

SOUTHWESTERN JOURNAL OF INTERNATIONAL LAW



VOLUME XXIV

2018

NUMBER 1

TABLE OF CONTENTS

SYMPOSIUM

FREEDOM OF INFORMATION LAWS ON THE GLOBAL STAGE: PAST, PRESENT AND FUTURE

JOHN MOSS AND THE ROOTS OF THE FREEDOM OF INFORMATION
ACT: WORLDWIDE IMPLICATIONS 1
Michael R. Lemov & Nate Jones

RALPH NADER, LONE CRUSADER? THE ROLE OF CONSUMER AND
PUBLIC INTEREST ADVOCATES IN THE HISTORY OF FREEDOM OF
INFORMATION 41
Tom McClean

Articles

ARGENTINA'S SOLUTION TO THE MICHAEL BROWN TRAVESTY: A
ROLE FOR THE COMPLAINANT VICTIM IN CRIMINAL PROCEEDINGS... 73
Federico S. Efron

MARTIAL LAW IN INDIA: THE DEPLOYMENT OF MILITARY UNDER
THE ARMED FORCES SPECIAL POWERS ACT, 1958 117
Khagesh Gautam

Notes & Comments

A CRITIQUE OF *PERINÇEK V. SWITZERLAND*: INCORPORATING AN INTERNATIONAL AND HISTORICAL CONTEXT IS THE MORE PRUDENT APPROACH TO GENOCIDE DENIAL CASES 147
Shant N. Nashalian

A CUTE COWBOY STOLE OUR MONEY: APPLE, IRELAND, AND WHY THE COURT OF JUSTICE OF THE EUROPEAN UNION SHOULD REVERSE THE EUROPEAN COMMISSION’S DECISION 177
Chantal C. Renta

Review

BOOK REVIEW PHILIPPE SANDS, *EAST WEST STREET: ON THE ORIGINS OF “GENOCIDE” AND “CRIMES AGAINST HUMANITY”* (ALFRED A. KNOPF ED., 2016) 209
Vik Kanwar

SOUTHWESTERN JOURNAL OF INTERNATIONAL LAW

VOLUME XXIV

2018

NUMBER 1

Editor-in-Chief

SHANT N. NASHALIANN

Managing Editor

ZURIT BARAJAS

Senior Editor

ARIANA BAYAT

Lead Article Editors

ANGELA BOIADJIAN
VERA HOVHANNISYAN

Note & Comment Editors

VICTORIA CARTHORN
LOURDES GALVAN

Research & Special Project Editor

CHASE WILT

Associate Editor

OLIVIA KIM

Staff

DIANA ARAMYAN
ALEXANDER AROESTE
ELIZABETH BLACK
MIRIAN CHAVEZ
MAY DORON
SHAHLA JAILIL-VALLES
CORINNA JIANG
DANIELA JONES
ERIN KAITEL
VANA KARALIAN

ALEXANDER LEWIS
JOSEPH LORANT
MARIE MASTERS
JOSEPH MENDOZA
ALANNA PIRES
KARLIE SCHAFFER
CHARLIE SPARKLE
CINDY SUH
CHI TRAN
HARUT VOSKANYAN

Faculty Advisors

MARK CAMMACK
JONATHAN M. MILLER

SOUTHWESTERN LAW SCHOOL 2017-2018

BOARD OF TRUSTEES

HON. DEBORAH S. BRAZIL
KEVIN BURKE
STEVEN P. BYRNE
MICHAEL E. CAHILL
DENNIS P.R. CODON
MICHAEL J. DOWNER
THOMAS L. DRISCOLL
PETER DUCHESNEAU
CHARLES P. FAIRCHILD
DARIN J. FEINSTEIN
THOMAS H. HOBERMAN
CINDY JOHNSON
LAUREN B. LEICHTMAN

WAYNE LEVIN
DANIEL M. PETROCELLI
HON. ROBERT H. PHILIBOSIAN
LARRAINE D. SEGIL
ROBERT G. VAN SCHOONENBERG
HON. ARLEIGH M. WOODS
GEORGE WOOLVERTON
JULIE K. XANDERS
FRANK L. ELLSWORTH, *Trustee Emeritus*
SHELDON A. GEBB, *Trustee Emeritus*
HON. RONALD S.W. LEW, *Trustee Emeritus*
BRIAN A. SUN, *Trustee Emeritus*

ADMINISTRATION

MICHAEL J. DOWNER, B.A., J.D., *Chair of the Board of Trustees*
SUSAN WESTERBERG PRAGER, B.A., M.A., J.D., *Dean and Chief Executive Officer*
MICHAEL CARTER, B.A., M.B.A., Ed.D., *Vice President and Chief Operating Officer*
CHRISTOPHER DAVID RUIZ CAMERON, B.A., J.D., *Vice Dean*
NYDIA DUENEZ, B.A., J.D., *Dean of Students and Diversity Affairs*
DOREEN E. HEYER, B.S., M.S., *Senior Associate Dean for Academic Administration*
MARCIE CANAL, B.A., *Associate Dean for Administrative Services*
WARREN GRIMES, B.A., J.D., *Associate Dean for Research*
DEBRA L. LEATHERS, B.A., *Associate Dean for Institutional Advancement*
ROBERT MENA, B.A., M.S., Ed.D., *Associate Dean for Student Affairs*
HARRIET M. ROLNICK, B.A., J.D., *Associate Dean for SCALE®*
BYRON STIER, B.A., J.D., LL.M., *Associate Dean for Strategic Initiatives*
JULIE K. WATERSTONE, B.A., J.D., *Associate Dean for Experiential Learning*
LINDA A. WHISMAN, B.A., M.L.S., J.D., *Associate Dean for Library Services*
MARY BASICK, B.S., J.D., *Assistant Dean of Bar Preparation*
LISA M. GEAR, B.A., *Assistant Dean for Admissions*
SHAHRZAD POORMOSLEH, B.A., J.D., *Assistant Dean for Career Services*
NATALIE RODRIGUEZ, B.A., J.D., *Assistant Dean of Academic Success*

FULL-TIME FACULTY

RONALD G. ARONOVSKY, A.B., J.D., *Professor of Law*
MARY BASICK, B.S., J.D., *Assistant Dean of Bar Preparation, Associate Professor of Law for Academic Success and Bar Preparation*
DEBRA LYN BASSETT, M.S., J.D., *John J. Schumacher Chair and Professor of Law*
PAUL A. BATEMAN, B.A., M.A., Ph.D., *Professor of Legal Analysis, Writing and Skills*
MICHAEL J. BERGER, B.A., M.A., J.D., *Associate Professor of Law*
BETH CALDWELL, B.A., M.S.W., J.D., *Professor of Legal Analysis, Writing and Skills*
ALAN L. CALNAN, B.A., J.D., *Professor of Law*
CHRISTOPHER DAVID RUIZ CAMERON, B.A., J.D., *Vice Dean and Justice Marshall F. McComb Professor of Law*
MARK CAMMACK, B.A., J.D., *Professor of Law*
KATHRYN CAMPBELL, B.A., J.D., *Associate Professor of Legal Analysis, Writing and Skills*
CATHERINE L. CARPENTER, B.A., J.D., *The Honorable Arleigh M. Woods and William T. Woods Professor of Law and Co-Director of the Moot Court Honors Program*

LAURA DYM COHEN, B.S., J.D., *Director of Street Law Clinic and Public Service Programs and Clinical Professor of Law*

ALEXANDRA D'ITALIA, B.A., J.D., M.P.W., *Director of Writing Center, Co-Director of the Moot Court Honors Program and Associate Professor of Law*

MICHAEL B. DORFF, A.B., J.D., *Michael & Jessica Downer Endowed Chair, Professor of Law and Technology Law & Entrepreneurship Program Director*

MICHAEL M. EPSTEIN, B.A., J.D., M.A., Ph.D., *Supervising Editor of the Journal of International Media and Entertainment Law and Professor of Law*

JOSEPH P. ESPOSITO, B.S., J.D., *Co-Director of the Trial Advocacy Honors Program and Professor of Law*

JENNY R. FEE, B.A., J.D., *Supervising Attorney, Children's Rights Clinic and Lecturer in Law*

JAMES M. FISCHER, J.D., *Professor of Law*

NORMAN M. GARLAND, B.S., B.A., J.D., LL.M., *Professor of Law*

JAY W. GENDRON, B.A., J.D., *Director of the Entertainment and the Arts Legal Clinic and Associate Professor of Law*

ANAHID GHARAKHANIAN, B.A., J.D., *Director of the Externship Program and Professor of Legal Analysis, Writing and Skills*

WARREN S. GRIMES, B.A., J.D., *Associate Dean for Research and Irving D. and Florence Rosenberg Professor of Law*

ISABELLE R. GUNNING, B.A., J.D., *Professor of Law*

PRIYA S. GUPTA, B.A., MSc., J.D., *Faculty Director of the General LL.M. Program and Professor of Law*

DANIELLE KIE HART, B.A., J.D., LL.M., *Professor of Law*

JOHN HEILMAN, B.S., J.D., M.P.A., M.R.E.D., *Professor of Law*

ROMAN J. HOYOS, A.B., J.D., M.A., Ph.D., *Professor of Law*

VIK KANWAR, B.A., J.D., LL.M., *Associate Director of International Programs, Adjunct Professor of Law*

HILA KEREN, LL.B., Ph.D., *Professor of Law*

JOERG W. KNIPPRATH, B.A., J.D., *Professor of Law*

CRISTINA C. KNOLTON, B.A., J.D., *Co-Director of the Negotiation Honors Program and Professor of Legal Analysis, Writing and Skills*

HERBERT T. KRIMMEL, B.S., M.Acc., J.D., *Professor of Law*

ROBERT C. LIND, B.E.S., J.D., LL.M., *Irwin R. Buchalter Professor of Law*

ROBERT E. LUTZ, B.A., J.D., *Paul E. Treusch Professor of Law*

ARTHUR F. MCEVOY, A.B., J.D., M.A., Ph.D., *Professor of Law*

JONATHAN M. MILLER, B.A., J.D., *Professor of Law*

JANET NALBANDYAN, B.A., J.D., *Associate Professor of Law for Academic Success and Bar Preparation*

NEIL OLLIVIERRA, B.A., J.D., *Co-Director of the Donald E. Biederman Entertainment and Media Law Institute and Associate Professor of Law*

ROBERT POPOVICH, B.S., MBT, J.D., *Visiting Professor of Law*

SUSAN WESTERBERG PRAGER, B.A., M.A., J.D., *Dean, Chief Executive Officer and Professor of Law*

GOWRI RAMACHANDRAN, B.A., M.A., J.D., LL.M., *Professor of Law*

ANDREA RAMOS, B.A., J.D., *Director of the Immigration Law Clinic and Clinical Professor of Law*

NATALIE RODRIGUEZ, B.A., J.D., *Assistant Dean of Academic Success and Associate Professor of Law for Academic Success and Bar Preparation*

JACQUELYN K. ROGERS, B.S., J.D., *Associate Professor of Law for Academic Success and Bar Preparation*

HARRIET M. ROLNICK, B.A., J.D., *Associate Dean for SCALE® and Associate Professor of Law*

MICHAEL D. SCOTT, B.S., J.D., *Professor of Law and Technology Law & Entrepreneurship Program Founding Director Emeritus*

BILL H. SEKI, B.A., J.D., *Co-Director of the Trial Advocacy Honors Program and Professor of Law*

IRA L. SHAFIROFF, B.A., J.D., *Professor of Law*

REBECCA A. SIMON, B.A., J.D., *Co-Director of Mindfulness, Stress Management, Peak Performance Program*

JUDY BECKNER SLOAN, B.A., J.D., *Professor of Law*
 BYRON G. STIER, B.A., J.D., LL.M., *Associate Dean for Strategic Initiatives and Professor of Law*
 J. KELLY STRADER, B.A., M.I.A., J.D., *Professor of Law*
 N. KEMBA TAYLOR, B.A., J.D., *Professor of Legal Analysis, Writing and Skills*
 JOHN TEHRANIAN, A.B., J.D., *Paul W. Wildman Chair and Professor of Law*
 TRACY L. TURNER, B.A., J.D., *Director of the Legal Analysis, Writing and Skills Program and Professor of Legal Analysis, Writing and Skills*
 RACHEL VANLANDINGHAM, B.A., M.P.M., J.D., LL.M., *Associate Professor of Law*
 JULIA VAZQUEZ, B.A., M.A., J.D., *Supervising Attorney, Immigration Law Clinic, Lecturer in Law and Director of Community Lawyering Clinic*
 DOV A. WAISMAN, A.B., M.S., J.D., *Professor of Law*
 JULIE K. WATERSTONE, B.A., J.D., *Associate Dean for Experiential Learning, Director of the Children's Rights Clinic and Clinical Professor of Law*
 LINDA A. WHISMAN, B.A., M.L.S., J.D., *Associate Dean for Library Services and Professor of Law*
 WILLIAM WOOD, B.A., M.S.E.L., J.D./M.A., *Visiting Associate Professor of Law*
 BRYCE WOOLLEY, B.A., J.D., *Associate Professor of Law for Academic Success and Bar Preparation*
 DENNIS T. YOKOYAMA, B.A., M.S., J.D., *Professor of Law*

EMERITIFACULTY

CRAIG W. CHRISTENSEN, B.S., J.D., *Professor of Law Emeritus*
 MICHAEL H. FROST, B.A., M.A., Ph.D., *Professor of Legal Analysis, Writing and Skills and Emeritus in Residence*
 BRYANT G. GARTH, B.A., J.D., Ph.D., *Dean Emeritus*
 ANITA L. GLASCO, A.B., J.D., M.C.L., *Professor of Law Emerita*
 JAMES A. KUSHNER, B.B.A., J.D., *Professor of Law Emeritus*
 CHRISTINE METTEER LORILLARD, B.A., M.A., Ph.D., *Professor of Legal Analysis, Writing and Skills Emerita*
 SUSAN J. MARTIN, B.A., J.D., *Professor of Law Emerita*
 ROBERT A. PUGSLEY, B.A., J.D., LL.M., *Professor of Law Emeritus in Residence*
 BUTLER D. SHAFFER, B.S., B.A., J.D., *Professor of Law Emeritus*
 KATHERINE C. SHEEHAN, B.A., M.A., J.D., *Professor of Law Emerita*
 LEIGH H. TAYLOR, B.A., J.D., LL.M., *Dean Emeritus and Professor of Law*

ADJUNCT FACULTY

RAHUL AGRAWAL	CRAIG GELFOUND	DOUGLAS JOHNSON
MILENE C. APANIAN	SHARREL GERLACH	NEVILLE JOHNSON
JEFF BIRREN	JAMES B. GLADSTONE	HON. MARK A. JUHAS
MICHAEL BLAHA	DAVID GOLDBERG	JARED JUSSIM
PATRICK BOIRON	AMANDA GOODMAN	KIA KAMRAN
SAMANTHA BORGHI	HON. SCOTT M. GORDON	HILLARY S. KANE
HON. DEBORAH BRAZIL	GARY GRADINGER	ROBERT KAYNE
ROBYN LEE CHEW	KARIN J. GRAVER	ANDREW KNAPP
ALEX COFFEE	JARRETT GREEN	JESSICA LANGER
LEAH COHEN-MAYS	MARGARET HALL	ZACHARY LEVINE
ANGELA DAVIS	JONATHAN HANDEL	KATHY M. LOMBARD
THOMAS DEBOE	NAZGOLE HASHEMI	APRIL MACARAEG
DANIEL H. DILLON	HON. J. GARY HASTINGS	KYLE MARKS
DEBORAH DROOZ	DAVID HELFANT	RICHARD D. MARKS
ROBERT N. DURAN	ROBERT F. HELFING	CRAIG MATSUDA
PEGGY FARRELL	KAREN A. HENRY	HON. DARRELL S. MAVIS
JAMES FELDMAN	HOWARD JACOBS	TIMOTHY B. MCCAFFREY, JR.
MITCH FEDERER	MATTHEW JACOBS	DAVID MCFADDEN
GARY P. FINE	VERONICA JEFFERS	HON. ANTHONY J. MOHR
ALICE J. GARFIELD	ALLAN JOHNSON	HERMEZ MORENO

MICHAEL MORSE
RONI MUELLER
ROBERT MYMAN
HON. DAVID NEUMEISTER
CHRISTOPHER O'CONNELL
DAVID OSTROVE
HON. YVETTE PALAZUELOS
TIGRAN PALYAN
HON. AMY M. PELLMAN
KATHERYN PODSIADLO
ROMY S. RAHMANIAN

JUAN A. RAMOS
ORLY RAVID
MICHAEL REXFORD
GEORGE H. RUIZ
ALICE A. SALVO
LOVEE SARENAS
LARRAINE SEGIL
DANIEL SELARZ
AMANDA M. SEWARD
ZEPUR SIMONIAN
TODD A. SMITH

ROURKE STACY
EDWARD C. STARK
HON. TERESE SULLIVAN
ANITA SURENDRAN
JULIA SYLVA
MARK A. TALISE
CATHERINE VALERIO BARRAD
DANIELLE VAN LIER
EMMANUEL VERGARA
HON. TIMOTHY M. WEINER
SONIA YAGURA

JOHN MOSS AND THE ROOTS OF THE FREEDOM OF INFORMATION ACT: WORLDWIDE IMPLICATIONS[†]

Michael R. Lemov*
& Nate Jones**

INTRODUCTION	2
I. MOSS AND THE CONGRESS	2
II. THE SPEAKER OF THE HOUSE	5
III. GROWTH OF GOVERNMENT SECRECY	7
IV. ROLE OF THE PRESS	8
V. CREATION OF THE SPECIAL SUBCOMMITTEE ON GOVERNMENT INFORMATION	12
VI. SUBSTANTIVE AND POLITICAL OPPOSITION TO FOIA ...	13
VII. TACTICS: THE LONG INVESTIGATION	17
VIII. OPPOSITION INCREASES	22
IX. THE SENATE END RUN; EMANUEL CELLER’S GIFT	24
X. PRESIDENTIAL VETO THREAT	26
XI. FOIA BECOMES LAW	29
XII. FREEDOM OF INFORMATION WORLDWIDE	32
XIII. INTERNATIONAL AND AMERICAN CHALLENGES	37

[†] This article was revised from a paper submitted to “Freedom of Information Laws on the Global Stage: Past, Present and Future,” a symposium held at Southwestern Law School on Friday, November 4, 2016. The Symposium was organized by Professor Michael M. Epstein and Professor David Goldberg and jointly by Southwestern’s Journal of International Media and Entertainment Law and Journal of International Law. Portions of this article discussing Congressman John Moss and the passage of the U.S. Freedom of Information Act were taken from co-author Michael R. Lemov’s book *People’s Warrior, John Moss and the Fight for Freedom of Information and Consumer Rights* (Fairleigh Dickinson University Press/Rowman and Littlefield, 2011).

* Michael R. Lemov is an attorney and former Commerce Committee counsel for Congressman John Moss. He is the author of *People’s Warrior, John Moss and the Fight for Freedom of Information and Consumer Rights* (Fairleigh Dickinson University Press/Rowman and Littlefield, 2011).

** Nate Jones is the Director of the Freedom of Information Act Project for the National Security Archive. He is also a Cold War historian and frequently utilizes FOIA in his research. He is the author of *Able Archer 83: The Secret History of the NATO Exercise That Almost Triggered Nuclear War* (The New Press, 2016).

INTRODUCTION

John Moss was an obscure Congressman from a newly created district in northern California when he arrived in Washington D.C. in 1953.¹ He had survived a razor-thin general election victory (by about 700 votes), which included unfounded charges of being a communist, or a communist sympathizer.² Those charges became an important force behind Moss's long battle to enact the Freedom of Information Act.

Except for an 18th century Swedish law and a similar information law in Finland in 1951, the U.S. Freedom of Information Act ("FOIA") was the first open government law in the world.³ During the twelve years it took John Moss to win enough Congressional votes to pass the bill, he endured intense political opposition, faced a veto threat from a president of his own party, and overcame fierce opposition from executive branch agencies.⁴

When President Lyndon Johnson signed the Freedom of Information Act into law on July 4, 1966, Moss did not receive a pen from the president, nor was there any signing ceremony.⁵

Since 1966, more than 117 nations have passed government information laws.⁶ Congress has amended and refined significant sections of the U.S. law several times, generally improving access in areas where Moss had to compromise in order to win its original passage.

I. MOSS AND THE CONGRESS

When Moss first arrived in Washington, D.C. there was a poisonous political atmosphere in the city.⁷ Senator Joseph McCarthy was riding anti-communist fears that he helped arouse and that propelled

1. Interview by Donald B. Seney with John E. Moss, Congressman, U.S. House of Representatives, in Sacramento, Cal., 15 (Oct. 3, 1989) [hereinafter Interview by Seney with Moss], <http://archives.cdn.sos.ca.gov/oral-history/pdf/oh-moss-john.pdf>.

2. *Id.* at 19.

3. *Fast Facts: Freedom of Information Laws Around the World*, RAPPLER (July 23, 2014, 9:15 AM), <https://www.rappler.com/newsbreak/iq/63867-fast-facts-access-to-information-laws-world>.

4. C.J. Ciaramella, *The Freedom of Information Act—and the Hero Who Pioneered It*, PACIFIC STANDARD (June 29, 2016), <https://psmag.com/news/the-freedom-of-information-act-and-the-hero-who-pioneered-it>.

5. *Id.*

6. See *Chronological and Alphabetical Lists of Countries with FOI Regimes*, FREEDOMINFO.ORG (Sept. 28, 2017) [hereinafter *List of Countries with FOI Regimes*], <http://www.freedominfo.org/?p=18223>.

7. MICHAEL J. HOGAN, *A CROSS OF IRON* 315 (1998).

him to great influence in the U.S. Senate and in the nation.⁸ The House Un-American Activities Committee was making headlines, with its endless investigations of security risks, Russian spies, and alleged disloyalty in dozens of government agencies and American industries.⁹

President Harry Truman issued an Executive Order establishing an administration Loyalty Program.¹⁰ It directed Truman's attorney general to compile a list of communist organizations and "front" organizations and to investigate the loyalty of federal government employees.¹¹ Based on the results of these investigations, the targets could be fired from their government jobs, prosecuted, and made virtually unemployable.¹² They faced public condemnation and personal humiliation in the process. People investigated under the Loyalty Program were not allowed to confront their accusers or see the charges against them, often based on hearsay evidence that was held in secret files compiled by the Federal Bureau of Investigation.¹³

United States Court of Appeals Judge Henry Edgerton wrote an opinion concerning the firing of one such government employee: "Without trial by jury, without evidence, and without even being allowed to confront her accusers or to know their identity, a citizen of the United States has been found disloyal to the government of the United States."¹⁴

Edgerton found the discharge proceedings to have been unconstitutional.¹⁵ "Whatever her actual thoughts may have been," he wrote, "to oust her as disloyal without trial is to pay too much for protection against any harm that could possibly be done."¹⁶ Edgerton was the lone dissenter on the federal Court of Appeals. The court affirmed the employee's firing from government service.¹⁷ The United States Supreme Court divided evenly in reviewing the case, four to four, thus upholding the legality of the Truman Loyalty Program and its attendant government secrecy.¹⁸

8. *Id.*

9. *\$4 Million For Probes*, 9 CONG. Q. ALMANAC 69 (1953).

10. See HOGAN, *supra* note 7, at 254 (citing Exec. Order No. 9,835, 3 C.F.R. Supp. 2 (1947)).

11. See Exec. Order No. 9,835, 3 C.F.R. Supp. 2 (1947); HOGAN, *supra* note 7, at 254.

12. See Exec. Order No. 9,835, 3 C.F.R. Supp. 2 (1947); HOGAN, *supra* note 7, at 254.

13. See HOGAN, *supra* note 7, at 255.

14. *Bailey v. Richardson*, 182 F.2d 46, 66 (D.C. Cir. 1950) (Edgerton, J., dissenting).

15. *Id.* at 74.

16. *Id.*

17. *Id.* at 65-66.

18. *Bailey v. Richardson*, 341 U.S. 918, 918 (1951).

Moss knew about the McCarthy approach, having been a target of similar charges in his California campaigns for both the state assembly in 1949 and, in 1953, for Congress.¹⁹ He survived the attacks. He did not forget them. His long campaign to secure freedom of information was grounded, in part, on his anger at being faced with such potentially devastating charges based on unsubstantiated claims against him.

Moss's information battle was also based, coincidentally, on his assignment to a very obscure congressional committee that had legislative responsibility only for federal civil service and post office employees.²⁰

When he took his seat in Congress in January 1953 representing California's new Third Congressional District, there was no evidence that limiting government secrecy and providing the public and the press with access to government records would be causes he would champion for twelve long years—and in fact, for the rest of his life.²¹ Perhaps because of Moss's independent views on several such issues, he later said, "By all that was holy, I was destined to be a one-term." ²²

But Moss and his new congressional district in Sacramento bonded almost instantly. The strong connection had started with his election to the California Assembly in 1949 in a portion of the Third district.²³ Moss had a clear record. He favored lower utility rates for consumers, strengthening public power to compete with the giant Pacific Gas and Electric Company, increased wages for government workers, and better working conditions for railroad employees.²⁴ His stances on the issues were a natural fit for Sacramento's voters, who appeared to like his combative style and his populist position on pocketbook issues. Moss was repeatedly returned to office in Sacramento for thirty years.²⁵

The young congressman knew about everyday problems from his own experience—particularly the sudden death of his mother when he was a small boy—and his subsequent abandonment by his father. Liv-

19. See Interview by Seney with Moss, *supra* note 1, at 19.

20. See MICHAEL SCHUDSON, *THE RISE OF THE RIGHT TO KNOW* 39 (2015).

21. See MICHAEL R. LEMOV, *PEOPLE'S WARRIOR: JOHN MOSS AND THE FIGHT FOR FREEDOM OF INFORMATION AND CONSUMER RIGHTS* 43 (2011). See generally Interview by Seney with Congressman Moss, *supra* note 1.

22. LEMOV, *supra* note 21(citing author's 1996 interview with John E. Moss).

23. See Interview by Seney with Moss, *supra* note 1, at iii.

24. See *id.* at 62-63.

25. See *id.* at iii.

ing in an attic with his older brother, he struggled financially to go to high school and never finished college.²⁶ He later said, “[I] gained all of my bits and pieces of knowledge and understanding the more difficult way . . . but at the same time, it made me appreciate them more, and I probably dug deeper to get some of the facts.”²⁷

In the nation’s capital in 1953, Moss was an unknown. He tried for an appointment to the powerful House Commerce Committee, or to the Government Operations Committee.²⁸ He was assigned instead to the Post Office-Civil Service and House Administration Committees.²⁹ These were not exactly major appointments, but freshmen are typically placed on such minor committees.³⁰ So he waited and did his best to make something of his position, serving out his “sentence” stoically and as it turned out, productively. He offered and pushed through amendments that gave post office workers the right to arbitration of disputes and a pay raise.³¹

II. THE SPEAKER OF THE HOUSE

At the end of Moss’s second term in 1956, the House Leadership promoted him to membership on the more powerful Government Operations Committee, which had jurisdiction over government information practices.³² He would serve on Government Operations for twenty-two years.³³

26. *See id.* at 10.

27. *See* LEMOV, *supra* note 21, at 44 (citing author’s 1996 interview with John E. Moss).

28. *Id.*

29. *See* SCHUDSON, *supra* note 20.

30. *See* Kathy Gill, *What is the Seniority System? How Power is Amassed in Congress*, THOUGHTCO., <https://www.thoughtco.com/what-is-the-seniority-system-3368073> (last updated Dec. 26, 2016).

31. *See* *Postal Rates, Postal Pay Hikes*, CONG. Q. ALMANAC 1954, 10TH ED., 1955, [goo.gl/Vc9XQZ](https://www.goo.gl/Vc9XQZ) (follow “Postal Rates, Postal Pay Hikes - CQ Almanac Online Edition” hyperlink) (indicating that, in 1954, Congressman Moss supported HR 9836 and HR 6052, which sought to, respectively, increase mail rates and increase the pay of postal employees).

32. *See* H.R. Journal, 82nd Cong., 2d Sess. 720-21 (1951-52) (indicating a change in the name of the “Committee on Expenditures in the Executive Departments” to the “Committee on Government Operations” on July 3, 1952 via unanimous consent following House Resolution 647); H.R. Journal, 90th Cong., 2d Sess. 1315 (1968) (outlining the powers and duties of the Committee on Government Operations, which include, among others, “receiving and examining reports of the Comptroller General of the United States [i.e. the director of the Government Accountability Office] and of submitting such recommendations to the House as it deems necessary or desirable in connection with the subject matter of such reports; . . . studying the operation of Government activities at all levels with a view to determining its economy and efficiency . . .”).

33. *See* 2 GARRISON NELSON ET AL., *COMMITTEES IN THE U.S. CONGRESS 1947-1992*, at 643 (1994).

But Moss wanted even more—a seat on another and perhaps more influential committee.³⁴ Moss let the California delegation know he was interested in membership on the Interstate and Foreign Commerce Committee as well as Government Operations.³⁵ He wanted Commerce because it had jurisdiction over major parts of business and industry in the United States and trade with foreign nations.³⁶ Before running for Congress, Moss had been in the appliance and real estate businesses in Sacramento.³⁷ He thought he knew something about commerce.³⁸ So the committee's jurisdiction over transportation, communications, securities markets, consumer protection, energy, the environment, and health care appealed to him.

Moss was disappointed when the selections of the Democratic caucus were announced.³⁹ Sam Rayburn, the all-powerful Texas Congressman who was Speaker of the House, “always liked to pick Texans for key committees[,] . . . he didn't particularly look to California.”⁴⁰ So Moss tried again, this time directly with Speaker Rayburn.

He walked from the House office building across the street to the Capitol to talk to the Speaker.⁴¹ From the way Moss described it later, he did not press Rayburn but Moss reminded him that there was no Californian on the Interstate and Foreign Commerce Committee; that he was from the growing northern part of the state; and that he probably would have the nomination of both parties in the next election—something he did not actually get until 1958.⁴² Moss assured Rayburn he knew about business issues; that he could handle the job; and that he really wanted it.⁴³ And, oh yes, putting a Californian on Commerce might be good for the Democratic Party. Rayburn was nobody's pushover. Moss found him friendly, but noncommittal.

A day or two later, Moss got a telephone call from the chairman of the California delegation: “You're on the Commerce Committee, John. What the hell did you say to Rayburn?”⁴⁴

It had not hurt Moss to go to the Speaker to make his case. The meeting began a strong relationship between the young Moss and the

34. See LEMOV, *supra* note 21, at 45-46.

35. See *id.* at 46.

36. See *id.*

37. See Interview by Seney with Moss, *supra* note 1, at iii.

38. See LEMOV, *supra* note 21, at 46.

39. *Id.*

40. *Id.*

41. *Id.*

42. See Interview by Seney with Moss, *supra* note 1, at iii, 139.

43. See LEMOV, *supra* note 21, at 46.

44. Interview by Seney with Moss, *supra* note 1, at 149.

older, more powerful Rayburn.⁴⁵ Rayburn placed Moss on the leadership track, eventually landing him as deputy whip.⁴⁶ Rayburn also oversaw the appointment of Moss as chairman of the newly established Special Subcommittee on Government Information, which was established as a part of the Government Operations Committee.⁴⁷ And it was Rayburn who, directly or indirectly, supported Moss's long freedom of information battle.⁴⁸

III. GROWTH OF GOVERNMENT SECRECY

World War II witnessed an immense growth of the federal government coupled with the wartime need for a high degree of secrecy—at least as to military-security information. Winning the war took precedence over everything. In the years immediately following World War II, the military's need to guard and control information declined, but secrecy and censorship limiting the flow of government information to the public continued.⁴⁹ During the Cold War and the anti-communist hysteria that followed, both the Truman and Eisenhower Administrations responded with many information and security restrictions, the Truman Loyalty Program among them.⁵⁰ Some restrictions became what appeared to be a permanent apparatus for state secrecy.

Due to government and public reaction to the uncertainties of the Cold War, thousands of documents were classified as secret. The pre-

45. See BERRY JONES, *DICTIONARY OF WORLD BIOGRAPHY* 710 (4th ed. 2017) (indicating that Rayburn was a U.S. Congressman from 1913 until 1961); SCHUDSON, *supra* note 20, at 147 (indicating that in the 1940s and 1950s Congressman and then Speaker Rayburn was a powerful figure); Deward C. Brown, *The Same Rayburn Papers: A Preliminary Investigation*, 35 *THE AM. ARCHIVIST* 331, 331 (1972) (indicating that Rayburn became Speaker in 1940 and acted as the Chairman of the Democratic National Convention in 1948, 1952, and 1956); Interview by Seney with Moss, *supra* note 1, at iii (indicating that Moss was born in 1913, the same year Rayburn was first elected, and that Moss was elected to Congress as a Representative of the Third District in 1952).

46. See Interview by Philip M. Stern with John Moss, U.S. House of Representatives, in Wash. D.C. (Apr. 13, 1965). Moss did not seek to continue as deputy floor whip after his confrontation with the White House and the House leadership over the Freedom of Information Act in the early 1960s. He said he wanted to pursue his own agenda and that he was not forced to resign.

