (Japan). This case is called *Waste disposal site case* in Japan.

F. OBLIGATION LAWSUIT

By the revision of the ACLA, the obligation of the government was added. There are two types in obligating the government to act. The first type does not require the right of application, or obligate the government to a measure. This is called direct obligation. The second type is when those who apply ask the Court to order the government to grant the administrative measure. This is called an obligation lawsuit to satisfy application. Direct obligation lawsuits necessitate two conditions. One is serious damage led by inaction of the government. Another is there is no other reasonable method than filing this lawsuit. In reviewing if inaction is serious or not, the Court considers the difficulty of recovering from the damage, the extent and character of the damage, and the contents and character of the measure. The review of standing is the same as in a revocation lawsuit.

In practice, the government rejects the application in some cases. An obligation lawsuit to satisfy application works effectively. In this lawsuit, a confirmation of illegal inaction lawsuit is required.

G. MONJU CASE

The residents brought a nullification confirmation lawsuit against the establishment of a nuclear electric power generator. In this case, under the statutes, the Prime Minister permitted the power reactor and nuclear fuel management organization to establish the nuclear electric power generator in the *Fukui* prefecture.

However, according to the Supreme Court, the statute for nuclear material and regulation of the reactor protected not only the interest of the public and environment, but also the life and safety of the residents as individual protected interests.

The residents living28 to 58 kilometers from the rapid nuclear reactor, which outputs 280000 kilowatt, were people who could potentially be affected directly and seriously by disaster. These people were under the definition of people enjoying a “legal interest” according to the ACLA.

H. STAY OF EXECUTION AND INJUNCTION

An administrative measure on stays of execution was added by the revision of the ACLA that changed the text from “unrecoverable” to “serious damage.”The factors to be considered were added. It has become easier to stop an administrative measure today.

Let us consider, for example, a development case.[62] Once the development has been completed, after permission and certification was given, common law says that the interest to bring a lawsuit to revoke permission for the development has been lost. Although a revocation lawsuit is usually brought, the stay of execution lawsuit is a possible option for plaintiffs.

Fundamental remedy is an injunction provided for in the ACLA. In the case that the measure or adjudication should not be made but is likely, the Court can order the administrative organs to refrain from action only when serious damage is likely to occur.

IV. STATE COMPENSATION AND RESIDENT LAWSUIT

A. ILLEGAL EXERCISE OF PUBLIC POWER

Article 1 of the State Compensation Act, *Kokka-BaishouHou,* provides for damage caused by illegal exercise of public power, either intentionally or negligently. The term "exercise of public power" is more widely interpreted than in Article 3 of the ACLA. It includes administrative measures and guidance.

In terms of liability led by the exercise of public power, administration of the local government is the issue to be disputed. In the *Shinagawa Apartment case,*[63] the Supreme Court held the manager of Tokyo construction liable for the illegal exercise of public power to the In the *Musashino apartment case*, the Supreme Court held illegal the exercise of the mayor who rejected the application to provide water supply for the business that violated administrative guidance.

In the *Minamata Kansai case*, the Court held that the power of the central and local government was illegally exercised. As for the central government, the inaction of authority in the Two Water Quality Acts—*Suishitsu Ni Hou*—case was held illegal. As for the local government, *Kumamoto* prefecture's inaction was held to be illegal in accordance with the ordinance in Kumamoto prefecture.

B. DEFECT OF INSTITUTION AND MANAGEMENT

Article 2 of the State Compensation Act establishes liability for damages caused by public construction materials. In general, the Court reviews if the construction material in question fulfills general safety rules. The Court held liability of the noise caused by general

[62] In administrative law, the action of the government is presumed valid until it is revoked by the court.
[63] *Shinagawa mansion* case*, supra* note 61.

use of the Osaka international airport. In the National road number 43 case,[64] the Supreme Court upheld liability for the health damage caused by the noise and gases emitted by cars.

C. RESIDENT SELF–GOVERNANCE

Lawsuits brought by citizens against local governments[65]are provided for by the Local Government Act, *ChhouJichiHou*. One of its purposes is to prevent illegal activity of the local government. This is called objective litigation. Any resident can bring a lawsuit regardless of the individual legal interest audit request. The Local Government Act provides for injunctions, revocation of measures, nullification confirmations, confirmation of negligent facts, and damages and returning of excessive profits. Although this provision has been disputed to be unconstitutional because it is against the notion of judiciary, it is understood that the parliament gives its authority to judiciary to review the action by the government, and that it is not against the Constitution.

D. THE TASK ON ENVIRONMENTAL PUBLIC LAW

The power and organization of the administration is granted by parliamentary legislation. This power is exercised under statutes. The power of the government is legal and democratic. In environmental law, there are three parties involved that complicate this doctrine.

For example, a business applies for permission to manage a waste site disposal. The government reviews the application and gives the company permission to operate the site. Standards for quality and quantity are fixed by ordinances or administrative regulations. If the disposal site infringes on the standard, the government may revoke its permission by administrative measure. Only two parties, the government and waste disposal manger, are involved in this dispute. It may turn out perfect if the government monitors the waste disposal all the time, and enters the site if the violation is found. However, in general, government resources (human, time, and financial) are limited. In some cases, violations of standards are left unpunished. [66]

In environmental pollution disputes, there is another party. For example, the people who live near a waste disposal site. The pollution associated with waste disposal is an important issue for them. A statute is passed in parliament, but the text of the statute is

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[64] *Route 43* case*, supra* note 28.
[65] Kyakkan Soshou [Objective litigation].
[66] Daniel Farber, *Taking Slippage Seriously: Noncompliance and Creative Compliance in Environmental Law,* 23 Harv. Envtl. L. Rev. 297 (1999).

too abstract and too general. The voices of the affected people are not reflected in the law. Thus residents must ask the Court to provide remedy.

A statute is a compromise or adjustment of the interests of various stakeholders. The standard or level reflects the nature of the compromise. The level may be too strict or too lenient in some cases. The government is obligated to execute statutes. However, the reason we need the Court is because statutes are imperfectly adjusted. There is a need to revise existing statutes or pass new statutes that legitimate administrative measures.

If the damage involves human health or life, the Court is generally willing to hear the case. On the other hand, if the case concerns the condition of the landscape, or ecological conservation, and even though these interests are shared among many people, the Court seldom hears the case.

The government continues to work even if lawsuit is brought against it. The administrative measure is valid until its revocation. After accepting standing, the Court carefully reviews the decision-making process exercised by the government. The Court reviews only abuses of power or legitimacy, not validity. Validity of the measure is one value judgment that is determined in the political process.

V. COMPENSATION

Although remedy is usually given in the judiciary after the dispute, the parliament passed a statute for compensation for the victims[67]of pollution. The compensation system address damages to people's health, which were caused by pollution. It was established in 1973, and revised in 1987. This system provides certain, quick, and simple remedy. It sometimes takes a long time if victims bring lawsuits to the court.

First, compensation is assessed through a levy on the polluter. This levy is based on the statute, and collected forcibly. Second, the compensation is provided for in the administrative proceeding. Its character is damage. Third, the subject of the compensation is the damage of health caused by air and water pollution. The public organization reviews victim's applications, and provides quick and easy remedy.

The parliament passed other compensation statutes. One is a statute for remedying the victim of asbestos. The pubic organization provides for medical costs and temporary or memorial money. This statute was revised in 2008.

First, the payment of medical costs goes back to the day the person started medical treatment. Second, special memorial money is paid to bereaved family members of the person who passed away, after a date fixed by law. Third, the period of payment of special memorial money is extended.

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[67] Kougai Kenko Higai no Hoshou ni kansuru ho [Act for compensation of health damage caused by pollution]. Law No. 111 of 1973.

CONCLUSION

The Constitution is a tool that creates a common stage upon which people may live together without conflict. For the creation of these rules, a government is established, which exercises power derived from the supreme law. In Japan, when there is a conflict, people are given two legal options to seek remedy. One is a civil law approach, and the other is a common law approach. In the civil law approach, the parliament passes a law that includes abstract and general texts. This law is created to apply to general people and abstract cases. The elected representatives of the parliament are required to work to protect the interests of the people.

The other option is the common law approach. In these cases, the Court is expected to fill in any gaps in the text of the statutes. The Court exists in order to provide access to justice to people who cannot compete equally in the politicized processes of parliament. Judges provide remedy for the minority damaged by the pollution, and protect their right to vote and their right to free speech. The court is an important resource for the less powerful.

In Japan, the idea of environmental rights is divided into private or individual and public or group rights. The public's environmental rights are achieved in the legislature and enjoyed by the general public. Individual or private environmental rights are achieved in court and enjoyed by individuals. Japanese courts should discuss how much environmental rights render protection of the environment for a sustainable society.

Although the representatives selected by the people work for the people, the political process does not work to produce the best outcome, like a market providing the best price for goods. Politicians are often controlled by interest or pressure groups. However, their actions might not be adequately explained by economic theory. They may in fact, work for the people who could potentially support them in the future. For example, to preserve the environment for future generation, recognize the limited resources of nature, and to protect sustainability of nature.

Parliamentary representatives are primarily motivated by the possibility of their re-election. They work for interest groups and powerful people who will support them during electoral races. The political process does not work perfectly. However, with the increased awareness of the voters, representative may begin to work for future generations.

In the judiciary, the eligibility to bring a lawsuit, which is called standing, is the biggest issue in an environmental public interest lawsuit. The court reviews whether or not the plaintiff has standing to seek litigation. In the *Odakyu* case, the Supreme Court said that health and life environment protected from the noise and vibration caused by the railroad was, in fact, a legal interest of the neighboring people.

As for ACLA, the legislature reflected the decision by the court. Even after the plaintiff was successful in meeting the requirement of administrative measure and standing, the court reviews the discretion of the administrative agency. In the *Monju* and the *Odakyu cases*, the Supreme Court held the validity of discretion. The Court said that the factors of magnitude and disposition of the city facilities was decided from the technology and policy perspective of the administrative agency. The Court was limited to review for deviation from or abuse of discretion.

A statute is a compromise or adjustment of the interests of various stakeholders. The standard or level reflects the nature of the compromise. The level may be too strict or too lenient in some cases. The government is obligated to execute statutes. There is a need to revise existing statutes or pass new statutes that legitimate administrative measures. The reason we need the Court is because statutes are imperfectly adjusted.

The legislature gave the power to review the governmental power in Local Government Act. Although this litigation is disputed as being unconstitutional because it is against the notion of judiciary, it is understood that the parliament gives its authority to judiciary to review the action by the government, and that it is not against the Constitution.

Although remedy is usually given in the judiciary after the dispute, the parliament passed a statute to compensate victims of pollution. The compensation system addresses damage to people's health, which were caused by pollution. It takes a long time if the victims bring lawsuit to the court. The court has faced the imperfect in its own judicial proceedings.

Democracy is not a perfect system. While we are aware of systems that are worse than the existing system, we have not found a better system. Legislature does not work effectively because of the collective action in the political process. The courts are bound to the text of the law and formal procedure. Judges need to render decisions between adverse parties in the formal judicial proceedings. Disputes regarding environmental pollution cost time and money.

The decisions and statutes are not perfect system because they are the product of human beings. As humans are imperfect, their creations are not perfect. It is important to assess the advantage and disadvantage of judiciary and parliament. By using the imperfect system but improving the existing system, the people can reach a sustainable society for the future. We need to be vigilant to see the purpose and method to achieve the purpose.

KEYWORDS
Japan, environmental law, constitutional law, Administrative Case Litigation Act, Yokkaichi, Ninamata, Itai-itai, Odakyu case, Osaka International Airport Case, Moju Case

Manuscript received: Aug. 25, 2010*; review completed;* Nov. 04, 2010*; accepted;* Nov. 10, 2010.

INCORPORATING PUBLIC SENTIMENT INTO A SCIENCE-BASED RISK ANALYSIS IN WTO LAWS

Sun Young Oh[*]

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ABSTRACT

This article is a modified version of several chapters in my doctoral thesis defended in May 2010 (the title of the dissertation is "the Precautionary Principle in the SPS Agreement: Risk Management, Public Participation and a New Standard of Review"). This article seeks to reconcile the science-based requirements of the WTO, especially within the Sanitary and Phytosanitary Agreement ("SPS"), with the need to reflect public sentiment in the regulatory decision-making processes in the face of scientific uncertainty. As the strict requirement of scientific justification in the SPS Agreement inappropriately excludes the democratic non-scientific factors in risk regulation, the desire to protect human health and environment has been undermined.

Therefore, it suggests the incorporation of public concerns and other social values in science-dictated risk assessment through the ensuring risk management in risk analysis, and promotion of public participation and awareness in decision-making based on a model exemplified in the Cartagena Protocol. In doing so, a meaningful acceptance of public sentiment in risk analysis will make the decision-making process fair and the final decision is reasonable, especially in an era of accelerating new technology and emergent science.

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INTRODUCTION

In recent decades, the rapid development of science and new technologies has been accompanied by the potential risks to human health, safety and environment. Public perceptions of risk are heavily influenced by a variety of psychological, social, and cultural factors where dangers or harms of activities are less obvious, or safety of certain acts has not yet been proven. As a representative of its citizens, national governments have a responsibility to respond to the concerns and listen to the voices of their public when dealing with potential hazards.

Indeed, Member States of the World Trade Organization ("WTO") adopt and implement their own sanitary and phytosanitary ("SPS") measures to protect human, animal and plant health and life against pests, diseases and food borne hazards. However, the divergent SPS measures between Member States often cause trade tensions when the measures are applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination. Therefore, the Agreement on the Application of Sanitary and Phytosanitary Measures ("SPS Agreement")[1] strictly requires the Member States to base their SPS measures on appropriate scientific justification in order to restrict the use of the SPS measures as disguised barriers to international trade in goods. Science is vital to providing objective and fair justifications for SPS measures because it provides impartial standards by which discriminatory or disguised protectionist regulations can be distinguished from ones that are democratic and legitimate.[2]

However, the appropriate role of science in the regulatory process is not to determine the intuitive judgments of individuals about what levels of risk are acceptable, but rather to guide individuals or national authorities in making informed decisions by considering non-scientific factors as well as scientific evidence.[3] In this sense, scientific evidence alone cannot satisfy all the factors needed to make democratic judgments about the appropriate level of protection under the SPS Agreement.

Public sentiment plays an important role in a transparent and informed decision-making process along with scientific findings in a sense that it induces public decision makers to reach a decision in situations where claims of hazard are uncertain by either taking immediate protective action or delaying such action until scientific uncertainty

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[1] Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Agreement on the Application Sanitary and Phytosanitary Agreement, Apr. 15, 1994, 1867 U.N.T.S. 493 [hereinafter SPS Agreement]. The SPS Agreement was designed for an effort to elaborate on the provision of Article XX (b) of the GATT 1994, and thus it establishes multilateral mechanism to protect human, animal, and plant health in WTO Member States.

[2] Kenneth R. Foster, Paolo Vecchia, & Michael H. Repacholi, *Risk Management: Science and the Precautionary Principle*, SCIENCE, May 12, 2010, at 979, 979-980.

[3] Cass Sunstein & Richard Pildes, *Experts, Economists, and Democrats*, *in* FREE MARKETS AND SOCIAL JUSTICE 128 (Cass Sunstein ed., 1997).

concerning these harms is eliminated. The great influence of public sentiment in decision-making process can be found on the beef hormones and biotech disputes where publics in Europe were unwilling to accept scientifically based assurances that hormone-treated beef or Genetically Modified Organisms ("GMOs") posed no health risk.[4] A meaningful acceptance of public sentiment in risk analysis will make the decision-making process fair and the resulting decision is reasonable.

This article examines how to reconcile rigid science-based requirement of risk assessment in WTO law, especially in the SPS Agreement, with public sentiment in decision-making process to protect genuine social values while complying with WTO laws and obligations. A possible solution lies in adopting risk management as a conjunctive component to science-based risk assessment in the risk analysis process and incorporating greater public participation in the decision-making process to respond to cultural, social, public opinion and concerns. The Cartagena Protocol on Biosafety[5] offers a good model for a more effective and legitimate application of the SPS Agreement in human health and environment-related disputes because the Cartagena Protocol emphasizes the significant role of risk management and stakeholder participation in achieving more objective and democratic decision-making.

I. RISK ANALYSIS IN THE SPS AGREEMENT

A. Perceptions of Risk and Public Sentiment

Uncertain threats to human health and potential ecological threats of anthropogenic activities have encouraged public involvement in the implementation of the SPS measure. As social scientists argue, the decision of what constitutes an acceptable risk, or of how risk is measured is a social construction rather than a demonstration of real hazards, and therefore, public sentiment should be taken into account in the regulatory decision making process.[6] It is because the public is directly affected by potential risks of new technologies

[4] Tracey Epps, *Reconciling Public Opinion and WTO rules under the SPS Agreement*, 7 WORLD TRADE REV. 359, 360 (2008).

[5] Cartagena Protocol on Biosafety to the Convention on Biological Diversity, Jan. 29, 2000, 2226 U.N.T.S. 208; 39 I.L.M. 1027 (2000) [hereinafter Cartagena Protocol]. The Cartagena Protocol is a supplementary agreement of the Convention on Biological Diversity, and it regulates Living Modified Organisms trade. There are 157 parties to the Cartagena Protocol, but the United States has not signed it.

[6] Andreas Klinke and Ortwin Renn, *A New Approach to Risk Evaluation and Management: Risk-Based, Precaution-Based, and Discourse-Based Strategies*, 22 RISK ANALYSIS 6, 1071, 1073 (2002).

or other risk-inducing activities, and thus, it should be their prerogative right to determine the acceptable level of risk.[7]

In practice, the Appellate Body in *EC-Hormones*[8] took into account the high levels of public apprehension about the use of growth hormones in reaching its decision that the EC ban was not a disguised restriction on trade.[9] Therefore, the *bona fide* character of public perspectives and attitudes towards risk are essential factors that must be considered in conjunction with science in deliberating SPS measures, and in distinguishing arbitrary or unjustifiable applications of the SPS measure that lead to discrimination or a disguised restriction of international trade.

Despite its significant role in risk analysis for the protection of human health and environment within SPS jurisprudence, the debate on the legitimate role of public sentiment in regulatory decision making process has been heated, and indeed, consideration of the public's appreciation of risk in risk analysis has remained outside the boundaries of WTO law, especially with regards to Articles 2.2, 5.1, and 5.7 of the SPS Agreement.[10] Furthermore, precautionary actions responding to public concerns in situations where the harms or effects of a risk have not been sufficiently proven have been left out of WTO jurisprudence due to a strong tendency to exclude non-scientific considerations in scientific risk assessment.

Under this backdrop, it is important to discuss how subjective elements of risk analysis such as public opinion, social and cultural diversity can be reintegrated into the science-based risk assessment process under the SPS Agreement.[11] Ensuring risk management process in risk analysis and public participation can play an important role in achieving a reasonable level of flexibility and reconciliation between public sentiment and

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[7] *Id.*

[8] Appellate Body Report, *European Communities- Measures Concerning Meat and Meat Products (Hormones),* WT/DS26/AB/R, WT/DS48/AB/R (Jan. 16, 1998) [hereinafter Appellate Body Report, *EC–Hormones*].