47. See SCHUDSON, *supra* note 20, at 40.

48. LEMOV, *supra* note 21, at 46.

49. See SCHUDSON, *supra* note 20, at 46; Harold C. Relyea, *Freedom of Information, Privacy, and Official Secrecy: The Evolution of Federal Government Information Policy Concepts*, 7 *SOC. INDICATORS RES.* 137, 138-39 (1980).

50. SCHUDSON, *supra* note 20, at 42. See generally Exec. Order No. 9,835, 3 C.F.R. Supp. 2 (1947) (the executive order that began the "Loyalty Program"); Deward, *supra* note 45, at 336 (pointing out the anti-communist hysteria that existed during the 1950s).

vailing attitude towards government records was “when in doubt, classify.”⁵¹ Secrecy labels were slapped on seemingly innocent bits of data. For example, the amount of peanut butter consumed by the armed forces was classified as secret (the government feared this information might enable an enemy to determine our military preparedness). A twenty-year-old report describing shark attacks on shipwrecked sailors was classified as secret, as was a description of modern adaptations of the bow and arrow.⁵²

In the midst of this wave of Cold War secrecy, Moss confronted executive branch secrecy for the first time.⁵³ During his first term in Congress, while on the House Post Office and Civil Service Committee, Moss became concerned with the discharge of some 2,800 federal employees for alleged “security reasons.”⁵⁴ Moss felt that the dismissals ought to be explained more thoroughly by the Civil Service Commission.⁵⁵ The firings had a devastating effect on employees and reflected poorly on the civil service in general. Besides, Moss believed the majority of the people dismissed had probably not been let go because they lacked patriotism, but for other minor incidents or because of disagreements with their superiors. An instinctive civil libertarian, Moss was sensitive to questionable charges of disloyalty. So the young congressman, as a member of the committee with jurisdiction, formally requested that the Civil Service Commission produce the records relating to the discharge of all 2,800 employees.⁵⁶ His request was flatly denied by the Civil Service Commission.⁵⁷ It seemed as though that would be the end of it. With the Republicans in control of both the Executive Branch and Congress, he was stymied.⁵⁸ But Moss did not forget the issue, or the affront.

IV. ROLE OF THE PRESS

The Cold War, the “red scare” and similar concerns continued to broaden government control over information. Kent Cooper, the executive director of the Associated Press, popularized the phrase “right

51. BRUCE LADD, *CRISIS IN CREDIBILITY* 188 (1968).

52. *Id.* at 188-89; Bruce Ladd, *50 Years After FOI Act, Celebrating Government Transparency*, THE NEWS & OBSERVER (July 3, 2016), <http://www.newsobserver.com/opinion/op-ed/article87239527.html>.

53. See SCHUDSON, *supra* note 20, at 45-46.

54. LADD, *supra* note 51, at 189.

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.* at 189-90.

to know” in his 1956 book by the same name.⁵⁹ He wrote: “American newspapers do have the constitutional right to print . . . but they cannot properly serve the people if governments suppress the news.”⁶⁰ Cooper cited a 1945 *New York Times* editorial that had referred to the “right to know” as a “good new phrase for an old freedom.”⁶¹

The American Society of Newspaper Editors (ASNE) organized a freedom of information committee in the late 1940s.⁶² The committee pressed to obtain access to government records but the levels of secrecy and the complexity of attempting to get facts from the now-bloated federal government caused one of its chairmen to say that the situation “frightened [him] very, very much, because, for the first time, [he] really realized the perils that we face in this country.”⁶³ Editors became so concerned about the denial of information to the press and the public that they commissioned Harold Cross, a leading newspaper lawyer and counsel to the *New York Herald Tribune*, to prepare a report on federal, state, and local information rights. Cross’s report was published in 1953 under the title, “The People’s Right to Know.”⁶⁴ It was funded by ASNE.⁶⁵

The Cross report confirmed press fears over the systematic denial of government information and asserted that the press and the public have an enforceable legal right to inspect government records for a lawful or proper purpose.⁶⁶ In ringing terms, Cross spelled out a new constitutional and legal principle: “Public business is the public’s business. The people have the right to know. Freedom of information is their just heritage. Without that, the citizens of a democracy have but changed their kings.”⁶⁷

The Cross report looked mainly at the state of the law as reflected in court decisions either granting or denying the right to access.⁶⁸ It also focused primarily on state and local law because under existing federal law, “in the absence of a general or specific act of Congress,” there was absolutely no enforceable right of the public or

59. HERBERT N. FOERSTEL, *FREEDOM OF INFORMATION AND THE RIGHT TO KNOW* 15 (1999).

60. KENT COOPER, *THE RIGHT TO KNOW* xii (1956).

61. *Id.* at xiii.

62. SCHUDSON, *supra* note 20, at 42.

63. FOERSTEL, *supra* note 59, at 16.

64. *Id.* at 17.

65. *Id.* at 17.

66. See HAROLD L. CROSS, *THE PEOPLE’S RIGHT TO KNOW* xiii, 49-50 (1953).

67. *Id.* at xiii.

68. See *id.* at 48, 58.

the press to access government documents.⁶⁹ The federal government was, in fact, subject to a series of statutes and regulations essentially making federal records and information the private property of each federal agency and ultimately of the White House.⁷⁰

Thus, Cross's book, which became the Bible of the press and ultimately a guide to the Congress regarding freedom of information, opened the way toward a more open government—but only in general terms.⁷¹ Cross said the First Amendment “points the way[;] [t]he function of the press is to carry the torch.”⁷² Where to carry the torch and how to secure such a public right to government information remained unclear.

Just after the publication of Cross's book, the Eisenhower Administration precipitated an incident that gave the issue of control of government information and public access to such information more national prominence and a new leader.⁷³

In 1954, the voters returned a Democratic Congress to Washington.⁷⁴ Around the same time, President Eisenhower created the Office of Strategic Information (OSI).⁷⁵ The OSI was officially established in the Department of Commerce at the request of the National Security Council.⁷⁶ It quickly became controversial.

The idea was to ask industry and the press to “voluntarily” refrain from disclosing any strategic information that might assist enemies of the United States.⁷⁷ At that time, the primary enemy was, of course, the Soviet Union. The chill of the Cold War dominated the American consciousness. OSI's new director was R. Karl Honaman, who later moved to the Department of Defense under Secretary of Defense Charles Wilson.⁷⁸

On March 29, 1955, Defense Secretary Wilson issued a directive to all government officials and defense contractors stating that, in order for an item to be cleared for publication or released to the public, it not only had to meet security requirements, but also had to make a

69. *Id.* at 197.

70. *See id.* at 23, 198-99.

71. SCHUDSON, *supra* note 20, at 42.

72. CROSS, *supra* note 66, at 132.

73. *See* Albert G. Pickerell, *Secrecy and the Access to Administrative Records*, 44 CAL. L. REV. 305, 306-08 (1956).

74. SCHUDSON, *supra* note 20, at 40.

75. FOERSTEL, *supra* note 59, at 18-19.

76. *Id.* at 19.

77. *See* Wallace Parks, *Secrecy and the Public Interest*, 26 GEO. WASH. L. REV. 23, 44-45, 62-64 (1957).

78. FOERSTEL, *supra* note 59, at 19-20.

“constructive contribution” to defense and national security.⁷⁹ Under this standard, the government would have had almost total control over all information released and, at the time, there was no possibility of court review of such decisions.⁸⁰

This new barrier of government secrecy infuriated editors, reporters, and the press generally.⁸¹ Editorials were published opposing the Eisenhower Administration’s information policy.⁸² *Time* magazine commented that “such a policy is just the thing for government officials who want to cover up their own mistakes by withholding non-constructive news.”⁸³

J.R. Wiggins of the *Washington Post* and chairman of the ASNE government information committee, said “newspapers will not join in the conspiracy with this or any other administration to withhold from the American people non-classified information.”⁸⁴ The public battle between the Eisenhower Administration and the press could not help but come to the attention of the newly-elected Democratic Congress—and to interested members like Moss.⁸⁵

One historian later noted that the battle may have precipitated the most important event on the path to the Freedom of Information Act; that event was the creation of a Special Subcommittee on Government Information in 1955, thereafter known as the “Moss Subcommittee.”⁸⁶

Some evidence suggests that Moss became interested in the denial of information to the press and public in 1955 when he met with press lawyer and author Harold Cross.⁸⁷ It was perhaps Moss’s own experience with the Civil Service Commission’s roadblock to his information requests and Cross’s eloquence that merged the strands of the issue for Moss. The controversy also came up at a moment in time when the political climate was ripe for at least an inquiry into the problem of access to government information.

79. *Id.* at 19-20.

80. See Pickerell, *supra* note 73, at 306-10.

81. FOERSTEL, *supra* note 59, at 20.

82. *Id.*

83. *Id.*

84. *Id.*

85. See *id.* at 21.

86. *Id.*

87. See *id.* at 22.

V. CREATION OF THE SPECIAL SUBCOMMITTEE ON GOVERNMENT INFORMATION

From his new position as a junior member of the Government Operations Committee, Moss saw a chance to deal with an issue that he cared about a lot and that affected many.⁸⁸ A short time after his appointment, Moss talked with William Dawson, the chairman of the Government Operations Committee, and suggested that the committee authorize a "study" to determine the extent of information withheld by the Executive Branch.⁸⁹

Moss's sense of the right of the public, as well as the prerogatives of the Congress, undoubtedly fueled his interest in freedom of information. His meetings with editors, reporters, and author Harold Cross increased his interest.⁹⁰ And he read the newspapers, as did the leadership.⁹¹ They thought that secrecy in government could be a potentially powerful political issue.⁹² Moss directed Dr. Wallace Parks, a committee counsel, to undertake a preliminary inquiry.⁹³ Parks, who later became counsel to Moss's Government Information Subcommittee, wrote a memorandum—undoubtedly with Moss's supervision—to committee chairman Dawson, indicating that there was indeed a trend toward suppression and denial of access to government information, that it was growing, and that it affected areas of government untouched by security considerations.⁹⁴ What happened next can only have been authorized by Speaker Rayburn.

In an effort to solicit support for a new subcommittee on government information and withholding, Moss and Parks, armed with their memorandum, approached House leadership through Majority Leader John McCormick of Massachusetts.⁹⁵ According to a committee staff member at the time, McCormick, Rayburn, and others in the leadership were "pushed out of shape because the Administration was withholding information from Congress. [They] wanted to get the press aroused over the issue so [that the Administration would be pressured on behalf of Congress]"⁹⁶ Moss, with his progressive

88. See LADD, *supra* note 51, at 191.

89. *Id.* at 190.

90. See FOERSTEL, *supra* note 59, at 22.

91. See *id.*; LADD, *supra* note 51, at 191.

92. See LADD, *supra* note 51, at 190.

93. See *id.*

94. *Id.*

95. See FOERSTEL, *supra* note 59, at 21.

96. *Id.* at 21-22.

attitudes and willingness to tackle big interests, clearly thought more broadly than access solely by the Congress.⁹⁷

With the support of McCormick and Rayburn, a new Special Subcommittee on Government Information was established on June 9, 1955.⁹⁸ A memorandum from Chairman Dawson—again written by Parks under Moss’s direction—noted that, “An informed public makes the difference between mob rule and democratic government. . . . I am asking your Subcommittee to make such an investigation as will verify or refute these charges.”⁹⁹

The chairman of the new and potentially powerful Special Subcommittee on Government Information might have been any one of several senior members of the House. It was, instead, the very junior representative from California, John Moss.¹⁰⁰

Why would the Democratic leadership of the new Congress place responsibility for the chairmanship of such a potentially powerful subcommittee in the hands of a second-term congressman? Only Rayburn, McCormick, and Moss know the answer to that question and they are long gone. But Moss’s early willingness to tackle big problems, demonstrated both in the California legislature and on the Post Office and Civil Service Committee, may have played a role. Leadership might have noted Moss’s intense interest in the subject and his personal drive. Otherwise, perhaps, Rayburn just liked the young congressman.

Moss’s sudden rise to a key House position may have simply been a case of the right leader appearing at the right time. One thing is certain, Moss thought there was a job to be done and he wanted the job “desperately.”¹⁰¹ Whatever the reason, when he assumed the chairmanship of the new Special Subcommittee on Government Information, Moss could not have known the true extent of the struggle that he had embarked upon, nor how long, and how difficult that battle would be.

VI. SUBSTANTIVE AND POLITICAL OPPOSITION TO FOIA

Ten years after being named chairman of the Special Subcommittee on Government Information in 1955, and eleven years after confronting the federal government’s wall of secrecy over alleged

97. See LADD, *supra* note 51, at 190.

98. See FOERSTEL, *supra* note 59, at 22; LADD, *supra* note 51, at 190.

99. See FOERSTEL, *supra* note 59, at 22.

100. See LADD, *supra* note 51, at 191.

101. See *id.*

employee disloyalty, Moss was still struggling to move a freedom of information bill out of the House of Representatives.¹⁰² He had spent most of these years in Congress immersed in a seemingly endless investigation of what he considered mostly unjustified government refusals to give up information and in an effort to write a bill that could become law.¹⁰³ In numerous hearings, he targeted “silly secrecy,” or the Government’s refusal to disclose such vital data, as: the modern uses of the bow and arrow and the amount of peanut butter consumed by United States soldiers.¹⁰⁴

Most of the subcommittee investigations, hearings, and reports resulted in confrontations with federal agencies that did not want to give his subcommittee, and the public, information from agency files.¹⁰⁵ *Every* federal agency that testified before the subcommittee opposed what was then known as the “federal records law.”¹⁰⁶

Moss believed that he was fighting a denial of a basic right.¹⁰⁷ But that right was not, and still is not, spelled out in the Constitution. The right to obtain information can only be inferred from the right to speak freely under the First Amendment to the Constitution. Moss wondered—perhaps doubted—if Congress would ever guarantee what most people incorrectly thought was already a part of the right to free speech under the First Amendment.¹⁰⁸

In 1965, as Moss opened hearings on what would be the final, dramatic struggle over the public information law, he noted that there now was a “legal void” into which executive agencies had moved because of Congress’s failure to guarantee a fundamental right.¹⁰⁹

102. *See id.* at 204, 206.

103. *See* FOERSTEL, *supra* note 59, at 25; David R. Davies, *An Industry in Transition: Major Trends in American Daily Newspapers, 1945-1965*, ch. 8 (1997) (unpublished Ph.D. dissertation, University of Alabama) (on file with author), <http://ocean.otr.usm.edu/~w304644/ch8.html>.

104. *See* LADD, *supra* note 51, at 188-89; Nate Jones, *John Moss’s Decade-Long Fight For FOIA, as Chronicled in “People’s Warrior” by Michael Lemov*, UNREDACTED: NAT’L SECURITY ARCHIVE BLOG (Oct. 1, 2011), <https://nsarchive.wordpress.com/2011/10/01/4230/> (referencing LEMOV, *supra* note 21).

105. *See* C.J. Ciamarella, *The Freedom of Information Act—And the Hero Who Pioneered It*, PAC. STANDARD (June 29, 2016), <https://psmag.com/news/the-freedom-of-information-act-and-the-hero-who-pioneered-it>.

106. *See Federal Public Records Law: Hearing on H.R. 5012 Before the Subcomm. on Foreign Operations and Gov’t Info. of the H. Comm. on Gov’t Operations*, 89th Cong. 1 *passim* (1965) [hereinafter *House Hearing*] (statement of Rep. John E. Moss, Chairman, H. Subcomm. on Foreign Operations and Gov’t Info); LADD, *supra* note 51, at 204 (“In the past, every executive agency testifying on the legislation had opposed it”).

107. *See House Hearing*, *supra* note 106, at 2.

108. *See id.*

109. *Id.*

He also recognized that the issue touched a very sensitive nerve of the executive branch, especially with the president. President Lyndon Johnson did not lean favorably towards increased access to government information.¹¹⁰ The respected *New York Times* columnist Arthur Krock described Johnson's attitude as "tight official lip."¹¹¹ Johnson not only distrusted the press but, "was convinced that the press hated him and wanted to bring him down."¹¹²

Moss, responding to such concerns, said that, "no one supporting the legislation would want to throw open Government files which would expose national defense plans to hostile eyes."¹¹³ But at the same time, the government should not "impose the iron hand of censorship on routine Government information."¹¹⁴ Between these extremes, Moss suggested, there might be an opening for compromise, one which had thus far eluded Congress and his subcommittee.¹¹⁵ Moss knew that, if the bill ever made it to the White House, he did not have the votes to override a presidential veto.¹¹⁶

The final round of hearings on the bill was courteously conducted. Beneath the calm lurked a major confrontation between the President and Congress. A key witness for the executive position came from the Department of Justice, Assistant Attorney General Norbert A. Schlei, testifying on behalf of the White House as well as the Justice Department.¹¹⁷ Schlei stated that the proposed law was unconstitutional because it impinged on the power of the president to keep information secret when release was "not in accord with his judgment of what was in the public interest."¹¹⁸

Because of the "scope and complexity of modern government," Schlei said, "there are, literally, an infinite number of situations wherein information in the hands of government must be afforded varying degrees of protection against public disclosure. The possibilities

110. See 112 CONG. REC. 13,641 (daily ed. June 20, 1966) (statement of Rep. John E. Moss), <https://www.gpo.gov/fdsys/pkg/GPO-CRECB-1966-pt10/pdf/GPO-CRECB-1966-pt10-8-2.pdf>.

111. Arthur Krock, *How Johnson Keeps Tight Official Lip*, DES MOINES REG., Mar. 9, 1965, at 6.

112. ROBERT DALLEK, *FLAWED GIANT: LYNDON JOHNSON AND HIS TIMES, 1961-1973*, at 368 (1998).

113. *House Hearing*, *supra* note 106, at 2.

114. *Id.*

115. *See id.*

116. See George Kennedy, *How Americans got their right to know*, JOHN E. MOSS FOUND. (1996), <http://www.johnemossfoundation.org/foi/kennedy.htm>.

117. *House Hearing*, *supra* note 106, at 3 (statement of Norbert A. Schlei, Assistant Att'y Gen. of the United States).

118. *Id.* at 5-6; see LEMOV, *supra* note 21, at 55.

of injury to private and public interests through ill-considered publication are limitless.”¹¹⁹ Highly sensitive FBI reports containing the names of undercover agents and informers, for example, were protected only by the president’s claimed right of “executive privilege” and ancient legal precedent. The subject was just too complicated, too changing, to be covered by any system of legal rules.¹²⁰

Schlei predicted that Moss’s bill would destroy the delicate balance between Congress and the Executive Branch, and that the legislation would eliminate “any application of judgment to questions of disclosure or nondisclosure”¹²¹ It would substitute a single legal rule that would automatically determine the availability, to any person, of all records in the possession of federal agencies—except Congress and the courts, which were excluded from Moss’s bill. That approach, according to the Justice Department representative, was impossible and could only be fatal.¹²² There was no way of eliminating judgment from the process used to resolve the problem. “The problem is too vast, too protean to yield to any such solution.”¹²³

Schlei’s testimony ended with an apparent veto threat.¹²⁴ Moss’s bill, Schlei said, impinged on the authority of the president to withhold documents where he determined that secrecy is in the public interest.¹²⁵ Since the bill would contravene the Separation of Powers Doctrine, it would be unconstitutional.¹²⁶ Neither the Department of Justice, nor its spokesman, discussed the scope of the claimed executive privilege right—which is not explicitly referred to in the Constitution.¹²⁷ Nor did the Justice Department indicate how the term “in the public interest” could be defined.

Moss challenged the witness and, through him, the president. He said the problem they were dealing with would not go away anytime soon.¹²⁸ He recalled that the House and the Senate had been working on a freedom of information law for many years.¹²⁹ The Senate had recently passed a bill identical to Moss’s House proposal and written

119. *House Hearing*, *supra* note 106, at 5 (statement of Norbert A. Schlei, Assistant Att’y Gen. of the United States).

120. *Id.* at 6-7, 16.

121. *Id.* at 5.

122. *Id.*

123. *Id.*

124. *See id.* at 8.

125. *See id.* at 6.

126. *See id.*

127. *See id.* at 11.

128. *See id.* at 17.

129. *See id.*

by Moss's staff. Moss asserted, "[W]e have not been impetuous here. Ten years in moving to a piece of legislation is rather a long period of time. . . . [T]his step can be taken now and . . . it will succeed" ¹³⁰

One of Moss's strongest congressional backers was a freshman Republican congressman from Illinois named Donald Rumsfeld. Rumsfeld, years later a secretary of defense with a very different perspective on information disclosure, not only supported Moss at the hearings, he also maintained his support with speeches on the House floor. ¹³¹ According to Bruce Ladd, a member of his staff, Rumsfeld convinced Minority Leader Gerald Ford and the House Republican Policy Committee to back the bill. ¹³² They attacked the Johnson Administration for not supporting it, although they had been strangely silent on the issue during the Eisenhower Administration. ¹³³ The political stakes over the proposed Freedom of Information Act were growing. ¹³⁴

VII. TACTICS: THE LONG INVESTIGATION

The Special Subcommittee on Government Information had been created in 1955 with little public notice. ¹³⁵ The issue of freedom of information versus government secrecy had not yet gained public traction ten years earlier.

The press, however, had long been frustrated by its inability to get government documents. As far back as the 1940s, the ASNE established a Freedom of Information Committee. Initially chaired by James Pope, editor of the *Louisville Journal*, it commissioned the landmark study by Harold Cross, the *Herald Tribune* counsel, which was published in 1953. ¹³⁶ Pope said, in a forward to the Cross book: "[W]e had only the foggiest idea of whence sprang the blossoming Washington legend that agency and department heads enjoyed a sort of personal ownership of news about their units. We knew it was all wrong, but we didn't know how to start the battle for reformation." ¹³⁷

Cross had opened his report with ringing statements of conviction: "Citizens of a self-governing society must have the legal right to examine and investigate the conduct of its affairs, subject only to

130. *Id.*

131. See LADD, *supra* note 51, at 208, 210.

132. See *id.* at 208-09.

133. See *id.* at 207-08.

134. See *id.* at 208.

135. See *House Hearing, supra* note 106, at 124.

136. See LADD, *supra* note 51, at 192-93.

137. CROSS, *supra* note 66, at viii.

those limitations imposed by the most urgent necessity. To that end they must have the right to simple, speedy enforcement”¹³⁸ Cross cited Patrick Henry’s statement at the dawn of the Republic: “To cover with the veil of secrecy the common routine of business is an abomination in the eyes of every intelligent man.”¹³⁹

All that was missing was a workable plan of action. Even when Moss and his special subcommittee got started in November 1955, the press did not focus much attention on the early hearings. As *Congressional Quarterly* reported, representatives of the press were asked to testify first before the subcommittee.¹⁴⁰ Russell Wiggins of the *Washington Post* told the subcommittee that newspaper editors were disturbed by the withholding of information in many areas of government.¹⁴¹ “We think it is due to the size of Government . . . and . . . to declining faith in the wisdom of the people”¹⁴² James Reston, chief of the *New York Times* Washington bureau asserted that withholding information was part of a growing tendency by government officials to “manage” news that might harm their image.¹⁴³ It was a barely concealed jab at Johnson.

Philip Young, chairman of the Civil Service Commission, countered that the commission, not just the president, had inherent power under the Constitution to withhold information from Congress, the press, and the public.¹⁴⁴ Officials of several government agencies testified that, if transactions or even conferences with private businesses were made public, it would be difficult to obtain frank disclosures and recommendations.¹⁴⁵

Less than a year after its creation, the Moss subcommittee forwarded its first “interim” report.¹⁴⁶ The idea was to energize members of Congress by telling them what the Executive Branch was doing. The staff report noted that the heads of departments often failed to

138. *Id.* at xiii.

139. *Id.* (quoting THE DEBATES IN THE SEVERAL STATE CONVENTIONS OF THE ADOPTION OF THE FEDERAL CONSTITUTION VOL. III, at 170 (Jonathan Elliot ed., 2d ed. 1827), <http://oll.libertyfund.org/titles/elliott-the-debates-in-the-several-state-conventions-vol-3> (follow “Facsimile PDF” hyperlink under “Available in the following formats”)).

140. See CONG. QUARTERLY SERV., CONGRESS AND THE NATION 1945-1964, at 1738 (1965) [hereinafter CONG. QUARTERLY SERV., 1956].

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. See Availability of Information from Fed. Departments and Agencies, H.R. REP. No. 84-2947, at 91 (1956) [hereinafter House Report 84-2947].

furnish information even to Congress, based on a “naked claim of privilege.”¹⁴⁷ At that time, the staff was headed by two newspapermen, Sam Archibald and Jack Matteson.¹⁴⁸ Their report argued that “Judicial precedent recognizes the power of Congress to grant control over official government information . . . If Congress can grant control . . . it follows that it can also regulate the release of such information”¹⁴⁹

The Department of Justice submitted a 102-page rebuttal.¹⁵⁰ It is hard to conceive of a federal agency asserting any similar definition of unbridled executive power today: “Congress cannot under the Constitution compel heads of departments to make public what the president desires to keep a secret in the public interest. The president alone is the judge of that interest and is accountable only to his country . . . and to his conscience.”¹⁵¹

As the dispute grew more intense, Moss suggested that if the Department of Justice was right, “Congress might as well fold up its tent and go home.”¹⁵²

Defense Department officials were prominent witnesses before the Moss subcommittee.¹⁵³ With the Vietnam War expanding and the Cold War still raging, national security fears were a major part of the information debate. Assistant Secretary Robert Ross did offer a minor concession.¹⁵⁴ He said that in the department’s recently issued directive, information must make a “constructive contribution to the defense effort or it could not be released.”¹⁵⁵ That said, he added that it did *not* apply to press inquiries.¹⁵⁶ He did not mention inquires by Congress or members of the public.

147. *See id.* at 89.

148. *See* LADD, *supra* note 51, at 192 (noting that Congressman Moss, in his capacity “as chairman of the new Subcommittee on Government Information[.]” appointed Samuel J. Archibald as staff director); Memorandum from John S. Warner, Legislative Counsel of the Central Intelligence Agency, to the Office of Legislative Counsel (May 6, 1964) (on file with Central Intelligence Agency Library), <https://www.cia.gov/library/readingroom/docs/CIA-RDP66B00403R000200220042-8.pdf> (noting Jack Matteson’s involvement with Congressman Moss’s Subcommittee).

149. CONG. QUARTERLY SERV., 1956, *supra* note 140 (quoting the 26-page staff report of the Subcommittee “presenting legal analysis of the right of Congress to obtain information from the Executive Branch”).

150. *See id.*

151. *Id.* (quoting the 102-page rebuttal brief submitted by the Justice Department to the Subcommittee).

152. *Id.*

153. *See id.*

154. *See id.* at 1738-39.

155. *Id.*

156. *See id.*

Another witness, Trevor Gardner, former assistant secretary of the Air Force, had resigned a few months prior, in protest against Defense Department information policies.¹⁵⁷ He stunned the subcommittee, testifying that at least half of all currently classified defense department documents were *not* properly secret.¹⁵⁸ Gardner gave an example of excessive secrecy by noting that a leading nuclear physicist—Robert Oppenheimer—had been denied security clearance by the Atomic Energy Commission in 1954.¹⁵⁹ Inconveniently, Oppenheimer kept coming up with valuable, top secret nuclear ideas.¹⁶⁰ Gardner thought keeping Oppenheimer uninformed was absurd.¹⁶¹

In July 1956, the Moss subcommittee issued its first formal report, which summed up its initial year of work.¹⁶² Despite the opposition of every federal agency that testified, the report concluded:

It, therefore, is now incumbent upon Congress to bring order out of the present chaos. Congress should establish a uniform and universal rule on information practices. This rule should authorize and require full disclosure of information, except for specific exceptions defined by statute or restricted delegation of authority to withhold for an assigned reason within the scope of the authority delegated. The withholding should be subject to judicial review and the burden of proof should be on the official who withholds information.¹⁶³

Republican Congressman Claire Hoffman filed vigorous dissenting views to the report, asserting that the information powers of the president—Dwight Eisenhower—could not be lawfully limited.¹⁶⁴

But the brief statement in the report by Moss and a nearly unanimous subcommittee, neatly summarized the heart of what was to become the Freedom of Information Act, an act that could not pass Congress for another ten long years. A Moss-Hennings amendment

157. *See id.* at 1739.

158. *See id.*

159. *See id.*

160. *See id.*

161. *See id.*

162. *See id.*

163. House Report 84-2947, *supra* note 146, at 93.

164. *Id.* at 96-99. The report was unanimous; however, Ranking Member Clare Hoffman (R-Michigan) filed additional views which were critical of possible legislation regarding public and congressional access to federal records. *See id.* Hoffman stated “the right of the citizen, of the Congress, to be advised of the information possessed by the executive departments is subject to several limitations, as is the right to a free press, to free speech, to freedom of petition, and every other right guaranteed by the Constitution. There must be a reason for the exercise of the right. . . . [The right] is limited by the fact that the Constitution grants to the President certain authority, imposes upon him certain duties. Acting in performance of those duties, within the scope of the authority granted, he is under no obligation to explain or justify his acts, either to individuals or to the Congress.” *Id.* at 96.

intended to limit the existing federal Housekeeping Law, giving ownership of records to executive agencies, did not change other federal laws, which were used to deny information to the public.¹⁶⁵ Moss, Hennings, and their allies had failed to bargain on the tenacity of the federal bureaucracy—which had noted the reluctance voiced in President Eisenhower’s signing statement on the Moss-Hennings amendment.¹⁶⁶ The Housekeeping amendment was ignored. Federal agencies continued to cite other provisions of law authorizing them to withhold information, either because it was not in the “public interest,” the person claiming the information did not have a legitimate right to get it, or the information might impair national security.¹⁶⁷ Rarely did President Eisenhower have to make a formal claim of executive privilege. That authority was delegated down the line to relatively low-level bureaucrats, who routinely blocked access to the public, the press, and Congress.

Another report, issued in 1966 by the full Committee on Government Operations in support of Moss’s proposed Freedom of Information Act, claimed that improper denials of information requests had occurred again and again for more than ten years through the administrations of both political parties.¹⁶⁸ Case after case of withholding of information was documented. There was no adequate remedy.¹⁶⁹

The 1966 report, approved by the full Government Operations Committee, noted many instances of questionable agency denials:

—The National Science Foundation decided it would not be in the “public interest” to disclose competing cost estimates submitted by bidders for the award of a multi-million dollar deep sea study;

—The Department of the Navy ruled that telephone directories fell within the category of information relating to “internal management” of the Navy and could not be released;

—The Postmaster General ruled that the public was not “directly concerned” in knowing the names and salaries of postal employees;

—Federal agencies refused to disclose the opinions of dissenting members, even where a vote on an issue had been taken; and

—The Board of Engineers for Rivers and Harbors, which ruled on billions of dollars of federal construction projects, said that “good

165. See *House Hearing*, *supra* note 106, at 227.

166. Clarifying and Protecting the Right of the Public to Information, H.R. REP. No. 89-1497, at 1, 4 (1966) [hereinafter *House Report 1497*].

167. See *House Hearing*, *supra* note 106, at 4-5.

168. See *House Report 1497*, *supra* note 166, at 5.

169. See *id.* at 2, 5-6.

cause” had not been shown to disclose the minutes of its meetings and the votes of its members on awarding contracts.¹⁷⁰

The committee reported that requirements for publication were so hedged with restrictions that twenty-four separate terms were used by federal agencies to deny information.¹⁷¹ These included “top secret,” “secret,” “confidential,” “official use only,” “non-public,” “individual company data,” and a seemingly endless list of other words and phrases.¹⁷²

VIII. OPPOSITION INCREASES

Proponents of a federal information law had other hurdles to overcome. There were efforts to deny the Moss subcommittee funding or completely eliminate it.¹⁷³ The ASNE committee wrote to the Chairman of the Government Operations Committee, William Dawson, that “the importance of the Committee’s work cannot be exaggerated. . . . We who have seen the danger and the need are greatly heartened, and we would like to see the Committee’s funds, its powers and its influence vastly expanded.”¹⁷⁴

The effort to de-fund the Moss committee did not succeed, but Moss faced other attempts to take away his committee powers. In 1965, near the end of his long investigation, Moss and his staff wrote and introduced a public information bill—identical to a Senate bill offered by Senator Edward Long of Missouri (after Senator Hennings’ death in 1960)—which would enact a freedom of information law similar to the one outlined in the subcommittee’s first report in 1955.¹⁷⁵ But Moss’s progress was halted when, suddenly, he was unable to muster a quorum of subcommittee members necessary to vote on the bill.

When interviewed by the *Albuquerque Journal* about what was happening to the Moss bill, subcommittee member Donald Rumsfeld suggested that President Johnson’s opposition was the problem.¹⁷⁶ According to the *Albuquerque Journal* reporter, when asked why the

170. *Id.* at 5-6.

171. *Id.* at 6.

172. *Id.*

173. LEMOV, *supra* note 21, at 60.

174. Letter from James D. Pope, Exec. Editor, Louisville Courier Journal, to William L. Dawson, Congressman, U.S. House of Representatives, Chairman, Committee on Gov’t Operations (Dec. 19, 1956) (on file with the National Archives).

175. See LADD, *supra* note 51, at 203-04, 208.

176. Paul R. Wieck, ‘Chill’ Threatens Press Bill, ALBUQUERQUE J., July 11, 1965, at A5.

subcommittee could not get members to meet and vote on the bill, Rumsfeld answered, “We always managed to meet before.”¹⁷⁷

Newspaper columnists Robert Alan and Paul Scott, writing in the *Tulsa World*, reported that the Johnson Administration was pushing to rewrite the bill to give the heads of all departments and agencies authority to bar publication of official information.¹⁷⁸ An *Associated Press* story said that the president had passed the word to jettison the bill.¹⁷⁹ Moss’s actions in continuing to force a quorum and in replacing the two absent subcommittee members showed he was determined to push the bill through, despite the apparent opposition of a president of his own party and, perhaps, of the seemingly conflicted House leadership.

The *Washington Post* editorialized in 1965 that:

Congress should promptly approve the Federal public records law now reintroduced by Senator Edward V. Long of Missouri and Representative John Moss of California. . . . The principles it involves have been extensively debated for the last decade. . . . Its great contribution to the law is its express acknowledgement that . . . citizens may resort to the courts to compel disclosure where withholding violates the [law].¹⁸⁰

Columnist Drew Pearson used his syndicated column, “Washington Merry-Go-Round,” to attack government secrecy.¹⁸¹ Pearson wrote that it took a lengthy barrage of correspondence from Representative John Moss, “crusader for freedom of information,” to get the Defense Department to reveal the facts about the use of plush private airplanes by defense department officials, even to the Congress.¹⁸²

Before his confrontations with the Johnson Administration, Moss had a positive relationship with President John Kennedy on the issue.¹⁸³ That had led to charges that Moss was being “soft” on an administration of his own party.¹⁸⁴ In Moss’s defense, Bruce Ladd, who worked for Rumsfeld at the time, said that Kennedy was a supporter of the principle of freedom of information and that Moss was trying to

177. *Id.*

178. Robert S. Allen & Paul Scott, *More Press Controls*, *TULSA WORLD*, July 31, 1965, at 6.

179. LADD, *supra* note 51, at 208.

180. *Public Records Law*, *WASH. POST, TIMES HERALD*, Mar. 1, 1965, at A16.

181. See Peter Hannaford, *Introduction to DREW PEARSON, WASHINGTON MERRY-GO-ROUND, THE DREW PEARSON DIARIES, 1960-1969*, at xvii, xix (Peter Hannaford ed., 2015).

182. Drew Pearson, *The Washington Merry-Go-Round Release Sunday*, May 28, 1961, <http://auislandora.wrlc.org/islandora/object/pearson%3A22500>.

183. See LADD, *supra* note 51, at 199, 205-06.

184. See *id.* at 201.

work within the administration to change the attitude of federal agencies.¹⁸⁵ Sigma Delta Chi, the national journalism society, nonetheless charged that it was a “gentle” Moss who chided the Democratic bureaucrats over secrecy, instead of the old fire-eating Moss of 1955 to 1960, who put scores of Republican bureaucrats on the witness stand and hammered them relentlessly and publicly.¹⁸⁶

Ladd, Rumsfeld’s staff member, wrote that the Moss critics had overlooked the subcommittee’s exhaustive hearings which had defined the secrecy problem. He thought Moss had moved to a less colorful phase of his investigation and was attempting a legislative remedy. Ladd said that Moss was able to establish a working relationship with the Kennedy administration, thus permitting “quiet persuasion” to sometimes take the place of public outcries.¹⁸⁷

Kennedy did initiate one important change in government information policy. He gave Moss a letter—at Moss’s request—agreeing to assert executive privilege only personally and not delegate the power to lower-level officials of his administration.¹⁸⁸ President Richard Nixon later furnished a similar pledge.¹⁸⁹

Republican support for a freedom of information bill, fueled by Rumsfeld and then Minority Leader Gerald Ford, was new. It was something that had been decidedly absent during the Eisenhower administration. Growing press coverage made the issue better known to the public.¹⁹⁰ The tide gradually began to turn. Moss waited, looking for a way to overcome the hesitation—or opposition—of the House leadership.¹⁹¹ He decided to ask the Senate to move first.¹⁹²

IX. THE SENATE END RUN; EMANUEL CELLER’S GIFT

Moss’s decision to temporarily cede the leadership, of the bill he had written and an issue he had pursued for ten years, was important.

185. See *id.* at 199-201; Barry Schrader, *Bruce Ladd*, NORTHERN STAR, (Jan. 5, 2011), http://northernstar.info/alumni/hall_of_fame/bruce-ladd/article_bbd702ae-1911-11e0-ae70-0017a4a78c22.html.

186. LADD, *supra* note 51, at 201.

187. *Id.*

188. Letter from John F. Kennedy, President, U.S., to John E. Moss, Congressman, U.S. House of Representatives, Chairman, Special Gov’t Info. Subcommittee of the Committee on Gov’t Operations (Mar. 7, 1962) (on file with the John E. Moss Foundation Website), http://www.johnemossfoundation.org/foi/from_jfk-orig.htm.

189. Presidential Statement About Executive Privilege, 76 PUB. PAPERS 184-86 (Mar. 12, 1973).

190. See LADD, *supra* note 51, at 203.

191. See *id.* at 203-04.

192. See *id.*

With the backing of Democrat Senator Edward Long, Republican Senator Everett Dirksen and—surprisingly—even the communist-hunting Senator Joseph McCarthy, the Senate passed a bill identical to the Moss bill in October 1965.¹⁹³ The House, however, still refused to act on its own committee bill. So the Senate bill was sent over to the House where it was to be assigned to a committee for consideration.¹⁹⁴

In a stunning defeat for information advocates, it was not referred to Moss's subcommittee. It was, instead, sent by Speaker John McCormack to the House Judiciary Committee.¹⁹⁵ And there it languished.¹⁹⁶

When the Senate passed the Long bill and sent it to the House, *Editor and Publisher*, the newspaper industry journal, observed that House members were too involved in “mending fences” to offer the public hope that anything could be accomplished to get the information bill out of the House Judiciary Committee.¹⁹⁷ *Editor and Publisher* added, “It might be worth a try if enough newspapers were to build a bonfire under that august body.”¹⁹⁸

It was Moss who built the bonfire. He arranged a meeting with the chairman of the House Judiciary Committee, the dignified Emanuel Celler, of Brooklyn.¹⁹⁹ Celler was seventy-six years old when Moss met with him in 1965.²⁰⁰ He had been elected to Congress from Brooklyn's Tenth Congressional District in 1922 when he was in his mid-thirties.²⁰¹

One would like to think that when John Moss came to see the powerful committee chairman, Celler remembered his own economic struggles as a young man, which were surprisingly similar to Moss's. The position of the Democratic leadership—and President Johnson—on the Freedom of Information bill remained unclear.

Celler helped Moss. He turned jurisdiction of the Freedom of Information bill over to Moss's subcommittee.²⁰²

193. 112 CONG. REC. 13007 (1966); see LADD, *supra* note 51, at 208. See generally S. 1160, 89th Cong. (1965).

194. LADD, *supra* note 51, at 208.

195. See *id.* at 203, 205.

196. See *id.*

197. *Id.* at 203.

198. *Id.*

199. *Id.* at 203-04.

200. See Celler, Emanuel, BIOGRAPHICAL DIRECTORY OF THE U.S. CONG., <http://bioguide.congress.gov/scripts/biodisplay.pl?index=C000264> (last visited Oct. 18, 2017).

201. See *id.*

202. See LADD, *supra* note 51, at 203-04.

Celler's gift to Moss is almost unheard of in Congress. Ordinarily, chairmen of major committees do not turn over significant legislation to a junior member, especially one who is only the chair of a subcommittee. But somehow, Moss had persuaded Celler to give him the bill.²⁰³ Celler may have felt that Moss's ten-year effort to get a freedom of information law through the Congress should not go unrecognized.²⁰⁴ Perhaps Celler wanted to get rid of a hot potato which might threaten his relations with the White House. Whatever the reason, Celler's action proved a momentous one.

Moss constructed the bonfire that newspapers wanted to build with help from Celler, Rumsfeld, and the House Republicans.²⁰⁵ With jurisdiction, and at least a grudging yellow light from the House leadership, the Government Operations Committee favorably reported out the Moss information bill in May 1966.²⁰⁶

The fact that Moss had been willing to wait for the Senate to act and to take up the Senate bill—not a different House bill—was a key decision. It meant that there would not have to be a possibly divisive conference committee meeting between the two bodies. The bills were the same. The House bill, which was identical to the Senate bill, was reported to the full body and unanimously passed the House on June 20, 1966.²⁰⁷ Having passed both the House and Senate, it was sent to the White House for the president's signature.²⁰⁸

X. PRESIDENTIAL VETO THREAT

The stage was now set for either the final chapter or yet another defeat for the unborn Freedom of Information Act. The bill was delivered on June 26, 1966, to President Lyndon Johnson at his Texas ranch in Johnson City on the Pedernales River.²⁰⁹ There it sat as the hot summer days dragged by.

Neither Moss nor Senator Edward Long knew whether Johnson would sign the bill.²¹⁰ The testimony of the Department of Justice in

203. *See id.*

204. *See generally id.* at 207.

205. *Id.* at 203, 210.

206. *See id.* at 204, 210.

207. *See id.* at 210.

208. *Id.*

209. *Id.* at 210; Thomas Blanton, *Freedom of Information at 40*, NAT'L SECURITY ARCHIVE (July 4, 2006), <http://nsarchive2.gwu.edu//NSAEPP/NSAEPP194/index.htm>.

210. LADD, *supra* note 51, at 210.

1965 had opined the bill was unconstitutional.²¹¹ Speaker McCormack had let Moss know that the president was displeased with the information bill and that the Executive Branch did not like it.²¹² Moss had moved forward against the wishes of the president.²¹³

In June 1966, the press reported that things were looking bleak for the Freedom of Information Act.²¹⁴ In an effort to reach an agreement with the White House that would get the bill signed by Johnson, Moss had met with Attorney General Nicholas Katzenbach.²¹⁵ He had offered a concession. Moss suggested the Department give the House some language that they would like to see in the House committee report.²¹⁶ Such language, he added, might suggest a more acceptable interpretation of the parts of the legislation that the White House opposed.²¹⁷ While offering to accept language in the House report, Moss stood his ground on the terms of the bill itself: “I want this bill to be passed. If counsel and the Justice Department can work out reasonable report language and my committee goes along with it, I’ll support it—with the bill as written.”²¹⁸

Moss’s staff and Justice Department lawyers jointly wrote a House report.²¹⁹ It was approved by the committee and released.²²⁰ It was somewhat different than the text of the legislation. The House Report suggested that Executive Branch officials would have more discretion in determining whether authorization existed for them to apply some of the bill’s exemptions, in order to deny information requests.²²¹ Moss went along with the jointly written report, although some referred to it as a “sellout.”²²² Benny Kass, Moss’s committee counsel, later said, “We believed the clear language of the law would override any negative comments in the House report. If the statute is

211. See *House Hearing*, *supra* note 106, at 6-7 (statement of Norbert A. Schlei, Assistant Att’y Gen., Department of Justice).

212. LADD, *supra* note 51, at 205-06.

213. *Id.*

214. See, e.g., *People’s Right to Know at Stake*, L.A. TIMES, June 17, 1966, at B4 (indicating that, “Although [the Freedom of Information Act’s] passage is deemed a certainty, its fate at the hands of President Johnson remains in doubt.”).

215. LEMOV, *supra* note 21, at 66.

216. See LADD, *supra* note 51, at 207.

217. See *id.*; see also LEMOV, *supra* note 21, at 66.

218. LEMOV, *supra* note 21, at 66 (quoting *Kass Interview* at 11).

219. *Id.*

220. *Id.*

221. *Id.*

222. *Id.*

clear, you don't look to the legislative history."²²³ More importantly, it was the price of getting a bill.²²⁴ Moss and the bill's supporters knew they did not have the votes to override a presidential veto.²²⁵

In summary, the primary objections to the FOIA bill raised by Executive Branch agencies (including the Department of Justice, the Department of Defense, and the Civil Service Commission), incorporated the views of the White House. They included major concerns about disclosure of:

1. information which could damage national defense or foreign policy interests of the U.S.;
2. inter-agency or intra-agency deliberations which might inhibit government decision-making;
3. personal files of individuals which should be kept private;
4. information which could impair law enforcement actions of federal agencies, including the names of FBI informants;
5. trade secrets and other traditionally confidential business information; and
6. any other information which the president or his deputies deemed necessary to kept secret because such action was "in the public interest."²²⁶

With significant narrowing limitations, particularly incorporating judicial review of agency denials of information requests and a shift of the burden of proof to the government to defend its denials of information requests, most of these executive branch objections were incorporated in some form into the final FOIA bill.²²⁷

Moss and his allies now waited. The bill was on Johnson's desk in Texas. Moss was not sure whether his agreement with the Department of Justice, which resulted in the House report language, would lead to a presidential signature.²²⁸ Moss had also explained the bill to the

223. *Id.* (quoting *Kass Interview* at 12); see also 2 *Executive Privilege, Secrecy in Government, Freedom of Information: Hearings on S. 858, S. Con. Res. 30, S.J. Res. 72, S. 1106, S. 1142, S. 1520, S. 1923, and S. 2073 Before the Subcomm. on Intergovernmental Relations of the S. Comm. on Government Operations and the Subcomm. on Separation of Powers and Administrative Practice and Procedure of the S. Comm. on the Judiciary*, 93d Cong. 126 (1973) [hereinafter *Senate Hearing on Freedom of Information*] (testimony of Benny L. Kass, attorney at law) (Kass testified "I don't think it was a sellout but in any event it was really the price of getting the bill. It was my legal advice to both the chairman of this committee and the chairman, Congressman Moss, that the legislative history only interprets and does not vitiate in any way the legislation and that the legislation was strong and was there.").

224. *Senate Hearing on Freedom of Information*, *supra* note 223.

225. LEMOV, *supra* note 21, at 66.

226. See 5 U.S.C. § 552 (b) (1)–(9) (West 2007 & Supp. 2017) (amended 2016).

227. See *id.*

228. LEMOV, *supra* note 21, at 66.

president during at least two meetings at the White House. Whether his explanations had been convincing remained unclear.

Rather than recessing for the July 4 holiday, Congress adjourned that year.²²⁹ The adjournment was significant. Under the Constitution, if Congress is in adjournment and the president fails to sign legislation delivered to him within ten days, the bill is “pocket vetoed.”²³⁰ No Congressional vote to override is possible. Thus, if Johnson did not sign the bill by midnight July 4, 1966, it would be dead.²³¹ The entire process would have to be repeated again, perhaps in some future Congress.

Bill Moyers, Lyndon Johnson’s press secretary at the time, had initially been skeptical of the need for a Freedom of Information Act and had sided with all federal agencies in opposition to the bill.²³² But over time, noting broad press support and growing congressional support for the legislation, Moyers changed his position.²³³ By July 1966, he had become a supporter.

Moss told his staff to talk to the press.²³⁴ He called newspaper editors all over the country regarding the proposed law.²³⁵

XI. FOIA BECOMES LAW

On July 4, the last possible day, it appeared that Johnson would not sign the bill because of his objections to its impact on the powers of the presidency. Pressure from the press and Congress was intense.²³⁶ The issue had become political. The Republican Policy Committee had announced support for the legislation. The mid-term congressional elections were approaching in the fall. The president was focused on problems of foreign policy, mostly the growing Viet-

229. *Id.* at 67.

230. *Pocket Veto*, 4 THE ENCYCLOPEDIA OF THE UNITED STATES CONGRESS (Donald C. Bacon et al. eds., 1995).

231. See Telegram from Robert C. Notson, Exec. Editor, The Oregonian, and President, American Society Newspaper Editors, to Bill Moyers, Press Secretary of President Lyndon B. Johnson (July 2, 1966) [hereinafter Telegram to Moyers] (on file with the National Security Archive), <https://nsarchive2.gwu.edu/NSAEBB/NSAEBB194/Document%2010.pdf>.

232. LEMOV, *supra* note 21, at 67.

233. See *id.*; see also, e.g., Telegram to Moyers, *supra* note 231.

234. LEMOV, *supra* note 21, at 67; see also Bill Moyers, *Bill Moyers on the Freedom of Information Act*, PBS (Apr.5, 2002), <http://www.pbs.org/now/commentary/moyers4.html> (“only some last-minute calls to LBJ from a handful of newspaper editors overcame the President’s reluctance . . .”).

235. LEMOV, *supra* note 21, at 67; see also Bill Moyers, *Bill Moyers on the Freedom of Information Act*, PBS (Apr.5, 2002), <http://www.pbs.org/now/commentary/moyers4.html>.

236. See Moyers, *supra* note 235.

nam conflict.²³⁷ Domestic issues were no longer Johnson's priority. At the last minute, Moyers went to Johnson's office and recommended that he sign the bill. Johnson agreed.²³⁸

At the signing, Johnson issued a statement alluding to his deep sense of pride that the United States is an open society in which the people's right to know is cherished and guarded.²³⁹ But Moyers, his press secretary at the time, later wrote about what had happened behind the closed doors. According to Moyers:

LBJ had to be dragged kicking and screaming to the signing ceremony. [Johnson] hated . . . of journalists rummaging in government closets; hated them challenging the official view of reality. He dug in his heels and even threatened to pocket veto the bill after it reached the White House. Only the courage and political skill of a Congressman named John Moss got the bill passed at all, and that was after a twelve-year battle against his elders in Congress who blinked every time the sun shined in the dark corridors of power. They managed to cripple the bill Moss had drafted. And even then, only some last-minute calls to LBJ from a handful of newspaper editors overcame the President's reluctance; he signed . . . [the f—ing thing] as he called it . . . and then went out to claim credit for it.²⁴⁰

So the Freedom of Information Act became law.

The concerns of Moyers, that the bill had been "crippled," and of others, that Moss had sold out, did not prove to be correct. Over the years, the courts have generally adhered to the broad principle of disclosure enunciated in the bill and have been critical of agencies attempting to withhold information.²⁴¹ The exception has been in cases involving national security. It is primarily in that area, or where there is a presidential claim of executive privilege, that the law has failed to increase government information to the public.²⁴² Executive branch delays in furnishing documents and the cost of persons and organiza-

237. See, e.g., Kent Germany, *Lyndon B. Johnson: Foreign Affairs*, MILLER CTR., <https://millercenter.org/president/lbjohnson/foreign-affairs> (last visited Nov. 19, 2017) (explaining President's Johnson's focus on U.S. foreign affairs, with the Vietnam conflict taking center stage).

238. See Press Release, Office of the White House Press Secretary, Statement by the President Lyndon B. Johnson Upon Signing S. 1160 (July 4, 1966) [hereinafter Press Release President Johnson FOIA Signing], <https://nsarchive2.gwu.edu//nsa/foia/FOIARRelease66.pdf>.

239. *Id.*

240. Moyers, *supra* note 235.

241. See, e.g., *Hall v. C.I.A.*, 668 F. Supp. 2d 172, at 182, 194 (D.D.C. 2009) (citing *McGehee v. C.I.A.*, 697 F.2d 1095, 1110 (D.C. Cir. 1983)); see also *Nat'l Sec. Counselors v. C.I.A.*, 960 F. Supp. 2d 101, 206 (D.D.C. 2013) (citing *Mead Data Cent., Inc. v. U.S. Dept. of Air Force*, 566 F.2d 242, 261 (D.C. Cir. 1977)).

242. See e.g., *Armstrong v. Exec. Office of the President*, 90 F.3d 553, 567 (D.C. Cir. 1996); *Kissinger v. Reporters Comm. for Freedom of the Press*, 100 S.Ct. 960, 966 (1980).

tions going to court to retain them remain major problems and a deterrent to greater use of the Act.

The legislative struggle that was commenced by Moss in 1954 ended successfully in 1966.²⁴³ “Twas a sparkling Fourth [of July] for FOI [Freedom of Information] crusaders,” said J. Edward Murray, chairman of the American Society of Newspaper Editors’ Freedom of Information Act Committee.²⁴⁴ “The long campaign in the never-ending war for freedom of information was crowned by a signal triumph[,]” he said.²⁴⁵ “The ‘dead hero’ of the battle was the distinguished newspaper lawyer Harold L. Cross,” who wrote the basic treatise in 1953.²⁴⁶ The “living hero,” said Murray, “was the distinguished California Representative John E. Moss, Congress’s most inveterate FOIA champion.”²⁴⁷

The Freedom of Information Act has been amended several times since 1966, most recently in 2016.²⁴⁸ It has mostly been strengthened by Congress—particularly in 1974 and in 1996—to make the withholding of information by the federal government *more* difficult, to apply to electronic records, and to permit attorney’s fees to be awarded to those whose requests for government data are improperly denied.²⁴⁹

As Moss understood, despite the list of exemptions, the principle of openness had been firmly established. The law is used annually by as many as 700,000 “persons” (private citizens, newspaper reporters, organizations and businesses) to obtain government information.²⁵⁰

243. See Press Release President Johnson FOIA Signing, *supra* note 237.

244. Edward J. Murray, *Twas a Sparkling Fourth for FOI Crusaders*, 500 BULL. OF THE AM. SOC’Y OF NEWSPAPER EDITORS, Aug. 1, 1966, at 3.

245. *Id.*

246. *Id.*

247. *Id.*

248. FOIA Improvement Act of 2016, Pub. L. No. 114-185, 130 Stat. 538 (2016).

249. See 5 U.S.C. § 552 (a) (4) (E) (West 2007 & Supp. 2017) (amended 2016) (“The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.”); Presidential Statement on Signing the Government in the Sunshine Act, 773 PUB. PAPERS 2236-37 (Sept. 13, 1974) (“[T]he provision of the Freedom of Information Act which permits an agency to withhold certain information when authorized to do so by statute has been narrowed to authorize such withholding only if the statute specifically prohibits disclosure, or establishes particular criteria for the withholding, or refers to particular types of matters to be withheld.”); Press Release, Office of the White House Press Secretary, Statement by the President William J. Clinton Upon Signing H.R. 3802 (Oct. 2, 1996), <https://nsarchive2.gwu.edu/nsa/foia/presidentstmt.pdf> (“The legislation I sign today brings FOIA into the information and electronic age by clarifying that it applies to records maintained in electronic format.”).

250. See DEP’T OF JUSTICE, SUMMARY OF ANNUAL FOIA REPORTS FOR FISCAL YEAR 2012 (2012).

Moss knew the act was not perfect. “You have to make compromises,” he said.²⁵¹ A decade after FOIA’s enactment, he added “If you compare it with today, we’ve made vast progress. If you ask me if we’ve made enough, the answer is no.”²⁵²

Before he died in 1997, Moss recalled that he knew from the beginning that the Freedom of Information Act would require continuing change to deal with new conditions. It would be, he predicted, a never-ending battle.²⁵³

XII. FREEDOM OF INFORMATION WORLDWIDE

The “never ending battle” for the Freedom of Information continues around the world today. According to FreedomInfo.org, today there are 117 countries with freedom of information laws, or similar administrative regulations.²⁵⁴ Some of the most recent to adopt such laws are Sri Lanka, Togo, and Vietnam.²⁵⁵

This proliferation of official legal avenues for citizens to access much of their government’s information affirms that the “right to know” is considered a universal value. While the motivations for each of the 117 countries with Freedom of Information regimes are as varied as the countries themselves, one-constant remains: rarely have governments themselves voluntarily opened their files to their citizens; the legislation has been thrust upon them by journalists, environmentalists, historians, and anti-corruption advocates.²⁵⁶

The worldwide adoption of freedom of information legislation can perhaps be categorized into three waves: The Early Adopters, including Sweden (the first by 200 years), Finland in 1951, the United States in 1966 and other countries that adopted freedom of information legislation before the end of the Cold War. The Post-Cold War Openness era, including former Communist and Eastern Bloc states like Hungary and Bulgaria, but also a plethora of other countries that, when freed from the worldwide competition of capitalism and communism, were able to become more open. And finally what Thomas S. Blanton of The National Security Archive has termed “The Openness Revolution,” a period continuing from the early 1990s to the pre-

251. Interview by Seney with Moss, *supra* note 1, at 204.

252. Kennedy, *supra* note 116.

253. LEMOV, *supra* note 21, at 69.

254. *List of Countries with FOI Regimes*, *supra* note 6.

255. *See id.* (indicating that Sri Lanka, Togo, and Vietnam implemented freedom of information regimes in 2016).

256. *See* Thomas S. Blanton, *The Openness Revolution: The Rise of a Global Movement for Freedom of Information*, 1 DEV. DIALOGUE 7, 7 (2002).

sent.²⁵⁷ This latest period has even largely overcome the closed-government backlash of the September 11, 2001 terrorist attacks. Over sixty countries including India, Mexico, and Tunisia added freedom of information laws during this period.²⁵⁸

In 1766, Swedish Riksdag member Anders Chydenius succeeded in establishing the world's first freedom of information law, *His Majesty's Gracious Ordinance Relating to Freedom of Writing and of the Press*.²⁵⁹ It opened "those recesses of knowledge" previously unavailable to the Swedish public—including the cost of pine-tar, the commodity used to seal ships, a key reason the Ordinance was drafted.²⁶⁰ The right to know remains built into the Swedish Constitution.²⁶¹ The next freedom of information law was not passed until 1951 when Finland, still heavily influenced by its neighbor, passed a law similar to Sweden's.²⁶² But it was not until after John Moss's successful endeavor in 1966 in the United States that other countries in large numbers began realizing the importance of—and enacting their own—freedom of information legislation. France passed its law in 1978.²⁶³ Between 1982 and 1983 commonwealth members Canada, Australia, and New Zealand each passed their own versions of a freedom of information law.²⁶⁴ Mirroring the challenges Moss faced, an Australian senator commented, upon taking governmental power in 1983, "If we are going to do anything to reform the Freedom of Information Act, and if we want to, we had better do it in the first fortnight, before the new government has any secrets to hide."²⁶⁵ Of course, simply being an early adopter of freedom of information legislation, or any adopter, does not necessarily guarantee that the legislation is well-drafted or fully enforced.

The second wave of freedom of information laws came after the end of the Cold War, including—but not exclusive to—the previously communist states of eastern and central Europe. One scholar, Ivan Szekeley, has written that during the communist era, Eastern Bloc

257. See *id.* at 12-14.

258. *List of Countries with FOI Regimes*, *supra* note 6.

259. See Gustav Björkstrand & Juha Mustonen, *Introduction: Anders Chydenius' Legacy Today*, in *THE WORLD'S FIRST FREEDOM OF INFORMATION ACT* 4, 4 (2006).

260. See Juha Manninen, *Anders Chydenius and the Origins of World's First Freedom of Information Act*, in *THE WORLD'S FIRST FREEDOM OF INFORMATION ACT* 18, 41 (2006).

261. See *id.* at 18.

262. See *List of Countries with FOI Regimes*, *supra* note 6.

263. *Id.*

264. *Id.*

265. Alan Missen, *Freedom of Information- the Australian Experience*, 100 *FREEDOM OF INFO. REV.* 42, 43 (2002).

countries had only “peculiar” or limited sources for transparency: *samizdat*, hand-copied, illegally circulated literature, and “the reimported public sphere” of western broadcast radio, including the U.S.-produced and broadcast Radio Free Europe and Radio Liberty.²⁶⁶ But despite this restricted starting position, these previously communist countries realized the importance of open government and soon began to institute their own freedom of information laws. Among the first was Hungary, which, along with privacy protections has a constitution that, with exceptions, declares the availability of data of public interest as a fundamental right.²⁶⁷ Ukraine passed a freedom of information law in 1992 and enshrined the right in its constitution in 1996.²⁶⁸ Bulgaria and Romania have also enacted freedom of information laws, in 2000 and 2001, respectively.²⁶⁹ While the freedom of information laws established in post-communist countries certainly are not perfectly written or perfectly implemented, information author Ivan Szekely writes that they are having or have had the desired effect: “In all likelihood, greater transparency has complicated the lives of people holding high office, people who attempted to exploit the situation after the democratic transition, and people who tried to preserve and convert their earlier influence.”²⁷⁰

But the Cold War dividend did not only benefit those formerly communist countries. Other countries including Ireland (1997), Thailand (1997), and Japan (1999) also passed freedom of information laws during this wave.²⁷¹ As Blanton writes, each of these three laws was also the result of a public backlash to government scandal or corruption.²⁷² In Ireland, the most damaging scandal was a public “Anti-D” blood bank in which errors by the Blood Transfusion Service Board potentially put as many as 100,000 mothers at risk, without initially raising any alarm.²⁷³ Thailand adopted freedom of information legislation as part of a wholesale constitutional reform and enacted as a re-

266. Ivan Szekely, *Central and Eastern Europe: Starting from Scratch*, in *THE RIGHT TO KNOW: TRANSPARENCY FOR AN OPEN WORLD* 116, 118 (Ann Florini ed., 2007).

267. *See id.* at 122.

268. *Id.* at 123; *see also* Ukraine Law of Information N.48 Art. 650 (1992).

269. Szekely, *supra* note 266, at 123-24; *see also* Law For Access to Public Information of Bulgaria (2000); Regarding the Free Access to Information of Public Interest Romania (2001).

270. Szekely, *supra* note 266, at 138.

271. Blanton, *supra* note 256, at 12-13.

272. *Id.* at 7, 13.

273. *See id.* at 12; Caroline O’Doherty, *Anti-D Scandal was a Bloody Disgrace*, *IRISH EXAMINER* (Feb. 21, 2014), <http://www.irishexaminer.com/viewpoints/analysis/anti-d-scandal-was-a-bloody-disgrace-259488.html>.

sult of mass demonstrations against the military regime.²⁷⁴ In Japan, local freedom of information laws revealed the billions of yen spent on food and alcohol by Japanese government officials entertaining each other—and led to the passage of a national statute.²⁷⁵

Finally, the third, continuing wave of countries enacting freedom of information laws is what Blanton has termed “The Openness Revolution.”²⁷⁶ By 2002, there were some forty-five countries that had established some form of freedom of information legislation.²⁷⁷ Today, fifteen years later, that number has more than doubled to 117 countries, and shows no sign of slowing.²⁷⁸ The first two phases of freedom of information laws were primarily spurred from pressure from below—citizens forcing their governments to share the price of pine tar, revealing the disparate funding for different school districts, shining light on government budgets and spending, and disclosing information about ecological issues.²⁷⁹ During the third phase, this pressure from below is combined with pressure from above. This increased pressure from above came and comes from international institutions, such as the United Nations, which has long declared, “[f]reedom of information is a fundamental human right”²⁸⁰ Similarly, other institutions such as the International Monetary Fund and World Bank have concluded that better access to information makes for better markets and better standards of living.²⁸¹

The U.S.-led Open Government Partnership launched in 2011 “to provide an international platform for domestic reformers committed to making their governments more open, accountable, and responsive to citizens[.]” now boasts seventy countries that have committed to

274. Blanton, *supra* note 256, at 13.

275. *Id.* at 13-14.

276. *Id.* at 8.

277. *Id.*

278. *See List of Countries with FOI Regimes, supra* note 6; *see also Eight Countries Adopt FOI Regimes in 2016*, FREEDOMINFO.ORG (Dec. 28, 2016), <http://www.freedominfo.org/2016/12/eight-countries-adopt-foi-regimes-2016/>.

279. *See* Thomas S. Blanton, *The Global Openness Movement in 2006: 240 Years after the First Freedom of Information Law, Access to Government Information Now Seen as a Human Right*, in *THE WORLD'S FIRST FREEDOM OF INFORMATION ACT* 80, 82 (2006); Blanton, *supra* note 256, at 13-14.

280. G.A. Res. 59 (I), at 95 (Dec. 14, 1946); *see also* TOBY MENDEL, *FREEDOM OF INFORMATION: A COMPARATIVE LEGAL SURVEY* 7 (2d ed. 2008).

281. *See* JÖRG DEGRESSIN, *INT'L MONETARY FUND, EUROPE HITTING ITS STRIDE* 46 (2017); MUSTAPHA KAMEL NABLI, *THE WORLD BANK, BREAKING THE BARRIERS TO HIGHER ECONOMIC GROWTH* 97-98 (2007).

work to “develop and implement ambitious open government reforms.”²⁸²

A few of the many successes from this Openness Revolution include India, Mexico, and Tunisia.²⁸³ After a decades-long fight, spurred along by multiple, diverse, grassroots efforts to end the government’s monopoly on information, India passed a freedom of information law in 2002 and a strengthened law in 2005.²⁸⁴ The Indian law includes a provision that Moss was unable to build into the American FOIA: an Information Commission which (in theory) is the final arbiter responsible for adjudicating disputes between citizens and the government.²⁸⁵ According to one Indian FOI expert, Shekhar Singh, “perhaps not since the concept of democracy itself was first conceived has any idea so caught the imagination of the people of India and so promised to revolutionize the way they will allow themselves to be governed.”²⁸⁶

Mexico passed its freedom of information law in 2002.²⁸⁷ In 2006, the Mexican Constitution was reformed to establish minimum standards of disclosure at the federal, state, and municipal levels. The law established a website called “Infomex,” which users can use to send requests, appeal agency decisions, and consult every request and public response ever processed electronically.²⁸⁸ According to the website Freedominfo.org, “this type of electronic filing system gives citizens the ability to view the progress and trajectory of Mexico’s transparency over time, and represents one of the most advanced Web-based information portals in the world.”²⁸⁹ The Mexican freedom of information law also surpasses the U.S. in another key provision that, *at least in theory*, forbids hiding or denying information related to gross human rights violations.²⁹⁰

282. *How It Works*, OPEN GOV’T P’SHP, <https://www.opengovpartnership.org/about/about-ogp/how-it-works> (last visited Oct. 21, 2017).