[9] Jan Bohanes, *Risk Regulation in WTO Law: A Procedure-Based Approach to the Precautionary Principle*, 40 COLUM. J. TRANSNAT'L L. 323, 384 (2002).

[10] Article 2.2 of the SPS Agreement reads that Members shall ensure that any sanitary or phytosanitary measure is applied only to the extent necessary to protect human, animal or plant life or health, is based on scientific principles and is not maintained without sufficient scientific evidence, except as provided for in paragraph 7 of Article 5. Article 5.1 reads that Members shall ensure that their sanitary or phytosanitary measures are based on an assessment, as appropriate to the circumstances, of the risks to human, animal or plant life or health, taking into account risk assessment techniques developed by the relevant international organizations. Article 5.7 reads that in cases where relevant scientific evidence is insufficient, a Member may provisionally adopt sanitary or phytosanitary measures on the basis of available pertinent information, including that from the relevant international organizations as well as from sanitary or phytosanitary measures applied by other Members. In such circumstances, Members shall seek to obtain the additional information necessary for a more objective assessment of risk and review the sanitary or phytosanitary measure accordingly within a reasonable period of time.

[11] Caroline E. Foster, *Public Opinion and the Interpretation of the World Trade Organization's Agreement on Sanitary and Phytosanitary Measures*, 11 J. INT'L ECON. L. 427, 430 (2008).

science-based framework that will allow public concerns and social responses to be reflected in the domestic regulatory decision-making process in a democratic manner while complying with the WTO restrictions and obligations.

B. Risk Analysis in Decision-Making Process

1. General Principles of Risk Analysis

Risk analysis is fundamental to developing domestic regulation for the protection of human health and environment. Risk analysis consists of three distinct but closely linked components: risk assessment, risk management, and risk communication.[12]

Risk assessment is defined as "the systematic, scientific characterization of potential adverse effects of human or ecological exposures to hazardous agents or activities" for the identification of hazards, while risk management refers to "the process of identifying, evaluating, selecting and implementing actions to reduce risk."[13] The Codex Alimentarius Commission defines risk communication as "the interactive exchange of information and opinions throughout the risk analysis process concerning risk" among risk assessors, risk managers and stakeholders in all aspects of the process.[14] Each component is essential in ensuring that risk analysis leads to more efficient and effective protection of human health and environment, and should be analyzed in a fully transparent manner.[15]

Risk *assessment*, which incorporates the four processes of hazard identification, hazard characterization, exposure assessment, and risk characterization, should be based on all scientific data available in order to make valuable contributions to sound decision-making in the process of risk management.[16] Risk *management* is an on-going process that incorporates newly generated information as it becomes available in the evaluation and review of risk-related decisions.[17] Risk *communication* requires exchanging information relating to the concerns of interested parties in order to ensure that all relevant factors and information required for effective risk management is incorporated into risk analysis and decision-making.[18] The process of risk analysis is properly carried out when the analysis

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[12] CODEX ALIMENTARIUS COMMISSION, A*ppendix IV: Working Principles for Risk Analysis for Application in the Framework of the Codex Alimentarius, in* REPORT OF THE TWENTY-SIXTH SESSION (2003), *available at* http://www.fao.org/docrep/006/y4800e/y4800e0o.htm [hereinafter CODEX Risk Analysis].

[13] PRESIDENTIAL/CONGRESSIONAL COMMISSION ON RISK ASSESSMENT AND RISK MANAGEMENT, RISK ASSESSMENT AND RISK MANAGEMENT IN REGULATORY DECISION-MAKING 2 (1997), *available at* http://www.riskworld.com/Nreports/1997/risk-rpt/volume2/pdf/V2EPA.pdf [hereinafter Commission on Risk Assessment and Risk Management].

[14] CODEX Risk Analysis, *supra* note 12, Annex.

[15] *Id.* at 1.

[16] *Id.* at 3.

[17] *Id.* at 4.

[18] *Id.* at 5.

incorporates risk management that is based on appropriate risk assessment conducted through stakeholder participation.

2. A Risk Assessment in the SPS Agreement

The SPS Agreement mandates "a rational or objective relationship" between the SPS measure and the "scientific evidence" in order to invoke Article 2.2 and Article 5.1 of the SPS Agreement, and such rational relationship is established when the Member State pursuing the SPS measure show the "likelihood of the establishment of entry, establishment, or spread of these diseases" in the process of risk assessment.[19] Paragraph 4 of Annex A of the SPS Agreement provides a general definition of risk assessment by containing:

> The evaluation of the likelihood of entry, establishment or spread of a pest or disease within the territory of an importing Member according to the sanitary or Phytosanitary measures which might be applied, and of the associated potential biological and economic consequences; or the evaluation of the potential for adverse effects on human or animal health arising from the presence of additives, contaminants, toxins or disease-causing organisms in food, beverages or feedstuffs.[20]

However, since the provision does not specify any particular method or type of risk assessment to be conducted in order to be in compliance with the Article, the precise meaning of "risk assessment" is unclear. Although it is clear that "scientific proof" is inevitable in the assessment of risk because it proves a rational relationship between the SPS measures and scientific evidence, the Appellate Body in *EC- Hormones* noted that risk assessment does not require that "a certain magnitude or threshold level of risk be demonstrated" – "such a quantitative requirement finds no basis" in the Agreement, and finally confirmed that the SPS Agreement does not require a showing of a minimum magnitude of risk through risk assessment.[21] This ruling gives a Member the right to maintain SPS measures even against low-level risks, and further allows a Member to legitimately pursue a zero risk-policy.[22]

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[19] Appellate Body Report, *Australia–Measures Affecting Importation of Salmon*, ¶ 113, WT/DS18/AB/R (Oct. 20, 1998) [hereinafter Appellate Body Report, *Australia–Salmon*].
[20] The SPS Agreement, *supra* note 1, Annex A (4).
[21] Appellate Body Report, *EC-Hormone*s, *supra* note 8, ¶¶ 186 & 253.
[22] Alan O. Sykes, *Domestic Regulation, Sovereignty and Scientific Evidence Requirements*, *in* TRADE AND HUMAN HEALTH AND SAFETY 257, 262 (George A. Bermann & Petros C. Mavroidis eds., 2006).

The Appellate Body further emphasized that "based on" should not be understood to mean that the SPS measure must conform absolutely to the prevailing risk assessment.[23] As the Appellate Body noted:

> […] The risk assessment could set out both the prevailing view representing the "mainstream" of scientific opinion, as well as the opinions of scientists taking a divergent view. Article 5.1 does not require that the risk assessment must necessarily embody only the view of a majority of the relevant scientific community. In some cases, the very existence of divergent views presented by qualified scientists who have investigated the particular issue at hand may indicate a state of scientific uncertainty. Sometimes the divergence may indicate a roughly equal balance of scientific opinion, which may itself be a form of scientific uncertainty. In most cases, responsible and representative governments tend to base their legislative and administrative measures on "mainstream" scientific opinion. In other cases, equally responsible and representative governments may act in good faith on the basis of what, at a given time, may be a divergent opinion coming from qualified and respected sources…[24]

According to the opinion, a Member could legitimately choose to follow opinions on the SPS measure supported by qualified sources that diverge from mainstream scientific opinion,[25] and apply a measure that relies on various factors such as the character of the threat and the quality of the evidence.[26] It certainly gives a certain margin of discretion in favor of a Member enacting legislation,[27] and it emphasizes the need of risk management in risk analysis.

3. Risk Management in the SPS Agreement

While major international environmental treaties, international standard-setting bodies, and even the Clean Air Act of the United States mandate an assessment and management of risks for the purpose of protecting human health, safety, and environment, the SPS Agreement does not explicitly recognize risk management in its risk analysis

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[23] *Id.*
[24] Appellate Body Report, *EC-Hormones*, *supra* note 8, ¶ 194.
[25] William J. Davey, *Reflections on the Appellate Body Decision in the Hormones Case ,in* TRADE AND HUMAN HEALTH AND SAFETY 118, 127 (George A. Bermann & Petros C. Mavroidis eds., 2006).
[26] Joost Pauwelyn, *Does the WTO Stand for "Deference To" or "Interference With" National Health Authorities When Applying the Agreement on Sanitary and Phytosanitary Measures, in* THE ROLE OF THE JUDGE IN INTERNATIONAL TRADE REGULATION 175, 180–81 (Thomas Cottier & Petros Mavroidis eds., 2003).
[27] Robert Howse & Petros C. Mavroidis, *Europe's Evolving Regulatory Strategy for GMOs—The Issue of Consistency with WTO Law: Of Kine and Brine*, 24 FORDHAM INT'L L. J. 317, 332 (2000).

process. Risk management is the stage of risk analysis that incorporates individual preferences for different levels of acceptable risk while the specific risk is being identified.[28] Rather than being in conflict with risk assessment, risk management works in conjunction with risk assessment to comprise essential elements in the risk analysis process. Moreover, the role of risk management takes on even more significance in situations where there is a lack of decisive scientific evidence regarding threats imposed by certain products or activities.

The Panel in *EC-Hormones* first recognized risk management as a distinct term from risk assessment by defining risk management as a "non-scientific" factor involving social value judgments in political settings. The Panel emphasized that risk *management* had to be distinguished from risk *assessment*, which is based primarily on substantially scientific information.[29] The Panel added that while Articles 5.1 to 5.3 of the SPS Agreement addressed risk assessment, Articles 5.4 to 5.6 was more closely linked to risk management.[30] According to this analysis, the determination of whether a Member State can accept the risk considering subjective factors such as values or different population's tolerance for risk can be made during the risk *management* process, which takes place after the Member has completed the risk *assessment*.[31]

However, the Appellate Body in *EC-Hormones* rejected the Panel's distinction between risk management with risk assessment by concluding that:

> The Panel observed that an assessment of risk is, at least with respect to risks to human life and health, a "scientific" examination of data and factual studies; it is not, in the view of the Panel, a "policy" exercise involving social value judgments made by political bodies. The Panel describes the latter as "non-scientific" and as pertaining to "risk management" rather than to "risk assessment." We must stress, in this connection, that Article 5 and Annex A of the SPS Agreement speak of "risk assessment" only and that the term "risk management" is not to be found either in Article 5 or in any other provision of the SPS Agreement. Thus, the Panel's distinction, which it apparently employs to achieve or support what appears to be a restrictive notion of risk assessment, has no textual basis. The fundamental rule of treaty interpretation requires a treaty interpreter to read and interpret the words

[28] Lukasz Gruszczynski, *Risk Management Policies under the WTO Agreement on the Application of Sanitary and Phytosanitary Measures*, 3 ASIAN J. WTO & INT'L HEALTH L. & POL'Y 261, 265 (2008).
[29] Appellate Body Report, *EC-Hormones, supra* note 8, ¶ 181.
[30] Terence P. Stewart & David S. Johanson, *The WTO Beef Hormone Dispute: an Analysis of the Appellate Body Decision*, 5 U.C. DAVIS J. INT'L L. & POL'Y 219, 241 (1999).
[31] *Id.*

> actually used by the agreement under examination, and not words which the interpreter may feel should have been used.[32]

As the Appellate Body addressed, a notion of risk management is not expressly stipulated in the SPS Agreement. However, certain Articles in the SPS Agreement do recognize that risk management is pivotal for national risk regulation. In addition, it should be noted that risk assessment alone cannot serve as a complete and exclusive means of achieving appropriate risk evaluation. Risk management greatly enhances the accuracy of risk analysis by adding valuable input to risk assessment, especially in the most common cases where the likelihood of disease or pest was low, but the potential social and economic effects of disease were argued to be serious enough to vindicate the maintenance of the SPS measures.[33]

As the Preamble, Article 2.1 and Article 5.6 of the SPS Agreement articulate, Member States have the right to implement SPS measures as they deem appropriate. The "appropriate" level of sanitary or phytosanitary protection is defined in Annex A of the SPS Agreement as "the level of protection deemed appropriate by the Member establishing a sanitary or phytosanitary measure to protect human, animal or plant life or health within its territory."[34]

As discussed above, a determination of the appropriate level of SPS protection hinges on the level of risk the Member State can tolerate or accept regarding a particular risk. Thus, the appropriate level of risk can vary from state to state, since cultural preferences or societal values of a Member State can influence risk perception in numerous ways. As establishing the appropriate level of risk in itself reflects the public concerns and preferences of a Member State towards particular risk, the process of identifying and selecting a certain level of risk is a part of risk management.[35]

Articles 5.2, 5.4 and 5.6 of the SPS Agreement enumerate the factors aside from scientific results that can be taken into account in establishing a Member State's appropriate level of risk. As the Panel defines risk management as a non-scientific process, it follows that the consideration and evaluation of factors established outside of laboratory science to achieve the appropriate level of risk reflect the risk management component of the risk analysis process. As previously mentioned, Article 5.2 of the SPS Agreement provides a potential basis to eventually allow diverse factors to be included as integral parts of risk assessment. Therefore, these Articles implicitly recognize the notion of risk

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[32] Appellate Body Report, *EC-Hormones*, *supra* note 8, ¶ 181.
[33] Robert Howse, *Democracy, Science, and Free Trade: Risk Regulation on Trial at the World Trade Organization*, 98 MICH. L. REV. 2329, 2344 (2000).
[34] The SPS Agreement, *supra* note 1, Annex A (5).
[35] L. Gruszczynski, *supra* note 28, at 267.

management within risk analysis, clearly showing that risk assessment and risk management are integrated components in establishing the appropriate level of risk.

Article 3 of the SPS Agreement urges Member States to rely on international standards, guidelines or recommendations to harmonize the SPS measures between Member States. As opposed to the text of the SPS Agreement, international standard-setting bodies recognized by the SPS Agreement contain the concept of risk management in their documents.[36] The Codex defines risk management as "a process distinct from risk assessment, of weighing policy alternatives, in consultation with all interested parties, considering risk assessment and other factors relevant for the health protection of consumers and for the promotion of fair trade practices, and, if needed, selecting appropriate prevention and control options." [37] The International Plant Protection Convention ("IPPC") also articulates the notion of risk management as "an evaluation and selection of options to reduce the risk of introduction and spread of a pest."[38]

Even though the terms used in these standards are different, they share the essential concept of risk management by referencing that risk management is a process of identifying, evaluating and implementing actions, and going even further to consider risk assessment as a method of *reducing* risk and establishing the appropriate level of risk. Again, international standard-setting bodies acknowledge that risk management should be distinguished from risk assessment, and further explain that risk management is an essential and integral part of risk analysis.[39] Insomuch as Article 3 and the paragraph 3 of Annex A of the SPS Agreement urge the Member State to base its SPS measures on international standards, the SPS Agreement implicitly recognizes the notion of risk management in the text of the SPS Agreement as well.

In short, even though the SPS Agreement does not manifestly address the notion of risk management, this concept has been implied not only in the text of the SPS Agreement, but also the holdings of the WTO adjudicatory bodies. In practice, however, Howse suggests that risk assessment and risk management need not necessarily be considered as distinct or separate exercises. In other words, even if no strict distinction was made between risk assessment and risk management, the risk analysis would not be significantly affected because risk assessment cannot be performed based solely on non-scientific value judgment, nor can science alone tell us the appropriate level of protection in the face of scientific uncertainty. As already introduced through the Appellate Body's holding in *EC-Hormones,* the Appellate Body supported this argument by stating:

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[36] *Id.* at 265.
[37] CODEX Risk Analysis, *supra* note 12, Annex.
[38] SECRETARIAT OF THE INTERNATIONAL PLANT PROTECTION CONVENTION, INTERNATIONAL STANDARDS FOR PHYTOSANITARY MEASURES 1 TO 24 53 (2005),
available at http://ftp.fao.org/docrep/fao/009/a0450e/a0450e.pdf.
[39] L. Gruszczynski, *supra* note 28, at 265-66.

> […] A risk assessment under Article 5.1 is not only risk ascertainable in a science laboratory operating under strictly controlled conditions, but also risk in human societies as they actually exist, in other words, the actual potential for adverse effects on human health in the real world where people live and work and die.[40]

This analysis clearly shows that public concern regarding risk played an essential role in the EC's decision to implement the ban, and demonstrates that the risk assessment process can take non-scientific factors into account in conducting risk analysis.[41] In this regard, the Appellate Body's holding in paragraph 181 that risk management was not provided for under the SPS Agreement did not actually mean that the Appellate Body rejected the notion of risk management under the SPS Agreement, but rather that it dismissed the strict distinction between risk assessment and risk management made by the Panel.[42] It seems that the purpose of this distinction is to emphasize the importance of science in risk assessment by distinguishing scientific evidence from value judgments rather than to simply draw a strict line between the two components.[43]

Regardless of whether risk assessment and risk management should be distinguished, it is important to note that risk management supports risk assessment in achieving more comprehensive risk analysis for the purposes of regulatory decision-making. Therefore, the paradigm of risk assessment under the SPS Agreement should be expanded, noting that risk management implies more than simply assessing risks but also encompasses a goal of producing the most relevant and useful information possible to achieve sound risk analysis that will reflect public sentiment in regulatory decision-making.

II. PUBLIC PARTICIPATION

Public participation plays a very significant role in risk management by incorporating public concerns and opinions into the risk analysis. A meaningful public participation in risk analysis will add validity to the regulatory making-decision process and make the resulting decisions reasonable. Therefore, public participation in the domestic regulatory decision-making process is regarded as one of the most effective and efficient ways to enhance a Member State's sovereignty.[44] Furthermore, public participation

[40] Appellate Body Report, *EC-Hormones*, *supra* note 8, ¶ 187.
[41] R. Howse, *supra* note 33, at 2344.
[42] L. Gruszczynski, *supra* note 28, at 272.
[43] *Id.* at 266.
[44] Yves Bonzon, *Institutionalizing Public Participation in WTO Decision Making: Some Conceptual hurdles and Avenues*, 11 J. INT'L ECON. L. 751, 753 (2008).

increases transparency and democratic legitimacy of WTO decision-making by including all institutionalized forms of interaction between an institution's organs and external actors such as NGOs.[45]

In situations where extensive uncertainties in risk assessment exist, the need for meaningful public participation has been reiterated both in designing standards for performing risk assessment and in making scientific and policy decisions.[46] Thus, public participation inputs public opinions into policy choices and even enhances the quality of technical evidence, as alternative risk estimates based on assumptions adopted by the public can help decide the likely range of acceptable risk.[47]

Despite its pivotal importance in risk assessment and risk management, public participation is usually relegated to only the risk management component of the decision-making process.[48] Even at this stage, public participation may be limited in scope and effect, and may not even be reflected in the final decision.[49] Further, the international trade regime has traditionally guaranteed very limited opportunities for citizens to participate in the decision-making process.[50]

Public participation in the WTO dispute settlement process is achieved through the submission of *amicus curiae* briefs by non-state actors.[51] While this mechanism for public participation exists within the WTO, briefs submitted by non-state actors are almost never considered by dispute bodies in a dispute.[52] Furthermore, the SPS Agreement provides no textual basis for public participation or injecting public opinions into risk assessment, nor is risk management a required component of the decision-making process.