283. MENDEL, *supra* note 280, at 5, 55, 81; Kouloud Dawahi, *Tunisia Breaks Down Government’s Secrecy Walls*, FREEDOMINFO.ORG (June 16, 2016), <http://www.freedominfo.org/2016/06/tunisia-breaks-down-governments-secrecy-walls/>.

284. Shekhar Singh, *India: Grassroots Initiatives*, in *THE RIGHT TO KNOW: TRANSPARENCY FOR AN OPEN WORLD* 19, 23-24, 43-45 (Ann Florini ed., 2007).

285. *Id.* at 45-46.

286. *Id.* at 52.

287. MENDEL, *supra* note 280, at 80.

288. *Freedom of Information: Overview*, FREEDOMINFO.ORG, <http://www.freedominfo.org/regions/latin-america/mexico/mexico2/> (last visited Oct. 21, 2017).

289. *Id.*

290. See MENDEL, *supra* note 280, at 81.

After establishing itself as perhaps the only successful political revolution of the Arab Spring, Tunisia further solidified its fledgling democracy by passing its own freedom of information law in 2016.²⁹¹ According to Kouloud Dawahi, the Tunisian law is based upon published consensus international norms, and succeeded in part because Tunisia made a public commitment to be admitted into the international Open Government Partnership.²⁹² Again, this young law surpasses the American FOIA in one significant way, requiring the law to apply to both Tunisia's central and local governments, each of the its three branches (executive, legislative, and judiciary), and to other relevant bodies, including public enterprises and regulatory authorities.²⁹³

The international movement toward freedom of information laws, spurred in part by the American Freedom of Information Act and its author John Moss, is nothing short of remarkable.

XIII. INTERNATIONAL AND AMERICAN CHALLENGES

At a recent U.S. Senate Judiciary Committee Hearing commemorating the fiftieth anniversary of the U.S. Freedom of Information Act, Senator Al Franken (D-MN) took issue with a survey showing that on paper, Russia had a stronger freedom of information law than the United States.²⁹⁴ "I can't believe that," Franken said.²⁹⁵ He had an important point; in one year alone the U.S. Freedom of Information law led to major revelations about Pentagon officials misleading Con-

291. Shelly Culbertson, *Tunisia is an Arab Spring Success Story*, OBSERVER (Apr. 20, 2016), <http://observer.com/2016/04/tunisia-is-an-arab-spring-success-story/>; Kouloud Dawahi, *Tunisia Breaks Down Government's Secrecy Walls*, FREEDOMINFO.ORG (June 16, 2016), <http://www.freedominfo.org/2016/06/tunisia-breaks-down-governments-secrecy-walls/>.

292. Dawahi, *supra* note 291.

293. *Id.* The U.S. law applies only to the federal executive branch. 5 U.S.C. § 552 (f) (West 2007 & Supp. 2017) (amended 2016) ("'agency' as defined in section 551(1) of this title includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency . . .").

294. Senate Judiciary Committee Hearing at 1:14:55, *FOIA at Fifty: Has the Sunshine Law's Promise Been Fulfilled?*, COMM. ON THE JUDICIARY (July 12, 2016), <https://www.judiciary.senate.gov/hearings/watch?hearingid=891D29A7-5056-A066-6027-F695186CBC6A>; *see also Country Data*, RIGHT TO INFO. RATING, <http://www.rti-rating.org/country-data/> (last visited Oct. 21, 2017).

295. Senate Judiciary Committee Hearing at 1:15:24, *FOIA at Fifty: Has the Sunshine Law's Promise Been Fulfilled?*, COMM. ON THE JUDICIARY (July 12, 2016), <https://www.judiciary.senate.gov/hearings/watch?hearingid=891D29A7-5056-A066-6027-F695186CBC6A>. Having filed freedom of information requests in both the United States and Russia, we can attest that Franken was correct; in actuality the U.S. system works much better than the Russian. <http://old.svobodainfo.org/en/node/2580>.

gress on the Department of Defense's handling of sexual assault cases, the EPA and state decisions that led to lead poisoning of children in Flint, Michigan, widespread overcharging in Medicare, cheese marked as being "100% parmesan" actually containing no parmesan, and hundreds more.²⁹⁶ That is an important yardstick for other governments because the disclosures directly challenged important executive actions and functions.

But merely because information requests can win the release of documents from their governments does not mean that the laws and their implementation do not need to be improved. Of the 117 freedom of information laws that exist, many that appear strong on paper are actually weak in practice. Public servants are often ignorant of, or outright hostile to such laws. Judges and ombuds offices are often overly deferential to their colleagues in governments. Threshold issues, including poor record keeping, destruction of documents, and lack of resources, all too often make requested records difficult or impossible for the public to find. Unacceptably long delays are all too common. For instance, in the United States, the National Security Archive has some FOIA requests that have been pending for two decades.²⁹⁷

However, there is progress as well. Countries, including many cited in this paper, have proven that such obstacles can be overcome. Perhaps the best way to measure and improve international openness is for countries to legislate, and to ensure that they actually facilitate the "Five Fundamentals" of openness. As Blanton has written:

[O]penness advocates have reached consensus on the five fundamentals of effective freedom of information statutes:

* First, such statutes begin with the presumption of openness. In other words, information is not owned by the state; it belongs to the citizens.

* Second, any exceptions to the presumption must be as narrow as possible and written in statute, not subject to bureaucratic variation and the change of administrations.

296. *FOIA Commands Headlines as Law Approaches 50th Birthday*, NAT'L SECURITY ARCHIVE (June 13, 2016), <http://nsarchive2.gwu.edu/news/20160613-FOIA-Commands-Headlines-as-Law-Approaches-50th-Birthday/>.

297. NAT'L ARCHIVES AND RECORDS ADMIN., ANNUAL FREEDOM OF INFORMATION ACT (FOIA) REPORT VII.E. (2015), <https://www.archives.gov/files/foia/reports/2015.pdf>; see also Nate Jones, *The Long, Ugly Journey of a FOIA Request Through the Referral Black Hole*, UNREDACTED: NAT'L SECURITY ARCHIVE BLOG (June 3, 2016) [hereinafter *The Long, Ugly Journey of a FOIA Request*], <https://nsarchive.wordpress.com/2016/06/03/the-long-ugly-journey-of-a-foia-request-through-the-referral-black-hole/>.

* Third, any exceptions to release must be based on identifiable harm to specific state interests, not general categories like “national security” or “foreign relations.”

* Fourth, even where there is identifiable harm, the harm must outweigh the public interest served by releasing the information, such as the general public interest in open and accountable government, and the specific public interest in exposing waste, fraud, abuse, criminal activity, and so forth.

* Fifth, a court, an information commissioner, an ombudsperson or other authority that is independent of the original bureaucracy holding the information should resolve any dispute over access.²⁹⁸

Beyond these fundamentals, it is now increasingly clear that, in the information age, a “sixth fundamental” is required for freedom of information laws.²⁹⁹ This policy requires that governments make their information widely available to and easily usable by the public.³⁰⁰ Documents likely to be requested under freedom of information laws should be proactively posted online; releases to requesters—processed with taxpayer funds—should also be made digitally available to the widest possible audience, not shipped in a package and possibly lost forever in a desk drawer.³⁰¹

Even after the passage of the 2016 FOIA Improvement Act,³⁰² (creating a requirement of reasonably foreseeable harm to a protected interest, if a request for government information is denied) an honest appraisal of the American law shows that often in practice—if not in text—it does not fulfill all of the six principles of openness. In a study of one recent year, up to sixty percent of all American FOIA requests were withheld in whole or in part.³⁰³ The government’s FOIA exemptions remain very broad and easy to apply;³⁰⁴ years and decade-long

298. Thomas S. Blanton, *The Global Openness Movement in 2006: 240 Years after the First Freedom of Information Law, Access to Government Information Now Seen as a Human Right*, in *THE WORLD’S FIRST FREEDOM OF INFORMATION ACT* 80, 87 (2006).

299. See Lauren Harper, *What the US National Action Plan is Missing*, UNREDACTED: NAT’L SECURITY ARCHIVE BLOG (Nov. 8, 2013), <https://nsarchive.wordpress.com/2013/11/08/what-the-us-national-action-plan-is-missing/>.

300. See *id.*

301. *Id.*

302. *President Obama Signs Freedom of Information Act Improvements into Law*, NAT’L SECURITY ARCHIVE (June 30, 2016), <http://nsarchive2.gwu.edu/news/20160630-Obama-signs-Freedom-of-Information-Act-Improvements/>. See generally Freedom of Information Improvement Act of 2016, Pub L. No. 114-185, S. 337, 114th Congress (2016).

303. See Nate Jones, *FOIA Statistics Shows the DOJ’s “94.5% Release Rate” is a –Ahem– “Stretch”*, UNREDACTED: NAT’L SECURITY ARCHIVE BLOG (Feb. 29, 2012), <https://nsarchive.wordpress.com/2012/02/29/foia-statistics-shows-the-dojs-94-5-release-rate-is-a-ahem-stretch/>.

304. See Nate Jones, *The Next FOIA Fight: The B(5) “Withhold It Because You Want To” Exemption*, UNREDACTED: NAT’L SECURITY ARCHIVE BLOG (Mar. 27, 2014), <https://ns>

delays often effectively deny requesters the information they need,³⁰⁵ and fees are often used to deter people from making requests (even though they cover just one percent of all government FOIA costs).³⁰⁶ The Department of Justice (which implements FOIA), the FOIA Ombuds Office, and the federal courts all too often provide unqualified support to agency withholdings.³⁰⁷

But as FOIA's author, Representative John Moss knew all too well, this reality should not be surprising. Despite the "vast progress"³⁰⁸ made in the United States and internationally, there is always much more to be done to ensure that citizens have full access to their information.

archive.wordpress.com/2014/03/27/the-next-foia-fight-the-b5-withhold-it-because-you-want-to-exemption/.

305. *The Long, Ugly Journey of a FOIA Request*, *supra* note 296.

306. Nate Jones, *Unnecessary Freedom of Information Act Fees*, UNREDACTED: NAT'L SECURITY ARCHIVE BLOG (Mar. 18, 2015), <https://nsarchive.wordpress.com/2015/03/18/unnecessary-freedom-of-information-act-fees/>. <https://nsarchive.wordpress.com/2015/03/18/unnecessary-freedom-of-information-act-fees/>.

307. *See, e.g.*, *Nat'l Sec. Archive v. Cent. Intelligence Agency*, 752 F.3d 461, 463, 468 (D.C. Cir. 2014); *CIA Successfully Conceals Bay of Pigs History*, NAT'L SECURITY ARCHIVE (May 21, 2014), <http://nsarchive2.gwu.edu/news/20140521/> (quoting *Nat'l Sec. Archive*, 752 F.3d at 463, 468).

308. LEMOV, *supra* note 21, at 69; *see also* Kennedy, *supra* note 116 (quoting author's 1996 interview with John E. Moss).

RALPH NADER, LONE CRUSADER? THE ROLE OF CONSUMER AND PUBLIC INTEREST ADVOCATES IN THE HISTORY OF FREEDOM OF INFORMATION[†]

*Tom McClean**

I. INTRODUCTION.....	41
II. CONSUMER ADVOCATES MATTERED.....	43
A. <i>United States</i>	47
B. <i>United Kingdom</i>	53
C. <i>Australia</i>	57
III. EXPLAINING THE HISTORY OF CONSUMER ADVOCACY .	60
A. <i>Why Did Decisive Mobilisation Arise When and Where It Did?</i>	61
B. <i>Why Did Consumer Advocacy Subside As An Important Factor?</i>	66
IV. CONCLUSION	71

I. INTRODUCTION

This article examines the role of consumer and public interest advocates in the diffusion of freedom of information laws.

Scholarly study of this issue has been uneven. Ralph Nader is widely-known to have played a very important role in the 1974 amendments to the United States *Freedom of Information Act*

[†] This article was revised from a paper submitted to “Freedom of Information Laws on the Global Stage: Past, Present and Future,” a symposium held at Southwestern Law School on Friday, November 4, 2016. The Symposium was organized by Professor Michael M. Epstein and Professor David Goldberg and jointly by Southwestern’s Journal of International Media and Entertainment Law and Journal of International Law.

* This article draws heavily on research conducted while the author was at the London School of Economics, and was supported by a Research Students grant.

(“FOIA”).¹ In other countries groups similar to Nader also contributed significantly to local laws by lobbying for access as a way of harnessing the state to address power imbalances in consumer markets.² These groups also became important users and supporters of access laws where they were introduced. But, aside from Nader himself, the role of these groups has only received attention in a few cases.³ Moreover, these groups have not been featured prominently in systematic studies of the spread of access laws. Such studies have typically only emphasised the importance of groups like journalists and politicians, and the influence of institutional factors like the structure of electoral politics.

This article constitutes an initial contribution to efforts to redress this imbalance, through historical analysis, drawing loosely on comparative methods⁴ and process tracing.⁵

This article begins by showing that consumer movements mattered, not just in the US but in many other countries as well, and that they contributed in three main ways. First, they responded to a widespread and increasing demand for information by consumers, and in so doing, fostered the development of expectations that information of many kinds, which had not formerly been widely available, should be publicly accessible. Second, in some of these countries, consumer movements actively supported proposals to introduce freedom of information laws once they were on the legislative agenda. And third, in a small number of what would turn out to be significant countries, they played a crucial role in putting the matter on the legislative agenda in the first place. The most prominent examples of this active mobilisation occurred in those English-speaking countries where con-

1. See Sam Archibald, *The Early Years of the Freedom of Information Act—1955 to 1974*, 26 POL. SCI. & POL. 726, 730 (1993).

2. See, e.g., Martin Smith, *Open Government and the Consumer in Britain*, in FREEDOM OF INFORMATION TRENDS IN THE INFORMATION AGE 125, 127 (Tom Riley & Harold Relyea eds., 1983).

3. Principally in the USA and the UK. See, e.g., *id.*; A Consumer Consultant, *Freedom of Information: The Consumer Dimension*, in SECRECY, OR THE RIGHT TO KNOW? 17 (1980); James Michael, *Access to Official Information*, 7 BRIT. J.L. & SOC'Y 95 *passim* (1980).

4. See generally 1 JOHN STUART MILL, *A SYSTEM OF LOGIC: RATIOCINATIVE AND INDUCTIVE* (9th ed., 1875) (expounding an inductive logical methodology on how to approach the discussion of a subject).

5. See generally Andrew Bennett, *Process tracing: A Bayesian Perspective*, in THE OXFORD HANDBOOK OF POLITICAL METHODOLOGY 702 (Janet M. Box-Steffensmeier et al. eds., 2008) (expounding an inferential method of analyzing historical and political events).

sumer movements were strongly influenced by public interest advocacy, particularly between the early 1960s and the late 1980s.⁶

The article then considers why consumer movements do not all appear to have mobilised to the same extent or equally decisively, despite having played an important role in distributing information and normalising access to the information in so many countries, and having a clear interest in freedom of information laws. The article will argue that this difference can be understood in terms of the intersection between biographical and structural factors. Mobilisation of consumer advocates on the issue was prominent in countries where important debates over access occurred between the 1970s and mid-1980s, and usually involved groups inspired by Ralph Nader's new style of advocacy, often in direct contact with him personally.⁷ Their influence was short-lived for many reasons, including the fact that from the late 1980s onwards, governments began to adopt targeted transparency mechanisms as a mainstream tool for regulating many aspects of economic life.⁸ Scholarly and professional discourse around these laws, and freedom of information in general, has tended to obscure the role consumer advocates played in identifying that transparency could be used in this way, and in pushing for the first of these laws to be introduced.

This study of the role of consumer advocates is a reminder that access laws are not merely significant for democratic relations between citizens and the state. They also have significant economic and social implications, and the state can be as much a means to an end as a participant in struggles over information. It also illuminates a particular, formative period in the modern regulation of relations between individual consumers and corporations.

II. CONSUMER ADVOCATES MATTERED

The consumer advocacy movement pre-dated freedom of information in almost every country, often by many decades.⁹ It developed

6. See *ENCYCLOPEDIA OF THE CONSUMER MOVEMENT* 175, 467-68, 535, 592 (Stephen Brobeck et al. eds., 1997).

7. See, e.g., Smith, *supra* note 2, at 127-28.

8. See ARCHON FUNG ET AL., *THE POLITICAL ECONOMY OF TRANSPARENCY: WHAT MAKES DISCLOSURE POLICIES EFFECTIVE?* 6 (2004), https://ash.harvard.edu/files/political_econ_transparency.pdf.

9. The main exceptions are the Scandinavian countries, particularly Sweden and Finland. Sweden's freedom of information laws date back almost two hundred years. See Tom Riley, *A Review of Freedom of Information around the World*, in *FREEDOM OF INFORMATION TRENDS IN THE INFORMATION AGE* 5, 5-6 (Tom Riley & Harold Relyea eds., 1983).

particularly early and was particularly strong in the United States, where several non-profit organisations were founded during the inter-war period. These included Consumers' Research¹⁰ (1929) and Consumers' Union¹¹ (1936). Similar organisations, which also tested products available on the consumer market and published the results, began to emerge in Europe during the post-war era in response to the development of the post-war consumer society.¹² One prominent example of a similar not-for-profit group outside the US is the Consumer's Association in the UK, which began publishing *Which?* Magazine in 1957.¹³ By 1960, these organisations were numerous and widespread enough to give rise to the International Organization of Consumers Union ("IOUC").¹⁴ The IOUC, founded by groups from the US, UK, the Netherlands, Belgium, and Australia, followed a conference attended by seventeen organisations from fourteen countries.¹⁵ In some parts of Europe, government agencies also came to play an important role in product testing and consumer information—such as the *Stiftung Warentest* in Germany.¹⁶

Consumer advocates from organisations such as these contributed to the development of freedom of information in three ways. First, they responded to demand for consumer-related information, and in so doing, both encouraged further demand and helped to legitimise the idea of access. This demand was considerable and widespread.¹⁷ It can be seen in the UK, where, for example, *Which?*

10. See Lawrence B. Glickman, *The Strike in the Temple of Consumption: Consumer Activism and Twentieth-Century American Political Culture*, 88 J. AM. HIS. 99, 106 (2001); CONSUMERS' RESEARCH, <http://consumersresearch.org/about/> (last visited Nov. 25, 2017) (indicating that "Consumers' Research was incorporated in New York City in 1929.").

11. See Joachin Marcus-Steff, *L'information Comme Mode D'action Des Organisations De Consommateurs*, 18 REVUE FRANÇAISE DE SOCIOLOGIE, 85, 88 (1977), www.jstor.org/stable/3320870; *About Us-Mission*, CONSUMERS UNION, <http://consumersunion.org/about/mission/> (last visited Nov. 25, 2017) (indicating that Consumers' Union "[f]ormed as an independent, nonprofit organization in 1936 . . .").

12. See REBECCA J. PULJU, *WOMEN AND MASS CONSUMER SOCIETY IN POSTWAR FRANCE* 30-31 (2011).

13. See Marcus-Steff, *supra* note 11, at 103. See generally *WHICH?*, <https://www.which.co.uk> (last visited Oct. 19, 2017).

14. See *Who We Are*, CONSUMERS INT'L, <http://www.consumersinternational.org/who-we-are/our-history/> (last visited Nov. 25, 2017) (indicating that "Consumers International, formerly known as the International Organisation of Consumers Unions (IOCU), . . . started in 1960 by a group of five consumer organisations from the US, Western Europe and Australia").

15. ENCYCLOPEDIA OF THE CONSUMER MOVEMENT, *supra* note 6, at 175-76; see also *Who We Are*, CONSUMERS INTERNATIONAL, <http://www.consumersinternational.org/who-we-are/our-history/> (last visited Nov. 25, 2017).

16. Marcus-Steff, *supra* note 11, at 86, 89.

17. See ENCYCLOPEDIA OF THE CONSUMER MOVEMENT, *supra* note 6, at 6-9.

Magazine had 700,000 subscribers by 1977.¹⁸ The contribution it made to legislative change was recognised by those involved. For instance, the technologically-driven rise of consumerism and consumer activism was cited as an important influence in the UK during parliamentary hearings on its access law almost two decades later.¹⁹ In addition to this indirect role by stimulating demand and influencing norms, advocacy organisations occasionally exerted direct influence.²⁰ In France in the 1970s, a series of legal disputes involving the publication of technical information about beach pollution, pharmaceuticals and polystyrene packaging led to a line of jurisprudence that consumers had a right to know about consumer information, and that consumer advocates enjoyed an associated right to publish it.²¹ By way of example, one of these cases arose out of a dispute between two medical laboratories and a publisher over the legality of a 1974 book containing the results of comparisons of the effectiveness of medicines.²² The decision by the *Cour d'Appel* (Court of Appeal in Paris) in favour of the publisher was important because it established a clear legal precedent in favour of access.²³ It was also culturally significant because the circumstances of the case contributed to the delegitimisation of social and professional status as a rationale for restricting the availability of information. In this instance, the laboratories had argued that medical information was “the business of doctors” and was not appropriate for public release.²⁴ This argument, however, was undermined by the revelation that the laboratories were selling the same information as the publisher they had sued, only at 365F instead of 9F per copy.²⁵ This case, and others like it, constituted the legal context within which the government sponsored a suite of reforms in 1975 that aimed at admin-

18. Marcus-Steiff, *supra* note 11, at 103.

19. SELECT COMMITTEE ON THE PARLIAMENTARY COMMISSIONER FOR ADMINISTRATION (OPEN GOVERNMENT: MINUTES OF EVIDENCE), REPORT, 1994-5, HC 290—i-iii, at 33 (UK).

20. See MICHAEL PERTSCHUK, REVOLT AGAINST REGULATION: THE RISE AND PAUSE OF THE CONSUMER MOVEMENT 30 (1982); John Goldring, *Consumer Protection, Globalization and Democracy*, 6 CARDOZO J. INT'L & COMP. L. 1, 25 (1998) (first citing MARK V. NADEL, THE POLITICS OF CONSUMER PROTECTION (1971); and then citing PERTSCHUK, *supra* note 20).

21. See Marcus-Steiff, *supra* note 11, at 95-96.

22. See *id.* at 96.

23. See *id.*; see also Jean-Yves Nau, *Avant Irène Frachon, qui se souvient du Dr Pradal?*, SLATE (Nov. 30, 2016, 11:40 AM), <http://www.slate.fr/story/129485/quarante-ans-irene-frachon-henri-pradal>.

24. Marcus-Steiff, *supra* note 11, at 96.

25. *Id.*

istrative liberalisation.²⁶ These opened the door to the French access law, under circumstances I have described elsewhere.²⁷

Second, consumer advocates were usually a prominent constituency, supporting proposals for legal rights of access once legislatures began to formally consider them. In many countries, this support appears most obviously as testimony in the records of legislative committee hearings.²⁸ One example is Canada, where its Consumer's Association testified in favour of making product testing information available under what would become the *Access to Information Act of 1983*.²⁹ In other countries, their counterparts supported freedom of information by joining with other interest groups to campaign.³⁰ The countries discussed below are all examples of this, including Japan, where the Consumers' Federation joined several other civil society organisations in the Citizen's Movement for an Information Disclosure Law.³¹ The support represented the crystallisation of an array of long-standing efforts by consumer groups to win access to specific sorts of information, such as the minutes of regulatory bodies, particularly pharmaceutical regulators.³² The Movement played an important role in defeating the Liberal Democratic Party ("LDP") of Japan's proposals for an official secrets law during the 1980s,³³ as well as supporting positive rights of access in later years.³⁴ The link between support for consumer rights and freedom of information can also be seen in the frequency with which politicians and parties, particularly those at the progressive end of the spectrum, adopted both sets of concerns.³⁵ This occurred in both Germany and Japan, where each country's Green party strongly advocated for reform in both areas in the 1990s and

26. *Id.* at 99.

27. See Tom McClean, *Why the French FOIA Failed*, 7 S.W. J. INT'L MEDIA & ENT. L. 31 (2016) [hereinafter *Why the French FOIA Failed*].

28. See, e.g., Riley, *supra* note 9, at 12, 43-44.

29. See *id.* at 43.

30. See, e.g., *id.* at 23, 31 (describing the efforts of freedom of information advocates in New Zealand and Australia, respectively, who joined other interest groups to campaign for freedom of information legislation).

31. Information Clearinghouse Japan, *Japan – Breaking Down the Walls of Secrecy: The Story of the Citizen's Movement for an Information Disclosure Law*, FREEDOMINFO.ORG (July 27, 2002), <http://www.freedominfo.org/2002/07/case-study-japan-breaking-down-the-walls-of-secrecy/>.

32. *Id.*

33. *Id.*

34. *Id.*; see also Katsuya Uga, *Development of the Concepts of Transparency and Accountability in Japanese Administrative Law*, in *LAW IN JAPAN: A TURNING POINT* 276, 293-94 (Daniel Foote ed., 2007).

35. See Information Clearinghouse Japan, *supra* note 31.

early 2000s.³⁶ The deep elective affinity between a commitment to freedom of information and to consumer rights can also be seen in the US, although the manner in which this played out did not affect the development of access rights in the same way.³⁷ John Moss, a member of Congress who was instrumental to the passage of the original *Freedom of Information Act of 1966*,³⁸ went on to play an instrumental role in the passage of key consumer protection acts in subsequent years, including the *Consumer Product Safety Act*,³⁹ the *Motor Vehicle Information and Cost Savings Act*,⁴⁰ the *Toy Safety Act of 1984*,⁴¹ the *Poison Packaging Prevention Act of 1970*⁴² and the *Toxic Substances Control Act*.⁴³

Third, in some countries, non-government consumer advocate groups went much further by actively campaigning to put freedom of information on the political agenda in order to further their advocacy goals, and often exercising a decisive influence over the legislative process.⁴⁴

A. United States

The United States provides the clearest example of this active and decisive contribution to freedom of information on the part of public interest consumer advocacy. This nexus is particularly easy to

36. See *An den Pranger stellen nutzt niemandem*, ALLGEMEINE FLEISCHER ZEITUNG, Feb. 1, 2006, LexisNexis; Diethard Wiechmann, *Am Ende war alles fuer die Katz*, LEBENSMITTEL ZEITUNG, Dec. 29, 2006, at 20; Information Clearinghouse Japan, *supra* note 31.

37. See generally ENCYCLOPEDIA OF THE CONSUMER MOVEMENT, *supra* note 6, at 168-69.

38. Freedom of Information Act, Pub. L. No. 89-487, 80 Stat. 250 (1966).

39. Consumer Product Safety Act, Pub. L. No. 92-573, 86 Stat. 1207 (1972).

40. Motor Vehicle Information and Cost Savings Act, Pub. L. No. 92-513, 86 Stat. 947 (1972).

41. Toy Safety Act of 1984, Pub. L. No. 98-491, 98 Stat. 2269.

42. Poison Prevention Packaging Act of 1970, Pub. L. No. 91-601 84 Stat. 1670.

43. Toxic Substances Control Act, Pub. L. No. 94-469, 90 Stat. 2003 (1976); see *Congressman John E. Moss Overview*, JOHN E. MOSS FOUND. (Feb. 11, 2014), <http://www.johnemossfoundation.org/overview.htm>; George Kennedy, *How Americans Got Their Right to Know: Getting Congress to Guarantee Access to Federal Information Through FOIA 30 Years Ago was a Press Triumph*, JOHN E. MOSS FOUND. (1996), <http://www.johnemossfoundation.org/foi/kennedy.htm>, for discussions on US Congressman John Moss's involvement in the fight for freedom of information legislation in the US.

44. See, e.g., JOHN McMILLAN, FREEDOM OF INFORMATION AND WHISTLEBLOWER LEGISLATION: AN AUSTRALIAN PERSPECTIVE 1-2 (2005), http://www.ombudsman.gov.au/__data/assets/pdf_file/0021/34437/30-November-2005-Freedom-of-information-and-whistleblower-legislation-an-Australian-perspective.pdf (stating that "FOI and whistleblower protection are both now part of the legal framework to ensure open government in Australia," thanks to the efforts of organisations in the 1970s); *About Us*, CAMPAIGN FOR FREEDOM OF INFO., <https://www.cfoi.org.uk/about/> (last visited Oct. 23, 2017) [hereinafter CAMPAIGN FOR FREEDOM OF INFO.] (stating that the organisation was established "in 1984 . . . to secure FOI legislation for the UK.").

identify because influence was largely exercised by one man, Ralph Nader, who was crucial to the 1974 amendments to the *Freedom of Information Act of 1966*.⁴⁵

Nader emerged out of the “traditional” American consumer advocacy movement described earlier, although he was not entirely the typical consumer advocate for reasons which we will return to shortly. Nader first rose to prominence in the early 1960s by publishing a book that accused General Motors of selling cars it knew to be unsafe.⁴⁶ Over the next decade, he took up a broad range of other consumer and environmental issues, including health hazards from nuclear power, mine safety, meat inspection and food, to automotive safety.⁴⁷ These substantive issues were important in their own right, but they were also part of a broader strategic goal, which may have only become clear to Nader himself over time: attacking the capture of regulatory agencies by the very industries they purported to regulate and attacking such agencies’ unaccountability to any constituency.⁴⁸ In fact, he argued, they often actually protected themselves from scrutiny, despite the costs to the public on behalf of whom regulation was nominally undertaken.⁴⁹ Particular targets for his attacks were part of what he called “lobbying infrastructure” in Washington, which included private advocacy and law firms.⁵⁰

Nader rapidly attracted considerable support, particularly from young lawyers and law students, and by the early 1970s, he led an increasingly large and well-organised movement.⁵¹ This consisted of at least fifteen specialised organisations, which benefited from funding from a variety of sources including the Carnegie Corporation and the Medical Commission on Human Rights.⁵² The structure of and rela-

45. See, e.g., David E. McCraw, *The “Freedom From Information” Act: A Look Back at Nader, FOIA, and What Went Wrong*, 126 YALE L.J. F. 232, 232, 234 (2016).

46. RALPH NADER, UNSAFE AT ANY SPEED: THE DESIGNED-IN DANGERS OF THE AMERICAN AUTOMOBILE (1965) [hereinafter UNSAFE AT ANY SPEED].

47. See Marti Mueller, *Nader: From Auto Safety to Permanent Crusade*, 166 SCI. 979, 979 (1969).

48. See David Bollier, *Ralph Nader*, in ENCYCLOPEDIA OF THE CONSUMER MOVEMENT 383 (Stephen Brobeck et al. eds., 1997); Jerry L. Mashaw, *Improving the Environment of Agency Rulemaking: An Essay on Management, Games, and Accountability*, 57 L. & CONTEMP. PROBS. 185, 193 (1994).

49. See Bollier, *supra* note 48.

50. JOSEPH C. GOULDEN, THE SUPER-LAWYERS: THE SMALL AND POWERFUL WORLD OF THE GREAT WASHINGTON LAW FIRMS 385-86 (1972).

51. Bollier, *supra* note 48.

52. See J. Craig Jenkins & Abigail Halcli, *Grassrooting the System? The Development and Impact of Social Movement Philanthropy, 1953-1990*, in PHILANTHROPIC FOUNDATIONS: NEW SCHOLARSHIP, NEW POSSIBILITIES 229, 232, 252 (Ellen Condliffe Lagemann ed., 1999); see also

tionships between these organisations have evolved since then but the more important of them included Public Citizen (initially charged with fundraising, but is now the umbrella organisation for many others),⁵³ “Congress Watch” (lobbying),⁵⁴ “Information Clearinghouse” (campaigning for freedom of information reform),⁵⁵ “Public Interest Research Group” (research, but also involves some campaigning on issues such as airtime equity),⁵⁶ and “Nader’s Raiders” (an informal group of volunteer students who undertook research and publication on specific topics).⁵⁷

Nader’s interest in freedom of information was a practical consequence of his substantive interests. His researchers were early and heavy users of the *Freedom of Information Act of 1966*, which they used to obtain technical information and data to support claims made in consumer reports.⁵⁸ Examples of such technical information and data include the safety of Firestone tires and Ford Pinto cars, “drug abuse among NASA employees,” and safety mishaps in nuclear power plants.⁵⁹ Nader’s supporters believed this kind of activity to be unusual in comparison with other NGOs,⁶⁰ but it was in fact not dissimilar from the work of contemporary investigative journalists who shared his public interest motivations.

Poor experience of using the law rapidly led Nader and his supporters to identify freedom of information as an issue worthy of attention in its own right. The catalyst appears to have been the realisation that regulatory agencies were selectively withholding information to favour particular interest groups and avoid the kind of scrutiny that

U.S. Public Interest Research Group (USPIRG), DISCOVERTHENETWORK, <http://www.discoverthenetworks.org/printgroupProfile.asp?grpId=6782> (last visited Nov. 27, 2017).

53. Bollier, *supra* note 48; see *About Us*, PUB. CITIZEN, <https://www.citizen.org/about/about-us> (last visited Nov. 27, 2017).

54. Bollier, *supra* note 48. See generally PUB. CITIZEN, CONGRESS WATCH, <https://www.citizen.org/congress-watch-0> (last visited Nov. 27, 2017).

55. Bollier, *supra* note 48. See generally PUB. CITIZEN, FREEDOM OF INFORMATION CLEARINGHOUSE, <https://www.citizen.org/freedom-information-clearinghouse> (last visited Nov. 27, 2017).

56. See *About*, U.S. PUB. INT. RES. GROUP, <https://uspig.org/page/usp/about-us-pirg-0> (last visited Oct. 21, 2017); see also *The Essential Nader*, RALPH NADER, <https://nader.org/biography/essential-nader/> (last visited Nov. 27, 2017).

57. See Bollier, *supra* note 48.

58. See David Bollier, *Citizen Action and Other Big Ideas: A History of Ralph Nader and the Modern Consumer Movement*, RALPH NADER (Jan. 5, 2004) [hereinafter *Citizen Action and Other Big Ideas*], <https://blog.nader.org/2004/01/05/chapter-4-let-the-information-flow/> (listing examples, such as the use of the FOIA “to discover that Eli Lilly pharmaceutical company was suppressing data on ‘adverse reactions’ to various drugs.”).

59. See *id.*

60. See *id.*

Nader's Raiders sought to apply.⁶¹ One early and significant example of what would become a comprehensive attack on government secrecy was Nader's report on the Federal Trade Commission ("FTC").⁶² The attack alleged that the Commission had been captured by industry interests, and was no longer regulating them in the interests of the public.⁶³ It also alleged that the agency was actively protecting these arrangements through the systematic withholding of important information.⁶⁴ Nader himself explicitly identified the need for stronger access laws in a press conference where he launched the FTC report, also published in an article at the same time.⁶⁵ In this report, he argued the FOIA was being "undercut by a riptide of bureaucratic ingenuity,"⁶⁶ which included dubiously citing exemptions in the Act as a rationale for not fully explaining decisions to withhold, incorrectly classifying files as "investigatory" or "internal communications," and delaying or simply ignoring inconvenient requests.⁶⁷ This also included mixing information that could be validly withheld with information the agency did not wish to disclose for other reasons and claiming an exemption for the whole, and selectively disclosing, hiding, destroying or simply not creating records containing sensitive information.⁶⁸ Nader and others also criticised the FOIA itself, alleging

61. See Ralph Nader, *Freedom from Information: The Act and the Agencies*, 5 HARV. C.R.-CIV. L. L. REV. 1, 8, 10 (1970) ("A typical tactic is to delay replying for several weeks to a request for information and then reply that it was not sufficiently specific," which then turns to "[m]ore primitive responses [when] an agency loses its last rationalizing props for withholding information.").

62. EDWARD F. COX ET AL., 'THE NADER REPORT' ON THE FEDERAL TRADE COMMISSION (1969) [hereinafter THE NADER REPORT]. For instance, as claimed in Nader's report, "the Commission's behavior with regard to automobile advertising, drugs, auto warranties, food and gasoline games, tires, medical devices, and many other problem areas can be traced to purposeful delay aimed at protecting certain interests." *Id.* at 75.

63. See Ralph Nader, *Preface* to THE NADER REPORT, *supra* note 62, at vii (1969) ("On paper, the FTC was the principal consumer-protection agency of the Federal government. . . . In reality, the 'little old lady on Pennsylvania Avenue' was a self-parody of bureaucracy, fact with cronyism, torpid through an inbreeding unusual even for Washington, manipulated by agents of commercial predators, impervious to governmental and citizen monitoring.").

64. See THE NADER REPORT, *supra* note 62, at 106 ("[W]hen 'average citizens' seek information on consumer problems and FTC performance of regulatory duties, the agency responds with total secrecy or minimal disclosure.").

65. Nader, *supra* note 61, at 13-15 ("The FOIA will remain putty in the hands of government personnel unless its provisions are given authoritative and concrete interpretation by the courts.").

66. *Id.* at 5.

67. See THE NADER REPORT, *supra* note 62, at 58-63, 71-73.

68. See Nader, *supra* note 61, at 9-10. Civilian agencies adopted the Pentagon's "contamination technique" to deny information requests. *Id.* at 10. This required taking "several batches of unclassified material that may prove embarrassing and mix them with other batches of classified information and the result is that the sum is entirely classified." *Id.*

that it placed too great a burden on the citizen to know about and comply with bureaucratic procedures, and provided insufficient incentives for agencies to meet requests in a timely manner and in the spirit of the legislation.⁶⁹

The 1974 amendments to the *Freedom of Information Act* were not solely a response to either concern about consumer rights or to Nader's advocacy. They must be understood in the context of a country that was experiencing a profound crisis of popular trust in government, due to events such as the Watergate break-in,⁷⁰ press coverage of the Vietnam War (and in particular the massacre at My Lai),⁷¹ and the legal battles over the Pentagon Papers.⁷² They must also be understood in the context of American electoral politics. Members of Congress were facing an election in late 1974, and endorsing a strengthened FOIA may have provided a useful way of signalling to the electorate a willingness to act on the corruption and abuse of power, which Nixon's secrecy had facilitated. Indeed, when President Ford initially vetoed the amendments, citing concerns over national security,⁷³ the bill was passed a second time with a veto-proof majority.⁷⁴

Nader and his supporters were, however, extremely important contributors to these amendments. They played an opportunistic role, working with and through Congress to ensure these broader circumstances produced the kinds of changes to the FOIA they had already been advocating for some time. Their contribution closely resembled

69. See *id.* at 2.

70. See JAMES P. PFIFFNER, *THE MODERN PRESIDENCY* 208-14 (1994).

71. See SEYMOUR M. HERSH, *MY LAI 4: A REPORT ON THE MASSACRE AND ITS AFTERMATH* 103 (1970).

72. See Harlow Uncer, *President Nixon and the Law*, *CANBERRA TIMES*, Jan. 26, 1974, at 2, <http://trove.nla.gov.au/newspaper/rendition/nla.news-article110758549.3.pdf?followup=C61c060d6961915c13508b74d998d70a> ("Ralph Nader and groups like the American Civil Liberties Union . . . all fill[ed] charges against Mr. Nixon before the Committee." President Nixon was charged with "crimes against people," including "ordering Internal Revenue Service to audit returns . . . and otherwise harass . . . leading opponents of the Vietnam War," and ordering the breaking and burglarizing of Dr. Daniel Ellsberg's office "while he was on trial for giving the Pentagon Papers to newsmen . . ." President Nixon was also charged with "crimes against justice," including the cover up of "involvement on White House officials in [the] Watergate affair by destroying documentary evidence . . .").

73. 120 CONG. REC. 36,243 (1974) (quoting Veto Message of Freedom of Information Act Amendments from Gerald R. Ford, President, U.S., to U.S. House of Representatives (Oct. 17, 1974) (on file with the American Presidency Project), <http://www.presidency.ucsb.edu/ws/index.php?pid=4477>).

74. See H.R. REP. NO. 93-876, at 119 (1974); S. H. REP. NO. 93-854, at 151 (1974); H. REP. NO. 93-1380, at 217 (1974). Note that it passed with a much narrower margin in the Senate, only one-third of which was due to face the electorate. See Archibald, *supra* note 1, at 730-31.

that of the press in the passage of the original Act around a decade earlier. Nader provided, first and foremost, a powerful critique from outside Congress of the shortcomings of the existing Act. This critique principally came from the Public Citizen's Freedom of Information Clearinghouse project, founded in 1972 to specifically assist individual citizens to make information requests.⁷⁵ It also came from Nader's Raiders, who lobbied members of Congress to ensure support.⁷⁶ Nader himself worked closely with Senator Edward Kennedy to overcome resistance from the bureaucracy once the amendments were being considered.⁷⁷ Even so, the passage of a strong bill was by no means a foregone conclusion. Agencies such as the FBI, the CIA and the Department of Justice supported an early draft that preserved broad exemptions for defence and investigatory files and opposed amendments designed to narrow these exemptions.⁷⁸ By the time the bill arrived on President Ford's desk for the first time, only the Department of Justice and a small but significant group of advisors still favoured a veto.⁷⁹ This opposition was eventually overcome by a second vote in the Congress.⁸⁰ Although Nader was not the only one involved in overcoming it,⁸¹ his work was specifically cited by one of

75. See *Obtaining Access to Government Records Since 1972*, PUB. CITIZEN (Jan. 1998), <https://www.citizen.org/our-work/litigation/obtaining-access-government-records-1972>.

76. Archibald, *supra* note 1, at 730.

77. *Citizen Action and Other Big Ideas*, *supra* note 58.

78. See Dan Lopez et al., *Veto Battle 30 Years Ago Set Freedom of Information Norms*, NAT'L SECURITY ARCHIVE (Nov. 23, 2004), <http://nsarchive2.gwu.edu/NSAEBB/NSAEBB142/index.htm> (first citing Memorandum on the Freedom of Information Act Amendments – S. 2543 from Robert G. Dixon, Assistant Attorney Gen., Office of Legal Counsel, to William B. Saxbe, Attorney Gen. (May 7, 1974) (on file with the National Security Archive), <https://nsarchive2.gwu.edu/NSAEBB/NSAEBB142/050774%20OLC%20to%20Saxbe%20Memo%20on%20FOIA%20Amdts.pdf>; and then citing Memorandum from Assistant Legislative Counsel, C.I.A. to Patrick E. O'Donnell, Special Assistant to Presidents Nixon for Legislative Affairs (May 23, 1974) (on file with the National Security Archive), <https://nsarchive2.gwu.edu/NSAEBB/NSAEBB142/052374%20CIA%20to%20ODonnell%20Memo.pdf>) (“The Central Intelligence Agency was particularly concerned with the *in camera* review provision and its effect on the CIA's statutory obligations for the proper handling of sensitive information . . . [T]he DOJ also took issue with the investigatory files exemption, administrative time limits, sanctions, and the limited time in which to answer a requester's complaint in court . . . [T]he FBI ceased its negotiations with Congress because it wanted the bill to be ‘as bad as possible’ to make the case stronger for presidential veto.”).

79. These included Ford's Chief of Staff, Donald Rumsfeld, his deputy Chief of Staff, Dick Cheney, and the head of the Justice Department's Office of Legal Counsel, Antonin Scalia. See Lopez, *supra* note 78.

80. Archibald, *supra* note 1, at 730-31.

81. See S. H. REP. NO. 93-854, at 156 (1974) for the list of witnesses to hearings in the United States.

Kennedy's staff as crucial to the passage of a much stronger Act than the bureaucracy wanted, with a veto-proof majority.⁸²

B. *United Kingdom*

The United Kingdom is the other country in which the links between public interest/consumer advocacy and freedom of information are particularly clear. Public interest advocacy in the UK arose somewhat later than in the US—in the early 1970s. One leading organisation was the Public Interest Research Centre, founded in 1972 and inspired directly by Ralph Nader's work in the United States.⁸³ Its original purpose was to conduct "social" audits as a parallel to the financial audits that large corporations and governments were increasingly undertaking during that period.⁸⁴ Its original purpose was also to report on whether or not these organisations were fulfilling their duties to those beyond direct shareholders (including workers, consumers, and others affected by their activities).⁸⁵ The Centre focused particularly on standards for corporate reports and on environmental and medical safety.⁸⁶ But from the outset, it raised concerns over government secrecy.⁸⁷ Many of its campaigns became institutionalised as standalone organisations, and some of the campaigns went on to play an important role in advocating freedom of information in their own right. The two most important were the Campaign for Freedom of Information ("the Campaign")⁸⁸ and Public Concern at Work.⁸⁹

Public Concern at Work was not primarily concerned with freedom of information, but deserves mention for its role in influencing public opinion. It was founded in 1993 to bring about a break with the prevailing British culture of "complacency and cover-up," and to provide support for members of the public service who wanted to publicly disclose information about mismanagement and poor government.⁹⁰ The organisation presented itself as a response to a number of scandals in which the government's cover-up or lack of disclosure was a

82. See Archibald, *supra* note 1, at 730.

83. PUB. INT. RES. CTR., <http://publicinterest.org.uk/> (last visited Oct. 14, 2017).

84. See *About Us*, PUB. INT. RES. CTR., <http://publicinterest.org.uk/about/> (last visited Oct. 14, 2017) [hereinafter *About Us*, PIRC].

85. See *id.*

86. See *id.*

87. See *id.*

88. *Our Work, About Us*, CAMPAIGN FOR FREEDOM OF INFO., <https://www.cfoi.org.uk/about/our-work/>.

89. See *About Us, Background*, PUB. CONCERN AT WORK, <http://www.pcaw.co.uk/about/background> (last visited Oct. 19, 2017).

90. See *id.*

factor. The Public Concern at Work sought the introduction of a whistle-blower's protection act to complement a freedom of information act.⁹¹ To this end, the organisation worked jointly with the Campaign on drafting the *Public Interest Disclosure Bill*,⁹² which was passed in 1998.⁹³ This period spans the transition between the Conservative Major government and Blair's New Labour administration, which introduced the British FOIA in 2005.⁹⁴

The Campaign was founded in 1984, and primarily sought to work through the parliamentary system rather than through public advocacy.⁹⁵ Its links with the public interest movement can be seen in its support (which included over 190 different voluntary and professional organisations together with backbenchers from all the major parties) and its personnel.⁹⁶ Its founding chair, Des Wilson, had a background in public affairs and had worked as a campaigner for organisations such as Shelter, Friends of the Earth and the Campaign for Lead-Free Air.⁹⁷ Its founding vice-chair, Maurice Frankel, began his career working for Social Audit, the publishing arm of the Public Interest Research Centre, and was also a trustee of Public Concern at Work.⁹⁸ Frankel took over Wilson's position as chair of the Campaign in 1987.

The Campaign attacked secrecy in a range of contexts, including defence (which was historically a prominent basis of mobilisation against official secrecy in general in the UK) and apparently mundane matters of routine interaction between citizens and administration.⁹⁹ In its magazine *Secrets*, the Campaign catalogued waste, maladminis-

91. See *id.*; see also S.W.R de A. Samarasinghe & Tissa Jayatilaka, *A Whistleblower Protection Act needs to Accompany Proposed Freedom of Information Act*, GROUNDVIEWS: JOURNALISM FOR CITIZENS (Jan. 28, 2015), <http://groundviews.org/2015/01/28/a-whistleblower-protection-act-needs-to-accompany-the-proposed-freedom-of-information-act/>.

92. Public Interest Disclosure Act 1998, c. 23, (Eng.).

93. *Id.*

94. See *More than 400,000 Freedom of Information Requests Made Since 2005*, BBC NEWS (Dec. 31, 2014), <http://www.bbc.com/news/uk-politics-30632221> (indicating that Blair's "government introduced FOI" to Britain).

95. See CAMPAIGN FOR FREEDOM OF INFO., *supra* note 44.

96. *Political Leaders Back Call for Freedom of Information 'Our right to know'*, SECRETS, No.1, 1984, at 2.

97. See *Des Wilson: We Can Only try to Edge the World in the Right Direction*, INDEP. (Feb. 28, 2011), <http://www.independent.co.uk/news/people/profiles/des-wilson-we-can-only-try-to-edge-the-world-in-the-right-direction-2227588.html>.

98. See *Who We Are, About Us*, CAMPAIGN FOR FREEDOM OF INFO., <https://www.cfoi.org.uk/about/who-we-are/>; see also *About Us*, PIRC, *supra* note 84.

99. See *Whistleblowers and Journalists Face Prison for Revealing Information that Could be Obtained Under FOI*, CAMPAIGN FOR FREEDOM OF INFO., (May 8, 2017), <https://www.cfoi.org.uk/2017/05/whistleblowers-and-journalists-face-prison-for-revealing-information-that-could-be-obtained-under-foi/>.

tration, and even outright corruption in areas such as local government housing and planning, and the problems for individual self-determination, which flowed from secret files held by schools, universities, and health providers.¹⁰⁰ It also catalogued what might be called the spill-over effects and irrationalities of secrecy, such as establishing the condition for industry to pollute far more than would otherwise have been possible because it prevented markets from identifying polluters and factoring in the costs of pollution.¹⁰¹ In particular, the magazine highlighted how polluters, under the guise of commercial concerns and legitimate trade secrets, argued against the establishment of polluters' registers and other environmental legislation covering water, air, explosives and so on.¹⁰²

This focus on consumer information was partly a matter of conviction, and partly a result of pragmatism. The Campaign's proposal for a general right of access quickly met with hostility from the conservative Thatcher government, particularly after its second electoral victory.¹⁰³ The Campaign, therefore, opted for piecemeal reform via private members' bills on specific issues.¹⁰⁴ It was met with some success, thanks in part to good luck. The Campaign cultivated widespread support among backbench Members of Parliament.¹⁰⁵ Many of these supporters were successful in the Parliamentary ballot for the right to put forward such bills. Furthermore, the government proved remarkably willing to let access rights with a limited scope pass, in part because they tended to affect bodies outside central government. Examples include the *Access to Medical Reports Act 1988*¹⁰⁶ and the *Environment and Safety Information Act 1988*.¹⁰⁷ The *Environment*

100. See, e.g., Maurice Frankel, *Files on Ourselves: Fact or Fiction?*, in *THE SECRETS FILE* 74, 75-76, 83-94 (Des Wilson ed., 1984).

101. See, e.g., Maurice Frankel, *How Secrecy Protects the Polluter*, in *THE SECRETS FILE*, *supra* note 100, at 22.

102. See, e.g., *id.*

103. See Jim Chandler, *Freedom of Information and Participation: Comparing Local and Central Government*, in *FREEDOM OF INFORMATION: LOCAL GOVERNMENT AND ACCOUNTABILITY* 106, 108 (Michael Hunt & Richard Chapman eds., 2010); *1993 Freedom of Information Awards*, CAMPAIGN FOR FREEDOM OF INFO. (Jan. 20, 1994), <https://www.foi.org.uk/1994/01/1993-freedom-of-information-awards/>.

104. See BEN WORTHY, *THE POLITICS OF FREEDOM OF INFORMATION: HOW AND WHY GOVERNMENTS PASS LAWS THAT THREATEN THEIR POWER* (2017).

105. See E-mail from Alexandra Crampton, Parliamentary Researcher and Assistant, Parliamentary Lab. Party to Lab. Members of Parliament (May 9, 2007) (on file with Campaign for Freedom of Information); see also *Attempt to Remove Parliament from the FOI Act*, CAMPAIGN FOR FREEDOM OF INFO., <https://www.foi.org.uk/s/attempt-to-remove-parliament-from-the-foi-act/> (2017).

106. *Access to Medical Reports Act 1988*, c. 28 (Eng.).

107. *Environment and Safety Information Act 1988*, c. 30 (Eng.).

and Safety Information Act requires safety and environmental authorities to set up public registers of the enforcement notices they serve on factories, shops, and other premises where public hazards or breaches of safety or environmental laws have occurred.¹⁰⁸

The Campaign was also a prominent participant in the legislative process, which led to the introduction of a full freedom of information act when that process eventually began in the late 1990s.¹⁰⁹ As in the US in 1974, its role was primarily one of skilfully exploiting the emergence of structurally-favourable conditions, which it had partly helped to create. In the UK, however, the conditions were a little different. The reforms introduced by Prime Ministers Thatcher and Major transformed the structure of the state in ways that substantially reduced electoral risks of transparency for governments in a Westminster system.¹¹⁰ Indeed, these reforms actually relied on certain forms of transparency as a tool of public administration for disciplining and controlling state bodies.¹¹¹ Despite this, as noted above, the Conservatives consistently refused to consider full legislative rights of access. This refusal was not merely at odds with the Campaign, but it was also difficult to justify given their willingness to allow the piecemeal legislative reforms discussed earlier. These contradictions presented then-opposition leader Tony Blair with the opportunity to make an explicit commitment to introduce an access law as a way of distinguishing himself from the Conservatives at the 1996 election. It is a sign of the Campaign's influence over this issue that he had taken this opportunity at its annual award ceremony.¹¹² The Campaign was also featured prominently in the Parliamentary hearings over the law, as noted above, and its reputation and influence helped ensure the Blair gov-

108. *Id.* §1.

109. See CAMPAIGN FOR FREEDOM OF INFO., *supra* note 44.

110. See KENNETH G. ROBERTSON, *SECRECY AND OPEN GOVERNMENT: WHY GOVERNMENTS WANT YOU TO KNOW* 141 (1999); see also Katharine Dommert et al., *Reforming the Westminster Model of Agency Governance: Britain and Ireland After the Crisis*, 29 GOVERNANCE: INT'L J. POL'Y, ADMIN., & INST., 535, 542 (2016).

111. The epitome of this reform is John Major's "Citizen's Charter", an administrative right of access. See generally PUBLIC ADMINISTRATION SELECTION COMMITTEE, *FROM CITIZEN'S CHARTER TO PUBLIC SERVICE GUARANTEES: ENTITLEMENTS TO PUBLIC SERVICE, 2007-8*, HC (UK).

112. Tony Blair, MP Leader, Labour Party, Address at the Campaign for Freedom of Information's Annual Awards Ceremony (Mar. 25, 1996), in *Speech by the Rt. Hon. Tony Blair MP, Leader of the Labour Party at the Campaign for Freedom of Information's annual Awards ceremony, 25 March 1996*, CAMPAIGN FOR FREEDOM OF INFO. (May 25, 1996), <https://www.cfoi.org.uk/1996/05/speech-by-the-rt-hon-tony-blair-mp-leader-of-the-labour-party-at-the-campaign-for-freedom-of-informations-annual-awards-ceremony-25-march-1996/>.

ernment followed through on its commitment despite the resistance of the major departments of state.¹¹³

C. *Australia*

The US and the UK are the two countries where the contribution of consumer advocacy to freedom of information has received the most sustained academic attention. But these are by no means the only two countries where such movements were active. A third example is Australia, where events resembled those in the UK and the US in a number of significant respects.

After more than two decades of conservative rule, the political debates around a legal right of access to government files emerged in Australia in the early 1970s, and coincided with the election of a progressive Whitlam government in 1972.¹¹⁴ The idea of access rights was something of a niche interest in Australia, and found its principal support among a small group of young, well-connected but relatively junior members of politically-significant institutions in Australian public life.¹¹⁵ The National Freedom of Information Legislation Campaign Committee was founded in the late 1970s,¹¹⁶ and included lawyers, journalists, politicians, academics, and senior representatives of unions, consumer advocacy groups, conservationists, and welfare providers.¹¹⁷

Consumer advocacy played an important role in this movement. One year earlier, a small group of progressive bureaucrats and political staffers who would later go on to find the Committee had also established the Rupert Public Interest Movement.¹¹⁸ Rupert, as it was colloquially known, shared the same broad concerns over public access to technical information as Ralph Nader's public citizens' groups

113. See WORTHY, *supra* note 104; see also Tom McClean, *Shackling Leviathan: A Comparative Historical Study of Institutions and the Adoption of Freedom of Information 293* (Dec. 2011) (unpublished Ph.D. & M.Phil. dissertation, London School of Economics and Political Science) (on file with author).

114. See AUSTRALIAN LAW REFORM COMMISSION, *OPEN GOVERNMENT: A REVIEW OF THE FEDERAL FREEDOM OF INFORMATION ACT 1982 chs. 3-4* (1995), <https://www.alrc.gov.au/sites/default/files/pdfs/publications/ALRC77.pdf>.

115. See *id.* ch. 3.

116. See McMILLAN, *supra* note 44, at 1.

117. See AUSTRALIAN LAW REFORM COMMISSION, *supra* note 114, ch. 3, n.7.

118. See John Wood, *The Origins of Rupert*, RUPERT PUB. INT. MOVEMENT J., Oct. 1984, at 4; see also Greg Terrill, *The Rise and Decline of Freedom of Information in Australia*, in *OPEN GOVERNMENT: FREEDOM OF INFORMATION AND PRIVACY* 89, 93 (Andrew McDonald & Greg Terrill eds., 1998). According to members of the movement with whom the author has spoken, the name was a joking reference to Rupert Murdoch, then the young proprietor of a growing newspaper empire in Australia.

in the United States, and the various UK bodies discussed above.¹¹⁹ And, like them, its main substantive goal was the adoption of a freedom of information act.¹²⁰ The Committee also adopted similar campaign techniques, including publishing a short-lived journal.¹²¹ In its ten issues, the journal addressed freedom of information in Australia and in other jurisdictions, privacy, media ownership and access, public libraries, administrative law, civil liberties, and a cluster of issues surrounding health, science, and safety such as food safety, pharmaceuticals and medicine, nuclear power, the environment, and the role of scientific expertise in policy-making and regulation.¹²² It is also quite clear from the content and tone of the journal that the similarity with developments in the US and the UK were not a coincidence. It was a case of deliberate imitation, based partly on direct personal contact. Nader visited Australia and New Zealand in 1980 on a visit convened by Rupert.¹²³

In Australia, this group was able to put freedom of information on the political agenda by exploiting their connections to institutionally powerful players, although in slightly different ways to their counterparts in other countries. Perhaps the clearest instance of this involves John McMillan, a founding member of both Rupert and the Campaign Committee.¹²⁴ McMillan went to become a Professor of Law at the Australian National University before serving as national Ombudsman and then as its inaugural Information Commissioner.¹²⁵

119. Wood, *supra* note 118; see also Nader in *Canberra – Part I*, RUPERT PUB. INT. MOVEMENT J., Nov. 1980–Feb. 1981, at 8 [hereinafter *Nader in Canberra*].

120. *FOIL is our Number One Issue*, RUPERT PUB. INT. MOVEMENT J., Mar. 1980, at 26 [hereinafter *FOIL is our Number One Issue*].

121. See generally RUPERT PUB. INT. MOVEMENT J.

122. See, e.g., *FOIL is our Number One Issue*, *supra* note 120 (discussing freedom of information legislation in Australia); John Nevill, *Mercury in Fish*, RUPERT PUB. INT. MOVEMENT J., Nov. 1981–Feb. 1982, at 16-22 (discussing mercury levels in fish and whether consumption is adverse to one's health); *Review of Administrative Decisions*, RUPERT PUB. INT. MOVEMENT J., Nov. 1981–Feb. 1982, at 34 (discussing administrative law); Tom Riley, *F.O.I. (1): New Zealand*, RUPERT PUB. INT. MOVEMENT J., Nov. 1981–Feb. 1982, at 28-29 (discussing freedom of information legislation in New Zealand).

123. *Nader in Canberra*, *supra* note 119.

124. Terrill, *supra* note 118 (“In 1976 the Rupert Public Interest Movement, whose founders included John McMillan, the prime author of the RCAGA Bill, helped form the Freedom of Information Legislation Campaign.”); see also Sean Parnell, *John McMillan to head FOI office*, THE AUSTRALIAN (Feb. 26, 2010), <http://www.theaustralian.com.au/archive/politics/john-mcmillan-to-head-foi-office/news-story/bf9adda6eb8a0e9323ec63daf36a6670> (“Professor McMillan . . . has extensive experience in law, and was a founding member of the Freedom of Information Campaign Committee in the 1970s . . .”).

125. *Our Executive*, OMBUDSMAN N.S.W., <https://www.ombo.nsw.gov.au/what-we-do/our-office/our-structure/our-executive> (last visited Oct. 25 2017).

While still a young legal academic in the early 1970s, he served as a research officer on the Royal Commission on Australian Government Administration, which was established under the Whitlam government.¹²⁶ In that role, he drafted the first proposal for an Australian Freedom of Information Act.¹²⁷ It appears he may have done this on his own initiative, but subsequently managed to convince one of the Commissioners of the merits of the idea, and the draft was included as an appendix to the Commission's report.¹²⁸ This draft formed the basis of the Bill that was eventually passed in 1982, over the objections of the bureaucracy but with broad, if uneven, support from across the political spectrum.¹²⁹

These Australian activists were able to influence the shape of ideas, but exerted less influence over the course of events than their counterparts elsewhere. This was, in part, because they were organisationally weaker, and in part because they did not enjoy the same favourable circumstances. Rupert was a relatively short-lived venture, which never had the organisational strength or resources of its equivalents in the UK or US. It served primarily as a means for bringing this loose coalition together and raising support among low and mid-ranking bureaucrats.¹³⁰ It did not exercise a great deal of influence over broader public opinion, and senior public servants were generally opposed.¹³¹ The Campaign Committee, too, served as an *ad hoc* coordinating mechanism among its own loose-knit members. It was influential enough over policy debates to be mentioned by a Senate inquiry into freedom of information in the late 1970s.¹³² But the *Freedom of Information Act* passed in 1982,¹³³ ten years after the Campaign Committee was founded and well after it had petered out.

126. See H. C. COOMBS ET AL., ROYAL COMM'N ON AUSTRALIAN GOV'T ADMIN., REPORT 465-66 (1976) [hereinafter ROYAL COMM'N REPORT] (indicating that "J. D. McMillan" worked under the Research Section of the Royal Commission between September 29, 1975 and January 12, 1976); Patrick Weller & R.F.I. Smith, *Inside the inquiry: Problems of Organising a Public Service Review*, in REFORMING AUSTRALIAN GOVERNMENT THE COOMBS REPORT AND BEYOND 5, 5 (Cameron Hazlehurst & J.R. Nethercote eds., 1977) ("In June 1974 the Labor Prime Minister, Gough Whitlam, announced the establishment of a Royal Commission to examine federal government administration in Australia.").

127. Wood, *supra* note 118 (indicating that John McMillan was "the prime author of the RCAGA [Royal Commission on Australian Government Administration] Bill . . .").

128. See ROYAL COMM'N REPORT, *supra* note 126, at 350.

129. See McMILLAN, *supra* note 44, at 2.

130. See Terrill, *supra* note 118.

131. See *id.*

132. SENATE STANDING COMM. ON CONSTITUTIONAL AND LEGAL AFFAIRS, PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA, FREEDOM OF INFORMATION REPORT 10 (1979).

133. *Freedom of Information Act 1982* (Cth) 215 n.3 (Austl.) (amended 2017).

The reasons for this delay emphasise the extent to which the Australian movement suffered from the absence of favourable circumstances, of the kind which arose in the US and the UK. This was primarily due to the fall of the Whitlam government in controversy in the mid-1970s.¹³⁴ The Whitlam government was replaced with the conservative Fraser government,¹³⁵ which was broadly sympathetic to the movement but had other priorities. This presented the bureaucracy with a significant opportunity to resist reform, which it exploited to the fullest through departmental committees and the Parliamentary process.¹³⁶ Despite this, the issue did not disappear entirely from the political agenda, primarily due to pressure from backbench members of the government,¹³⁷ and a Senate Committee which held consultations showing reforms were widely-supported in the press and by public opinion, even if not electorally decisive.¹³⁸ A law resembling McMillan's original draft was eventually passed in the final hours before the Fraser government was replaced by the progressive Hawke government in the early 1980s.¹³⁹

III. EXPLAINING THE HISTORY OF CONSUMER ADVOCACY

The consumer advocacy movement has had a curious relationship with freedom of information. On the one hand, movements that existed in many countries were typically favourable towards access rights. On the other hand, they only appear to have played a truly decisive role in the early period of the global diffusion of these laws. The countries in which they were most influential were generally among the first outside the Scandinavian countries to introduce laws, particularly, but by no means only, the English-speaking countries.¹⁴⁰ This last part of the article considers two aspects of this. First, why did advocates only begin to play a decisive role from the 1970s and why was their influence strongest in these particular countries? Second,

134. See *Sir John Kerr; Overturned Government of Australia*, L.A. TIMES, Mar. 30, 1991, at A18.

135. *Malcolm Fraser*, NAT'L ARCHIVES OF AUSTRALIA, http://primeministers.naa.gov.au/prime_ministers/fraser/ (last visited Nov. 28, 2017).

136. See ROYAL COMM'N REPORT, *supra* note 126, at 119, 350.

137. See Riley, *supra* note 9, at 38.

138. *Id.* at 31-33.

139. See *Freedom of Information Act 1982* (Cth) 215 n.3 (Austl.) (amended 2017); *Prime Ministers of Australia: Malcolm Fraser*, NAT'L MUSEUM OF AUSTRALIA, http://www.nma.gov.au/primeministers/malcolm_fraser (last visited Oct. 13, 2017).

140. See *Access to Information Laws: Overview and Statutory Goals*, RIGHT2INFO, http://www.right2info.org/access-to-information-laws/access-to-information-laws#_ftnref7 (last updated Jan. 20, 2012, 1:30 PM).

why do they not appear to have been so decisive since the 1990s? The answers offered here will necessarily be tentative due to the qualitative nature of this study. Nevertheless, through structured historical analysis between and within cases, we can identify certain plausible possibilities.

A. *Why Did Decisive Mobilisation Arise When and Where It Did?*

Deliberate action among consumer advocates in favour of freedom of information arose when it did, and in the countries where it did, due to a combination of structural factors and contingent events. I have already examined the role of structural, and particularly, institutional, features in other work including things like electoral systems and relations between legislatures and executives¹⁴¹ (so-called “political opportunity structures”¹⁴²), and the institutional structure of the economy.¹⁴³ The following discussion seeks to complement this earlier work by focussing primarily on the role of individual agency, and more broadly, on historical processes of change. This article will only seek to show briefly that these factors were channelled and filtered by institutions.