Provisions for public participation by consumers, environmental groups and other entities found in international standard-setting proceedings may offer guidelines in incorporating public consensus in decision-making for the protection of human health and environment.[53] Such public consensus is important because the SPS Agreement requires harmonization, mandating national measures to be based on internationally developed

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[45] *Id.*
[46] Ashley C. Schannauer, *Issues in Environmental Law Science and Policy in Risk Assessments: The Need for Effective Public Participation*, 24 VT. L. REV. 31, 37 (1999).
[47] *Id.*
[48] James S. Freeman & Rachel D. Godsil, *The Question of Risk: Incorporating Community Perceptions into Environmental Risk Assessments*, 21 FORDHAM URB. L. J. 547, 565 (1994).
[49] *Id.*
[50] Benn McGrady, *Trade and Tobacco Control: Resolving Policy Conflicts through Impact Assessment and Administrative Type International Laws*, 3 ASIAN J. WTO & INT'L HEALTH L. & POL'Y 341, 371 (2008).
[51] Y. Bonzon, *supra* note 44, at 758.
[52] Padideh Ala'i, *Judicial Lobbying at the WTO: The Debate over the Use of Amicus Curiae Briefs and the U.S. Experience*, 24 FORDHAM INT'L L. J. 62, 84 (2000).
[53] Bruce A. Silverglade, *International Harmonization under the SPS Agreement*, *in* INCORPORATING SCIENCE, ECONOMICS AND SOCIOLOGY IN DEVELOPING SANITARY AND PHYTOSANITARY STANDARDS IN INTERNATIONAL TRADE 210, 211 (National Research Council ed., 2000).

standards, guidelines or recommendations such as the Codex Alimentarius Commission, the Office International des Epizooties, and the International Plant Protection Convention.[54]

Lack of public participation input in decision-making under the SPS Agreement often severely constrains the ability of Member States to choose their own level of SPS protection based on the precautionary principle in areas where scientific evidence is not yet available. As previously discussed, not all national regulations are backed by scientific evidence. For instance, the European Community in *EC-Hormones* and *EC-Biotech* respectively restricted hormone treated beef and adopted strict traceability and labeling requirement for GMOs in order to respond to public concern and address social and cultural diversity.

In addition, many international environmental laws or treaties have encouraged public participation in domestic regulatory decision-making, emphasizing the role of public participation in risk analysis. Article 23 of the Cartagena Protocol reflects public concern by requiring public participation in both risk assessment and risk management. Further, the Secretariat of the World Health Organization (WHO) in International Trade and Health recognizes the importance of public participation, particularly in decisions regarding human health that affect international trade rules, by emphasizing that "ministries of health need to consult health providers, consumers and other key private and public stakeholders, and to collaborate more closely with their trade colleagues when trade policies and Agreements are formulated that have possible implications for public health"[55]

Even though an ill-informed public may not accept risks in the same way as scientists, the non-statistical, more qualitative, and heuristic-based risk perceptions of the public are often arguably quite sensible.[56] Indeed, risk management decisions made with the involvement of stakeholders enhance the legitimacy of risk analysis under the SPS Agreement because such collaboration facilitates an exchange of information, knowledge, expertise and ideas that enable all parties to make informed decisions toward risks, especially those that are unknown.[57]

All stakeholders who are most directly affected by the risk, including the public, should be made meaningful participants from the beginning of the risk assessment process, at least from the stage in which the hazard caused by products or activities is first perceived.[58] Clarifying the objectives of public participation at the outset will aid in efficiently and effectively engaging the public and other stakeholders in regulatory

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[54] *Id. see also* the SPS Agreement, *supra* note 1, Article 3.
[55] World Health Organization [WHO], *International Trade and Human Health*, at 5, WHO Doc. EB116/4 (Apr.28, 2005).
[56] T. Epps, *supra* note 4, at 368.
[57] Commission on Risk Assessment and Risk Management, *supra* note 13, at 16-17.
[58] Robert R. Kuehn, *The Environmental Justice Implications of Quantitative Risk Assessment*, 1996 U. ILL. L. REV. 103, 160 (1996).

decision-making, instead of limiting public engagement to the purpose of ending controversy over risks.[59] In addition, stakeholders should be engaged at an early stage of the decision-making process by explaining how their participation is used and by providing appropriate incentives to encourage participation.[60]

III. THE SIGNIFICANCE OF THE CARTAGENA PROTOCOL TO THE PUBLIC SENTIMENT

While the Cartagena Protocol on Biosafety to the Convention on Biological Diversity ("Cartagena Protocol") is limited to the use of "living modified organisms" ("LMOs"), a discussion on the relationship between the Cartagena Protocol and WTO laws can shed light on risk management and public participation in risk analysis. The major characteristics of the Cartagena Protocol that make it a precautionary instrument are that, contrary to other multilateral environmental agreements, it was negotiated without evidence of concrete environmental harms resulting from the release of LMOs into the environment, and sets out rules for decision-making that seeks to minimize potential risk.[61]

Contrary to the SPS Agreement, the risk assessment requirement in the Cartagena Protocol includes a consideration of potential risks to human health and recognizes the need for risk management.[62] While the Cartagena Protocol mandates science as a means of "risk assessment," it acknowledges the limits of science by requiring a complex weighing of other social interests. By including this requirement, the Cartagena Protocol reflects an understanding that risk cannot be analyzed solely through science or reference to expertise. Regulations enacted in consideration of all relevant facts may enhance the scientific justification of risk analysis and lead to democratic and legitimate decisions where scientific knowledge or consensus is lacking.

In addition, Article 23 of the Cartagena Protocol expressly calls for the promotion of public awareness and participation in its text.[63] Providing a mechanism for public participation will enhance the democratic nature and legitimacy of the decision-making process. Public participation requirements in the Cartagena Protocol have inevitably

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[59] Commission on Risk Assessment and Risk Management, *supra* note 13, at 17.
[60] *Id.*
[61] Robert Falkner, *Negotiating the Biosafety Protocol, in* THE CARTAGENA PROTOCOL ON BIOSAFETY: RECONCILING TRADE IN BIOTECHNOLOGY WITH ENVIRONMENT & DEVELOPMENT? 3, 4 (Christoph Bail, Robert Falkner & Helen Marquard eds., 2002).
[62] The Cartagena Protocol, *supra* note 5, Articles 15 & 16.
[63] Article 23 (1) (a) reads that the Parties shall promote and facilitate public awareness, education and participation concerning the safe transfer, handling and use of living modified organisms in relation to the conservation and sustainable use of biological diversity, taking into account risks to human health. In doing so, the Parties shall cooperate, as appropriate, with other States and international bodies.

highlighted the importance of considering socio-economic, ethical and other subjective values implicit in science-based risk assessment.[64] Therefore, mechanisms for public participation should be implemented throughout the entire decision-making process, from carrying out public hearings and public surveys for information-sharing to joint decision-making and monitoring.

In order to promote and facilitate effective stakeholder involvement and public awareness in the regulatory decision-making process under the SPS Agreement, education of the public and easy access to information should be guaranteed in a way similar to the Cartagena Protocol.[65] In other words, in order to achieve reconciliation of risk assessment and environmental justice, particularly where scientific evidence is lacking, citizens should be made aware of uncertainties or assumptions by allowing open and fair access to all relevant information.[66] Citizens cannot raise significant questions of environmental justice, such as who benefits and who loses form the proposed policy or measure, without full and comprehensive access to these uncertainties and assumptions on which they can judge whether the assessment is biased or incomplete.[67] The provided information should clarify the scope of the interested public, its concern and interests, and the nature of the potential risk, all based on an impartial analysis in the appropriate languages, styles and formats.[68] It should be noted that making scientific knowledge accessible and useful to a general public of non-scientists would promote more public participation in science-based risk analysis.[69]Therefore, providing accessible information to citizens is a significant first step in achieving legitimate risk assessment and management in the decision-making process.

Sufficient notice to interested parties is also essential and should be accompanied by information sharing, as ensuring sufficient time allows genuine consultation, learning or participatory deliberation to occur.[70] Further, notification procedures with sufficient time allowance should be accompanied by appropriate information sharing, because public awareness is the first step to encouraging public participation.

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[64] DOMINIC GLOVER, JAMES KEELEY, PETER NEWEL & ROSEMARY MCGEE, PUBLIC PARTICIPATION AND THE CARTAGENA PROTOCOL ON BIOSAFETY: A REVIEW FOR DFID AND UNEP-GEF 5, *available at* http://www.unep.org/biosafety/Documents/ PublicParticipationIDS.pdf [hereinafter Public Participation and the Cartagena Protocol].
[65] The Cartagena Protocol, *supra* note 5, Article 23.
[66] T. Epps, *supra* note 4, at 158–61.
[67] *Id.* at 159.
[68] Public Participation and the Cartagena Protocol, *supra* note 64, at 4.
[69] *Id.*
[70] *Id.* at 4-5.

CONCLUSION

The desire to promote free trade between nations and the desire to protect human health and environment cannot be changed, especially in face of scientific uncertainty. However, as public sentiment arising from differing cultural, ethical, political, and social values do have a significant and legitimate role in risk regulation, the SPS Agreement's requirement for scientific evidence can be reconciled with the need to reflect public sentiment genuinely concerned with human health and environment by incorporating the risk management process into risk analysis, and by granting Member States the flexibility to ensure public participation in accordance with the wishes of their citizens while complying with their WTO obligations.

Good risk management is based on an intensive evaluation of scientific evidence supporting decisions to protect against potential risks to human health and the environment by legitimately taking into account the best scientific, economic, and technical information available, as well as public perception and other non-scientific considerations in the decision-making process.[71] In addition, granting greater public participation in domestic regulatory decision-making enhances government legitimacy as well as to preserve the legitimacy of science. The Cartagena Protocol is discussed as a helpful guide to enhancing risk management and public participation in risk analysis under the SPS Agreement. Specifically, the Protocol's requirements for educating and providing accessible information to the public, as well as providing enough notice and opportunity for comments are identified as principles applicable to the SPS Agreement.

Through its recommendations, this article argues that incorporating risk management and public participation in risk regulation achieves the best balance between science and democratic public sentiment, by reflecting the factors considered in a national authority's decision to implement measures for the protection of human health and the environment before science can provide irrefutable proof of irreversible and serious harm.

KEY WORDS:
Public Sentiment, Non-scientific Factors, Risk Management, Public Participation, WTO, SPS Agreement

Manuscript received: Sep. 25, 2010*; review completed:* Nov. 05, 2010*; accepted:* Nov. 10, 2010.

[71] Commission on Risk Assessment and Risk Management, *supra* note 13, at 9.

YONSEI LAW JOURNAL

VOL.1 NO. 2, NOVEMBER 2010

STUDENT NOTE

CATEGORIES AND UNDERLYING MYTHS OF MARITAL RAPE EXEMPTION PROVISIONS IN THE UNITED STATES – TO THE ABOLISHMENT OF REMAINING MARITAL RAPE EXEMPTION

Seungyoun Seo[*]

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ABSTRACT

Before the 1970's, marital rape was not even a crime in all states of the U.S. However, thanks to the feminist movement and legal reformers' work, marital rape exemption provisions have eventually disappeared in states' penal codes. Now, "absolute" marital rape exemption, which acquits the husband in every case he sexually offenses his wife, does not exist anymore. But several states still have partial marital rape exemptions in their penal statutes in one form another. On examination of the remaining partial exemption provisions in states, this paper categorizes those provisions into four types; rape against an incapacitated wife, spousal offense as a less severe crime, reporting requirements, and estrangement requirements. Then, the paper analyzes the underlying ideas and shows that these ideas are based on incorrect assumptions, and therefore, unreasonable.

A. Rape against an Incapacitated Wife – Fourteen states exempt husbands from sexual offense charges when their wives are mentally or physically incapacitated at the time of the sexual offense. This category of marital rape exemption indicates that rape of a helpless spouse is not harmful enough to be criminalized. However, for four reasons, this offense is baleful enough to be penalized: first, an unconscious rape victim is more vulnerable in terms of her physical health than a conscious victim; second, this kind of rape does not necessarily lack force; third, the fact that the wife is silent does not mean that she consents to the sexual conduct in question; and finally, rape without use of force also outrages woman's sexual autonomy just like a forcible one.

B. Spousal Offense as a Less Severe Crime – Twelve states treat spousal offense as a less severe crime than the one perpetrated by strangers or acquaintances; by not punishing husbands for committing other types of sexual offenses against their wives than the most aggravated sexual crime in their legal system; mandating lesser penalties for spousal rape than for non-spousal rape regardless of the force used and injury caused; and by requiring force from husbands for them to be charged, while other types of coercion other than force suffice for rape by a stranger. This category of exemption implies that spousal offense in

general is not serious enough to be criminalized and is less traumatizing than a non-marital sexual offense. However, marital rape is more harmful than stranger or acquaintance rape because: rape in a marriage correlates with non-sexual domestic violence; marital rape occurs more than once while non-spousal rape usually happens once; and because oral and anal rape which can be more insulting than vaginal rape are experienced more often in spousal rape. Also, the idea that marital rape is less traumatizing is wrong because: the victims of spousal rape experience greater and longer effects than victims of non-spousal rape; they also fall into "learned helplessness"; and, the nature of rape itself causes destruction of ego just like rape outside of marriage.

C. Reporting Requirements– Criminal codes of two states require marital rape victims to report the offense to local authorities within a certain period. This category indicates that women are liable to make false accusations against their husbands. But there is no need to worry about false accusations because courts can tell whether the accusation is false, and because women do not tend to select rape, which carries a social stigma as a means of punishing their husbands.

D. Estrangement Requirements – Under the statutes of seven states, for the offender to be charged, husband and wife have to be estranged de facto or de jure either at the time of the offense or after the alleged rape. This category of exemption provisions indicates the wives' consent at the time of marriage goes on throughout the whole marriage unless they leave their husbands. However, the fact that the victims still live with their husbands does not mean that they consented to the sexual conduct in question. Also, rape of an estranged wife and rape of a legally married wife are substantially the same with respect to the nature of marital rape, in that there is no basis for distinguishing one from the other. The justification of spousal rape that the wife's consent to the sexual conduct at the time of marriage continues throughout the duration of the marriage is also not valid.

For the foregoing reasons, the author concludes that marital rape exemptions remaining in certain states must be abolished.

INTRODUCTION

According to the Merriam-Webster dictionary, marriage is defined as the state of being united to a person of the opposite sex as husband or wife in a consensual and contractual relationship recognized by law.[1] As seen in the dictionary definition as well as the recognition of our society, it is a widely accepted idea that marriage is a physical and mental unification of two lovers. Although physical unification through marriage does not mean that a spouse has given up her or his sexual autonomy, there is a continuing

[1] MERRIAM-WEBSTER DICTIONARY, MARRIAGE, http://www.merriam-webster.com/dictionary/marriage.

misconception that a sexual act between husband and wife, regardless of whether it is coercive or not, is natural and out of legal boundaries.[2] Before the 1970s, rape by a husband was not even a crime by law.[3] Due to the feminist movement against marital sexual offense and legal reformers' efforts,[4] condemnation of marital rape began to appear in several states in the late 1970s.[5] In 1977, in State v. Smith,[6] courts of New Jersey denied justifications of marital rape and held that laws allowing husbands to rape their wives were discriminatory toward women.[7] In the 1980s, U.S. courts showed a movement towards denying marital rape laws by eliminating all or some parts of the marital rape exemption.[8] Since then, a number of states have abolished marital rape exemption provisions in their penal statutes. Consequently, on July 5, 1993, the "absolute"[9] marital rape exemption which acquits the husband in every sexual~~ly~~ offense against his wife was eliminated in every state in the United States.[10] However, some states still have partial marital rape exemption provisions in their penal codes in one form or another. This paper will examine those provisions and categorize them into four parts, and analyze the underlying assumptions. Then, it will show that these assumptions are unreasonable. As a result, this paper concludes that the remaining marital rape exemptions should be abolished.

I. HISTORICAL AND LEGAL BACKGROUND OF MARITAL RAPE EXEMPTION

The major justification for marital rape exemption can be traced back to the statement of the British jurist, Matthew Hale. He stated, "the husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract."[11] This statement has been the major source of justification of marital rape

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[2] MARTHA ALBERTSON FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES 145-64 (1995).
[3] RAQUEL KENNEDY BERGEN, MARITAL RAPE (1999),
available at http:// www.vawnet.org/DomesticViolence/Research/VAWnetDocs/AR_mrape.pdf.
[4] Sarah M. Harless, *From the Bedroom to the Courtroom: the Impact of Domestic Violence Law on Marital Rape Victims*, 35 RUTGERS L. J. 305, 312 (2003).
[5] Rene Augustine, *Marriage: the Safe Heaven for Rapists*, 29 J. FAM. L. 559, 559 (1990/1991).
[6] State v. Smith, 148 N.J. Super. 219, 372 A.2d 386 (1977), *aff'd,* 169 N.J. Super. 98, 404 A.2d 331 (1979), *rev'd,* 85 N.J. 193, 426 A.2d 38 (1981).
[7] *Id.*
[8] *Id.*
[9] Lalenya Weintraub Siegel, *The Marital Rape Exemption: Evolution to Extinction*, 43 CLEV. ST. L. REV. 351, 367 (1995).
[10] Augustine, *supra* note 5, at 561.
[11] MATTHEW HALE ET AL, THE HISTORY OF THE PLEAS OF THE CROWN 628 (Sollom Emlyn ed., Professional Books 1971) (1736).

exemption.[12] But it was proved that this is not a proper authority since it was extrajudicial, and cited nothing.[13] His theory is called "implied consent and contract theory," that is, a marriage contract between a man and a woman was made at the time of marriage, and this contract implies a woman's consent to sexual act with her husband throughout the marriage.[14] The wife's implied consent is said to be irrevocable[15] and to expire only when the marriage also expires. According to the implied consent and contract theory, any sexual act between the husband and wife, regardless of whether it is violent and/or coercive, is not unlawful since the wife has consented to it at the time of marriage.[16]

Another historical justification of the marital rape exemption is the "property theory." This view sees a wife as a chattel owned by her husband.[17] As it is lawful that the husband uses his own property, it was also permitted that he rapes his wife as she is his property.[18] But, when a man other than the victim's husband rapes the victim, then it was unlawful since the man violated the husband's property right.[19]

The third background of the marital rape exemption is the "unity theory." This perspective views marriage as a unification of two people, husband and wife, into one entity.[20] The wife comes to belong to her husband, and therefore, she does not have her own social identity under the unity theory.[21] Only the husband has legal identity, and represents his wife as well as himself. A man raping his wife was regarded to be conducting

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[12] Michelle J. Anderson, *Marital Immunity, Intimate Relationships, and Improper Inferences: A New Law on Sexual Offenses by Intimates*, 54 HASTINGS L.J. 1465, 1479-81 (2003); BERGEN, *supra* note 3, at 2; Lisa R. Eskow, *The Ultimate Weapon?: Demythologizing Spousal Rape and Reconceptualizing Its Prosecution*, 48 STAN. L. REV. 677, 680 (1996); Siegel, *supra* note 9, at 353; Augustine, *supra* note 5, at 559; The Harvard Law Review Association, *To Have and to Hold: The Marital Rape Exemption and the Fourteenth Amendment*, 99 HARV. L. REV. 1255, 1256 (1986) [hereinafter HARV.]; Katherine M. Schelong, *Domestic Violence and the State: Responses to and Rationales for Spousal Battering, Marital Rape & Stalking*, 78 MARQ. L. REV. 79, 88 (1994).