Active mobilisation for freedom of information occurred among consumer advocates in the early 1970s, and not before, primarily as a result of the emergence of public interest advocacy within the movement itself in the previous decade.¹⁴⁴ This shift occurred first in the US, where the public interest advocacy movement emerged before spreading to the other countries discussed earlier. This movement consisted of lawyers working in a diverse range of settings such as: traditional law firms with *pro bono* programmes; private advocates and political lobbyists; freelance legal representatives whose clients were the urban poor; in-house lawyers for social movements; and consumer safety advocates (to name but a few).¹⁴⁵ Chief among these was Ralph Nader, who was quite explicit in his desire to bring legal and consumer activism together.¹⁴⁶ This was by no means uncontroversial; Nader was on the Board of the Consumer’s Union until 1975, but re-

141. See McClean, *supra* note 113; *Why the French FOIA Failed*, *supra* note 27.

142. See generally Herbert Kitschelt, *Political Opportunity Structures and Political Protest: Anti-Nuclear Movements in Four Democracies*, 16 BRIT. J. POL. SCI. 57, 58 (1986).

143. See McClean, *supra* note 113.

144. See FUNG, *supra* note 8, at 6, 6 n.1.

145. Comment, *The New Public Interest Lawyers*, 79 YALE L.J. 1069, 1071-72 (1970).

146. See Ralph Nader, *Consumerism and Legal Services: The Merging of Movements*, 11 L. & SOC’Y REV. 247, 252 (1976).

signed because it refused to adopt the more radical approach he proposed.¹⁴⁷

This change manifested itself in the emergence of new concerns and tactics, and as institutional and generational change. The consumer information movement exists, in functional terms, to address a structural imbalance in the market economy. It is not necessarily in the interests of vendors or advertisers to provide sufficient information on products to enable consumers to make fully informed choices since they have an interest in restricting information that could reflect badly on their products. Before the 1960s, consumer advocacy tended to address this by comparing the efficiency and technical quality of the products that were available on the market.¹⁴⁸ The legitimacy of this kind of advocacy rested on the expertise of the lawyers, engineers, economists, and doctors conducting the analyses on behalf of consumer advocacy organisations, and on the fact these experts had no vested interest in the productive process (they were neither producers nor regulators). The new public interest advocates were quite self-consciously interested in mobilising public opinion around concerns such as consumer safety and the environmental impact of products, and in influencing which products were available for sale in the first place.¹⁴⁹ Their influence can be seen (amongst other things) in the increasing frequency of recommendations not to buy a particular product or range of products because of these kinds of problems.¹⁵⁰

The fact that public interest advocates became such strong supporters of freedom of information was probably made easier by historical chance. By the late 1960s, when Nader rose to prominence, the United States had a *Freedom of Information Act*,¹⁵¹ and as we have seen, his supporters were significant early users of it. The promise the Act held out in principle, and the shortcomings it displayed in practice, undoubtedly contributed to the way these actors gradually came

147. Laurie Johnston, Notes on People, *Nader Quits Consumers Union*, N.Y. TIMES, Aug. 23, 1975, at 10.

148. See *Consumer Advocacy, INC.*, <https://www.inc.com/encyclopedia/consumer-advocacy.html> (last visited Nov. 29, 2017).

149. See UNSAFE AT ANY SPEED, *supra* 46, at vi-xi, 343.

150. See John TD Wood, *Consumer Protection: A Case of Successful Regulation*, in REGULATORY THEORY 633, 640-41 (Peter Drahos ed., 2017) (discussing that government regulation of products stemmed from public interest advocate reviews of products).

151. The Freedom of Information Act came into effect in 1967. See Freedom of Information Act, Pub. L. No. 90-23, 81 Stat. 54 (1967) (codified as amended at 5 U.S.C. § 552 (2016)); Christopher Jensen, *Even to Critics, Ralph Nader Revolutionized Cars*, INT'L N.Y. TIMES, Nov. 27, 2015, at 18, 2015 WLNR 35177786.

to see government control over the disclosure of information as a problem worthy of attention in its own right.

But we should not overstate the importance of this contingency; there is clearly a deep elective affinity between public interest advocacy and concern over government secrecy. It is likely that the movement would have confronted state control over information as an issue in its own right sooner or later, even without the model of the FOIA to work from. Public interest advocacy constitutes a very specific response to problems of market failure, such as spill-overs and abuse of monopoly positions. It seeks to address collective ills like environmental degradation, poor financial reporting and consumer safety, and other issues by mobilising consumer behaviour and public opinion through providing information (this contrasts with classic consumer advocacy, which seeks primarily to maximise individual utility).¹⁵² This strategy entails a highly ambiguous relationship with the State. On the one hand, its emphasis on individual choice represents a reaction against a reliance on the bureaucratic regulation of economic life, which was the characteristic feature of earlier “New Deal” progressivism.¹⁵³ This manifested itself in Nader’s denunciations of “agency capture,” discussed earlier. On the other hand, public interest advocacy often relies on official files to demonstrate that a problem exists, and this requires a state with sufficient infrastructural capacity to collect the information in question. Public interest advocacy also needs a State that is capable of imposing regulations to solve these problems, and which is sufficiently responsive to public opinion to do so over the objections of powerful economic interests.¹⁵⁴

The global spread of consumer movement engagement with freedom of information is also heavily influenced by contingent events

152. See Comment, *supra* note 145, at 1070 n.3 (first citing H. KARIEL, *THE DECLINE OF AMERICAN PLURALISM* (1961); then citing GALBRAITH, *THE NEW INDUSTRIAL STATE* (1967); then citing G. McCONNEL, *PRIVATE PROPERTY AND AMERICAN DEMOCRACY* (1966); and then citing William E. Connolly, *The Challenge to Pluralist Theory*, in *BIAS OF PLURALISM* 3 (William E. Connolly ed., 1969)).

153. See FUNG, *supra* note 8, at 1-2, 5 (first citing Ginger Zhe Jin & Leslie Phillip, *The Effect of Information on Product Quality: Evidence from Restaurant Hygiene Grade Cards*, 118 Q. J. ECON. 409 (2003); then citing STEPHEN BREYER, *BREAKING THE VICIOUS CIRCLE* (1993); and then citing Richard J. Zeckhauser & David V. P. Marks, *Signposting: The Selective Revelation of Product Information*, in *WISE CHOICES: GAMES, DECISIONS, AND NEGOTIATIONS* 22 (Richard J. Zeckhauser et al. eds., 1996)).

154. See FUNG, *supra* note 8, at 1-2, 5-6 (citing STEPHEN BREYER, *BREAKING THE VICIOUS CIRCLE* (1993)).

flowing from the emergence of public interest-style advocacy.¹⁵⁵ Public interest movements outside the United States typically arose and began to advocate for freedom of information as a result of direct contact with Nader himself, and the adoption of his approach.¹⁵⁶ The importance of personal contacts is quite clear from the historical sources for Australia, the UK, and Canada.¹⁵⁷ The importance of personal contact is also noteworthy from a scholarly perspective because it stands in stark contrast to other studies of diffusion; the most important study of this aspect of freedom of information focuses on deep-seated structural factors like technological and economic change, fashion among policy elites, and network effects.¹⁵⁸ Diffusion of norms among civil society is not given great weight.

The fact that this kind of mobilisation did not spread more widely or prove more widely effective is probably also related to the limits on the diffusion of public interest advocacy. It might be tempting to assume that the English language was a factor here aiding diffusion of norms and practices among consumer advocates. If this were the case, we might expect that mobilisation would be slower and less decisive outside the English-speaking world, a hypothesis apparently confirmed by the experience of Germany.¹⁵⁹ But the case of France suggests that state structures are probably more likely the cause than language barriers.¹⁶⁰ In France, as already noted, the 1970s saw a considerable growth in consumer information organisations, and also a shift in tactics which was fairly similar to Nader's public interest advocacy (and, indeed, may have been inspired by him).¹⁶¹ In the 1970s, French and Belgian consumer advocates shifted from simply providing information on products and began to organise local groups, recruit

155. See, for example, Wood, *supra* note 150, at 639-40, for a discussion of the link and nearly simultaneous rise of the consumer movement and freedom of information in both the US and Australian.

156. See *id.* at 640-41.

157. See, e.g., PUB. INT. RES. CTR., *supra* note 83 (indicating that "PIRC [a public interest organisation based in the UK] was originally conceived of as an offshoot of the Public Citizen network of organisations created in the US by Ralph Nader.").

158. See Colin J. Bennett, *Understanding Ripple Effects: The Cross-National Adoption of Policy Instruments for Bureaucratic Accountability*, 10 GOVERNANCE: INT'L J. POL'Y, ADMIN., & INST. 213 (1997); Paul J. DiMaggio & Walter W. Powell, *The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields*, 48 AM. SOC. REV. 147, 149-50, 157 (1983).

159. See Christian Kleinschmidt, *Comparative Consumer Product Testing in Germany*, 84 BUS. HIST. REV. 105, 107-08 (2010) (citing Trumbull Gunnar, *National Varieties of Consumerism*, 47 JAHRBUCH FÜR WIRTSCHAFTSGESCHICHTE 77, 92 (2006)).

160. Kleinschmidt, *supra* note 159, at 106-07; see also Matthew Hilton, *Consumers and the State since the Second World War*, 611 ANNALS AM. ACAD. POL. & SOC. SCI. 66, 72, 74 (2007).

161. See Marcus-Steff, *supra* note 11, at 92.

activists, and hold “consumers’ strikes.”¹⁶² These activities indirectly formed part of a general climate favourable to reform, but as I have shown elsewhere, the French reform process may have occurred at around this time but was almost entirely driven by the Government for its own purposes.¹⁶³ There was no serious attempt by consumer advocates to pressure the government to introduce a general right of access because the French political system provided extremely limited opportunities for advocates to directly pressure the government and almost no incentives for the government to respond to that pressure.¹⁶⁴ The experience of Japan is also consistent with this. The earliest mobilisation in favour of freedom of information appears to have arisen among public interest lawyers and activists in the late 1970s in response to scandals involving political corruption (e.g. the use of expense accounts to bribe) and environmental, health, and safety issues—especially regarding nuclear reactors and waste.¹⁶⁵ Ralph Nader toured Japan in 1989, advocating a product liability law and a Japanese FOIA.¹⁶⁶ Despite this, and despite the fact that draft disclosure laws were proposed in parliament on five occasions in the 1980s and early 1990s by opposition parties, the Japanese law was only passed in the early 2000s.¹⁶⁷ An operative factor in this delay appears to be that a national access law in Japan was never an electorally-significant issue in Japan,¹⁶⁸ although the similarities with the French experience suggest the insulation of the State from popular pressure may also have been a factor.

162. See Giselle Nath, *Giving Consumers a Political Voice*, 132 *LOW COUNTRIES HIST. REV.* 70, 72, 75-76 (2017); see also Matthew Hilton, *The Death of a Consumer Society*, 18 *TRANSACTIONS ROYAL HIST. SOC.* 211, 217-20, 223-27, 231 (2008) (discussing the globalisation and radicalisation of Western European consumer movements).

163. See *Why the French FOIA Failed*, *supra* note 27, at 45-46 (citing Michel Aurillac, *Les Origines Parlementaires du Droit D'accès*, in *TRANSPARENCE ET SECRET* 53 (2003)).

164. See *Why the French FOIA Failed*, *supra* note 27, at 52 (citing Herbert Kitschelt, *Political Opportunity Structures and Political Protest: Anti-Nuclear Movements in Four Democracies*, 16 *BRITISH J. POL. SCI.* 57 (1986)).

165. See David Boling, *Access to Government-Held Information in Japan: Citizens' Right to Know Bows to the Bureaucracy*, 34 *STAN. J. INT'L L.*, 1, 7 (1998) (first citing EDWIN O. REISCHAUER, *THE JAPANESE* (1977); then citing Kawabata Tai, *Information on Nuclear-Plant Accident Hard to Get*, *JAPAN TIMES*, July 20, 1988, at 13; and then citing *Tokyo Fire Department Nixing Requests for Nuclear Fuel Shipment Information*, *ASAHI EVENING NEWS*, Apr. 29, 1992, at 4); see also Lawrence Repeta & David M. Schultz, *Japanese Government Information: New Rules for Access*, *NAT'L SECURITY ARCHIVE* (May 23, 2002), <http://nsarchive2.gwu.edu/nsa/foia/japanfoia.html>.

166. Boling, *supra* note 165, at 1-2 (citing 5 U.S.C. § 552 (West 2007) (amended 2016)).

167. See Boling, *supra* note 165, at 15 (citing David Boling, *Challenging the Rule of Angels*, *AM. CHAMBER COM. J. JAPAN*, May 1993, at 39, 41); see also Repeta & Schultz, *supra* note 165.

168. See Boling, *supra* note 165, at 19 (citing *Citizens' Movement Seeking FOIA in Japan* (Radio Japan broadcast Jan. 20, 1994)).

B. *Why Did Consumer Advocacy Subside As An Important Factor?*

The events discussed above all occurred relatively early in the diffusion of freedom of information around the world. Since then, the number of countries with access laws has increased dramatically.¹⁶⁹ In 1990, the number stood at only fourteen; in 2000, it had grown to forty-six; by 2010, around ninety countries had introduced an access law, and the number has continued to grow since.¹⁷⁰ Despite this dramatic growth and the role they played early on, consumer advocates have not played a particularly significant role since. They have been part of broad supportive coalitions in some cases, including Germany as noted earlier, but in most of these cases, the primary drivers of reform have been political insiders—elected politicians, international government organisations, and on some occasions, journalists, and constitutional reformers.

This apparent waning of influence is not because the consumer advocacy movement has abandoned the cause. Public interest lawyers remain a very important constituency for freedom of information in most of the countries discussed above (France being a notable exception). This is particularly true of the US, where Nader's groups such as Public Interest, and others, which arose at the same time like Common Cause, remain significant users.¹⁷¹ They also form a strong lobby in support of the law itself.¹⁷² Since the 1970s, they have continued to work for the extension of rights by supporting requesters to lobbying Congress and bringing lawsuits to achieve reforms through jurisprudence when legislation has proved impractical,¹⁷³ although not always so decisively as in 1974. Public interest law firms and other groups continue to play similar roles in the UK and Australia and, as already discussed, supported the introduction of laws elsewhere.

This apparent waning is due, at least in part, to the fact that freedom of information began to spread for different reasons in the 1990s and the conventional account of these reasons has tended to obscure the role played by consumer advocates in developing the models which were being diffused. Chief among these is the rapid interna-

169. See RIGHT2INFO, *supra* note 140.

170. *Id.*

171. See U.S. PUB. INT. RES. GROUP, *supra* note 56; see also *About Us*, COMMON CAUSE, <http://www.commoncause.org/about/> (last visited Oct. 21, 2017).

172. See Kevin Bogardus, *The Top 10 Lobbying Victories of 2010*, THE HILL (Dec. 15, 2010, 12:51 AM), <http://thehill.com/business-a-lobbying/133691-the-top-10-lobbying-victories-of-2010>.

173. See U.S. PUB. INT. RES. GROUP, *supra* note 56; see also *About Us*, COMMON CAUSE, <http://www.commoncause.org/about/> (last visited Oct. 21, 2017).

tional uptake of so-called “targeted disclosure mechanisms” by governments themselves.¹⁷⁴ This is a relatively new label for mechanisms for regulating divisive social issues like financial markets, pollution control, and food and product safety through transparency. Under these mechanisms, the government does not directly enforce standards of behaviour through investigation and sanction.¹⁷⁵ Rather, it ensures that trustworthy, comparable information is available to the public (usually understood as “consumers”) about the quality of food, levels of pollution, the investments made by companies, or whatever the case may be.¹⁷⁶ Standards are enforced through market pressure.¹⁷⁷ The functional similarities with the uses that public interest advocates made of access laws should be clear.

The origin of these mechanisms is conventionally traced to the Union Carbide disaster at Bhopal in December 1984.¹⁷⁸ In response, the US introduced the *Emergency Planning and Community Right to Know Act of 1986*,¹⁷⁹ which mandated the publication of the volume of certain chemicals released by industries into the environment.¹⁸⁰ In so doing, it sought to shift responsibility away from government for setting acceptable levels of emissions in favour of allowing market pressure and negotiations with interest groups to achieve the same end.¹⁸¹ The model established by this law diffused rapidly around the world, due in part to the influence of international organisations. The Organisation for Economic Co-operation and Development (“OECD”), for example, encouraged member nations to adopt so-called Toxic Release Inventory laws, also known as Pollutant Release and Transfer Registers, from the early 1990s.¹⁸² In a separate but related process, the United National Economic Commission for Eu-

174. See FUNG, *supra* note 8, at 1-2, 4.

175. See *id.* at 1-2, 6.

176. See *id.* at 6.

177. See *id.* at 2-4.

178. OFF. OF EMERGENCY MGMT., U.S. ENVTL. PROTECTION AGENCY, THE EMERGENCY PLANNING AND COMMUNITY RIGHT-TO-KNOW ACT (Sept. 2012), <https://www.epa.gov/epcra/epcra-fact-sheet>.

179. Emergency Planning and Right-to-Know Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (codified as amended at 42 U.S.C. §§ 11001-11050 (1986)).

180. *Id.*; see also DAVID BANISAR, FREEDOM OF INFORMATION AROUND THE WORLD 2006: A GLOBAL SURVEY OF ACCESS TO GOVERNMENT INFORMATION LAWS 162 (2006), http://www.freedominfo.org/documents/global_survey2006.pdf.

181. See ARCHON FUNG ET AL., FULL DISCLOSURE: THE POLITICS, PERILS AND PROMISE OF TRANSPARENCY 29 (2007) [hereinafter FULL DISCLOSURE]; Vivek Ramkumar & Elena Petkova, *Transparency and Environmental Governance*, in THE RIGHT TO KNOW: TRANSPARENCY FOR AN OPEN WORLD 279, 280 (Ann Florini ed., 2007).

182. Ramkumar & Petkova, *supra* note 181, at 281.

rope's Convention on Access to Information, Public Participation in Decision-Making, and Access to Justice in Environmental Matters, also known as the Aarhus Convention,¹⁸³ entered into force in October 2001, and by the end of the decade, had forty signatories and twenty-seven parties.¹⁸⁴ The Convention mandates the collection and disclosure of certain sorts of environmental information, and grants certain enforceable rights to citizens and NGOs to participate in decision-making processes and justice mechanisms.¹⁸⁵

At the same time, as governments began to take up targeted transparency mechanisms, international organisations also began to encourage the adoption of access laws as a general tool of good public governance.¹⁸⁶ By the early 2000s, international government organisations like the World Bank and the OECD were advocating open government in this way.¹⁸⁷ Alongside international civil society organisations like Article 19, Access Info Europe, and Amnesty International, they were playing a crucial role in the spread of freedom of information laws, particularly among newly-democratising nations.¹⁸⁸

The role of public interest advocates in developing these models and in campaigning for freedom of information tends not to be recognised in contemporary scholarship on either targeted transparency mechanisms or freedom of information. This may be because this scholarship is influenced by the way the international policy community thinks about these reforms.

A good example of this is Archon Fung's thorough and insightful work on targeted transparency mechanisms.¹⁸⁹ Fung defines targeted transparency mechanisms in terms that cover exactly the same ground as the laws introduced by the Campaign for Freedom of Information in the UK as alternatives to a full Freedom of Information Act, and which are consistent with the uses to which Nader put in the US

183. Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, June 25, 1998, 2161 U.N.T.S. 447 [hereinafter Convention on Access to Information]; Ramkumar & Petkova, *supra* note 181, at 297.

184. Convention on Access to Information, *supra* note 183; Ramkumar & Petkova, *supra* note 181, at 297.

185. Convention on Access to Information, *supra* note 183; see Ramkumar & Petkova, *supra* note 181, at 297.

186. Public Affairs Division, *Public Sector Modernisation: Open Government*, OECD OBSERVER, Nov. 2005, at 3, <http://www.oecd.org/site/govgfg/39044786.pdf>.

187. *Id.*

188. See Alexandru Grigorescu, *International Organizations and Government Transparency: Linking the International and Domestic Realms*, 47 INT'L STUD. Q. 643, 649-50 (2003).

189. See FULL DISCLOSURE, *supra* note 181.

FOIA.¹⁹⁰ They are laws that have specific a policy purpose, which is achieved by enforcing disclosure of defined information via defined means by defined disclosers (who need not necessarily be government agencies), usually backed up by enforcement mechanisms.¹⁹¹

To be fair to Fung, his primary purpose is not to explain the origins of these laws, but to identify the factors that contribute to their success. Based on a comparison of the eighteen American policies that meet his definition, he concludes that they work best when applied to problems where a lack of information is a significant contributor and where there is consensus on how to measure the problem.¹⁹² He also concludes that they work best where communicating this information is practical, where users have the will and capacity make relevant choices, where this choice will encourage those with the capacity to reduce risks or improve performance, and where variable results that flow from individual choice are acceptable.¹⁹³ All of this is, broadly, consistent with the theory underpinning *Emergency Planning and Community Right to Know Act*. It does, however, display a neoliberal emphasis on the primacy of individual choice in a quasi-market environment as a policy tool. As such, it tends to downplay the important role which intermediary organisations like public interest advocates have actually played by accessing and distributing information and harnessing the perception that they may be able to influence mass behaviour in order to influence the behaviour of governments and regulated organisations.

This tendency to overlook the influence of public interest advocacy is also a feature of the brief historical discussion Fung offers early in the book.¹⁹⁴ Targeted transparency mechanisms are, he argues, a second generation of transparency instruments (the first being classic right to know legislation).¹⁹⁵ They emerged, he says, as a response to pressure from unions and environmental movements about spill-overs such as pollution.¹⁹⁶ More generally, they are a result of the emergence of policy areas characterised by irreconcilable social divisions in which “conventional forms of government intervention . . . are some-

190. See FULL DISCLOSURE, *supra* note 181, at 39. See generally Freedom of Information Act, 5 U.S.C. § 552 (West 2007) (amended 2016); CAMPAIGN FOR FREEDOM OF INFO., *supra* note 44 (all of these sources refer to transparency mechanisms as laws made with a specific policy purpose, which is accomplished through specific disclosures).

191. See FULL DISCLOSURE, *supra* note 181, at 39.

192. *Id.* at 174.

193. *Id.* at 174-75.

194. See *id.* at 24-25.

195. *Id.* at 25.

196. *Id.* at 29.

times ill suited to the kinds of risks and performance flaws that policy-makers now identify for action” such as food labelling and car safety.¹⁹⁷ In response, governments hand over to citizens the ability to choose for themselves.¹⁹⁸ Their spread is also a result of technological change, which provides the means to collect, assemble, process and distribute information far more quickly and conveniently than in the past.¹⁹⁹ And, finally, they constitute a response to scepticism about the ability of government to regulate, and a general decline in trust that government will regulate in the interests of the people, as a result of which government responds by giving citizens the ability to exert pressure on their own.²⁰⁰ This explanation is consistent in some respects with the actual course of events in the US from the 1990s onwards, such as the environmental movement and the personal computing revolution.²⁰¹ It however obscures the role played by public interest advocacy over the preceding two decades in pioneering this use of access laws and subtly portrays the government as a much more active, and willing participant in the adoption of these laws than was actually the case.

It would be unfair to dwell much longer on a relatively minor aspect of a book which sets itself a very different task, but it is nevertheless worth noting because it is common to a great deal of contemporary scholarship and professional literature on this subject. This, too, tends to be primarily concerned with the analysis of the effectiveness of transparency as a policy tool. It also offers potted histories of the development of these laws, which are strongly influenced by the functions that the authors are most interested in and tends to look no further than recent events that conform to these instrumental expectations. This is particularly true of professional literature on freedom of information (as opposed to targeted transparency mechanisms), which tends to emphasise its role in contributing to democratic control of the administrative state, and hence to emphasise the role of groups with well-recognised roles in contemporary democratic theory. These groups include elected politicians, appointed bureaucrats, the voting public, and NGOs for whom transparency is a primary goal in its own right, rather than as instrumental goal.²⁰²

197. *Id.* at 14.

198. *Id.*

199. *Id.* at 14-15.

200. *Id.* at 15.

201. *Id.* at 28-29.

202. See, e.g., Public Affairs Division, *supra* note 186. See Daniel Berliner, *The Political Origins of Transparency*, 76 J. POL. 479 (2014); Robert Gregory Michener, *The Surrender of Se-*

IV. CONCLUSION

Consumer advocates played an important role in the development and spread of freedom of information. These organisations were widespread in the industrialised democratic world of the mid and late twentieth century and helped to establish favourable conditions for the introduction of access laws by distributing information to the general public about commercial issues and by legitimising its availability. Once freedom of information emerged as a matter of public debate, these groups were typically among the supporters. From the late 1960s, some consumer advocacy movements shifted emphasis away from simply informing consumers and increasingly sought to influence regulators and producers. In these countries, the consumer advocacy movement was typically a much more active supporter of freedom of information and was often responsible for putting access laws on the legislative agenda and ensuring these laws were actually passed. The most prominent examples of this occurred in the English-speaking world, particularly in the US, the UK, and Australia, but there is also evidence of something similar in Canada, Japan, and to a lesser extent Germany.

This article has offered a tentative explanation for this historical alignment between public interest advocacy and freedom of information, which emphasises both structural and contingent factors. Structurally, public interest advocacy emerged from dissatisfaction with the capture of regulatory agencies by producers and with the contribution of government secrecy to this situation. This happened to occur earliest in the United States because the public interest advocacy movement emerged there first, and because the *Freedom of Information Act of 1966* provided a point around which this alignment could crystallise. It spread around the world largely due to personal contact between local public interest advocates and their American counterparts, particularly Ralph Nader. The article has not attempted to systematically assess why this mobilisation appears to have occurred most prominently in particular countries, but on the basis of a preliminary comparative analysis of the countries cited above, and by reference to other scholarship, has suggested favourable political opportunity structures and a conducive political economy may be relevant.

crecy: Explaining the Emergence of Strong Access to Information Laws in Latin America (May 2010) (unpublished Ph.D. dissertation, University of Texas at Austin) (on file with University of Texas at Austin) for scholarly examples focusing on political factors.

The article has also considered the rather curious fact that these events are not widely acknowledged in contemporary scholarly and professional literature on transparency, despite the fact that public interest advocacy was a crucial contributor to both freedom of information and the theory underpinning contemporary targeted transparency mechanisms. It has suggested that this may be partly due to the fact that, from the 1990s, transparency became an accepted tool of public sector governance, and that as a result, these mechanisms were taken up by governments and international government organisations. As a result, although public interest advocates continue to use and support these laws, they have played a less significant role in their diffusion. It also appears that contemporary scholarship on this subject has typically been more interested in the functions and uses of these laws than in their origins and has tended to read contemporary (and somewhat neoliberal) assumptions about them back into history.

A study of the history of these laws serves as a useful corrective to this. Freedom of information is not merely the outcome of struggles to exert democratic control over the state, it is also the legacy of efforts to shift the balance between consumers and producers in the economy. The laws in many countries have been influenced by these struggles because the countries in which consumer advocates fought have served as models from which other governments and non-government organisations have drawn inspiration. This history also serves to draw attention to the crucial role played by intermediary organisations in the relationship between individuals, whether they be voters or consumers, and the large bureaucracies which shape many aspects of contemporary life.

ARGENTINA'S SOLUTION TO THE MICHAEL BROWN TRAVESTY: A ROLE FOR THE COMPLAINANT VICTIM IN CRIMINAL PROCEEDINGS

*Federico S. Efron**

I. INTRODUCTION.....	74
II. THE VICTIM IN THE CRIMINAL PROCEDURE IN ARGENTINA: A COMPLETE OVERVIEW	78
A. <i>Review of the Present Situation of the Complainant Victim in Argentina</i>	78
1. Who can be a Complainant Victim?	78
2. Powers Established in the Criminal Procedure Code.....	81
3. Differences From the Public Prosecutor's Powers	82
4. Powers Recognized by Interpretation by the Supreme Court and the Influence of Inter- American System Rulings Recognizing Victims' Rights in the Argentine System.....	83
5. Limits.....	87
B. <i>Analysis and Review of the Influence of the Complainant Victim in Human Rights Processes</i>	88
1. Crimes Against Humanity	88
2. Institutional Violence	90

* I would like to thank Dean Catherine Carpenter for her time and wisdom on how to approach and write this paper. I would also like to thank Professor Jonathan Miller for always looking after me as a Siderman Fellow at Southwestern Law School. Finally, a special thanks to Carlos Siderman and his family, who, in honor of his father, José, has established an amazing fellowship that has allowed me to become part of the Southwestern community and make everything happen.

III. ANALYSIS OF THE MICHAEL BROWN CASE BY INTRODUCING THE PARTICIPATION OF THE COMPLAINANT VICTIM	93
A. <i>Brief Introduction to the Second Part of This Article</i>	93
B. <i>Control the Understandable Hurry to Call a Grand Jury</i>	94
C. <i>An Unusual Strategy of the Prosecution Before the Grand Jury</i>	97
D. <i>The Initial Approach That Can Determine the Fate of the Case</i>	101
E. <i>A Different Approach Regarding Witnesses</i>	106
F. <i>The Questioning of Darren Wilson</i>	109
IV. DIFFERENT, NEW EVIDENCE	111
V. CONCLUSION	115

I. INTRODUCTION

Something has to change regarding police abuse cases in the United States. Police officers continue to shoot unarmed Black and Latino men without any consequence. Shooting after shooting, victims and society are left with a feeling of injustice and many unanswered questions. This article is a mere attempt to contribute to the discussion on what can change. In Argentina, the victim of a crime is entitled to fully participate in criminal investigations and trials to seek a conviction.¹ Victims, as a party in the criminal proceeding, are called “querellante.”² Roughly translated, it means the “complainant victim.” The role of the complainant victim in the criminal process in Argentina has proven to be significant in the search for justice while maintaining the proper balance between defense and prosecution, which is necessary for an adequate justice system. The participation of the victim has proven essential to human rights processes in combating police misconduct and pursuing the prosecution of ordinary crimes, such as business fraud and other economic crimes, while not destroying the proper balance required to assure a fair trial for the defendant. Their presence has been especially important in human rights trials dealing with cases of enforced disappearances, torture, rape, kidnapping of children and homicide that took place during the Argentine dictatorship

1. CÓDIGO PROCESAL PENAL DE LA NACIÓN [CÓD. PROC. PEN.] [CRIM. PRO. CODE] art. 82 (2017) (Arg.), <http://servicios.infoleg.gob.ar/infolegInternet/anexos/0-4999/383/texact.htm>.

2. *Id.*

between 1976-1983 or in cases of institutional violence.³ Greater access for the complainant victim helps achieve better results, and in many cases, justice. In the case of the proceedings regarding the crimes committed during the Argentine dictatorship, the complainant victims played a central role in reopening terminated cases.⁴ Therefore, the participation of the victim has enhanced the possibility of reducing the gap between real and legal justice, and, as a consequence, conveyed truth, memory, and justice from the legal system to society regarding the worst crimes committed during the last dictatorship.

In the United States, whether it is at the federal or state level, the victim depends almost entirely on the actions of the prosecutor, including whether the prosecutor seeks to file the case, the direction the case is taken, or any plea agreements offered.⁵ True, there is some minimal involvement, such as sentencing hearings where the victim may give an impact statement,⁶ or where the prosecution allows the involvement of the victim in accepting plea agreements.⁷ However, victims in the United States do not enjoy the full participation as in Argentina. As a result, they still rely on the prosecutor's will to involve them. Although there are some specific issues addressed in new laws, such as California's Victim's Bill of Rights⁸ known as Marsy's

3. See LUIS ALBERTO ROMERO, *A HISTORY OF ARGENTINA IN THE TWENTIETH CENTURY* 217 (James P. Brennan trans., Pa. St. U. Press 2002) (1994); JORGE TAIANA ET AL., *CTR. OF LEGAL & SOC. STUD. & INT'L CTR. FOR TRANSITIONAL JUST., MAKING JUSTICE: FURTHER DISCUSSIONS ON THE PROSECUTION OF CRIMES AGAINST HUMANITY IN ARGENTINA* 13, 16-17 (Paula Arturo trans., 2011).

4. See TAIANA, *supra* note 3, at 16-17.

5. See ALEJANDRO D. CARRIO, *THE CRIMINAL JUSTICE SYSTEM OF ARGENTINA (AN OVERVIEW FOR AMERICAN READERS)* 71 n.90 (1989) ("Contrast [the criminal justice system of Argentina] with the American scheme, in which the victim is provided with no means of initiating criminal proceedings or taking any part in them."); Angela J. Davis, *In Search of Racial Justice: The Role of the Prosecutor*, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 821, 832 (2013) (discussing the great power prosecutors maintain within the American criminal justice system).

6. See, e.g., *Ariel Castro Sentencing: Victim Impact Statements by Michelle Knight, Relatives of Berry, DeJesus*, ABC NEWS 5 CLEVELAND (Aug. 2, 2013, 5:21 AM), <http://www.news5cleveland.com/news/local-news/oh-cuyahoga/ariel-castro-sentencing-victim-impact-statements-by-michelle-knight-relatives-of-amanda-berry-gina-dejesus> (describing the involvement in the sentencing hearing of the responsible for the killing of their relative); *Driver Gets Fifty-One Years to Life for Adenhardt Death*, ORANGE CTY. REG. (Dec. 23, 2010, 9:11 AM), <http://www.ocregister.com/2010/12/23/driver-gets-51-years-to-life-for-adenhardt-death/>.

7. See 18 U.S.C. § 3771(a)(4) (2012); 18 U.S.C. § 3771(a)(9) (2012 & Supp. III 2016).

8. CAL. CONST. art. I, § 28 (Deering 2009); CAL. PENAL CODE §§ 3041.5, 3043 (Deering 2009) (expanding victims' rights in parole proceedings for prisoners sentenced to life in prison with the possibility of parole, applying their rights to all hearings for the purpose of setting, postponing, or rescinding of life prisoner parole dates).

Law, the victim is not entitled to participate in the criminal proceeding.⁹

Take the Michael Brown case, for example. In August of 2014, Michael Brown was shot and killed by Ferguson Police Officer, Darren Wilson.¹⁰ This was an extremely controversial shooting, considering that Brown was unarmed and presented no immediate threat, but still, Wilson shot him approximately seven times.¹¹ Because Brown's family was not entitled to participate in the proceedings that followed, they were forced to rely entirely on the prosecutor, who decided to present the evidence to the grand jury in a way that some have criticized as pro-police.¹² Furthermore, evidence was gathered almost without any involvement of Brown's family.¹³ Against all odds, the result was a "no bill" from the grand jury.¹⁴ This was unusual considering the overwhelming statistics that grand juries vote to indict.¹⁵ If Michael Brown's family had been allowed to participate in the criminal proceedings, the result might have been completely different. Moreover, through counsel of their choice, they would have had increased control over how all the evidence was gathered and presented,

9. See CAL. CONST. art. I, § 28, subsec. (b)(8) (establishing the victim's right to be heard upon any release decision, plea, and sentencing hearing in California); CARRIÓ, *supra* note 5 (pointing out that the Argentine criminal system allows for victim participation while the American criminal system does not).

10. DEP'T OF JUST., DEPARTMENT OF JUSTICE REPORT REGARDING THE CRIMINAL INVESTIGATION INTO THE SHOOTING DEATH OF MICHAEL BROWN BY FERGUSON, MISSOURI POLICE OFFICER DARREN WILSON, 1, 4 (Mar. 4, 2015) [hereinafter DEP'T OF JUST. REP.], https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/doj_report_on_shooting_of_michael_brown_1.pdf.

11. *Id.* at 7, 17 (reporting that Brown was shot at least six or as many as eight times); see Larry Buchanan et al., *What Happened in Ferguson?*, N.Y. TIMES, <https://www.nytimes.com/interactive/2014/08/13/us/ferguson-missouri-town-under-siege-after-police-shooting.html> (last updated Aug. 10, 2015) (discussing the societal uproar surrounding the shooting and that several witnesses recounted that Brown had posed no immediate threat to officer Wilson).

12. See Marisol Bello et al., *Grand Jury Charges are Easy, Except Against Police*, USA TODAY (Nov. 25, 2014), <https://www.usatoday.com/story/news/nation/2014/11/25/ferguson-grand-jury/70098616/>; David Zucchini, *Prosecution's Grand Jury Strategy in Ferguson Adds to Controversy*, L.A. TIMES (Nov. 25, 2014, 8:49 PM), <http://www.latimes.com/nation/la-na-ferguson-da-analysis-20141126-story.html>.

13. See DEP'T OF JUST. REP., *supra* note 10, at 9, 59 (indicating the negligible instances of the Brown family's involvement).

14. Jeffrey Fagan & Bernard E. Harcourt, *Fact Sheet on the Michael Brown Case*, COLUM. L. SCH., <http://www.law.columbia.edu/news/2014/11/michael-brown-case-fact-sheet> (last updated Dec. 5, 2014, 12:00 PM); see Eyder Peralta & Bill Chappell, *Ferguson Jury: No Charges For Officer In Michael Brown's Death*, NPR (Nov. 24, 2014, 3:37 PM), <http://www.npr.org/sections/thetwo-way/2014/11/24/366370100/grand-jury-reaches-decision-in-michael-brown-case>.

15. See *Restoring Legitimacy: The Grand Jury as the Prosecutor's Administrative Agency*, 130 HARV. L. REV. 1205, 1210 (2017) (citing MARK MOTIVANS, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, FEDERAL JUSTICE STATISTICS 2012 - STATISTICAL TABLES 12 (2015)).

the use of witnesses, and selection of experts. In addition, the Brown family could have participated in the preparation of the case presented to the grand jury. This would allow real control over how the case was introduced to the grand jury. Under this scenario, a true bill seems more possible.

In Argentina, the complainant victim can even participate in what is a rough equivalent to a U.S. plea bargain, the “abbreviated trial.”¹⁶ In that proceeding, similar to the U.S. plea bargain, there is a negotiation of the penalty between defendant and prosecutor, but the complainant victim has a right to give an opinion about the agreement that is presented to the deciding judge.¹⁷ And if the complainant victim does not agree with the conviction terms, they have the right to an appeal.¹⁸ This equivalent heightens the victim’s sense of receiving justice, something that should be considered in the U.S. Generally, after an indictment by a grand jury, a vast majority of cases are pleaded.¹⁹ After an indictment is obtained, and with the participation of the complainant victim, the possibility of a plea bargain is diminished.²⁰ This not only favors the interest of the complainant victim but also favors the defendant, as well as the proper administration of justice. The relatives of someone killed often dislike a plea bargain, and as the complainant victim, they should have a say on that matter. Also, the complainant victim deserves a proper outcome; the complainant victim deserve to know who the defendant is, why they are being punished, and what punishment they will receive for the crime committed. The reasons for, and the rights established in *Marsy’s law*, demonstrate this by recognizing the victim’s right to justice and due process, and therefore, explicitly establishes the right to confer with the prosecutor regarding arrest and the charges filed, among other issues.²¹

Plea bargaining, a specific but often used and important stage of criminal procedure, will likely achieve better results with the involvement of the complainant victim. In Argentina, the participation of the complainant victim in the probation hearing can be important in shap-

16. See Cód. PROC. PEN. art. 431 bis (Arg.); see also Alejandro D. Carrió & Alejandro M. Garro, *Argentina, in* Criminal Procedure: A Worldwide Study 46 (Craig Bradley ed., 2d ed. 2007) (discussing the concept and process of an “abbreviated trial”).

17. See Cód. PROC. PEN. art. 431 bis para. 3 (Arg.).

18. *Id.* para. 6.

19. See *Missouri v. Frye*, 566 U.S. 134, 143 (2012) (“Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas.”); *Criminal Cases*, BUREAU OF JUSTICE STATISTICS, <https://www.bjs.gov/index.cfm?ty=tp&tid=23> (last visited Sept. 3, 2017).

20. See CARRIÓ, *supra* note 5, at 178-79, 184, 179 n.22.

21. CAL. CONST. art. I §28, subsec. (b)(6).

ing the conditions imposed on the defendant. Therefore, the conditions to grant the probation, by request of the complainant victim, will be tailored to the offense, such as attending a human rights course, donating money to a specific charity, etc.

This article is divided into two sections. The first describes and explains the powers and capabilities of the complainant victim in the Argentinean criminal system and shows the differences and similarities with the prosecutor's role. It also discusses the role and influence of the complainant victim in criminal cases of crimes against humanity and institutional violence in Argentina. The first section shows how the participation of the complainant victim is an important part of the search for justice. The second section tries to show, through the review and analysis of the evidence in the Michael Brown case, that participation in the criminal proceeding against Darren Wilson by the complainant victim, his family in this case, would have created a different result.

II. THE VICTIM IN THE CRIMINAL PROCEDURE IN ARGENTINA: A COMPLETE OVERVIEW

A. *Review of the Present Situation of the Complainant Victim in Argentina*

1. Who can be a Complainant Victim?

Individuals: From the inception of Argentina's first criminal procedure code in 1889,²² victims in Argentina have been entitled to participate in the criminal process with the representation of a lawyer on their behalf.²³ To achieve the status of "complainant victim," the complainant victim must be directly injured by the crime or, in the case of a crime resulting in the death of the victim, the closest relative of the deceased, particularly the spouse, parents, or children.²⁴ Also, the legal tutor of a disabled person can also become a complainant victim on his behalf.²⁵

An illustrative example is offered through the killing of Franco Almiron and Mauricio Ramos and the attempted murder of Joaquin Romero on February 3, 2011 by the police of the Province of Buenos

22. See generally 5 A. ESMEIN, THE CONTINENTAL LEGAL HIST. SERIES—A HIST. OF CONTINENTAL CRIM. PRO.: WITH SPECIAL REFERENCE TO FR. 596 (John Simpson trans., Ass'n of Am. L. Schools 1968) (indicating that the Argentine Code of Criminal Procedure came into force in 1889).

23. See Cód. Proc. Pen. art. 80, 82 (Arg.); CARRIÓ, *supra* note 5, at 20.

24. Cód. Proc. Pen. art. 82 (Arg.).

25. *Id.*

Aires.²⁶ In that case, the mother of Franco Almiron and Joaquin Romero became complainant victims in the criminal proceedings and fully participated in the investigation.²⁷ Their participation has proven to be critical. Only a few days after the same law enforcement agency responsible for the crimes filed the police report, the prosecutor was ready to close the investigation.²⁸ The prosecutor was determined to accept the version of facts presented by law enforcement, which assumed the police responded to a gang of armed men trying to derail a train to steal cargo in the shantytown of Carcova.²⁹ The police created a story where many armed men fired at them after throwing branches of trees on the rails while the officers only tried to protect the train from being stolen.³⁰

However, in having the complainant victims participate, they not only avoided the closure of the investigation but were able to prove what had really happened that day. Three years later, the truth came out. The derail of the train was an accident, and not planned as the police had suggested.³¹ The alleged “gang” of armed men shooting at the police turned out to be only one man. Furthermore, the shots he fired were an hour before the shooting of the kids and in a different location—100 meters away from where Franco, Mauricio, and Joaquin were standing simply watching what was going on.³² Because of the participation of the claimant victims, it was proven that the three of

26. See *Reclamo de Justicia a Cuatro Meses de los Asesinatos de José León Suárez*, CENTRO DE ESTUDIOS LEGALES Y SOCIALES (June 9, 2011), <http://www.cels.org.ar/web/2011/06/reclamo-de-justicia-a-cuatro-meses-de-los-asesinatos-de-jose-leon-suarez/>.

27. See *Juicio por la Masacre de Carcova: Solicitan la Condena de los Policías Imputados*, CENTRO DE ESTUDIOS LEGALES Y SOCIALES (Mar. 11, 2014), <http://www.cels.org.ar/web/2014/03/juicio-por-la-masacre-de-carcova-solicitan-la-condena-de-los-policias-imputados/>.

28. See *Policeman condemned for 2011 killings in José León Suárez*, BUENOS AIRES HERALD (Mar. 15, 2014), <http://www.buenosairesherald.com/article/154469/policeman-condemned-for-2011-killings-in-jos%C3%A9-le%C3%B3n-su%C3%A1rez>.

29. See *Argentina News Roundup: 20th February 2014*, THE ARG. INDEP. (Feb. 20, 2014), <http://www.argentinaindependent.com/currentaffairs/argentina-news-roundup-20th-february-2014/>; *Argentina News Roundup: 17th March 2014: Ex-Police Officer Acquitted in ‘Masacre de La Cárcova’ Trial*, THE ARGENTINA INDEPENDENT (Mar. 17, 2014), <http://www.argentinaindependent.com/currentaffairs/argentina-news-roundup-17th-march-2014/>.

30. See Alan Gerónimo, *A 6 Años de la Masacre de la Carcova*, LA IZQUIERDA DIARIO (Feb. 3, 2017), <https://www.laizquierdadiario.com/A-6-anos-de-la-Masacre-de-La-Carcova>.

31. See *Reclamo de Justicia a Cuatro Meses de los Asesinatos de José León Suárez*, *supra* note 26.

32. See Ben Darlington, *Two Youths Shot Dead in Chaotic Train Robbery, While Fresh Leads Shed New Light on the Disappearance of Julio Lopez*, PULSAMÉRICA: THE IMPARTIAL LATIN AM. NEWS MAG. (Feb. 7, 2011), <http://www.pulsamerica.co.uk/2011/02/argentina-this-week-9/>.

them were the only kids watching what was going on.³³ By the time of their death, many officers were on the scene, firing hundreds of shotgun rubber rounds.³⁴ The trial court concluded that the police were responsible for the death of Mauricio and Franco, and the attempted murder of Joaquin.³⁵

Groups: There is also a special provision in which civil associations and foundations can become a complainant victim in cases of human rights violations and crimes against humanity.³⁶ The specific requirement is that their statutory purpose has to be directly related to the defense of the affected human rights.³⁷ For example, Center for Legal and Social Studies (“CELS”),³⁸ a human rights organization in Argentina with a large background in litigating crimes against humanity committed by the last dictatorship in Argentina, utilizes this possibility as a way to initiate and foster criminal investigations regarding the crimes committed by the dictators.³⁹ Recently, the CELS has been accepted as a complainant victim in criminal proceedings against the dictators in the disappearance of twenty-six workers from Molinos Rio de la Plata.⁴⁰ The criminal investigation seeks to determine the level of responsibility of the directors of Bunge & Born, an economic group that owned Molinos Rio de la Plata during that time, in the workers’ disappearances committed by the dictatorship with their participation.⁴¹

33. *Masacre de la Cárcova: Absolvieron al Policía Acusado de Asesinar a Franco Almirón y Mauricio Ramos*, EL DIARIO DE BUENOS AIRES (Mar. 17, 2014), <http://www.eldiariodebuenosaires.com/2014/03/17/masacre-de-la-carcova-absolvieron-al-policia-acusado-de-asesinar-a-franco-almiron-y-mauricio-ramos/>.

34. *Id.*; see Darlington, *supra* note 32.

35. See *A Cinco Años de la Masacre de la Cárcova: “Seguimos Pidiendo Justicia”*, INFOJUS NOTICIAS: AGENCIA NACIONAL DE NOTICIAS JURIDICAS (Feb. 3, 2016), <http://www.infojusnoticias.gov.ar/nacionales/a-cinco-anos-de-la-masacre-de-la-carcova-seguimos-pidiendo-justicia-11032.html>; *Reclamo de Justicia a Cuatro Meses de los Asesinatos de José León Suárez*, *supra* note 26.

36. CÓD. PROC. PEN. art. 82 bis (Arg.).

37. *Id.*

38. CENTRO DE ESTUDIOS LEGALES Y SOCIALES, <https://www.cels.org.ar/web/>.

39. See U.S. Dep’t of State, Bureau of Democracy, H.R. and Lab., *Argentina 2014 Human Rights Report 2* (2014).

40. CENTRO DE ESTUDIOS LEGALES Y SOCIALES, *CELS JOINS COURT PROBE TO UNCOVER CORPORATE COMPLICITY IN CRIMES AGAINST HUMANITY* (Sept. 18, 2014); *New LawsUIT Over Dictatorship-Era Crimes*, BUENOS AIRES HERALD (Sept. 9, 2014), <http://www.buenosairesherald.com/article/169274/new-lawsuit-over-dictatorship-era-crimes>.

41. See BUENO AIRES HERALD, *supra* note 40; Alejandra Dandan, *Una Querrela Para Investigar al Directorio de Bunge & Born*, PAGINA 12 (Sept. 8, 2014), <https://www.pagina12.com.ar/diario/elpais/1-254807-2014-09-08.html>.

2. Powers Established in the Criminal Procedure Code

Argentina has a two stage criminal process: an investigation stage where a judge determines if a case should go to trial, and a trial stage, where the parties make their arguments before a three-judge panel.⁴² The complainant victim may participate in both. First, the complainant victim has to present itself in court and be admitted as a party in the investigation of the crime.⁴³ If the victim is denied its pretended role, the victim can appeal to the Court of Appeals.⁴⁴ Since the Supreme Court of the Nation recognizes the right of the victim to get a response as within their constitutional rights, a victim persistently denied of becoming a “complainant victim” can take the case up to the Supreme Court.⁴⁵

Once accepted, the complainant victim can do almost everything that the public prosecutor can. In the investigatory stage, the complainant victim can participate in the questioning of all witnesses, by formulating questions and objecting whenever the questions made by the public prosecutor or defense counsel are inadequate.⁴⁶ They also can have their own expert witnesses participate in all the different forensic analyses.⁴⁷ If their own expert witness does not concur with the official expert, they are allowed to present their own findings.⁴⁸ Article 82 of the Federal Criminal Procedure establishes that the complainant victim may “as such, to promote the process, provide elements of conviction, argue about them and appeal to the scope of this Code.”⁴⁹

When sufficient evidence is gathered against a person, the complainant victim can then ask the court to call that person as a suspect so that the suspect formally becomes a defendant.⁵⁰ After the defendant is called before the judge, the complainant victim has the power to ask the judge to send the case to the oral trial stage of the proceeding.⁵¹ The complainant victim is also entitled to participate in the trial.⁵² In Argentina's federal criminal system, and in almost all local

42. See Cód. Proc. Pen. art. 25, 32 (Arg.); CARRIÓ, *supra* note 5, at 29.

43. Cód. Proc. Pen. art. 83 (Arg.); see CARRIÓ, *supra* note 5, at 70-71.

44. See CARRIÓ, *supra* note 5, at 41.

45. See *id.* at 41, 215.

46. See *id.* at 72.

47. See Cód. Proc. Pen. art. 259 (Arg.); CARRIÓ, *supra* note 5, at 72.

48. See Cód. Proc. Pen. art. 80, 259 (Arg.); Carrió & Garro, *supra* note 16, at 48 (citing Cód. Proc. Pen. art. 259 (Arg.)).

49. Cód. Proc. Pen. art. 82 (Arg.).

50. See CARRIÓ, *supra* note 5, at 72.

51. *Id.*

52. *Id.* at 70.

criminal systems, there are no jury trials.⁵³ Rather, the evidence is presented by the parties to a three-judge tribunal.⁵⁴ One of the three judges presides over the hearings and makes most decisions regarding the admissibility of the questions made to witnesses.⁵⁵ After closing arguments, the three judges communicate the decision they have reached, including a written ruling with their reasoning about the facts and how they applied the law.⁵⁶ In this type of trial, the complainant victim enjoys the same powers as the public prosecutor. This means he can examine and bring his own witness and his own expert witnesses to the stand, cross-examine all witnesses of the defense, and, after all the evidence is presented, the complainant victim has the power to make a closing statement and ask the three-judge tribunal for a conviction.⁵⁷ Finally, at every stage of the procedure, including in the case of an acquittal, the complainant victim is entitled to appeal the rulings it considers unjustified or wrongfully decided.⁵⁸ For example, in the case of the killings in the shantytown of Carcova mentioned above, the trial concluded with an acquittal for one of the policemen who killed Franco and Mauricio.⁵⁹ The appeal from the prosecution and the complainant victim was successful, and the acquittal was declared null.⁶⁰ A new trial is set to happen.⁶¹

3. Differences From the Public Prosecutor's Powers

The most significant difference regarding the public prosecutor's powers and the complainant victim's powers is participation in the bail process. The Criminal Procedure Code is clear that the complainant victim may not appeal any kind of decision regarding bail.⁶² Therefore, victims may offer an opinion to the judge about bail, but nothing more. For example, the complainant can urge the court to have the defendant remain in custody but would not be able to appeal the decision of the judge to grant bail. An important policy justification under-

53. See Carrió & Garro, *supra* note 16, at 48.

54. *Id.*

55. See Cód. Proc. Pen. art. 375 (Arg.).

56. CARRIÓ, *supra* note 5, at 202, 215.

57. *Id.* at 61, 72, 202.

58. See Cód. Proc. Pen. art. 435 (Arg.); CARRIÓ, *supra* note 5, at 214.

59. See *Masacre de la Cárcova: Casación Anuló la Absolución de un ex Policía Bonaerense y Agravó la Condena de Otro*, CENTRO DE ESTUDIOS LEGALES Y SOCIALES (Nov. 3, 2015), <http://www.cels.org.ar/web/2015/11/masacre-de-la-carcova-casacion-anulo-la-absolucion-de-un-ex-policia-bonaerense-y-agravo-la-condena-de-otro/>.

60. *Id.*

61. *Id.*

62. See Cód. Proc. Pen. art. 332 (Arg.).

lies this distinction of powers. The victim's sole interest in participating in the investigation is to seek justice. Whether the defendant remains or does not remain in custody while the proceedings advance towards a conviction, is a precautionary measure not directly related to the investigation. Rather, the issue of bail is tied to assuring the presence of the defendant at trial. Therefore, the only party, other than the defendant, with appeal powers on the issue of bail, is the public prosecutor.

4. Powers Recognized by Interpretation by the Supreme Court and the Influence of Inter-American System Rulings Recognizing Victims' Rights in the Argentine System

The Supreme Court and the Inter-American Human Rights System have been central in pushing Argentina to expand the rights of victims in the criminal process.⁶³ Although not expressly established in the Criminal Procedure Code, the National Supreme Court of Justice in *Santillan*⁶⁴ ruled that a trial court may convict a defendant, even without the prosecution seeking a conviction, by acting solely on the basis of the accusation of the complainant victim.⁶⁵ So, if the public prosecutor decides during his closing argument, for whatever reason, to ask the trial court to acquit the defendant, but the complainant victim in its own closing argument asks that the defendant should be convicted, the trial court may choose to convict. To decide this way, the Court considers that:

anyone to whom the law recognizes standing to sue to defend their rights is covered by the guarantee of due process enshrined in art. 18 of the Constitution, which guarantees all litigants alike the right to obtain a reasoned judgment

under the right to jurisdiction implicitly enshrined in the article of the Constitution and whose scope, as the possibility of occurring before a court to seek justice and get helpful adjudication of the rights of litigants (Decisions 199:617; 305:2150 —La Ley, 1984-B, 206—, among others), is consistent with recognizing arts 8th, para-

63. See, e.g., *Jorge Luis Bronstein v. Argentina*, Cases 11.205, 11.236, 11.238, 11.239, 11.242, 11.243, 11.244, 11.247, 11.248, 11.249, 11.251, 11.254, 11.255, 11.257, 11.258, 11.261, 11.263, 11.305, 11.320, 11.326, 11.330, 11.499, 11.504, Inter-Am. Comm'n H.R., Report No. 2/97, OEA/Ser.L/V/II.95, doc. 7 rev. ¶ 61, §§ i-ii (1997).

64. Corte Suprema de Justicia de la Nación [CSJN][National Supreme Court of Justice], 13/08/1998, "Santillán, Francisco A. / recurso extraordinario," Fallos de la Corte Suprema de Justicia de la Nación [Fallos] (1998-321-2021) (Arg.).

65. *Id.* at 2027.

graph first, of the American Convention on Human Rights and article 14.1 of the International Covenant on Civil and Political Rights.⁶⁶

After *Santillan*, the Supreme Court issued several rulings reaffirming this important power recognized in the complainant victim and further explained how it should be applied.⁶⁷ These rulings were based on international human rights treaties that recognize the rights of the victim.⁶⁸ In direct connection with this recognition of rights in the complainant victim, it is important to consider that in Argentina many human rights treaties have constitutional status.⁶⁹ This means they are considered part of the Constitution, and therefore, they are also considered the supreme law of Argentina.⁷⁰

In *Del'Olio*,⁷¹ for example, the Court expressly mentioned that as long as there is a formal accusation of a crime so that the defendant may know what the accusation is, it does not matter if the accusation is made either by the prosecution or by the complainant victim.⁷² In *Quiroga*,⁷³ the Court expressly referred to the "autonomy" of the criminal complainant in the criminal procedure where the public prosecutor decides to close an investigation.⁷⁴ Autonomy is a full recognition of the complainant victim as a party in the criminal procedure with extended and important powers, including the possibility to carry on with the procedure without the public prosecutor either filing charges or asking the trial court for a conviction.⁷⁵

66. *Id.* at 2029.

67. *E.g.*, Corte Suprema de Justicia de la Nación [CSJN][National Supreme Court of Justice], 11/07/2007, "Sabio, Edgardo Alberto, Herrero, Carlos Washington / falsedad material de documento," Fallos de la Corte Suprema de Justicia de la Nación [Fallos] (2007-330-3092) (Arg.).

68. *See, e.g., id.* at 3094 (citing International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 172; G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948)).

69. Art. 75, para. 22, CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.).

70. *Id.*

71. Corte Suprema de Justicia de la Nación [CSJN][National Supreme Court of Justice], 11/07/2006, "Del'Olio, Edgardo Luis y Del'Olio, Juan Carlos / defraudación por administración fraudulenta," Fallos de la Corte Suprema de Justicia de la Nación [Fallos] (2006-329-2596) (Arg.).

72. *Id.* at 2598.

73. Corte Suprema de Justicia de la Nación [CSJN][National Supreme Court of Justice], 23/12/2004, "Quiroga, Edgardo Oscar / causa 4302," Fallos de la Corte Suprema de Justicia de la Nación [Fallos] (2004-327-5863) (Arg.).

74. *Id.* at 5895.

75. LAURENCE BURGORGUE LARSEN & AMAYA ÚBEDA DE TORRES, *THE INTER-AMERICAN COURT OF HUMAN RIGHTS: CASE LAW AND COMMENTARY* 43 (Rosalind Greenstein trans., Oxford University Press 2011).

The importance of Human Rights treaties in Argentina is underscored in the following example. In *Ekmekdjian*,⁷⁶ Ekmekdjian was denied his right to exercise a public rejoinder regarding some statements made in open television about Jesus and the Virgin Mary.⁷⁷ As a result, he filed a lawsuit against the owner of the TV show.⁷⁸ The Supreme Court held that the rights recognized by the American Convention on Human Rights, such as the right to a replica, are applicable in the domestic courts without the necessity of any regulating law by Congress.⁷⁹ Since the ruling in *Ekmekdjian* in 1992, and two years before the Constitution was modified to incorporate human rights treaties, the Supreme Court has taken the lead in applying human right standards into the domestic administration of justice.⁸⁰

By the early '90s, Argentina had ratified many human right treaties, which the Supreme Court recognized the importance and applicability of their standards and rules in the domestic justice system.⁸¹ Therefore, during the process to reform the Constitution in 1994, the inclusion of constitutional status of the human rights treaties was on the agenda.⁸² Finally, the reform included the human rights treaties that were already ratified by Argentina, which opened the door to the inclusion of future human rights treaties.⁸³ Under a special constitutional provision, with the approval of two-thirds of the members of the National Congress, a human rights treaty can be incorporated into the Constitution, such as the inclusion of the Convention on Imprescriptibility of Crimes of War and Against Humanity in 2003.⁸⁴ After the constitutional modification, the Court applied for the first time the new constitutional scheme set in *Giroldi*.⁸⁵ In *Giroldi*, the defendant

76. Corte Suprema de Justicia de la Nación [CSJN][National Supreme Court of Justice], 7/07/1992, "Ekmekdjian, Miguel A. c. Sofovich, Gerardo y otros / recurso extraordinario," Fallos (1992-315-1503) (Arg.).

77. *Id.*

78. *Id.*

79. *Id.* at 1505-06.

80. *Id.* at 1514.

81. See generally CSJN, 7/07/1992, "Ekmekdjian, Miguael A.," Fallos (1992-315-1503); CSJN, 13/08/1998, "Santillán, Francisco A.," Fallos (1998-321-2021) (Arg.).

82. Janet K. Levit, *The Constitutionalization of Human Rights in Argentina: Problem or Promise?*, 37 COLUM. J. TRANSNAT'L L. 281, 288-289 (1999) (discussing the problems and promise of Argentina's internalization of international law, such as human rights treaties, via constitutionalization).

83. Art. 75, para. 22, CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.).

84. *Id.* art. 30, 75 para. 22.

85. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 7/4/1995, "Horacio David Giroldi y Otro / recurso extraordinario," Fallos de la Corte Suprema de Justicia de la Nación [Fallos] (1995-318-514) (Arg.); see Ariel E. Dulitzky, *La Aplicación de los Tratados Sobre Derechos Humanos por los Tribunales Locales: Un Estudio Comparado*, 1997

was denied an appeal on a suspended conviction and sought the declaration of unconstitutionality of the article of the Criminal Procedure Code that established that inability to appeal.⁸⁶ By applying the new constitutional scheme, the Supreme Court declared unconstitutional a national law for violating Article 8.2h of the American Convention on Human Rights.⁸⁷ Human Rights treaties and rulings by the Inter-American Court are therefore binding for Argentina's judicial system.⁸⁸ Regarding the issue of participation by the complainant victim, Argentina's Supreme Court acknowledges that the Inter-American Court of Human Rights has established standards where the Court recognizes the right of the victim to an effective remedy and participation in the criminal procedure.⁸⁹ In *Bayarri v. Argentina*⁹⁰ the Court said:

Denial of access to justice is related to the effectiveness of remedies, within the meaning of Article 25 of the American Convention, since it is not possible to say that a criminal case in which the clarification of the facts and determining the imputed criminal responsibility is impossible due to an unjustified delay in it, may be considered as an effective judicial remedy. The right to an effective remedy requires judges to direct the process as to avoid undue delays and obstructions that lead to impunity, thus frustrating due judicial protection of human rights.⁹¹

Also, in a case against *Brazil*,⁹² the Inter-American Commission on Human Rights said that "the family of the victim must have full access and capacity to act at all stages and levels of investigations, in accordance with domestic law and the provisions of the American Convention."⁹³

CELS 68 (explaining that the Argentinean Supreme Court established that the jurisprudence of the Inter-American Commission of Human Rights is also mandatory for Argentinean Courts).

86. CSJN 7/4/1995, "Horacio David Giroldi," Fallos (1995-318-516).

87. *Id.* at 527-31.

88. Sadly, this may be under review. In March 2017, the Supreme Court issued its ruling in the "Fontevecchia" case where, although it sustained the obligation of complying with Inter-American Court decisions, they established a set of variables that may change the criteria. *Las Consecuencias del fallo Fontevecchia de la CSJN para la vigencia de los DD.HH.*, CENTRO DE ESTUDIOS LEGALES Y SOCIALES (Feb. 18, 2017), <http://www.cels.org.ar/web/wp-content/uploads/2017/02/cels-sobre-fallo-fontevecchia-pdf>.

89. See *Bayarri v. Argentina*, Preliminary Objection, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 187 (Oct. 30, 2008).

90. *Id.* ¶¶ 102-03.

91. *Id.* ¶ 116.

92. *Fernandes v. Brazil*, Case 12.051, Inter-Am. Comm'n H.R., Report No. 54/01, OEA/Ser.L./V/II.111, doc. 20 rev. (2001).

93. *Id.*

5. Limits

The criminal procedure establishes certain limitations on the powers of the complainant victim so as to maintain the proper balance of force between the accusing parties and the defendant. The first and most important limitation on the complainant victim is the opportunity to become one. He cannot become a party at any time under any circumstance.⁹⁴ He may only become a complainant victim any time during the investigatory stage of the proceedings, but not after.⁹⁵ In the investigatory stage, almost all of the evidence is gathered, including witnesses, experts, and forensic evidence.⁹⁶ If the investigatory judge rules there is enough evidence about the defendant committing the alleged crime, they will send the case to the trial stage.⁹⁷ If the criminal proceedings passed from the investigatory stage to the trial stage, or is already at the trial stage, the opportunity to become a complainant victim is gone, and therefore, has no possibility of becoming a party.⁹⁸

As explained above, the criminal procedure in Argentina has two stages: an investigatory stage and a trial stage. In order to be permitted to participate in the second stage, where the complainant victim themselves can even ask the trial court to convict the defendant, there is a specific requirement that the complainant victim has to have participated in the previous stage.⁹⁹ This requirement preserves the right of the defendant to know what facts are the ones for which he will face at trial. This right is protected by demanding that both the public prosecutor and complainant victim be precise about the facts that are the basis of the criminal charges presented against the defendant.¹⁰⁰ Therefore, if the complainant victim has not participated in the investigatory stage, and has not described with precision what the defendant allegedly did, the defendant will not be able to properly prepare a defense at the trial stage since he does not know what facts he is being accused according to the complainant victim.

The complainant victim also faces one simple but important risk—if by the end of the criminal proceedings the defendant is found to be innocent, the complainant victim will have to face all costs made

94. Cód. Proc. Pen. art. 84, 90, 179 (Arg.).

95. *Id.* art. 90.

96. *Id.* art. 216, 304.

97. *Id.* art. 306.

98. *Id.* art. 84, 90.

99. *See id.* art. 60, 86, 346, 347, 353 *ter.*, 374.

100. *See id.* art. 83, 346, 347, 374.

by the defendant.¹⁰¹ This rule is a deterrent policy that assures there is no misuse of the complainant victim policy, and only a concrete and harmed victim with a true interest will become a complainant victim. Finally, to preserve the proper balance in the process between the defendant and prosecution and for procedural economy, the trial judge has the discretion before the trial begins to accumulate all complainant victims on one legal representation.¹⁰² With this decision, all complainant victims will be a party to the trial, but in one formal representation on behalf of all the complainant victims. As a practical matter, instead of having one lawyer for each victim who would question witnesses, introduce experts, and make opening and closing statements, there would be only one attorney representing all the victims. This procedure is regularly used; for example, it was used in the trials of crimes against humanity committed by the last dictatorship between 1976 and 1983, where there are hundreds, perhaps thousands of victims seeking justice.¹⁰³

B. Analysis and Review of the Influence of the Complainant Victim in Human Rights Processes

As we will see in this section, the influence of the complainant victim cannot be underestimated. The use of the powers described above, by victims of the cruelest and most unthinkable crimes, has proven to be an inestimable enhancement for the criminal process and the search for justice. Let's see.