[13] Schelong, *supra* note 12, at 87; Siegel, *supra* note 9, at 353-54; Anderson, *supra* note 12, at 1480; Augustine, *supra* note 5.

[14] BERGEN, *supra* note 3, at 2; Eskow, *supra* note 12, at 680; Anderson, *supra* note 12, at 1480.

[15] Eskow, *supra* note 12, at 680; Siegel, *supra* note 9, at 354; *see* BERGEN, *supra* note 3, at 2.

[16] Harless, *supra* note 4, at 311; Siegel, *supra* note 9, at 354; Anderson, *supra* note 12, at 1480; *see* BERGEN, *supra* note 3, at 2.

[17] Harless, *supra* note 4, at 311-12; Siegel, *supra* note 9, at 356; Anderson, *supra* note 12, at 1478; Eskow, *supra* note 12, at 680; Shelong, *supra* note 12, at 87; Augustine, *supra* note 5; HARV., *supra* note 12, at 1256.

[18] Anderson, *supra* note 12, at 1478; Siegel, *supra* note 9, at 356; Eskow, *supra* note 12, at 680; Augustine, *supra* note 5; Shelong, *supra* note 12, at 87.

[19] Anderson, *supra* note 12, at 1478; Siegel, *supra* note 9, at 356; Eskow, *supra* note 12, at 680; Shelong, *supra* note 12, at 87; Harless, *supra* note 4, at 312; HARV., *supra* note 12, at 1256-57.

[20] Anderson, *supra* note 12, at 1478-79; Eskow, *supra* note 12, at 680; Augustine, *supra* note 5; Shelong, *supra* note 12, at 86; HARV., *supra* note 12, at 1256; Siegel, *supra* note 9, at 357.

[21] *Id.*

sexual acts with himself, which could not constitute rape.[22] Therefore, under the unity theory, marital rape was not a crime.

II. CATEGORIES OF MARITAL RAPE EXEMPTION IN SEVERAL STATES

While every state in the United States has abolished the "absolute" marital rape exemption, some states still maintain partial marital sexual offense exemptions in various forms.[23] In this section, this paper will examine those partial exemption provisions in state

[22] Anderson, *supra* note 12, at 1479; Eskow, *supra* note 12, at 680; Augustine, *supra* note 5; Siegel, *supra* note 9, at 357.

[23] Alaska; AK ST S 11.41.432(a)(2), Defenses (It is a defense to a crime charged under AS 11.41.410(a)(3)[first degree unconscious sexual penetration], 11.41.420(a)(2)[second degree sexual contact], 11.41.420(a)(3)[second degree unconscious sexual penetration], or 11.41.425[third degree unconscious sexual assault] that the offender is married to the person and neither party has filed with the court for a separation, divorce, or dissolution of the marriage.): Arizona; A.R.S. § 13-1407 D, Defenses (It is a defense to a prosecution pursuant to section 13-1404 or 13-1405 [sexual abuse] that the person was the spouse of the other person at the time of commission of the act. It is not a defense to a prosecution pursuant to section 13-1406 [sexual assault] that the defendant was the spouse of the victim at the time of commission of the act.): California; West's Ann. Cal. Penal Code § 262(b), Rape of a spouse (no prosecution shall be commenced under this section unless the violation was reported to medical personnel, a member of the clergy, an attorney, a shelter representative, a counselor, a judicial officer, a rape crisis agency, a prosecuting agency, a law enforcement officer, or a firefighter within one year after the date of the violation.): Connecticut; C.G.S.A. § 53a-67(b), Affirmative defenses (In any prosecution for an offense under this part, except an offense under section 53a-70, 53a-70a, 53a-70b, 53a-71, 53a-72a or 53a-72b, it shall be an affirmative defense that the defendant and the alleged victim were, at the time of the alleged offense, living together by mutual consent in a relationship of cohabitation, regardless of the legal status of their relationship.); C.G.S.A. § 53a-70b(b), Sexual assault in spousal or cohabiting relationship (No spouse or cohabitor shall compel the other spouse or cohabitor to engage in sexual intercourse by the use of force against such other spouse or cohabitor, or by the threat of the use of force against such other spouse or cohabitor which reasonably causes such other spouse or cohabitor to fear physical injury.): Idaho; I.C. § 18-6107, Rape of spouse (No person shall be convicted of rape for any act or acts with that person's spouse, except under the circumstances cited in paragraphs 3.[rape with force] and 4.[where the victim cannot resist due to threat of bodily harm] of section 18-6101, Idaho Code.): Iowa; I.C.A. § 709.4 A(2)(a), Sexual abuse in the third degree (A person commits sexual abuse in the third degree when the person performs a sex act under circumstances where the act is between persons who are not at the time cohabiting as husband and wife and if the other person is suffering from a mental defect or incapacity which precludes giving consent.): Kansas; K.S.A. § 21-3517, Sexual battery (Sexual battery is the intentional touching of the person of another who is not the spouse of the offender and who does not consent thereto, with the intent to arouse or satisfy the sexual desires of the offender or another.): Maryland; MD Code, Criminal Law, § 3-318, Rape and sexual offense – Spousal defense (a person may not be prosecuted against a victim who was the person's legal spouse at the time of the alleged rape or sexual offense.): Minnesota; M.S.A. § 609.349, Voluntary relationships (A person does not commit criminal sexual conduct if the complainant is the actor's legal spouse, unless the couple is living apart and one of them has filed for legal separation or dissolution of the marriage.): Mississippi; Miss. Code. Ann. § 97-3-99, Sexual battery, defense of marriage (A person is not guilty of any offense under Sections 97-3-95 through 97- 3-103 [sexual battery] if the alleged victim is that person's legal spouse and at the time of the alleged offense such person and the alleged victim are not separated and living apart.): Nevada; N.R.S. 200.373, Sexual assault of spouse by spouse (It is no defense to a charge of sexual assault that the perpetrator was, at the time of the assault,

statutes, and categorize them into four types that are not mutually exclusive; rape against an incapacitated wife, spousal offense as a less severe crime, reporting requirements, and estrangement requirements.

A. RAPE AGAINST AN INCAPACITATED WIFE

Many states exempt husbands from sexual offense charges when their wives are mentally incapacitated or physically helpless at the time of sexual offense.[24] In these states,

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married to the victim, if the assault was committed by force or by the threat of force.): Ohio; R.C. § 2907.02(A)(1)(c), Rape (No person shall engage in sexual conduct with another who is not the spouse of the offender or who is the spouse of the offender but is living separate and apart from the offender, when The other person's ability to resist or consent is substantially impaired because of a mental or physical condition): Oklahoma; 21 Okl. St. Ann. § 1111(A)(5), Rape defined (Rape is an act of sexual intercourse involving vaginal or anal penetration accomplished with a male or female who is not the spouse of the perpetrator under circumstances where the victim is at the time unconscious of the nature of the act and this fact is known to the accused.): Rhode Island; RI ST S 11-37-2, First degree sexual assault (A person is guilty of first degree sexual assault if he or she engages in sexual penetration with another person, and if the accused, not being the spouse, knows or has reason to know that the victim is mentally incapacitated, mentally disabled, or physically helpless.): South Carolina; SC ST S 16-3-658, Criminal sexual conduct where victim is spouse (A person cannot be guilty of criminal sexual conduct if the victim is the legal spouse unless the couple is living apart and the offending spouse's conduct constitutes criminal sexual conduct in the first degree or second degree. The offending spouse's conduct must be reported to appropriate law enforcement authorities within thirty days in order for a person to be prosecuted for these offenses.): South Dakota; SDCL § 22-22-7.2, Sexual contact with person incapable of consenting – Felony (Any person, who knowingly engages in sexual contact with another person, other than his spouse if the other person is incapable, because of physical or mental incapacity, of consenting to sexual contact, is guilty of a Class 4 felony.); SDCL § 22-22-7.4, Sexual contact without consent with person capable of consenting as misdemeanor (No person may knowingly engage in sexual contact with another person other than his spouse who, although capable of consenting, has not consented to such contact. A violation of this section is a Class 1 misdemeanor.): Virginia; Va. Code. Ann. § 18.2-61(B) [Rape], § 18.2-67.1(B) [Forcible sodomy], § 18.2-67.2(B) [object sexual penetration], (A violation under this section against a spouse may be suspended.): Washington; RCWA 9A.44.060, Rape in the third degree (A person is guilty of rape in the third degree when, under circumstances not constituting rape in the first or second degrees, such person engages in sexual intercourse with another person, not married to the perpetrator); RCWA 9A.44.100, Indecent liberties (person is guilty of indecent liberties when he or she knowingly causes another person who is not his or her spouse to have sexual contact with him or her or another When the other person is incapable of consent by reason of being mentally defective, mentally incapacitated, or physically helpless.).

[24] Alaska; AK ST S 11.41.432(a)(2), Defenses (It is a defense to a crime charged under AS 11.41.410(a)(3)[first degree unconscious sexual penetration], 11.41.420(a)(3)[second degree unconscious sexual penetration], or 11.41.425[third degree unconscious sexual assault] that the offender is married to the person.): Connecticut; C.G.S.A. § 53a-67(b), Affirmative defenses (In any prosecution for an offense under § 53a-73a [fourth degree sexual assault of physically helpless victim], it shall be an affirmative defense that the defendant and the alleged victim were, at the time of the alleged offense, living together by mutual consent in a relationship of cohabitation, regardless of the legal status of their relationship.): Idaho; I.C. § 18-6107, Rape of spouse (No person shall be convicted of rape for any act or acts with that person's spouse, except under the circumstances cited in paragraphs 4.[where the victim cannot resist due to threat of bodily harm] of section 18-6101, Idaho Code.): Iowa; I.C.A. § 709.4 A(2)(a), Sexual abuse in the third degree (A person commits sexual abuse in the third degree when the person performs a sex act under circumstances where the act is

non-marital rape of an unconscious woman is punished. In three of those states, men are even immune from charges when they drug or intoxicate their wives in order to perpetrate a sexual offense while the wives are unconscious.[25] A few states give the husband immunity even when he renders his wife physically and mentally incapacitated against her consent, and rapes her.[26]

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between persons who are not at the time cohabiting as husband and wife and if the other person is suffering from a mental defect or incapacity which precludes giving consent.): Maryland; MD Code, Criminal Law, § 3-318(a), Rape and sexual offense-Spousal defense (A person may not be prosecuted under § 3-304(a)(2) [second degree unconscious sexual intercourse] against a victim who was the person's legal spouse at the time of the alleged rape or sexual offense.): Minnesota; M.S.A. § 609.349, Voluntary relationships (A person does not commit criminal sexual conduct under section 609.344(d) [third degree unconscious sexual penetration] if the complainant is the actor's legal spouse.): Mississippi; Miss. Code. Ann. § 97-3-99, Sexual battery, defense of marriage (A person is not guilty of any offense under Sections 97-3-95(1)(b) [unconscious sexual penetration] if the alleged victim is that person's legal spouse.): Nevada; N.R.S. 200.373, Sexual assault of spouse by spouse (It is no defense to a charge of sexual assault that the perpetrator was, at the time of the assault, married to the victim, if the assault was committed by force or by the threat of force.): Ohio; R.C. § 2907.02(A)(1)(c), Rape (No person shall engage in sexual conduct with another who is not the spouse of the offender, when the other person's ability to resist or consent is substantially impaired because of a mental or physical condition.): Oklahoma; 21 Okl. St. Ann. § 1111(A)(5), Rape defined (Rape is an act of sexual intercourse involving vaginal or anal penetration accomplished with a male or female who is not the spouse of the perpetrator under circumstances where the victim is at the time unconscious of the nature of the act and this fact is known to the accuse.): Rhode Island; RI ST S 11-37-2, First degree sexual assault (A person is guilty of first degree sexual assault if he or she engages in sexual penetration with another person, and if the accused, not being the spouse, knows or has reason to know that the victim is mentally incapacitated, mentally disabled, or physically helpless.): South Carolina; SC ST S 16-3-658, Criminal sexual conduct: where victim is spouse (A person cannot be guilty of criminal sexual conduct under Section 16-3-652 [unconscious sexual conduct in first degree], if the victim is the legal spouse.): South Dakota; SDCL § 22-22-7.2, Sexual contact with person incapable of consenting – Felony (Any person, who knowingly engages in sexual contact with another person, other than his spouse if the other person is incapable, because of physical or mental incapacity, of consenting to sexual contact, is guilty of a Class 4 felony): Washington; RCWA 9A.44.100, Indecent liberties (person is guilty of indecent liberties when he or she knowingly causes another person who is not his or her spouse to have sexual contact with him or her or another when the other person is incapable of consent by reason of being mentally defective, mentally incapacitated, or physically helpless.).

[25] Ohio; R.C. § 2907.02(A)(1)(a), Rape (No person shall engage in sexual conduct with another who is not the spouse of the offender or who is the spouse of the offender but is living separate and apart from the offender, when for the purpose of preventing resistance, the offender substantially impairs the other person's judgment or control by administering any drug, intoxicant, or controlled substance to the other person surreptitiously or by force, threat of force, or deception.): Oklahoma; 21 Okl. St. Ann. § 1111(A)(4), Rape defined (Rape is an act of sexual intercourse involving vaginal or anal penetration accomplished with a male or female who is not the spouse of the perpetrator under circumstances where the victim is intoxicated by a narcotic or anesthetic agent, administered by or with the privity of the accused as a means of forcing the victim to submit.): South Carolina; S.C. § 16-3-658, Criminal sexual conduct: where victim is spouse (A person cannot be guilty of criminal sexual conduct under Section 16-3-652(1)(c) [The actor causes the victim, without the victim's consent, to become mentally incapacitated or physically helpless by administering, distributing, dispensing, delivering, or causing to be administered, distributed, dispensed, or delivered a controlled substance, a controlled substance analogue, or any intoxicating substance.] if the victim is the legal spouse.); See Anderson, supra note 12, at 1487-88.

[26] Connecticut: C.G.S.A. § 53a-65(5), Definitions ("Mentally incapacitated" means that a person is rendered temporarily incapable of appraising or controlling such person's conduct owing to the influence of a drug or

This category of state statutes exempts a husband from raping his wife because he did not employ force to make her comply. He did not have to use force or threat in conducting the offense because the victim was already incapacitated. This category of statutes indicates that rapes against a helpless spouse are not harmful enough to be criminalized.[27]

B. SPOUSAL OFFENSE AS A LESS SEVERE CRIME

Some states permit men to perpetrate against their wives non-consensual sexual offenses which are less aggravated, including sexual abuse, sexual assault, sexual battery, sexual contact, and sexual misconduct.[28] This kind of provision indicates that only the most

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intoxicating substance administered to such person without such person's consent, or owing to any other act committed upon such person without such person's consent.); § 53a-67(b), Affirmative defenses (In any prosecution for an offense under this part, except an offense under section 53a-70, 53a-70a, 53a-70b, 53a-71, 53a-72a or 53a-72b, it shall be an affirmative defense that the defendant and the alleged victim were, at the time of the alleged offense, living together by mutual consent in a relationship of cohabitation, regardless of the legal status of their relationship.): Maryland; MD Code, Criminal Law, § 3-301(c), Definitions ("Mentally incapacitated individual" means an individual who, because of an act committed on the individual without the individual's consent or awareness, is rendered substantially incapable of resisting vaginal intercourse, a sexual act, or sexual contact.): Rhode Island; RI ST S 11-37-1(5), Definitions ("Mentally incapacitated" means a person who is rendered temporarily incapable of appraising or controlling his or her conduct due to the influence of a narcotic, anesthetic, or other substance administered to that person without his or her consent, or who is mentally unable to communicate unwillingness to engage in the act.); RI ST S 11-37-2, First degree sexual assault (A person is guilty of first degree sexual assault if he or she engages in sexual penetration with another person under circumstances where the accused, not being the spouse, knows or has reason to know that the victim is mentally incapacitated, mentally disabled, or physically helpless.); *See id*. at 1488.

[27] *Id.* at 1498; BERGEN, supra note 3, at 2.

[28] Arizona; A.R.S. § 13-1407 D, Defenses (It is a defense to a prosecution pursuant to section 13-1404 or 13-1405 [sexual abuse] that the person was the spouse of the other person at the time of commission of the act.): Connecticut; C.G.S.A. § 53a-67(b), Affirmative defenses (In any prosecution for an offense under this part, except an offense under section 53a-70[sexual assault in the first degree], 53a-70a[aggravated sexual assault in the first degree], 53a-71[sexual assault in the second degree], 53a-72a[sexual assault in the third degree] or 53a-72b[sexual assault in the third degree], it shall be an affirmative defense that the defendant and the alleged victim were, at the time of the alleged offense, living together by mutual consent in a relationship of cohabitation, regardless of the legal status of their relationship.); C.G.S.A. § 53a-73a, Sexual assault in the fourth degree (Marital immunity for sexual assault in the fourth degree): Kansas; K.S.A. § 21-3517, Sexual battery (Sexual battery is the intentional touching of the person of another who is not the spouse of the offender and who does not consent thereto, with the intent to arouse or satisfy the sexual desires of the offender or another. Sexual battery is a class A person misdemeanor.): Ohio; R.C. § 2907.03(B), Sexual battery (No person shall engage in sexual conduct with another, not the spouse of the offender. Whoever violates this section is guilty of a felony of the third degree.): South Dakota; SDCL § 22-22-7.4, Sexual contact without consent with person capable of consenting as misdemeanor (No person may knowingly engage in sexual contact with another person other than his spouse who, although capable of consenting, has not consented to such contact. A violation of this section is a Class 1 misdemeanor.): Washington; RCWA 9A.44.060, Rape in the third degree (A person is guilty of rape in the third degree when, under circumstances not constituting rape in the first or second degrees, such person engages in sexual intercourse with another person, not married to the perpetrator.).

aggravated sexual crime in the legal system is chargeable to a husband. Consequently, husbands are immune when committing other types of sexual offenses. This means that the state does not punish a husband unless he commits the crime recognized as the worst type of sexual crime possible, and that spousal offense is not harmful enough to be treated in a way equal to a non-marital offense.[29]

One state mandates lesser penalties for spousal rape than for other types of rapes regardless of the force used or injury caused.[30] In this state, even though a husband perpetrates the same sexual offense as another man who is not the victim's spouse, the husband is punished less than the other man only because the husband is married to the victim. This provision indicates that spousal rape is seen as less harmful and less important than stranger or acquaintance rape.[31]

Some states' penal provisions, in addition, require force or violence in the perpetration of the sexual assault from husbands for them to be charged.[32] Unless the

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[29] Schelong, *supra* note 12, at 106-07, 115; BERGEN, *supra* note 3, at 2; Augustine, *supra* note 5; *see* Anderson, *supra* note 12, at 1500; *see also* Harless, *supra* note 4, at 308-09; *see also* BERGEN, *supra* note 3, at 4.

[30] South Carolina; compare SC ST S 16-3-651, Spousal sexual battery (Sexual battery, when accomplished by one spouse against the other spouse, constitutes the felony of spousal sexual battery and, upon conviction, a person must not be imprisoned not more than ten years.) and SC ST S 16-3-652, Criminal sexual conduct in the first degree (Sexual battery perpetrated by non-spouse mandates imprisonment not more than thirty years.).

[31] Bergen, *supra* note 3, at 2; Schelong, *supra* note 12, at 106-07, 115; Augustine, *supra* note 5; *see* Anderson, *supra* note 12, at 1501; *see also* Harless, *supra* note 4, at 308-09.

[32] Connecticut: C.G.S.A. § 53a-70b(b), Sexual assault in spousal or cohabiting relationship (No spouse or cohabitor shall compel the other spouse or cohabitor to engage in sexual intercourse by the use of force against such other spouse or cohabitor, or by the threat of the use of force against such other spouse or cohabitor which reasonably causes such other spouse or cohabitor to fear physical injury.): Idaho; I.C. § 18-6107, Rape of spouse (No person shall be convicted of rape for any act or acts with that person's spouse, except under the circumstances cited in paragraphs 3.[rape with force] of section 18-6101, Idaho Code.): Maryland; MD Code, Criminal legal spouse, unless the couple is living apart and one of them has filed for legal Law, § 3-318(b)(2), Rape and sexual offense – Spousal defense (A person may be prosecuted for a crime against the person's spouse if the person in committing the crime uses force or threat of force and the act is without the consent of the spouse.): Mississippi; Miss. Code. Ann. § 97-3-99, Sexual battery, defense of marriage (The legal spouse of the alleged victim may be found guilty of sexual battery if the legal spouse engaged in forcible sexual penetration without the consent of the alleged victim.): Nevada; N.R.S. 200.373, Sexual assault of spouse by spouse (It is no defense to a charge of sexual assault that the perpetrator was, at the time of the assault, married to the victim, if the assault was committed by force or by the threat of force.): Ohio; R.C. § 2907.02(A)(2) (No person shall engage in sexual conduct with another when the offender purposely compels the other person to submit by force or threat of force.); R.C. § 2907.02(G) (It is not a defense to a charge under (A)(2) of this section that the offender and the victim were married at the time of the commission of the offense.): Oklahoma; 21 Okl. St. Ann. § 1111(B), Rape defined (Rape is an act of sexual intercourse accomplished with a male or female who is the spouse of the perpetrator if force or violence is used or threatened, accompanied by apparent power of execution to the victim or to another person.): South Carolina; SC ST S 16-3-615(A), Spousal sexual battery (Sexual battery, when accomplished through use of aggravated force, defined as the use or the threat of use of a weapon or the use or threat of use of physical force or physical violence of a high and aggravated nature, by one spouse against the other spouse constitutes the felony of spousal sexual battery.).

husband uses force along with the sexual offense in question, the sexual offense does not constitute a crime while other types of coercion than force suffice for rape by a stranger. These states make it a crime only when marital sexual offenses are of a severe degree and involve physical force.[33] as the provisions above, shows that spousal rape is not seen as severe enough to be treated as non-marital rape.[34]

This category of state provisions indicates that spousal offenses in general are not severe enough to be criminalized, not important enough to be treated in an equal way to which non-marital offense is treated, and are seen as less traumatizing than non-marital sexual offenses.

C. REPORTING REQUIREMENTS

Criminal statutes of California and South Carolina require marital rape survivors to report their offenses to local authorities within a certain period.[35] This category of statutes implies that the accusation of husbands is based on an afterthought,[36] the wife is using the threat of the accusation to extort money or to punish a man for abandoning her,[37] that women are vindictive and will fabricate charges,[38] and that women are distrustful.[39]

D. ESTRANGEMENT REQUIREMENTS

Some states require that the husband and wife be estranged either at the time of the assault or after the assault to charge the husband of raping his wife; thus, a husband cannot be prosecuted for rape unless the couple is living apart, legally separated, or has filed for divorce or order of protection at the time of or after the alleged rape.[40]

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[33] DIANA E.H. RUSSELL, RAPE IN MARRIAGE 377-82 (1982).
[34] *Id.*; Anderson, *supra* note 12, at 1501.
[35] West's Ann. Cal. Penal Code § 262(b), Rape of spouse (no prosecution shall be commenced unless the violation was reported to medical personnel, a member of the clergy, an attorney, a shelter representative, a counselor, a judicial officer, a rape crisis agency, a prosecuting agency, a law enforcement officer, or a firefighter within one year after the date of the violation.); SC ST S 16-3-658, Criminal sexual conduct: where victim is spouse (The offending spouse's conduct must be reported to appropriate law enforcement authorities within thirty days in order for a person to be prosecuted for these offenses.).
[36] Michael G. Walsh, *Criminal Responsibility of Husband for Rape, or Assault to Commit Rape, on Wife*, 24 A.L.R.4th 105.
[37] Eskow, *supra* note 12, at 692.
[38] *See* Schelong, *supra* note12, at 116; *see also* Augustine, *supra* note 5.
[39] Eskow, *supra* note 18, at 594-95.
[40] Alaska; AK ST S 11.41.432(a)(2), Defenses (It is a defense to a crime charged under AS 11.41.410(a)(3)[first degree unconscious sexual penetration], 11.41.420(a)(2)[second degree sexual contact], 11.41.420(a)(3)[second degree unconscious sexual penetration], or 11.41.425[third degree unconscious sexual assault] that the offender is married to the person and neither party has filed with the court for a separation, divorce, or dissolution of the marriage.): Kansas; K.S.A. § 21-3501(3), Definitions ("Spouse" means a lawful

This category indicates that the consent allegedly given to the husband at the time of marriage continues throughout the entire duration of the marriage unless the wife lives apart, is legally separated, or has filed divorce or protective order.[41] Thus, the justice system still recognizes the implied consent and contract theory as one of the justifications for the marital offense exemption.[42]

III. MARITAL RAPE EXEMPTIONS ARE UNREASONABLE

In this section, this paper will show that the marital rape exemption provisions in the statutes of states are unreasonable. Each of the four categories of husband exemption — rape against an incapacitated wife, spousal offense as a less severe crime, reporting requirements, and estrangement requirements — is based on a social myth about sex and women, and also on false assumptions.

A. RAPE AGAINST AN INCAPACITATED WIFE: ARE RAPES AGAINST HELPLESS SPOUSE NOT HARMFUL ENOUGH TO BE CRIMINALIZED?

There are several grounds that show rape of an incapacitated wife is dangerous enough to be criminalized.

First, rape, while a woman is mentally incapacitated, is more harmful to women's physical health than rape where the victim is conscious. When an offender penetrates his wife while she is incapacitated or unconscious, the victim cannot negotiate or persuade her husband to use contraceptives. As a result, she is subject to the risks of unwanted

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husband or wife, unless the couple is living apart in separate residences or either spouse has filed an action for annulment, separate maintenance or divorce or for relief under the protection from abuse act.): Minnesota; M.S.A. § 609.349, Voluntary relationships (A person does not commit criminal sexual conduct if the complainant is the actor's legal spouse, unless the couple is living apart and one of them has filed for legal separation or dissolution of the marriage.): Mississippi; Miss. Code. Ann. § 97-3-99, Sexual battery, defense of marriage (A person is not guilty of any offense under Sections 97-3-95 through 97- 3-103 [sexual battery] if the alleged victim is that person's legal spouse and at the time of the alleged offense such person and the alleged victim are not separated and living apart.): Rhode Island; RI ST S 11-37-1(9), Definitions ("Spouse" means a person married to the accused at the time of the alleged sexual assault, except that such persons shall not be considered the spouse if the couple are living apart and a decision for divorce has been granted, whether or not a final decree has been entered.): South Carolina; SC ST S 16-3-658, Criminal sexual conduct where victim is spouse (A person cannot be guilty of criminal sexual conduct if the victim is the legal spouse unless the couple is living apart and the offending spouse's conduct constitutes criminal sexual conduct in the first degree or second degree.): Washington; RCWA 9A.44.010(3), Definitions ("Married" means one who is legally married to another, but does not include a person who is living separate and apart from his or her spouse and who has filed in an appropriate court for legal separation or for dissolution of his or her marriage.).

[41] Anderson, *supra* note 12, at 1497-98.

[42] *Id.*

pregnancy and contacting diseases.[43] Moreover, since she is not aroused in her unconsciousness state at the time of penetration, her orifices suffer greater damage through the forceful insertion.[44]

Second, unconscious rape does not necessarily lack force, but is sometimes accompanied by a husband's use of force. Since rape consists of force and lack of the victim's consent,[45] the existence of force, in practice, is assessed by the victim's resistance; where resistance cannot be seen, force seems not to exist.[46] The reason unconscious rape is regarded as non-forcible is because of the lack of resistance from the victim during intercourse. However, to have sex, husbands may drug their wives to render them unconscious,[47] and choke or use force to make them incapacitated.[48] Although drugging and choking the victim to block her resistance by making her helpless is one form of force,[49] those states whose statutes allow husbands to offend their unconscious wives do not recognize that.

Next, silence does not mean YES. The condition of being silent because of being unconscious does not mean the victim consents.[50] Rather, silence should be regarded as NO as the husband has no way of knowing, or cannot verbally verify whether their unconscious wives consent to sex. In the case of raping a victim who is unconscious or incapacitated, there is no consent.

Finally, rape against an incapacitated victim is also rape. Lack of force does not mean the offense did not outrage the woman's sexual autonomy. The very interest each state's rape statute must protect is survivors' sexual autonomy, not offenders' freedom to exert their power toward women. Whether or not force exists within the perpetration of the act, intercourse against a person's will is rape.

B. SPOUSAL OFFENSE AS A LESS SERIOUS CRIME: ARE THE SPOUSAL OFFENSES IN GENERAL NOT SERIOUS ENOUGH TO BE CRIMINALIZED, OR TO BE TREATED IN AN EQUAL WAY TO WHICH NON-MARITAL OFFENSE IS TREATED? ARE THEY LESS TRAUMATIZING THAN NON-MARITAL SEXUAL OFFENSES?

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[43] Anderson, *supra* note 12, at 1508.
[44] *Id.*; Kristen M. Carpenter & Barbara L. Anderson, *Peer Commentaries on Binik*, 34 Archives of Sexual Behavior 23 (2005).
[45] Nicholas J. Little, *From No Means No to Only Yes Means Yes: the Rational Results of an Affirmative Consent Standard in Rape Law*, 58 VAND. L. REV. 1321, 1328-29 (2005).
[46] *Id.* at 1337.
[47] Anderson, *supra* note 12, at 1506.
[48] *Id.*
[49] *Id.*
[50] Little, *supra* note 45, at 1347.

1. MARITAL RAPE IS MORE HARMFUL AND SERIOUS THAN ACQUAINTANCE AND STRANGER RAPE

First, most of the raped wives also experience non-sexual physical violence from their husbands.[51] Battering and sexual abuse in marriage is closely linked; battered women are especially vulnerable to rape by their partners,[52] and raped wives face other forms of domestic violence.[53] While acquaintance and stranger rapes occur with the exact amount of force needed to enable intercourse, marital rape occurs with other forms of force such as battering along with the force needed to achieve penetration.

Furthermore, marital rape often occurs more than once while stranger or acquaintance rape usually happens once.[54] Studies have shown that victims in marriage are likely to be raped 20 times or more by their husbands.[55] Marital rape is also more pervasive than other types of rape. One study showed that one out of seven married women gets raped by her husband at least once,[56] and this statistic is significant.[57] Another study suggested that 10% of all married women are battered and raped by their husbands.[58]

Lastly, unwanted oral and anal intercourse happens more often in marital rape than in rape out of marriage.[59] Oral and anal rape can be more violent than vaginal rape. A victim's posture of kneeling, or lying prone makes her feel like an outlet of the offender's lust. Oral and anal intercourse also fortifies the image of passive objectified women in pornography; it enables the offender to manifest his pornographic desire. In addition, forcible oral penetration can take place only between husbands and wives because, in stranger or acquaintance rape, the victim can bite her offender's genitals.[60]

2. MARITAL RAPE IS MORE TRAUMATIZING THAN OTHER TYPES OF RAPE

First, victims of marital rape report higher rates of anger and depression than victims of stranger rape.[61] This is not surprising because marital rape victims experience

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[51] HARV., *supra* note 12, at 1261; Anderson, *supra* note 12, at 127; c.f. Bergen, *supra* note 3, at 3 (Since most of the research on marital rape survivors focused on battered rather than raped women, it is easy to neglect the reality that some women are raped but not battered by their husbands.).
[52] Bergen, *supra* note 3, at 1.
[53] Eskow, *supra* note 12, at 685.
[54] Bergen, *supra* note 3, at 3; HARV., *supra* note 12, at 1261; Augustine, *supra* note 5; *Id.* at 359 (citing Russell, *supra* note 33, at 359).
[55] Bergen, *supra* note 3, at 3.
[56] Siegel, *supra* note 9, at 358.
[57] *Id.*
[58] DAVID FINKELHOR & KERSTI YLLO, LICENSE TO RAPE 6,7 (1987).
[59] Bergen, *supra* note 3, at 3.
[60] Oral sexual offense may also often happen in the scope of the child sexual abuse for the same reason.
[61] Bergen, *supra* note 3, at 4.

"multiple assaults, completed sexual attacks, and rape by someone that they once loved and trusted."[62]

Second, marital rape victims are more likely to suffer severe long-term effects than other victims. 52 percent of marital rape victims reported "great" long-term effects, compared to 39 percent of stranger rape victims.[63] One factor that causes marital rape victims to undergo such long-term trauma is the fact that even after the sexual offense, victims may stay with the rapists[64] until their relationship ends.[65] Flashbacks which may occur at any moment is also a very difficult experience for all sexual offense survivors.[66] But when you live with your rapist, every moment is a flashback.[67] Living with a sexually abusive husband also leads to repeated rapes.

Victims often experience mental dependency on their offenders, while other types of rape victims do not.[68] Continued violence or threats of violence lead wives to a state of "learned helplessness."[69]

The assumption that marital rape is less traumatizing than other types of rape is incorrect with respect to the nature of rape. The very reason why sexual offense is traumatic is because victims were used by the attackers as an "object" to be treated arbitrarily, and not treated with the respect due to every human being.[70] Rape is the peak of disrespect.[71] This disrespect, when exerted, is intermediated by sex, which is one of the most important factors of self-identity, and therefore closely attached to one's ego.[72] When a woman's sense of identity is outraged by means of rape, her ego is destroyed regardless of who the attacker is. Thus, the assumption that marital rape is less traumatic only because the victim

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[62] *Id.*
[63] Russell, *supra* note 33, at 193; *see* Siegel, *supra* note 9, at 359; *see also* Augustine, *supra* note 5; *see also* HARV., *supra* note 12, at 1262.
[64] Anderson, *supra* note 12, at 1503 (Victims have nowhere to go, do not want to affect children, love their husbands, depend upon their husbands economically, and violence escalates at their attempts to leave.); *see* Russell, *supra* note 33, at 220 (100% of the women who were sole provider of their husbands at the time of rape left.); *see also* Eskow, *supra* note 12, at 687-88; *see also* Harless, *supra* note 4, at 309; *see also* Schelong, *supra* note 12, at 100.
[65] Rape could occur even after the relationship ends. Anderson, *supra* note 12, at 1504; Schelong, *supra* note 12, at 99; RUSSELL, *supra* note 33, at 237-245.
[66] Flashback: "a recurring, intensely vivid mental image of a past traumatic experience." EDITORS OF THE AMERICAN HERITAGE DICTIONARIES, AMERICAN HERITAGE STEDMAN'S MEDICAL DICTIONARY (Houghton Mifflin Company 2002) (1995).
[67] *See* Siegel, *supra* note 9, at 359; *see also* Augustine, *supra* note 5.
[68] Schelong, *supra* note 12, at 100-01; HARV., supra note 12, at 1261.
[69] Learned helplessness: "a mental condition in which one becomes unable to help oneself due to previous failed attempts at controlling one's life; also, a condition in which a person establishes and maintains contact with another by adopting a helpless, powerless stance,"
available at http://dictionary.reference.com/browse/learned+helplessness.
[70] *See generally* SUSAN J. BRISON, AFTERMATH: VIOLENCE AND THE REMAKING OF A SELF (2002).
[71] *Id.*
[72] *Id.*

is the wife of the attacker is wrong. Marital rape is more traumatic than other types of rape due to the reasons above.

3. SPOUSAL OFFENSE AS A LESS SEVERE CRIME

The better the victim knows the assailant, the less chance there is that the assailant will be prosecuted.[73] This is because former acquaintance with the offender connotes that the victim provoked the offender first,[74] and that she consented to sexual relations. This view assumes that simply knowing the perpetrator means the victim likely provoked him. This view indicates that the woman deserved to be raped,[75] that she could have prevented the rape,[76] and that sexual assault is the survivors' fault although sexual assault can never be prevented by the victims.

C. REPORTING REQUIREMENTS: ARE THE PROSECUTIONS OF THEIR HUSBANDS FALSE ACCUSATIONS?

1. NO NEED FOR FEAR OF FALSE ACCUSATIONS

For those who worry about the situation where women bring false accusations against their husbands, there is no need to fear. The Courts can distinguish false accusations from true one.[77] It is unreasonable to argue that courts cannot distinguish false marital rape allegations as carefully as it normally does other criminal claims.[78] Moreover, such fear of vindictive claims is not unique to marital rape.[79] There are fabricated accusations in other crimes as well.[80] Also, women will not tend to select rape as a false allegation because rape carries a social stigma.[81] It is not a good idea to choose rape rather than battering, and suffer a black eye.

2. REPORTING REQUIREMENTS SHOULD BE ABOLISHED.

Victims of spousal rape are even less likely to report their offenses to authorities compared to victims of rape by an acquaintance or stranger.[82] They are reluctant to report

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[73] Schelong, *supra* note 9, at 82; *see* Little, *supra* note 45, at 1333; *see also* HARV., supra note 12, at 1259.
[74] Eskow, *supra* note 12, at 692.
[75] *Id.*
[76] *Id.*
[77] Siegel, *supra* note 9, at 361.
[78] *Id.*
[79] Augustine, *supra* note 5.
[80] *Id.*
[81] *Id.*; Siegel, *supra* note 9, at 361.
[82] Bergen, *supra* note 3, at 5.

because they fear of husband's retaliation, cannot leave their relationship,[83] do not define their experiences as rape, and regard sex as wife's duty.[84] For these reasons, wives do not often report marital rape. The existence of the report requirement decreases the possibility of spousal rape report even further.

D. ESTRANGEMENT REQUIREMENTS: DOES THE FACT THAT THE WIFE STILL LIVES WITH THE OFFENDER EVEN AFTER THE ALLEGED RAPE MEAN SHE CONSENTED TO THE SEXUAL INTERCOURSE IN QUESTION? IS THE CONSENT GOING ON UNLESS SHE LIVES APART FROM HER ATTACKER?

1. THE FACT THAT THE WIFE STILL LIVES WITH THE OFFENDER EVEN AFTER ALLEGED RAPE DOES NOT MEAN SHE CONSENTED TO THE SEXUAL INTERCOURSE IN QUESTION

First, although they did not consent to coercive sexual conduct, the survivors may remain with their offenders because they cannot leave the relationship easily; they are often financially dependent on their husbands, the violence often get worse at their attempts to leave, they do not want to affect their children by leaving, and they sometimes love their husbands.[85] Some survivors are mentally tied to their offenders, and therefore, cannot leave.[86]

Second, it is too formalistic to determine whether the victim consented to the alleged intercourse based only on the fact that she lives apart, or is separated, or filed for divorce since the assault. Even if she still lives with her husband, this does not mean she consented to the sexual act.

Finally, rapes in marriage and rapes after divorce are composed of the same factors; husband's desire to dominate the wife, husband's expression of anger and husband's false idea that his wife has to comply with his sexual demands because they are married.[87] Rape is substantially the same whether it occurs when the parties are legally married or estranged. In other words, rape at the time of marriage and the one at the time of legal estrangement are alike. This rape could happen even after the divorce.[88] Therefore, there is no basis for distinguishing the rape of an estranged wife from the rape of a legally married wife in terms of the nature of spousal rape. Consequently, estrangement requirements are not very useful.

2. THE CONSENT IS NOT GOING ON

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[83] *Supra* note 65.
[84] Bergen, *supra* note 3, at 5.
[85] Schelong, *supra* 12, at 100-01; Harless, *supra* note 12, at 309.
[86] Schelong, *supra* note 12, at 100; HARV., *supra* note 12, at 1261.
[87] Eskow, *supra* note 12, at 691.
[88] Anderson, *supra* note 12, at 1504; Schelong, *supra* note 12, at 99.

First, Justice Hale's "implied consent and contract theory" is not valid at all.[89] It is illegal to consent to severe injury administered by another person.[90] Since a state has an interest keeping its citizens safe from bodily harm, the state is prohibited from recognizing the "implied consent and contract theory" which allows harms to its female citizens.[91] A conjugal contract is not valid[92] since; "its provisions are unwritten, its penalties unspecified, and the terms of the contract are typically unknown to the 'contracting' parties."[93] Even if the contract were valid, private parties are not allowed to exercise self-help in order to remedy breach of contract,[94] and the remedy for breach of contract is not a particular act.[95]

Second, battering and rape in marriage are closely connected, and happen together very often.[96] Most of the survivors of spousal rape are battered by their husbands.[97] The survivors must have not consent to being battered and sexually injured.

Finally, the fact that the parties once had consensual sex does not mean the wife always consents to sexual conduct thereafter. Regardless of the victim's marital status and her sexual history, she should be granted sexual autonomy and freedom to consent affirmatively.

3. NEW CONSENT STANDARD PROVISION

Consent must be viewed as temporary, only to a particular act, and non-transferable to another person.[98] "Sexual consent is permission that must be negotiated each time."[99] Any previous relationship between men and women is not relevant, but only "whether she wanted the particular act of sex on that particular occasion with that particular man" is the issue.[100] In this sense, marital status or sexual history of the marital rape survivor does not give clues to the question of whether she consented or not. Further, in order to avoid regarding silence as consent, only explicit and verbal "YES" should be accepted as consent.[101] It is not very realistic to modify a legal standard of sexual consent into the affirmative one restrained to specific occasion, act, and person. However, it should be developed closer to feminist theories to protect women's sexual autonomy.

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[89] Siegel, *supra* note 9, at 355.
[90] *Id.*
[91] *Id.*
[92] *Id.* at 356.
[93] *Id.*
[94] *Id.*
[95] *Id.*
[96] *Supra* note 52, 53.
[97] *Supra* note 51.
[98] Anderson, *supra* note 12, at 1546-47; *see* Little, *supra* note 45, at 1335.
[99] Anderson, *supra* note 12, at 1547.
[100] Little, *supra* note 45, at 1335.
[101] *See* ANN J. CAHILL, RETHINKING RAPE 181 (2001); *see also* Little, *supra* note 45, at 1352.

CONCLUSION

Marital rape exemptions in the penal statutes of several states reflect the social myth about sex, woman, and marriage. People generally think a sexual act while a wife is asleep is not a sexual offense, whether or not she consents; fourteen states of the United States exempt husbands from raping their wives while the victims are physically or mentally helpless. It is also a common idea that rape in a marriage is not as bad as a rape by a stranger; twelve states treat marital rape as a less severe type of rape by punishing husbands for only aggravated rape, mandating lesser penalties for husbands than for non-spouse criminals, and by requiring additional force from husbands. One of the stereotypes of women is that they lie and hoax to get revenge on men; two states require marital rape victims to report the rape to authorities within a certain period of time. A social myth about sex also indicates that once a woman consents to sex with her partner, she agrees to sex thereafter before the relationship ends; seven states do not criminalize rape in marriage unless the couple is estranged. However, regardless of whether the victim is incapacitated at the time of offense, does not report the crime thereafter, and whether the rape occurs when the couple is not estranged, marital rape is severe and traumatic enough to be criminalized in the same way non-marital rape is penalized. Marital rape is even more harmful to victims physically and psychologically than non-marital rape. Marriage should not be a sanctuary for rapists any more. Remaining states must abolish the remaining marital rape exemptions.

KEYWORDS
Marital rape, Marital Rape Exemption, Spousal Rape, Domestic Violence, Sexual Offense, Reporting Requirements, Estrangement Requirements

Manuscript received: Oct. 15, 2010*; review completed:* Nov. 5, 2010*; accepted:* Nov. 16, 2010.

YONSEI LAW JOURNAL

VOL.1 NO. 2, NOVEMBER 2010

CONFERENCE PAPER

THE TREND OF JAPAN'S LEGAL EDUCATION SYSTEM: IN PURSUIT OF THE IDEAL IN THE FUTURE*

*Masahiko Omura***

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ABSTRACT

This article describes the Japan's new legal education system and its problems that it has encountered. The new law school system was introduced in Japan in 2004 to support the judicial reform plan which was announced in 2001 by the Justice System Reform Council. The Council proposed increasing the number of legal professionals by producing 3,000 new lawyers per year. This proposal was adopted officially by the government. However, we have encountered serious problems such as the lower passing rate in the new bar examination and the difficulty for apprentices to find their jobs. The former problem was caused by the fact that there are too many law students compared to the number of successful applicants which has been restricted to the level much fewer than the Council proposed. The latter problem was caused partly by lack of effort to develop new fields in the society for the new lawyers to engage in and partly by the unfortunate economic conditions that we have faced with recently. Since these problems are related to the social, economic and traditional structure of Japan, it seems difficult to bring about a breakthrough in a short period. We will need to take various measures to improve the situation gradually without abandoning the ideals that the Justice System Reform Council announced 10 years ago.

I. THE OPENING OF THE SYSTEM AND THE SITUATION AFTER SEVEN YEARS

A. THE RECOMMENDATIONS OF THE JUSTICE SYSTEM REFORM COUNCIL (2001)

The new Japanese law school system started in April, 2004, and is now in its seventh year. The new system was introduced as one of the core parts of the grand design of our judicial reform announced in 2001 by the Justice System Reform Council. In its report,[1] the Council pointed out two aims with regard to increasing the pool of legal professionals in Japan, as follows.

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* This article is based on a report presented to the joint 125th anniversary conference of Yonsei University (Korea) and Chuo University (Japan), "The Globalization of Legal Education and the Transnationalization of Legal Practice: Implications for East Asia," held on September 3, 2010 at Yonsei Law School. It was my great honor to have a chance to address to the distinguished colleagues of Yonsei Law School in this commemorative year, which is the 125th anniversary of both universities. I express my deep gratitude to Dean SHIN Hyun Yoon and other colleagues who made every effort to ensure the success of the conference.

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[1] The Justice System Reform Council, *Recommendations of the Justice System Reform Council: For a Justice System to Support Japan in the 21st Century*, (June 12, 2001), *available at* http://www.kantei.go.jp/foreign/policy/sihou/singikai/990612_e.html

([I]n the future, legal demands in various aspects of the people's lives are expected to increase in number and also to become more diverse and more complicated. The reasons for this are too numerous to mention, but include advances in economic and financial globalization and the response to global issues such as human rights, environmental issues and international crimes; increases in litigation requiring specialized knowledge

(1) 3,000 new lawyers should be produced every year by the year 2010,[2] and

(2) Highly qualified lawyers should be trained in various fields, including internationalization.

The Council also proposed that the new bar examination introduced in 2006 should be used as a test to check the result of legal education in the new law schools, and that the ideal passing rate of the bar examination should be 70-80%. Under such situations, law students will be able to take their time to study a variety of specialized subjects without worrying about competition in the bar examination.

In 2003, with this ideal figure in mind, each university prepared a featured program of its own and submitted a proposal for establishing a law school to the Ministry of Education, Culture, Sports, Science and Technology (hereinafter, the Ministry of Education). Because the screening was done basically on a laissez-faire principle resulting from the deregulation policy undertaken by the then-government, almost all of the proposals were approved. Finally, 74 law schools were chartered , and the total capacity of those schools swelled up to approximately 5,800. Under such circumstances, it was impossible for the passing rate of the new bar examination to reach 70%, and law students would not be able to avoid the harsh competition. Therefore, it was obvious from the beginning that the design of the Justice System Reform Council was bound to collapse in a couple of years. All we, teachers and students, could do at that stage was to put ourselves into a survival race, hoping that the competition would be somewhat relaxed in the future through the natural selection of the law schools by their applicants.

B. DECLINING TENDENCY OF THE PASSING RATE IN THE NEW BAR EXAMINATION

The proposition of the Justice System Reform Council that Japan should have 3,000 successful candidates per year in the new bar examination was endorsed by Cabinet decision. Subsequently the Ministry of Justice, which has jurisdiction over the bar examination, announced a schedule on how it would increase the number gradually from 2006 to 2010.

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in such fields as intellectual property rights, medical malpractice, and labor problems; the necessity to redress the imbalance in lawyer population across geographical regions as a precondition for realizing "the rule of law" throughout Japan; and the expansion of the role of the legal profession as "doctors for the people's social lives," against the backdrop of changes in the society and economy and changes in public awareness. From such a point of view, with regard to the legal population, this Council considers it necessary to aim, deliberately and as soon as possible, to secure 3,000 new entrants to the legal profession annually… [T]he aim should be to have 3,000 successful candidates per year for the new national bar examination around 2010, when the full switchover to the new system is scheduled to occur, paying heed to the progress of establishment of the new legal training system, including law schools, which aim to accept students from 2004).

[2] The number of the successful applicants to the existing bar examination in the year 2001 was around 1,000.

Because there was not an extremely large number of examinees for the first new bar examination in 2006, the average passing rate was not criticized. However, as the number of the new graduates and the repeat exam-takers (unsuccessful applicants of the former years) increases rapidly, the average acceptance rate steadily went down (Table 1). This was a situation that was easily predictable when 74 law schools were chartered.

What is especially striking is that the number of the successful applicants in 2009, which was decided by the vote of the Bar Examiners Committee, was less than that of 2008. This was apparently against the schedule announced by the Ministry of Justice three years ago, which showed about 2,500 as a prospective number. Therefore, the results attracted keen interest and attention from the law teachers and students who were expecting an increase in the number of successful applicants.[3]

Table 1: The number and the rate of success in the new bar examination[4]

2006 (the first bar exam)	1,009	48.3%
2007 (the second bar exam)	1,851	40.2%
2008 (the third bar exam)	2,065	33.0%
2009 (the fourth bar exam)	2,043	27.6%

C. CERTIFIED EVALUATION (ACCREDITATION)

The law schools are required to undergo an evaluation (accreditation) process by a specified third-party institution every five years, which is called the "Certified Evaluation and Accreditation for Law Schools" (*ninshou hyouka*)." All law schools were subject to the first certified evaluation in 2008 or 2009, and the third party institutions[5] pointed out various problems. The institutions found that 24 of the 74 law schools did not meet the accreditation standards, *inter alia*, for reasons such as excessively large class sizes in fundamental law subjects, lack of adequate balance in the subject classification of the curriculum (i.e., too much weight on fundamental legal subject groups), lack of strict scholastic grading, teaching methods that resembled prep-schools, and lack of required

[3] We encountered similar results in the year 2010, which was announced on September 9. The number of successful applicants was 2074 and the average passing rate was 25.4%. [Supplemented after the conference]. This is far from the target figure of the Justice System Reform Council (see the text of note 2). This restraining tendency apparently has its basis on the opinion mentioned in note 10 and its text.

[4] All of the statistics shown in the tables in this article are based on the figures officially announced by the Ministry of Education and the Ministry of Justice, with some supplementation by Committee on Occupational Development Issues, Japan Association of Law Schools, of which I am a member.

[5] There are three such institutions that are in charge of certification evaluation of law schools, namely, National Institution for Academic Degrees and University Evaluation, Japan University Accreditation Association, and Japan Law Foundation (the last is an affiliated organization of Japan Federation of Bar Associations).

number of full-time teachers in fundamental subjects. Most of the substandard schools were able to regain accreditation in the following year by barely improving the identified defects.

What became clear by the certification evaluation is that the competitive rate of entrance examination, scholastic ability of students, educational power of teachers, and, on the whole, the level of legal education varied greatly from school to school. Based on such a perception, a strong criticism arose that a substantial number of law schools had mass-produced inferior graduates, reminiscent of slipshod or irresponsible manufacturing. The criticism was related to the fact that the passing rate for the new bar examination varied considerably among the law schools. The rank or position of each law school has been almost fixed during the previous four years, and there seems to be a tendency of bipolarization between the high-ranking and the low-ranking schools.

D. Each Law School's Characteristics such as Training of International Lawyers

Each law school adopted various characteristics such as training lawyers who are skilled at specialized fields including international corporate law, international trade law, and intellectual property law. The areas of expertise were reflected in their curriculum. However, as the passing rate of the new bar examination decreases, the students cannot help being nervous about the subjects included in the new bar examination, and the number of students taking elective courses of international and innovative nature seems to be decreasing.

So far, Japan's attempt to encourage students to acquire dual degrees in both Japan and in a foreign country has not produced successful results.[6]

Such a state of affairs is rather disappointing and regrettable in light of the original idea of Japan's new legal education system.[7]

E. The Problem Regarding Mishusya

Every law school is required to accept students who were educated in non-legal fields (*Mishusya*), or who have been working members of society (*Shakaijin*) for at least 20%, and preferably 30% of each new entering class. This can be seen as an affirmative action to produce new lawyers from diverse backgrounds.

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[6] Chuo Law School had only one student who passed the New York Bar Examination before he graduated from Chuo. He also passed the Japanese new bar exam in the year he graduated. This is one of the rare exceptions all over Japan.

[7] Masahiko Omura, Satoru Osanai & Malcolm Smith, *Japan's New Legal Education System: Towards International Legal Education?* 10 ZEITSCHRIFT FÜR JAPANISCHES RECHT/JOURNAL OF JAPANESE LAW [Z.JAPNAR/J. JAPAN. L] 20, 39 (2005).

However, students who lack undergraduate legal education (*Mishusya*), have had trouble catching up in three years with those who have had undergraduate legal education (*Kishusya*). This becomes clear when comparing the passing rates of *Mishusya* and *kishusya* in the new bar examination. Even in the high-ranking law schools, the difference between the two groups is apparent.

Table 2: A comparison of passing rate between *mishusya* and *kishusya* in 2009 new bar examination

	Mishusya	*Kishusya*	Total
All 74 law schools	7 77 (18.9%)	1,266 (38.7%)	2,043 (27.6%)
Tokyo Univ.	48 (41.0%)	168 (61.8%)	216 (55.5%)
Chuo Univ.	26 (21.1%)	136 (54.4%)	162 (43.4%)
Keio Univ.	29 (29.3%)	118 (54.1%)	147 (46.4%)
Kyoto Univ.	25 (30.1%)	120 (58.5%)	145 (50.3%)
Waseda Univ.	114 (31.3%)	10 (62.5%)	124 (32.6%)
Meiji Univ.	30 (21.4%)	66 (38.8%)	96 (31.0%)
Hitotsubashi Univ.	23 (56.1%)	60 (65.9%)	83 (62.9%)
Kobe Univ.	14 (35.0%)	59 (54.1%)	73 (49.0%)

Since the *Mishusya* course constitutes the main curriculum for students without undergraduate legal education as well as working members of society, these data mean that the goal declared by the Justice System Reform Council to secure diversification of lawyers is becoming more and more difficult to realize.

Under the present system of Japanese law schools, *Mishusya* is expected to acquire basic knowledge and the way of thinking of the seven fundamental law subjects in the first academic year. However, this is not an easy task to fulfill in one year, and the burden has proven overwhelming. Some law schools are trying to reduce their burden by shifting procedural law or administrative law subjects to the second year, but the problem does not seem to have been resolved yet.

The issue of *Mishusya* is a problem that all Japanese law schools commonly share, and it is necessary to continuously consider a variety of countermeasures, such as an introductory mini-course at the beginning, or even prior to, the first semester.

II. CRITICAL OPINIONS FROM OUTSIDE OF THE LAW SCHOOLS

A. THE MINISTRY OF EDUCATION

The Ministry of Education is struggling with this troubled situation. The Ministry itself has been criticized from various sectors of society, but its basic standpoint is that we

should continue to promote the reform, along with the idea of educating students through the new law school system. On the other hand, the Ministry has become aware that too many law schools being established has resulted in the level of legal education varying from school to school. Consequently, the level of education is quite low in a considerable number of law schools. Therefore, the Ministry of Education is demanding, as a means of improving the quality of the students and the schools, a voluntary cut in the entrance capacity of each law school. At the same time, it is trying to persuade some law schools to withdraw from legal education, i.e. close down their law school program altogether.[8]

The "Special Committee on Law Schools" of the Central Council of Education in the Ministry of Education announced a report entitled "Regarding the Methods for Improving the Quality of Law School Education" in April, 2009. The report expressed opinions and evaluation about the present and future of the law schools as follows.

On the one hand, the graduates of the new law schools have acquired a good reputation in that they have an attitude of spontaneous and positive learning, capacity in legal research, and superior communication and presentation skills. On the other hand, there are graduates who lack basic knowledge and understanding of law. In addition, the contents of legal practice education are different from school to school, and consequently, their standard of legal practice is uneven. The report concluded that this state of affairs should be improved.

Then, the Committee proposed a number of measures and plans to be undertaken by the law schools, including the following.

1. SECURING QUALITY AND DIVERSITY OF THE ENTRANTS TO LAW SCHOOLS [9]

The 42 law schools whose applicant to entrant ratio fell short of 2.0 should curtail their entrance capacity to raise the competition rate. Applicants whose score in the national aptitude test for law school falls within the lower 15% should not be allowed to enter any law school.

2. SECURING QUALITY OF THE LAW SCHOOL GRADUATES

A core curriculum should be adopted, and the minimum standard required of all graduates should be clarified.

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[8] Himeji Dokkyo University Law School announced in March 2010 that they will give up recruitment of new students and will close down when the existing students graduate.

[9] The critical importance of securing the quality of entrants, in other words, of recruiting high level students, is emphasized in Korea too. Young-Cheol K. Jeong, *Korean Legal Education for the Age of Professionalism: Suggestions for More Concerted Curricula*, 5 E. ASIA L. J. 155, 195 (2010).

Each law school can introduce additional credits (up to 6 credits) into the fundamental subjects for the first year students in order to improve basic legal education.

Each law school should set a strict standard for their students to advance from the first-year class to the second-year class. Law schools with a low passing rate in the new bar examination should reduce their entrance capacity. Law schools passing the threshold are also expected to consider curtailing their entrance capacity in order to reduce the number of unsuccessful applicants in the new bar examination.

3. QUALITY-ORIENTED SYSTEM OF CERTIFICATION EVALUATION (ACCREDITATION)

In the certification evaluation (accreditation), a greater importance is to be placed on the quality of teachers based on academic performance and teaching capability, strict scholastic evaluation of students, bar examination passing rate, and active information disclosure of each law school.

All law schools have been encouraged to reduce their entrance capacity by the Ministry of Education and through instructions from the Special Committee. The current nationwide statistics can be summarized as follows (Table 3).

Table 3: Total nationwide entrance capacity

Year 2004	5,825
Year 2009	5,765
Year 2010	4,904
Year 2011	4,500

B. THE SUPREME COURT AND THE MINISTRY OF JUSTICE

The Supreme Court and the Ministry of Justice have dispatched judges and prosecutors as teachers to many law schools, and have cooperated with law schools in other ways as required by law. However, the Court and the Ministry have noted their opinion that some of the law apprentices (*Shiho-Shushusei*) displayed a lack of basic legal knowledge. As the number of such apprentices was increasing, they came to have some doubt about the quality of law school graduates in general. Now, a considerable number of judges and prosecutors seem to be against increasing the number of successful applicants to the new bar exam. Especially, the Department of Judicial System of the Ministry of Justice is of the opinion that the initial goal of passing 3,000 applicants is based on the condition that the quality of the applicants is guaranteed. Thus, if the quality is substandard, target number of 3,000 need not necessarily be adhered to. They insist that this opinion had been approved

through the Cabinet's decision.[10] It is likely that this was the thought process underlying the unexpected result of the fourth bar examination in 2009.

On the other hand, the salary system for judicial apprentices is scheduled for abolishment in 2010, a decision made by the Supreme Court when it introduced the new training system several years ago. Therefore, as far as the framework on the side of Supreme Court is concerned, no additional budget is required to accommodate 3,000 new apprentices.

C. THE JAPAN FEDERATION OF BAR ASSOCIATIONS

The Japan Federation of Bar Associations (JFBA) has established an internal department designated to provide law schools with cooperation for legal training. The department has conducted several activities including dispatching attorneys as teachers and developing various externship programs. However, strong opposition has developed among attorneys, as the number of new lawyers has increased drastically while employment on the side of the law firms has not increased proportionately. Recently, JFBA's executives announced that the number of the new entrants to the legal profession should be maintained at approximately 2,000, because there will be constant difficulty in finding jobs as well as difficulty to senior lawyers training new attorneys. There is also widespread belief that the negative effects caused by a continuation of the current situation (e.g. decrease of income, decline of professional ethics, etc.) will be harmful to clients in the end.

The complaints of the local bar associations was so strong that, in the election of the President of JFBA in 2010, the candidate from the mainstream party lost to a candidate who insisted on reducing the bar examination passage quota to 1,500. Since the election, however, it does not seem that the new President is adhering to his original 1,500 number commitment, as he has recently indicated that the increase in the number of legal professionals is an issue that should be decelerated and reargued.

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[10] The Justice System Reform Council, *supra* note 1, at Part 1. The Cabinet's decision adopted all of the report of the Justice System Reform Council, which said " [T]he aim should be to have 3,000 successful candidates per year for the new national bar examination around 2010, …… *paying heed to the progress of establishment of the new legal training system, including law schools* ….." (emphasis added). The Ministry of Justice seems to say that if there are many law school graduates whose legal knowledge is insufficient, the progress of the law school system is deemed to be behind the schedule set by the Council. To the contrary, Professor Masahito Inoue at University of Tokyo, who was a member of the Justice System Reform Council, explained that this phrase merely pointed out the need to take into account how many law schools would be established, since the number was totally unpredictable at the time of discussion in the Council. *See also* Inoue Masahito, Keynote Address at the Working Team to Investigate in the Problems of Legal Education System Conference: housou yousei seido(tokuni houkadaigakuin oyobi shinsihousiken)o meguru genkano zyoukyou ni tsuite [The Current Situation regarding the Law School Systems and the New National Bar Examination] (April 12, 2010) (transcript *available at* http://www.moj.go.jp/content/000047578.pdf).

The JFBA has also objected to the abolition of the salary system for law apprentices. Once the loan system replaces the salary system, the amount of apprentices' debt will inevitably increase, in addition to the student loans. Comparing the two systems, the salary system is inevitably a better option from the viewpoint of apprentices. However, in order to maintain the salary system for 3,000 new attorneys, much more funding will be necessary than ever. Thus, maintaining the salary system while greatly increasing the number of apprentices would not be feasible under the government's present economic conditions. Moreover, the salary system regardless of means of each apprentice will not be seen reasonable from the view point of average citizens, since there is a possibility of exemption from the loan debt under the loan system depending on the economic conditions of each lawyer.

III. JOB SEEKING BY THE LAW SCHOOL GRADUATES

A. THE NEED FOR DEVELOPING NEW FIELDS OF LAWYERS' ACTIVITY

The Justice System Reform Council announced its idea that the traditional attitude of lawyers to focus their activity on litigation-related field should be changed in order to make "the rule of law" prevail in every corner of the society. This attitude was linked with the fact that there had been a lower number of legal professionals in Japan than that of western developed countries. To break this linkage between these two factors and increase the lawyer population, it is necessary for us to encourage lawyers to find new professional roles in various fields of society other than litigation-related work. This is, however, not an easy task, as will be discussed later.

The "Authorized Attorney Qualification System"[11] will be an useful mechanism to both increase the lawyer population and develop new occupational fields. Under this system, a person who passed the bar examination and has over seven years of experience in law-related practice in a business corporation or in the public sector can qualify to be an attorney after taking a two month training course provided by the Japan Federation of Bar Associations, without going through the one year practical legal training course provided by the Legal Training and Research Institute. I think this is an interesting attempt to facilitate development of new occupational fields for lawyers and it should be utilized from now on, although the required number of years in practice (7 years) should be shortened a bit.

[11] This is the author's tentative translation. It is enacted in the statute named "Law of Attorneys." The information is *available at* http://www.moj.go.jp/content/000004377.pdf (Japanese).

If we follow the original ideal proposed by the Justice System Reform Council, much effort should be made toward developing new occupational fields. Otherwise, the increase of the lawyer population will face substantial difficulties.

B. JOB HUNTING COMPETITION

Despite expectations for a great increase in the number of people joining the job hunt, the Japan Federation of Bar Associations (JFBA) was not swift in promoting employment for its member attorneys. It was the year when the first graduating students from law schools entered into the Legal Training and Research Institute that JFBA began its promotion for employment of new attorneys to its member lawyers.[12]

The biggest employers of new faces are, of course, large law firms in urban areas. Local lawyers and law offices also met the request of the JFBA considerably well; nevertheless, huge complaints eventually emerged that there is no room for new attorneys in small cities. The situation is becoming similar even in urban areas. It is said that a considerable number of apprentices will not be able to find jobs in 2010. As of June, 2010, it is reported that 43% of judicial apprentices are still seeking jobs. These numbers are even more discouraging than last year, when the unemployment rate was 30% during the same period.

Last year, the job-hunting competition was very harsh indeed, but almost all of job applicants eventually found employment in the end . Therefore, I hope the same or similar results will be seen this year.

Table 4: Employment data of the 2009 legal apprentices

Successful applicants of new bar exam 2008	2,065
New faces finished legal apprenticeship	1,992
Assistant judges	99
Prosecutors	67
Attorney registrant	1,785
Others (non-registrant)	41*

* This number includes 14 people who found a job at business companies, government offices, universities, etc. without registering as an attorney to JFBA.

C. THE ACTIVITY OF JAPAN ASSOCIATION OF LAW SCHOOLS

The Japan Association of Law Schools has carried out a variety of activities, but, partly because of the underdevelopment of its website, they remained largely unknown.

[12] JFBA has a website called "Sunflower job-offer /job-hunting Navi." The website is available at http://www.nichibenren.or.jp/ja/legal_apprentice/himawari_navi/index.html (Japanese).

Owing to the recent renewal of its website, information regarding its history, opinions and activities has become much easier to access by the public.[13]

In December 2007, The Association installed the "Committee on Occupational Development Issues." This committee has been conducting activities in cooperation with the Ministry of Education and the Ministry of Justice to develop or broaden new fields for legal professionals, such as holding conferences and symposia to introduce more information to law students on corporate legal practice in the private sector and public legal practice in governmental offices. The Committee has also been establishing contacts with many business corporations, the Federation of Economic Organizations (*Keidannren*) and governmental offices to provide information regarding the law school system and to facilitate employment of law school graduates, regardless of their success in the new bar examination.[14]

A law-related job-offer and job-hunting website "jurinavi"[15] is a new attempt which was set up by ten law schools including Meiji University, Hosei University and Chuo University, in close cooperation with the Committee on Occupational Development Issues, and with a subsidy of the Ministry of Education. To date, all but three of the 74 law schools have joined "jurinavi," and many of their students and graduates have registered on the website. The problem is, however, that the number of corporations offering jobs is too scarce in comparison with the number of law school graduates. I should say many difficulties lie ahead. Moreover, the effort to develop and broaden new occupational areas for legal professionals is a challenge to the existing and stubborn social structure, which does not easily change. Therefore, longstanding plans and repeated attempts will be necessary to accomplish the ideal of the Justice System Reform Council.

Table 5: The number of in-house (corporate) counsels and the number of new faces employed therein

Year 2007	242	28
Year 2008	347	65
Year 2009	412	57

Table 6: The number of law school graduates who succeeded in the national examination for 1st class government officials, and the number of those who were actually employed therein

Year 2006	26	4
Year 2007	65	11

[13] The website of the Japan Association of Law Schools is available at http://www.lawschool-jp.info/index.html (Japanese)

[14] Some business corporations say that they do not necessarily hire based on passage of the new bar examination, but examine the applicants' ability and personality based on their own criteria.

[15] The website is available at https://www.jurinavi.com (Japanese).

Year 2008	87	18
Year 2009	71	15

* It is unknown if these people passed the new bar examination or not.
* Some governmental branches have adopted applicants who passed the new bar examination but not the examination for government officials, though the number is few.

IV. SOME OTHER MOVEMENTS OF INTEREST

Some of the former members of the Justice System Reform Council announced "A Proposal on the Reform of the Legal Education System" dated February 24, 2010. The main points of this paper are as follows:

Japan should make self-renewal, and become a "problem-solution type nation". To that end, we should extend the role of legal professionals, and must switch it from "domestic litigation representatives" to "problem solvers both in domestic and global areas." Diverse backgrounds are necessary to develop such problem solvers.

Some portion of governmental officials, local government officials, or policy secretaries of the Diet members should be adopted from the legal profession. Corporations listed in the stock market should be obligated to adopt a qualified lawyer as a legal compliance officer.

The number of the successful applicants to the new bar examination should be 3,000 per year. Integration and abolition of law schools and reduction of the entrance capacity should be pushed forward, and necessary financial measures for such law schools should be taken.

This proposal by the former members of the Justice System Reform Council is an attempt to reinforce the original idea of the Council. I believe that development of the new occupational fields for legal profession stressed in this proposal is a critical point in order to promote increase of the lawyer population.

"The Working Team to Investigate in the Problems of Legal Education System" was organized in early 2010, with the Vice Ministers of Education and Justice as its co-chairs. The Working Team submitted its report on July 6, 2010, which scrutinized each problem and proposed a forum to discuss and decide on an improvement policy for the legal education.[16] We should pay attention to how the forum will be formed and which direction it will take.

[16] MINISTRY OF JUSTICE, HOUSOU YOUSEI SEIDO NI KANSURU KENTOU WAKINGUCHIMU [REVIEW ON LEGAL EDUCATION SYSTEM] (2010), *available at* http://www.moj.go.jp/shingi1/shingi03400004.html (Japan).

The Preliminary Test for the Bar Examination was allowed to be introduced by the Justice System Reform Council for the purpose of relieving the financial burden of the expensive education in the new law schools.[17] The test, however, is contradictory to the basic idea of the "process-oriented" legal education system adopted by the Council, since it makes possible to skip law school education. If the Ministry of Justice introduces the preliminary test in an easy and lenient form, it may destroy the ideal role that the Justice System Reform Council gave to the law school system. Therefore, there were substantial discussions in the Working Team mentioned above.

It is my opinion that, unless the Ministry of Justice strictly curtails the preliminary test, it will degenerate into, on the one hand, a mere bypass or shortcut for those undergraduate law students who are very young and able, and, on the other hand, a revival route for those who were struck out from the normal course to legal profession . Neither will be a desirable situation, indeed, in the light of the purpose for which the preliminary test was introduced.

It can be said a wise decision that Korea did not introduce a preliminary test which might bring about such a troublesome problems.

V. CONCLUSION

The number of applicants to Japanese law schools is decreasing year by year, and the proportion comprising of members of society (so-called *shakaijin*) is also going down. This is paralleled by the fact that the average passing rate of the new bar examination is going down quickly. Meanwhile, the competitiveness of the job market among new lawyers is becoming increasingly harsh. The number of lawyers who advance into the new areas such as corporate legal departments or public legal departments remain at a low level. If time goes by under these conditions, the legal profession may lose vocational popularity, even among undergraduate law students.

It is a bad tendency of the Japanese to postpone difficult tasks to the future. The fact that we could not take drastic measures at the outset has caused this vicious downward spiral. Japan, however, is struggling to adjust the orbit and to reform the present system step by step. Most law school teachers are continuing steady efforts. There seems to be no quick remedy. Our progress will be very slow; nevertheless I believe we are stepping forward in a desirable direction.

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[17] MINISTRY OF JUSTICE, SIHOUSIKENYOHISIKEN NO SIKUMI [THE FRAMEWORK AND CONTENTS OF THE PRELIMINARY TEST] (2010), available *at* http://www.moj.go.jp/jinji/shihoushiken/shiken_shinqa01-08.html (Japanese).

I hope that Japanese law schools will become streamlined through a natural selection process by applicants, as well as an artificial selection process by the Ministry of Education. On the other hand, we must devise and try various measures for new lawyers to find their way into a new world. Then, the number of new lawyers could be increased gradually, and we will be able to approach the ideal design that the Justice System Reform Council developed ten years ago. This process may prove to be painful, but it will have a historical significance to be evaluated by the next generation.

Korea and Japan have introduced a similar system of legal education for the first time in East Asia. Therefore, it is a request of history that we should lead this reform to a fruitful success in the future.

KEYWORDS
Legal Education, Law School, Bar Examination, Justice System Reform Council, Japan

Manuscript received: Oct. 08, 2010*; review completed:* Nov. 06, 2010*; accepted:* Nov. 15, 2010.

LIBERALIZATION OF LEGAL SERVICES IN JAPAN*

*Noboru Kashiwagi***

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ABSTRACT

In the most countries, legal services are monopolized by lawyers licensed in the respective country. Foreign lawyers are not allowed to practice law or only allowed in very limited way. In Japan, foreign lawyers were not allowed to practice law at all with small exceptions until 1987. In that year, foreign lawyers registered with Ministry of Justice have been allowed to practice law in Japan under various strict conditions in the scope of legal services and the manner of rendering legal services. Since then, Japan relaxed a little by little these restrictions due to political pressures mainly from the United States.

A big change came in 2003. Since 2003, foreign lawyers may employ Japanese lawyers and may form partnerships with Japanese lawyers. Close cooperation between Japanese lawyers and foreign lawyers became possible. The momentum was given by the report of the Justice System Reform Council published on June 12, 2001. It recommended the relaxation of restrictions upon the activities of foreign lawyers from users' point of view. It was the first time in Japan that the regulations upon foreign lawyers were examined from the view point of users. Until then, regulations upon lawyers had been discussed by bar associations and the Ministry of Justice. Users of legal services could not participate in the discussion.

Japanese lawyers opposed fiercely the relaxation of the restrictions. They argued that major Japanese law firms would be taken over by American or UK mega-firms. The salaries of young associates would skyrocket. In spite of the opposition

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* This paper is based on a speech at the conference of "the Globalization of Legal Education and the Transnationalization of Legal Practice: Implications for East Asia," held on September 3, 2010 at Yonsei Law School.

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of Japanese lawyers, relaxation was made because it was required by the users of legal services. After the relaxation, the number of lawyers in Japanese major law firms increased and number of foreign lawyers of foreign law firms in Japan also increased. Take-over boom of Japanese law firms by foreign mega firms did not happen. Japanese clients can now enjoy more efficient legal services by firms with Japanese lawyers and foreign lawyers. Salaries of young associates did not skyrocket but rather decreased.

I. FOREIGN LAWYERS ACT 1987 AND EARLIER

Before 1987, it was believed that no foreign lawyer could practice law in Japan with one small exception. The exception was the practice among associate members of bar associations in Japan. After World War II, Allied Forces occupied Japan. Many foreigners including lawyers came to Japan with the Allied Forces. Some of them wanted to practice law in Japan. The Attorney Act (*Bengoshi-ho*) was thus amended so that these foreign lawyers could practice law in Japan as associate members of any regional bar association. A handful of foreign lawyers were admitted as associate members. The provisions in the Attorney Act setting forth this exception were repealed in 1955. Since then, no foreign lawyers were admitted to practice law except such grand-fathered associate members. At present, only one such associate member is still alive.

In 1977, an American lawyer, Isaac Shapiro of Milbank Tweed Hadley & McCloy, opened an office in Tokyo to handle increasing legal business involvements in Japan. Mr. Shapiro argued that he was allowed to provide legal services under the Japan-U.S. Commerce and Navigation Treaty. The Japan Federation of Bar Associations was quite unhappy about this matter. However, at that time, international business involving Japan was on the rise, in keeping with Japan's emergence as an economic powerhouse. As a result, the need for American lawyers to open offices in Japan also became more acute. At that time, the U.S. Government was quite frustrated by the trade imbalance between Japan and the United States. The American people used to say then that for every Japanese car imported into the United States, the U.S. government should export two lawyers to Japan. Indeed, the U.S. government went on to blame the imbalance on Japanese restrictive trade practices and the closed Japanese market. Somehow, the American people believed that this was the cause of the huge trade deficit between the U.S. and Japan. Restrictions against foreign lawyers in Japan were believed by the United States to be a typical example of a non-trade barrier. Not only did United States, but also the EC, put pressure upon the Japanese government to open up its legal business market.

As a result, both the Japanese government and Japan Federation of Bar Associations were forced to open up the legal service market to foreign lawyers. And even though the

Japan Federation of Bar Association was at first very reluctant to allow foreign lawyers into Japan, the association finally decided in 1985 to accept foreign lawyers under various conditions. These conditions were: (i) the principle of reciprocity; and (ii) foreign lawyers being subject to the self autonomy regime of the Japan Federation of Bar Association.

After long negotiations between the Japan Federation of Bar Associations and the Japanese government, finally the Act on Special Measures concerning the Handling of Legal Services by Foreign Lawyers (hereinafter called "Foreign Lawyers Act") was enacted as of May 23, 1986. It became effective as of April 1, 1987.

The law was very restrictive against foreign lawyers:

A. Foreign lawyers who want to practice law in Japan had to be registered with the Ministry of Justice. They had to have had experience of practicing law in the country or area where s/he obtained qualification as a lawyer ("country of original qualification") for at least 5 years, with the period of practicing law in Japan not included in those 5 years. There were many young American lawyers who worked in Japan as trainees or employees of Japanese law firms and companies. They could not use their time in Japan for this 5-year experience requirement. Due to such restrictions, Japanese clients could not get the services of foreign lawyers who had enough experience in Japan.

B. Foreign lawyers were not allowed to indicate the name of the law firm they belonged to in their country of origin. For example, a lawyer, whose name was John Smith and who belonged to Milbank Tweed Hadley & McCloy, must name his office as John Smith *Gaikokuho Jim-bengoshi Jimusyo* (Foreign Lawyer Office), without mentioning Milbank Tweed Hadley & McCloy. Japanese clients were confused. They wanted to use lawyers belonging to reputable foreign law firms. But, in the Japanese phone directory, clients could not find a foreign lawyer belonging to any foreign law firm of repute.

C. Foreign lawyers could neither employ nor form partnership with Japanese lawyers. Japanese lawyers argued that should a foreign lawyer be allowed to employ Japanese lawyers, then that foreign lawyer would end up instructing them on matters of Japanese law. As employees, Japanese lawyers would have to follow the instructions of registered foreign lawyers due to the employer-employee relationship. By way of instructing employee-Japanese lawyers, registered foreign lawyers would practice Japanese law. Neither empirical study nor realistic grounds support this argument as presented. A partnership with

Japanese lawyers was banned because the partnership could be used to circumvent the prohibition of employing Japanese lawyers.

Clients both inside and outside Japan were not amused by this restriction. Nowadays, most international legal problems involve a hybrid of laws from various countries. Therefore, close cooperation among lawyers with different expertise is required. The ban on employment of and partnership with foreign lawyers was proven harmful to the efficient coordination among lawyers at the international level.

D. Reciprocity was required. In order to be admitted to practice foreign law in Japan, the laws of one's country of original qualification must provide similar treatment to Japanese lawyers.

E. Foreign lawyers could practice law, though, only with respect to the laws of the country of original qualification. Also, they could practice such other laws as specifically approved by the Minister of Justice. They must be knowledgeable regarding the law of their original qualification with not less than 5 years of experience (hereinafter called "Designated Law"). For example, a New York lawyer could also give legal services on the laws of other states if they were so approved by the Minister of Justice.

F. There once was an opinion that foreign lawyers in Japan could not represent foreign or Japanese clients in international arbitration proceedings.[1] It was so, even in arbitration cases where the governing law was a foreign law or a party to the arbitration was a foreign company. In some arbitration cases, the Japanese attorney representing one party argued in the arbitration hearing that the foreign lawyer representing the other party was violating Japanese Attorney Law. This argument discredited the reputation of international arbitration in Japan. Foreign companies tried to avoid international arbitration in Japan in favor of arbitration elsewhere.

[1] Article 72 of the Foreign Lawyers Acts reads that no person other than an attorney or a Legal Professional Corporation may, for the purpose of obtaining compensation, engage in the business of providing legal advice or representation, handling arbitration matters, aiding in conciliation, or providing other legal services in connection with any lawsuits, non-contentious cases, or objections, requesting for re-examination, appeals and other petitions against administrative agencies, etc., or other general legal services, or acting as an intermediary in such matters; provided, however, that the foregoing shall not apply if otherwise specified in this Act or other laws.

These foreign lawyers, admitted to practice law in Japan as above, were called Registered Foreign Lawyer (*Gaikokuho Jimu Bengoshi*).

II. INTERNATIONALIZATION COMMITTEE AND AMENDMENTS TO FOREIGN LAWYERS ACT IN 2003

A. Restrictions upon registered foreign lawyers before 2003 Amendments

Even though the Foreign Lawyers Act was enacted in 1987, registered foreign lawyers, especially American and UK lawyers, were still very unhappy. This was because the provisions of the Foreign Lawyers Act were too restrictive. Japanese clients were also quite unhappy. Foreign governments continued to put pressure upon the Japanese government to further liberalize the activities of registered foreign lawyers in Japan. As a result, several amendments were made to the Foreign Lawyers Act. The original restrictions were relaxed to some extent.

(i) The period of experience in the country of original qualification was reduced to 3 years. Registered foreign lawyers could include in this 3-year period the time of practicing law in Japan although only up to one year.

(ii) Registered foreign lawyers could also give services with respect to the laws of foreign countries other than the Designated Law, if they are recommended in writing by an expert of such foreign law.

(iii) Reciprocity is no longer required, if the country of the original qualification is a member state of the WTO.

(iv) Registered foreign lawyers can now use the name of the law firm to which they belong in a foreign country.

(v) Registered foreign lawyers may represent clients in international arbitration procedures without regard to the governing law of the case. Further, foreign lawyers who are not yet registered as foreign lawyers may also represent their clients in international arbitration cases where the place of arbitration is in Japan.

(vi) Registered foreign lawyers were allowed to form partnership with Japanese lawyer(s) for limited business (hereinafter called "Specified Joint Enterprise") if such registered foreign lawyers have had law practice experience of not less than 5 years. Allowed business includes: (x) legal services requiring knowledge on foreign laws; (y) legal services for a case where a party had headquarters in a foreign country; and (z) legal services for a client who was a subsidiary of a foreign company.

However, registered foreign lawyers were still not allowed to employ Japanese lawyers nor form any partnership for general legal services.

Still, registered foreign lawyers were quite unhappy. They complained the most about the prohibition on the employment of Japanese lawyers and the restriction on business. Registered foreign lawyers claimed, among others: (i) there were cases where a client who was a subsidiary of a foreign company was abruptly taken over by a Japanese company and all of a sudden the Specified Joint Enterprise could no longer take care of the case; (ii) the Specified Joint Enterprise had to tell clients from time to time what kind of services it can or cannot provide. If not, then the service had to be provided either by a Japanese firm or registered foreign lawyers; (iii) thus, close cooperation between Japanese and foreign lawyers could not be achieved; (iv) the Specified Joint Enterprise could not deal with the case where a party was a foreigner living in Japan or a local company in which a foreign company had only less than 50% of total shares.

The office of Specified Joint Enterprises had to prepare various kinds of stationary with the names of Japanese law firms, foreign lawyers' firms as the Specified Joint Enterprise. Accounting of the Specified Joint Enterprises also became very complicated.[2]

B. 2003 AMENDMENTS TO FOREIGN LAWYERS ACT

In 1999, the Justice System Reform Council was formed to discuss various problems with the judicial system in Japan. The Council published its report on June 12, 2001. The report said, among others:

> "As for the review of the GJB (*Gaikokuho Jimu Bengoshi*: meaning registered foreign lawyers) system and the management thereof, prompt and thorough consideration should be given from the users' point of view, bearing in mind international discussion. Specifically, from the standpoint of actively promoting collaborations and cooperation between Japanese lawyers and GJB, requisites for specified joint enterprises (under the existing system, these are joint ventures for the purpose of having Japanese lawyers and GJB perform legal work involving an international aspect under certain conditions stipulated by law) should be relaxed. Continued consideration should be given to abolishing the prohibition on the employment of Japanese lawyers by GJB, as a matter of the future, paying heed to the international discussion."[3]

Several committees were formed in order to recommend to the Government how to implement the suggestions made in the Report of the Justice System Reform Council. One such committee was the Internationalization Committee. Its main job was to consider the appropriateness of further relaxation of the restrictions on the cooperation and collaboration

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[2] Problems are more elaborately stated in John Kakinuki, *The History and Problems Observed by a Foreign Lawyer* (*Hitorino Gaikokuho-Jimubengoshi-ga Mita Gaibenho-no Rekisi-to Kadai*), 54-12 Jiyu to Seigi 87.

[3] The Justice System Reform Council, *Recommendations of the Justice System Reform Council: For a Justice System to Support Japan in the 21st Century*, at 55 (2001), *available at* http://www.kantei.go.jp/foreign/judiciary/2001/0612report.html.

between Japanese lawyers and registered foreign lawyers and whether to abolish the ban on the employment of Japanese lawyers by registered foreign lawyers.[4] The committee recommended that the government abolishes: (i) the ban on employment; and (ii) the restriction on legal partnership between Japanese lawyers and registered foreign lawyers (hereinafter called "Foreign Law Joint Enterprise"). Because Japanese lawyers expressed great concern about the possibility that registered foreign lawyers might practice Japanese law by giving instructions to Japanese employee-lawyers, a new provision was provided for. It said that registered foreign lawyers could not direct Japanese employee-lawyers regarding any legal business that registered foreign lawyers could not handle.

Further, a key concern expressed by Japanese lawyers had to do with the possibility that registered foreign lawyers might unduly influence the Japanese partner-lawyers regarding Japanese law in the course of conducting the Foreign Law Joint Enterprise. Therefore, such exercise of undue influence was also prohibited.

C. *POST-2003 AMENDMENTS*

1. CONCERNS AND CONSEQUENCES

Various concerns were expressed by Japanese lawyers during the discussion at the Internationalization Committee. One concern was that if employment of Japanese lawyers and the joint law firm between Japanese and registered foreign lawyers were allowed, Japanese law firms would become like German law firms.[5] It was pointed out that as a result of the complete liberalization of legal services within EU member states, 9 out of 10 top German law firms were taken over by either British or American law firms or accounting firms.

According to the White Paper on Lawyers (*Bengoshi Hakusyo*) for the year 2005, the largest law firms in Japanwere[6]:

1. Nagashima Ohno & Tsunematsu	195 lawyers.
2. Mori Hamada & Matsumoto	187 lawyers.
3. Nishimura & Tokiwa	184 lawyers.
4. Anderson Mori & Tomotsune	175 lawyers.
5. Asahi & Koma	139 lawyers.

[4] The author was the chairman of that committee.
[5] Masahiro Shimojyo, *History of Acceptance of Foreign Lawyers in Japan*, Jiyu to Seigi (December 2003) 75.
[6] All the data comes from the 2005 White Paper on Lawyers (as of April 1, 2004). The numbers of lawyers include the number of registered foreign lawyers.

In 2006, Asahi & Koma was broken up. A part of the lawyers of the firm went to Nishimura & Tokiwa that later changed the name to Nishimura & Asahi. White Paper on Lawyers for the year 2005 lists only the top 5 largest law firms in Japan.

The number of lawyers in foreign law firms in 2005 is not available. Only the numbers of Japanese and foreign lawyers forming Specified Joint Enterprises are available. These are:

1. Baker & McKenzie/Tokyo Aoyama & Aoki 70 (11)[7]
2. White & Case 50 (24)
3. Linklaters 38 (8)
4. Atsumi Sogo Horitsu-jimusyo 38 (1)
5. Morison & Foerster 33 (12)
6. Fleshfields Bruckhaus Deringer 28 (5)
7. Jones Day 27 (3)

According to the White Paper on Lawyers (*Bengoshi Hakusyo*) for the year 2010, the largest law firms in Japan are[8]:

1. Nishimura & Asahi 430 lawyers
2. Nagashima Ohno & Tsunematsu 320 lawyers
3. Mori Hamada & Matsumoto 274 lawyers
4. Anderson Mori & Tomotsune 260 lawyers
5. TMI Associates[9] 210 lawyers
6. Tokyo Aoyama, Aoki, Koma Bengoshi Jimusyo Baker and McKenzie Gaikokuho Jimu Bengoshi Jimusyo Foreign Law Joint Enterprise ("Tokyo Aoyama")[10] 113 lawyers
7. City-Yuwa Partners 102 lawyers
8. Oh-ebashi LPC & Partners 90 lawyers
9. Atsumi & Partners 73 lawyers
10. Sakai, Mimura & Aizawa law office[11] 65 lawyers

The largest law firms in Japan that have the names of American or UK law firms other than the above cited Tokyo Aoyama are:

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[7] The number in parenthesis is the number of foreign lawyers.

[8] All the data comes from 2010 White Paper on Lawyers (as of April 1, 2009). The numbers of lawyers include the number of registered foreign lawyers.

[9] This law firm is forming Foreign Law Joint Enterprises with (i) Simons & Simons, a UK firm, (ii) Morgan Lewis & Bockius, a U.S. firm and (iii) Arqis Rechtsanwälte, a German firm.

[10] Their internet home page in Japanese depicts themselves as "a member firm of Baker & McKenzie." Although it has two distinguished law firm names such as "Tokyo Aoyama Aoki Koma Law Firm" and "Baker & McKenzie," it says that it is a fully integrated law firm. http://www.taalo-bakernet.com/e/top.html, last visited on August 13, 2010.

[11] It conducts Foreign Law Joint Enterprise with Bingham McCutchen, a U.S. law firm.

1. Jones Day (U.S.)	55 lawyers
2. White & Case (U.S.)	50 lawyers
3. Linklaters (U.K.)	45 lawyers
4. Clifford Chance (U.K.)	41 lawyers
5. Paul Hastings (U.S.)	40 lawyers
6. Morison & Foerster (U.S.)	33 lawyers[12]
7. Fleshfields Bruckhaus Deringer (U.K.)	29 lawyers
8. Allen & Overy (U.K.)	25 lawyers
9. Scaden, Arps, Slate, Meagher & Flom (U.S.)	23 lawyers
10. Orrick, Herrington & Sutcliff (U.S.)	20 lawyers

'Germanization' did not occur. The number of foreign registered lawyers has increased since 2003 from 189 to 290 in 2009. The number of Japanese lawyers who were parties to Foreign Law Joint Enterprises was 175 as of April 1, 2009 compared to 77 as of May 31, 2005[13]. The number of Japanese lawyers employed by Foreign Law Joint Enterprises was 664 as of April 1, 2009 compared to 235 as of May 31, 2005. The number of Japanese lawyers employed by registered foreign lawyers just after the relaxation of the restriction was 37 as of May 31, 2005[14]. It was 65 in 2009.

From the above observation, the take-over boom by U.S. or U.K. law firms of large Japanese law firms did not happen. One significant event that occurred after the 2003 amendment to the Foreign Lawyers Act was the break-up of the Mitsui Yasuda law office which had more than 100 lawyers. It was the 6th largest law firm in Japan at the time. A good number of Mitsui Yasuda lawyers went to Linklaters, while others went to Nishimura & Asahi, and Orrick. The rest established Mitsui Company, a new law firm.

Some lawyers were very concerned prior to 2003 that if registered foreign lawyers or foreign law firms could employ Japanese lawyers, the salary of young Japanese lawyers would skyrocket because financially strong UK and US mega-firms would lure young capable lawyers with high salaries.[15] This did not happen either. Because of an increase in the number of people passing the bar exam, the legal service market has been supplied with a large number of young lawyers. As a result, the salary of young lawyers is decreasing.[16]

Another change that occurred after 2003, according to rumors, is that international legal business normally assigned to so-called Japanese international law firms has also decreased. More international legal business has been shifted to law firms of foreign mega-

[12] It is a Foreign Law Joint Enterprise between Morison Foerster and Ito Mitomi law office. But, its registered foreign lawyers outnumber Japanese lawyers.
[13] 2005 White Paper on Lawyers (*Bengoshi Hakusho*) at 88.
[14] *Ibid.* at 90.
[15] Yasuma Sugiura, Foreign Lawyer Problem from View Point of ACCJ, 1034 Jurist 128.
[16] Fierce Competition in Job Market and Exhausting Young Lawyers, Syuukan Toyo-Keizai, (May 22, 2010) 61.

firms. However, it seems that the increase of demands in domestic legal service supported a rapid expansion of Japanese law firms.

2. LESSONS FROM JAPANESE EXPERIENCE

Lawyers have been inherently loathed to any increase in the number of lawyers. Since a long time ago, the Japan Federation of Bar Association vehemently opposed the increase in the number of passers of the bar exam. The new president of Japan Federation of Bar Association, Mr. Kenji Utsunomiya, insists that the number of passers of bar exam should be reduced to 1,500 from the present figure of over 2,000. During the discussion of the Internationalization Committee, most Japanese lawyers who appeared as witnesses were opposed to the liberalization of unfounded restrictions upon registered foreign lawyers. They just wanted to prevent an increase in competition for business in international legal services. Japanese lawyers had inherent conflicts of interest with the liberalization of international legal services. They paid little attention to the benefits that could be reaped by users of legal services. All witnesses from business companies welcomed the liberalization. Fears and concerns expressed by Japanese lawyers were all unfounded and were nothing more than mere speculation. There was no realistic precursor for such concerns.

Until the 2003 Amendments to the Foreign Lawyers Act, the request by foreign governments and lawyers was discussed between the Ministry of Justice and the Japan Federation of Bar Associations. From the enactment of the Foreign Lawyers Act, every amendment to the Act was subject to the approval of the Japan Federation of Bar Associations, except the 2003 amendments.[17] It was not a requirement by law however. The 2003 amendments were enacted without such approval. As expected, the Japanese lawyers were angry.[18] Of course, it is necessary to hear their opinion. However, it is wrong to give them veto power over the liberalization of the services of foreign lawyers. What is most important is the opinion of users of legal services in Japan.

There are several problems yet to be resolved. One such problem is that registered foreign lawyers are not yet allowed to form a legal professional corporation.[19] With regard to the legal services concerning the law of third countries other than the Designated Law, registered lawyers may only give services with the written advice from experts of such law while Japanese lawyers are not required to obtain any such advice. I do not see any reasonable ground for this discrimination.

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[17] Takeshi Kojima ed., Foreign Lawyers Act Vol.1, Shinzan-sha (2004) 41.
[18] Masahiro Shimojyo, History of Acceptance of Foreign Lawyers in Japan, Jiyu to Seigi (December 2003) 89.
[19] It is pointed out that this restriction may be a problem under GATS. Masaki Abe, A Topic that Is a Little Global, 119 Judicial System Department Journal (2008) 117.

A recent New York Times article reported that some U.S. and U.K. law firms are out-sourcing some of their legal work to India where people speak and write English while their salary is low. While common law lawyers try hard to provide good services at a lower cost, Japanese law firms have tried hard to set up trade barriers at the expense of Japanese users of international legal services. I believe that Japanese law firms ought to compete with foreign law firms on a level playing field.

KEYWORDS
Act on Special Measures concerning the Handling of Legal Services by Foreign Lawyers, Attorney Act, Japan Federation of Bar Associations, Reciprocity, Country of Original Qualification, Employment of Japanese Lawyers, Partnership with Japanese Lawyers, Designated Law, Registered Foreign Lawyers, Specified Joint Enterprise, Justice System Reform Council

Manuscript received: Oct. 20, 2010*; review completed:* Nov. 14, 2010*; accepted:* Nov. 19, 2010.