1. Crimes Against Humanity

After the first trial in 1985 known as the "Juicio a las Juntas Militares"¹⁰⁴ ("Trial of the Military Boards"), several executive decisions and federal laws enacted in 1986 and 1987 made it almost impossible to prosecute and convict the dictators and their collaborators under the Argentine dictatorship.¹⁰⁵ These new laws almost completely eliminated the possibility of prosecuting and convicting the

101. *Id.* art. 531.

102. *Id.* art. 85, 416.

103. See *Human Rights: 300 Trials Still Open*, BUENOS AIRES HERALD (June 14, 2015), <http://www.buenosairesherald.com/article/191569/human-rights-300-trials-still-open>.

104. See *Documentos Historicos*, MEMORIA ABIERTA, http://www.memoriaabierta.org.ar/materiales/documentos_historicos.html/ (last visited Oct. 10, 2017); *Juicio a las Juntas*, MEMORIA ABIERTA, <http://www.memoriaabierta.org.ar/juicioalasjuntas/> (last visited Oct. 10, 2017).

105. See generally Law No. 23.492, Dec. 24, 1986, [1986-B] B.O. 1100 (Arg.) (providing for immunity against criminal actions for alleged participation, to any degree, by those related to the establishment of violent forms of political action and the few exceptions to that immunity); Law No. 23.521, June 8, 1987, [1987-A] B.O. 260 (Arg.) (providing criminal immunity for alleged

dictators and their collaborators who were responsible for over 30,000 enforced disappearances and thousands of homicides, torture, child appropriation, and sexual abuse cases.¹⁰⁶

Due to pressure from the Argentine military, two laws passed that, together, attempted to curtail most trials against the dictators and their collaborators, even against the worst abusers. First, the Full Stop Law,¹⁰⁷ passed in 1986, shortened the statute of limitations of the perpetrators by establishing a sixty day limit to initiate all criminal investigations regarding human rights crimes committed during the dictatorship.¹⁰⁸ Second, the Due Obedience Law,¹⁰⁹ enacted in 1987, generally limited the criminal prosecutions of military officers to the rank of Colonel or above, allowing most junior officers, even the most heinous torturers, to escape prosecution.¹¹⁰ Complainant victims, however, pushed back. First, in 1998, the complainant victims, represented by the “Abuelas de Plaza de Mayo” Organization, and starting in 2000, victims represented by the CELS, commenced a criminal complaint process that eventually led to the declaration of unconstitutionality of the laws that protected the human rights abusers.¹¹¹ For example, in a motion by CELS in 2000, the complainant victim in the criminal case known as *Simón*,¹¹² asked the judge to nullify the laws that blocked the prosecutions.¹¹³ On March 6, 2001, the judge declared, for the first time since they were enacted by Congress, that both the Full Stop and Due Obedience Laws were invalid, unconstitutional, and null.¹¹⁴ The Court of Appeals affirmed the ruling on November 9, 2001.¹¹⁵

participation, to any degree, by those who helped establish violent forms of political action acting under authority or in obedience as subordinates).

106. CENTRO DE ESTUDIOS LEGALES Y SOCIALES (CELS), DERECHOS HUMANOS Y CONTROL CIVIL SOBRE LAS FUERZAS ARMADAS 27, 30, 36-37 (2006), <http://www.cels.org.ar/web/wp-content/uploads/2016/12/2006Control-civil-de-las-Fuerzas-Armadas.pdf>.

107. Law No. 23.492, B.O. 1100 (Arg.).

108. *Id.* art. 1.

109. Law No. 23.521, B.O. 260 (Arg.).

110. *Id.*; see also *Argentina: The Full Stop and Due Obedience Laws and International Law*, AMNESTY INTERNATIONAL, 1 (2003).

111. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 14/6/2005, “Julio Hector Simon y otros / recurso extraordinario,” Fallos de la Corte Suprema de Justicia de la Nación [Fallos] (2005-328-2064) (Arg.).

112. *Id.*

113. See *id.*

114. *Id.* at 2131; see, e.g., Victoria Ginzberg, *Una Llave Para Reabrir la Justicia*, PAGINA 12 (Jan. 3, 2001), <http://www.pagina12.com.ar/2001/01-03/01-03-07/pag03.htm>.

115. *Reluctant Partner: The Argentine Government's Failure to Back Trials of Human Rights Violators*, 13 HUMAN RIGHTS WATCH (2001), https://www.hrw.org/legacy/reports/2001/argentina/argen1201-01.htm#P53_4982.

The judicial, historical, and political impact of these decisions were instant and comprehensive. For the first time since 1986 and 1987, there were no limits on the ability to prosecute the authors of the worst atrocities in Argentine history. After years of struggle, justice for the complainant victim seemed to be possible. Finally, in 2005, the Supreme Court in *Simón* not only affirmed the decision of the lower courts holding that the limiting laws were unconstitutional but also declared constitutional a law, enacted by Congress in 2003, that, by its implication, repudiated the Full Stop and Due Obedience Laws.¹¹⁶ The Supreme Court decision opened the door for an unprecedented process of justice for the crimes against humanity committed during the dictatorship.¹¹⁷ Since then, dozens of oral trials have taken place all over the country.¹¹⁸ Courts convicted hundreds of military officers at all ranks, but there were also many acquittals.¹¹⁹ The sole existence of these acquittals is the best sign that trials are carried out with all the due process rights of the defendants observed, and that the influence of the victim, sometimes working side by side with the prosecutor, does not destroy nor affect the balance of the process. By using the justice system to jail the authors of the worst offenses against human rights in Argentine history, the victims and their relatives taught a lesson to human rights violators. These victims showed them that in the search for justice, they respected every single right that the Constitution offered to the dictators as criminal defendants, something that the dictators and their collaborators did not do with regards to the victims' rights.

2. Institutional Violence

The influence of the complainant victim has been equally significant in crimes involving institutional violence, such as police abuse cases that often include homicide. First, the participation of victims has significantly reduced the possibility of impunity.¹²⁰ The presence of the complainant victim makes it difficult for courts to dismiss a case when the prosecutor is not interested in investigating the police. It is common for prosecutors to try to close investigations too quickly. This

116. CSJN, 14/6/2005, "Julio Hector Simon," L.L. (2005-328-2347) (Arg.).

117. See, e.g., *Proceso de Justicia Estadísticas*, CENTRO DE ESTUDIOS LEGALES Y SOCIALES, <http://www.cels.org.ar/web/estadisticas-delitos-de-lesa-humanidad/> (last updated June 30, 2017).

118. *Id.*

119. *Id.*

120. See *A Tres Años de la Masacre de la Carcova*, CENTRO DE ESTUDIOS LEGALES Y SOCIALES (Jan. 6, 2014), <http://www.cels.org.ar/web/2014/01/a-tres-anos-de-la-masacre-de-la-carcova-el-modelo-de-seguridad-bonaerense-a-juicio/>.

occurs most often in police abuse cases because the victims are often minorities or foreigners—mainly poor young men of the so-called “Villas” (shantytowns)—who are not usually protected by the public prosecutors. As mentioned above regarding the killing of Franco Almiron and Mauricio Ramos and the attempted killing of Joaquin Romero by police, impunity is exactly what was avoided by the complainant victim becoming a party in the criminal investigation and stopping the dismissal of the case.¹²¹ All the victims were habitants of “La Carcova,” one of the poorest shantytowns in the Province of Buenos Aires, but the families of the victims thwarted the public prosecutor’s decision to close the investigation.¹²²

Second, the presence of a complainant victim ensures greater scrutiny of all actors connected to the incident.¹²³ Often, when the public prosecutor does investigate, the prosecutor only focuses on the police officer who has killed the young man without considering higher-ups.¹²⁴ Prosecutors rarely address the fact that someone gave the order to carry a lethal weapon to a situation, such as a social protest in the streets, that did not justify it, or that, sometimes, the person giving the orders was at the scene with the defendant.¹²⁵ In other words, when a prosecutor charges the officer, the investigation will end unless the complainant victim steps up and provides the court with a big picture that fully shows what actually happened on the day of the crime and highlights all of the persons responsible for the crime. In the case of Mauricio Ramos, Franco Almiron, and Joaquín Romero mentioned above, the families and their lawyers, acting as complainant victims, are currently trying to bring the high-ranking officers, who were in charge of the two shooters, to court.¹²⁶ Even before the trial against the two shooters began, the complainant victims unsuccessfully tried, due to the lack of interest of the public prosecutor, to get a second trial for the officers who gave the orders on that day and who were directly responsible for the deaths.¹²⁷

Third, sometimes attorneys for the criminal complainant have a stronger grasp of the case than the trial stage prosecutor since Argen-

121. *Id.*

122. *Id.*

123. See CARRIÓ, *supra* note 5, at 30-31, 178-79.

124. *19 y 20 de Diciembre de 2001: Condenas a la Represión de la Protesta Social*, CENTRO DE ESTUDIOS LEGALES Y SOCIALES (May 23, 2016), <http://www.cels.org.ar/web/2016/05/19-y-20-de-diciembre-de-2001-condenas-a-la-represion-de-la-protesta-social/>.

125. *Id.*

126. See *A Tres Años de la Masacre de la Carcova*, *supra* note 120.

127. See Carlos Rodríguez, *La Segunda Muerte de Mauricio y Franco*, PAGINA 12 (Mar. 15, 2014), <https://www.pagina12.com.ar/diario/sociedad/3-241895-2014-03-15.html>.

tina splits the criminal process into two stages, an investigation stage and a trial stage. The trial prosecutor is rarely the individual who prosecuted at the investigation stage.¹²⁸ Furthermore, institutional violence cases are often very complex. Since the investigatory prosecutor is not the one taking the case to trial, he may not especially be concerned about how the case concludes. His primary goal is to get enough evidence to send the case to the trial court, but often that is not enough to get a conviction. The requirements to move from the investigation stage to the trial stage are significantly lower than those demanded to convict at trial.¹²⁹

The presence of complainant victims also helps human rights groups focus society's attention on the need for policy changes. The criminal complainant may often obtain information that would otherwise be kept hidden by the police, and sometimes, the cases will show that it was a political decision taken by superiors that led to the lower ranking police officers to commit abuses.¹³⁰ Thus, not only does the presence of a complainant victim help institutional violence cases move forward in the face of resistance from prosecutors and judges who often have a close relationship with the police, but the complainant victim's participation in the process can also become a tool for institutional reform.

C. *Analysis of the Role of the Complainant Victim in Argentina's New Accusatorial System*

On December 4, 2014, the Argentine Congress enacted the new Criminal Procedure Code,¹³¹ the implementation of which is still unclear. The biggest change brought about by the new code is structural, causing the system to resemble the system used in the United States. The Code moves from a mixture of accusatory and inquisitor to a purely accusatory system.¹³² Therefore, the distribution of powers and capabilities in the procedure is established the same way as the United States procedure. Also, the Code institutes the "docket,"¹³³ which es-

128. See CARRIÓ, *supra* note 5, at 172-73.

129. See CÓD. PROC. PEN. art. 349 (Arg.); CARRIÓ, *supra* note 5, at 197.

130. CARRIÓ, *supra* note 5, at 178-79.

131. See Leonel Poblete Codutti, *Argentina's New Criminal Code Bill*, TELESUR (Oct. 28, 2014, 3:35 PM), <https://www.telesurtv.net/english/analysis/Argentinas-New-Criminal-Code-Bill-20141028-0036.html>. See generally CÓD. PROC. PEN. (Arg.).

132. CÓD. PROC. PEN. art. 9 (Arg.).

133. *Id.* art. 57.

establishes time limits to make the process move more swiftly, and includes a hearing similar to the preliminary hearing before trial.¹³⁴

However, the role and capabilities of the complainant victim remain effective entirely. Therefore, the complainant victim will have the same authority as previously held: the ability to interview witnesses, produce and gather evidence, as well as participate in the trial and ask for a conviction.¹³⁵ The powers of the complainant victim, as previously established by the Supreme Court, are also included expressly in the new criminal procedure code with full “autonomy” of the complainant victim to continue with the procedure when the public prosecutor decides to dismiss an investigation.¹³⁶

III. ANALYSIS OF THE MICHAEL BROWN CASE BY INTRODUCING THE PARTICIPATION OF THE COMPLAINANT VICTIM

A. *Brief Introduction to the Second Part of This Article*

This part of the article intends only one thing—to explain the importance the role of the complainant victim would have had in the decision-making process of the Michael Brown case. Participation by the complainant victim would have ensured a more just resolution. To that end, as a complainant victim, Michael Brown’s family would have been involved in the preparation and gathering of the evidence, the introduction and questioning of proposed experts and witnesses, and the production of any other evidence the public prosecutor did not offer or discover in the investigation. This section intends to show that the presence of the complainant victim could have influenced the way the public prosecutor introduced the evidence, and what evidence was ultimately sent to the grand jury. Ultimately, it shows how the final outcome, the “no bill” decision by the grand jury, could have come out precisely the opposite way.

This Article does not intend to criticize the work done by any of the involved authorities, but the Argentinean experience of the complainant victim has proven to be an enhancement of criminal proceedings and the everyday search for justice. Therefore, this Article intends to be a contribution to the public discussion about cases that involve potential abuse by the police and to raise concerns about a system of criminal investigation that is dominated and controlled by

134. *Id.*

135. *Id.* art. 80.

136. *Id.*

the prosecutor and police without reasonable possibilities of control or influence by anyone outside the procedure. Not even the victim.

B. Control the Understandable Hurry to Call a Grand Jury

Michael Brown, an unarmed black teenager from Ferguson, Missouri, was shot and killed by a white Police Officer, Darren Wilson, on August 9, 2014.¹³⁷ Brown was walking down the street with his friend Dorian Johnson.¹³⁸ Apparently, they had stolen a few packages of cigarettes when Wilson encountered Brown and Johnson.¹³⁹ Wilson stated that that is when he realized that the two men matched the robbery suspects' descriptions.¹⁴⁰ Wilson backed up his cruiser and blocked them.¹⁴¹ An altercation ensued with Brown and Wilson struggling through the window of the police vehicle until Wilson was able to fire his gun one time from inside his car.¹⁴² Brown and Johnson then fled, with Wilson in pursuit of Brown.¹⁴³ Brown stopped and turned to face the officer.¹⁴⁴ According to Wilson, Brown moved toward him.¹⁴⁵ Allegedly in self-defense, Wilson fired at Brown several times, all shots striking him in the front, with the possible exception of the two bullets fired into Brown's right arm.¹⁴⁶ According to other witnesses, Brown was standing with his hands up when Wilson started shooting.¹⁴⁷ During the entire altercation, Wilson fired a total of twelve bullets with the last probably being the fatal shot.¹⁴⁸

On August 20, only eleven days after the incident, the grand jury hearings began.¹⁴⁹ Considering the social significance this case reached and the enormous amount of evidence to be gathered, calling

137. DEP'T OF JUST. REP., *supra* note 10.

138. *Id.* at 6.

139. *Id.*

140. *Id.* at 13.

141. *Id.*

142. *Id.* at 6.

143. *Id.* at 7.

144. *Id.*

145. *Id.*

146. *Id.* at 7, 10.

147. Steve Nelson, *Police Attorneys: Brown Head Wounds not Fatal to Officer's Defense*, U.S. NEWS (Aug. 18, 2014, 4:49 PM), <https://www.usnews.com/news/articles/2014/08/18/police-at-torneys-michael-brown-head-wounds-not-fatal-to-officers-defense>. *But see* DEP'T OF JUST. REP., *supra* note 10, at 8 (explaining that, of the accounts claiming Brown had his hands up when Wilson fired his gun, none were reliable because some were inconsistent with physical and forensic evidence, some were inconsistent with the witnesses' prior testimony, and some were admittedly inaccurate).

148. DEP'T OF JUST. REP., *supra* note 10, at 7, 18.

149. Transcript of Grand Jury Trial Vol. I, *Missouri v. Wilson*, WL 6657091 (2014) (No. GJ2014-0820) [hereinafter Grand Jury Vol. I].

the grand jury that quickly could be easily considered premature. However, the rush was also understandable due to the social pressure in Ferguson at the time.¹⁵⁰ This hard-to-reconcile situation between the social desire for a proper and quick response and the need to present to a grand jury a well-prepared case could have been resolved with the involvement of the complainant victim.

On the very first day of the grand jury hearing, the prosecutor explained to the grand jury that there were still some important pieces of evidence without finalization. The prosecutor explained, "So there is a lot that is still going on with the officers gathering the evidence, evidence is being tested, being evaluated. I say evaluated, it is being looked at, firearms evidence, the firearms people are looking at, DNA evidence, the DNA are examining that."¹⁵¹ So, this shows the prosecutor was perfectly aware that the case was not ready to be properly introduced to a grand jury but, nevertheless, chose to proceed. Finalizing evidence while the grand jury is hearing the case is not a proper solution. What if some particular piece of evidence that is finished in the middle of the hearings contradicts another piece of evidence that was already introduced by the prosecution? What if the contradiction is only apparent then and it is all about having enough time to process the evidence properly? The prosecution's case-in-chief will be jeopardized and with it, the entire case. The introduction of witnesses in a disorganized manner can confuse the grand jury. Furthermore, it is reasonable to think that to present a case properly, the prosecutor must first have prepared all the evidence to be presented. Then, prepare their case-in-chief, and finally, introduce it to the jurors. For example, the analysis and results of the firearm forensic analysis on Wilson's gun finished on September 8, eighteen days after the beginning of the grand jury.¹⁵² We should also consider that Darren Wilson

150. See, e.g., *id.* at 7 (Prosecutor McCulloch explaining that the case was still in the middle of investigation and alluding to the fact that there was unrest in Ferguson at the time); David Catanese, *Potential Presidential Candidates find Common Ground on Ferguson*, U.S. NEWS (Aug. 14, 2014, 4:20 PM), <https://www.usnews.com/news/blogs/run-2016/2014/08/14/cruz-paul-warren-weigh-in-on-ferguson>; Pema Levy, *How Strong is the Legal Case Against Darren Wilson?*, NEWSWEEK (Aug. 19, 2014 12:58 PM), <http://www.newsweek.com/how-strong-legal-case-against-darren-wilson-265675>; Nelson, *supra* note 147; Tierney Sneed, *NAACP to Cops: Identify Michael Brown Shooter*, U.S. NEWS (Aug. 12, 2014, 6:39 PM), <https://www.usnews.com/news/articles/2014/08/12/naacp-to-cops-identify-michael-brown-shooter>.

151. Grand Jury Vol. I, *supra* note 149, at 7.

152. ST. LOUIS COUNTY POLICE DEP'T, CRIME LABORATORY ANALYSIS REPORT 1 (2014), <http://www.documentcloud.org/documents/1371001-crime-lab-firearm-evidence.html> [<https://perma.cc/334R-ZSS7>] [hereinafter CRIME LABORATORY ANALYSIS REPORT].

had not been arrested during this time. As a result, the prosecutor was under no statutory requirement to call the grand jury in such a hurry.

On the other hand, in cases involving potential police abuse or any case with significant societal demand, often public and mass media play important roles on how the case evolves on a daily basis. As a result, high pressure is put on the authorities in charge of dealing with the case. In that context, the prosecution deals with a great amount of pressure. Society is asking for a proper and quick response. The protests on the streets of Ferguson, Missouri and the violent response by law enforcement agencies against individuals' First Amendment rights in the days following the shooting of Michael Brown, are of public knowledge and show the social significance of the shooting and the need for an answer.¹⁵³

If Michael Brown's family were entitled to participate in the criminal proceeding against Officer Wilson as a complainant victim, they could have utilized their powers in the proceedings to avoid presenting the case to the grand jury until it was complete. Also, as a complainant victim in this kind of investigation, they would have reasonably had the support and respect of the public, and therefore, could have utilized this influence to pressure the prosecutor to not introduce the case to a grand jury until it was ready. Furthermore, the complainant victim, who enjoys the same powers as the prosecutor, has the possibility to file an injunction, restraining the presentation of the case for grand jury consideration or by any other recourse available.¹⁵⁴ As a party to the proceedings, the complainant victim can formally request an injunction and let the judge decide whether the prosecutor should carry on with the grand jury or momentarily suspend the call on the grand jury.¹⁵⁵ Although the prosecution and complainant victim theoretically are aiming at the same goal, that does not mean it always happens or that they always want it done in the same way. In cases of abuse by the police, it is often normal to see the prosecutor trying to protect the law enforcement agency involved.¹⁵⁶ In situations like this, the complainant victim would have the recourses,

153. See, e.g., *Looting Erupts After Vigil for Slain Missouri Teen Michael Brown*, NBC NEWS (Aug. 11, 2014, 3:58 AM), <https://www.nbcnews.com/news/us-news/looting-erupts-after-vigil-slain-missouri-teen-michael-brown-n177426>.

154. See Cód. PROC. PEN. art. 45, 80, 82 (Arg.).

155. See *id.* art. 80.

156. See David Packman, *The Problem with Prosecuting Police in Washington State*, CATO INST. (Feb. 27, 2011), <https://www.policemisconduct.net/the-problem-with-prosecuting-police-in-washington-state/> (reporting an inverse relationship between prosecution and conviction rates for law enforcement).

such as an injunction, to prevent the prosecutor from jeopardizing the case.

Compared to reactions a prosecutor seeking postponement would endure, the public will hardly question the complainant victim's decision to postpone the case by a few weeks or months. Public opinion, which was highly involved in how the case moved on a daily basis, would see the involvement of Michael Brown's family and any decision to postpone the grand jury hearings and, therefore, diminish any belief that the prosecution was protecting law enforcement or being dishonest in any other way. This would ensure that the case is introduced to a grand jury in a consistent, serious, and strategically prepared manner.

Finally, if the situation were in reverse, where the prosecutor inexplicably postpones the proceedings even though all the evidence is ready for trial, the complainant victim would have the powers to activate the case.¹⁵⁷ As a first course of action, the complainant victim, having direct involvement with the prosecution's office, can insist on the summoning of the grand jury.¹⁵⁸ The prosecution would then have to at least listen to what the complainant victim has to say, since it is a party to the proceedings. Also, depending on the stage of the case, the complainant victim would be entitled to file a complaint and ask the judge to set a date for a preliminary hearing.¹⁵⁹

C. *An Unusual Strategy of the Prosecution Before the Grand Jury*

Generally, prosecutors present only enough evidence to secure a bill of indictment.¹⁶⁰ In 1985, former Chief Judge Sol Wachtler said, if they so desired, a prosecutor could persuade a grand jury to "indict a ham sandwich."¹⁶¹ In 2010, official statistics tended to confirm the message Judge Wachtler conveyed twenty-five years earlier as only eleven of all federal cases were dismissed by a "No Bill" decision.¹⁶² In this case, the prosecution made the unusual decision to present absolutely all of its evidence to the grand jury, even evidence that was unnecessary to the case, instead of only presenting enough evidence to

157. See Cód. PROC. PEN. art. 80 (Arg.).

158. See *id.*

159. See *id.* art. 80, 82.

160. See Judd Legum, *Legal Experts Explain Why the Ferguson Grand Jury Was Set Up for Failure*, THINKPROGRESS (Nov. 25, 2014, 2:10 AM), <https://thinkprogress.org/legal-experts-explain-why-the-ferguson-grand-jury-was-set-up-for-failure-363f71a74b78/>.

161. Marcia Kramer & Frank Lombardi, *New Top State Judge: Abolish Grand Juries & Let Us Decide*, N.Y. DAILEY NEWS, Jan. 31, 1985, at 3.

162. See MOTIVANS, *supra* note 15.

get a “True Bill” and go to trial as usual.¹⁶³ The prosecutor decided to present to the grand jury all the witnesses of the crime and all the people that had participated in some way, either by calling 911 because they heard gun shots or by standing in a place where they might have seen something.¹⁶⁴ Every single person, every possible witness, was introduced to the grand jury.¹⁶⁵ Therefore, when the prosecution went before the grand jury, he gave them everything he had, and thereby, converted the grand jury into some kind of trial. He did this however, without a defendant, a judge, or any rules of admissibility of evidence and without the many particularities a trial has that a grand jury does not.¹⁶⁶

The complainant victim in Argentina works the criminal procedure such as a private litigator would. The complainant victim also enjoys almost the same kind of powers as the public prosecutor would. In this sense, the complainant victim participates in the production of all the evidence, as we will see later below. This means he will share the job and directly participate in how the evidence is gathered and will have the ability to influence the prosecutor. In the Michael Brown case, a lot of people criticized the prosecution’s strategy, including the prosecutor’s presentation of all the evidence to the grand jury rather than only the necessary evidence.¹⁶⁷ It is definitely not normal, or necessary, to present every witness related to the investigation. Presenting such evidence can amount to the equivalent of “reasonable doubt” and increase the likelihood of the grand jury returning a “No Bill” when a trial would have seemed necessary to ensure justice through a public trial involving all parties. Under the current system of handling grand juries, this evidence was a matter for a jury trial, not a grand jury hearing. Whether this was done to protect law enforcement by

163. See WILLIAM T. HOSTON, RACE AND THE BLACK MALE SUBCULTURE: THE LIVES OF TOBY WALLER 70 (2016); see also Erica Smith, *Prosecutors Answer Questions about Michael Brown Case*, ST. LOUIS PUBLIC RADIO (Oct. 1, 2014) (stating that the grand jury heard much more evidence in this case than grand juries typically do).

164. See Smith, *supra* note 163.

165. See *id.*

166. See Jeffrey Fagan & Bernard E. Harcourt, *Professors Fagan and Harcourt Provide Facts on Grand Jury Practice In Light of Ferguson Decision*, COLUMBIA LAW SCHOOL, http://www.law.columbia.edu/media_inquiries/news_events/2014/november2014/Facts-on-Ferguson-Grand-Jury (last updated Dec. 5, 2014, 12:00 PM).

167. See, e.g., *id.*; Legum, *supra* note 160; Alice Miranda Ollstein & Kira Lerner, *Experts Blast Ferguson Prosecutor’s Press Conference, Legal Strategy*, THINK PROGRESS (Nov. 25, 2014, 7:54 PM), <https://thinkprogress.org/experts-blast-ferguson-prosecutors-press-conference-legal-strategy-202dfd230ad3/>; Tierney Sneed, *Scrutiny Over Handling of Michael Brown Case Continues*, U.S. NEWS (Jan. 6, 2015, 6:43 PM), <https://www.usnews.com/news/articles/2015/01/06/scrutiny-over-handling-of-michael-brown-case-continues>.

misleading the grand jury so that a “No bill” would result or whether it was part of some rare but out-of-good-faith strategy by the prosecutor, a complainant victim would have likely made things different by influencing the prosecutor on how they could present the case to the grand jury.

Therefore, the prosecutor turned this grand jury hearing into a trial, where either the defendant is found guilty and will lose his liberty or is acquitted and remains a free man. As mentioned earlier, the prosecutor in the Michael Brown case also decided to do something that does not usually happen in every trial: he called to the stand every possible witness related to the investigation and questioned them on every single issue, including mere procedural rules.¹⁶⁸ As mentioned, this is not normal in an ordinary grand jury, where the prosecutor only introduces the most relevant evidence. All this evidence is important in a trial, but not necessarily in a grand jury hearing where the goal is to decide whether a trial should even occur. This notion is particularly relevant regarding witnesses of the crime for one other reason. If for some reason the grand jury returned a “True Bill,” Darren Wilson would still have been benefited from the prosecutor’s actions since, now, he would have been able to better prepare for trial. As opposed to a defendant who had an ordinary grand jury, Darren Wilson, for example, could reasonably get a copy of the grand jury hearing transcripts and use it during his actual trial. For defendants who do not get the same treatment police officer Darren Wilson received,

the most important benefit of the grand jury is neither shield nor sword, but discovery. After a prosecution witness testifies on direct examination at a federal trial, the defendant may obtain a copy of the transcript of any relevant grand jury testimony of that witness. . . the transcript might be useful to impeach the trial testimony of a witness.¹⁶⁹

Although in federal prosecutions the defendant is not entitled to a transcript of the grand jury proceedings as a general rule,¹⁷⁰ the combination of Federal Rules of Criminal Procedure 16(a)(1)(B)(iii),¹⁷¹ the Jencks Act 18 U.S.C.A. §3500,¹⁷² and the pros-

168. See Fagan & Harcourt, *supra* note 166; Sneed, *supra* note 167.

169. MYRON MOSKOVITZ, *CASES AND PROBLEMS IN CRIMINAL PROCEDURE: THE COURTROOM 219* (Lexis Nexis, 5th ed. 2009).

170. See FED. R. CRIM. P. 6(e).

171. See FED. R. CRIM. P. 16(a)(1)(B)(iii).

172. See Jencks Act, 18 U.S.C. § 3500(b) (2012) (providing all persons accused of violating federal law may obtain copies of witness statements *after* that person has testified).

ecutor's constitutional duty to disclose favorable evidence to the defense under the Brady Rule¹⁷³ would have allowed Darren Wilson to obtain a transcript, which would have better prepared him for trial than any other defendant.

In sum, if Darren Wilson had to face trial, he would reasonably have had something that absolutely no other defendant has ever had—a full copy of transcripts from the grand jury hearings where all the relevant witnesses testified. Why afford Darren Wilson this incredible advantage over any other kind of “defendant?” As a matter of principle, the advantage should be available for both kinds of defendants, not only for law enforcement agents.

As mentioned before, presenting all the evidence to the grand jury is not consistent with the true purpose of a grand jury, which is to determine whether there is probable cause to believe that the criminal suspect has committed the crime.¹⁷⁴ How criminal investigators worked and how evidence is gathered is not intended to be part of the grand jury's job. The involvement of the complainant victim will usually mean that the prosecutor will likely be more careful in how he works and what he does since someone with the same resources is not only working along with him but has almost the same powers. When the public prosecutor works the case, prepares his case-in-chief, and calls for a grand jury, he controls the procedure entirely. That is why, ironically, the result was a “No Bill” for Darren Wilson, although prosecutors tend to get incredibly high rates of “True Bill.”¹⁷⁵ This is not to say that the current system works just fine; it does not. The issue is showing that the involvement of the complainant victim might have avoided any confusion the prosecution presented to the grand jury that led to the “No Bill” decision. Therefore, it is the simple fact that this high-profile case clearly needed to be sorted out through a public trial and the way the public prosecutor worked severely diminished the possibility of that happening.

By involving the complainant victim, who is only concerned about this particular criminal proceeding and not pressured by public opinion or concerned about keeping a good relationship with the law enforcement agencies, the decision of presenting the case, as the prosecutor did in the Michael Brown grand jury hearing, can be reasona-

173. See *Brady v. Maryland*, 373 U.S. 83 (1963) (requiring prosecutors to disclose materially exculpatory evidence in the government's possession to the defense).

174. See LAURA BEREND & JEAN RAMIREZ, *CRIMINAL LITIGATION IN ACTION* 137 (Carolina Acad. Press, 2d ed. 2012).

175. See *MOTIVANS*, *supra* note 15.

bly avoided. A complainant victim would undoubtedly try to avoid presenting the case like the prosecutor did and would not leave the testimony of Darren Wilson unchallenged. This might be done by having the ability to talk to the prosecutor on a daily basis, discuss the case and try to have an influence on the prosecutor's case-in-chief. In this matter, the complainant victim would influence the prosecutor to not bring Darren Wilson to the stand before the grand jury, but if he did, the complainant victim would make the prosecutor question Wilson regarding the contradictions in his testimony versus the witnesses' testimony.

D. The Initial Approach That Can Determine the Fate of the Case

When Michael Brown died, the death turned into a criminal investigation.¹⁷⁶ The record shows that from the very first moment, officers and investigators took the approach that Darren Wilson was the victim and that Michael Brown was the suspect.¹⁷⁷ One of the crime scene detectives, from the St. Louis County Police Department, testified in the grand jury hearing and said clearly, "At first, we treated it as an 'assault on law enforcement.'"¹⁷⁸ Also, if one were to look at the numerous police reports, every single one of them says, "Victim: Darren Wilson, Suspect: Michael Brown."¹⁷⁹ Furthermore, when interviewing many of the witnesses, the detectives referred to the death of Michael Brown as an "incident."¹⁸⁰ This subtle reference to what happened illustrates how the detectives of the St. Louis Police Depart-

176. See ST. LOUIS COUNTY POLICE DEP'T, CRIME LABORATORY CONTROLLED SUBSTANCE ANALYSIS REPORT (2014), <https://assets.documentcloud.org/documents/1371000/crime-lab-controlled-substance-report.pdf> [<https://perma.cc/JH5D-8S86>] [hereinafter CONTROLLED SUBSTANCE REPORT].

177. *Id.*

178. Transcript of Grand Jury Trial Vol. II at 43, *Missouri v. Wilson*, WL 6657092 (2014) (No. GJ2014-0903), <https://assets.documentcloud.org/documents/1370904/grand-jury-volume-2.pdf> [<https://perma.cc/FU89-KNKN>] [hereinafter Grand Jury Vol. II].

179. See, e.g., CRIME LABORATORY ANALYSIS REPORT, *supra* note 152; CONTROLLED SUBSTANCE REPORT, *supra* note 178; ST. LOUIS COUNTY POLICE DEP'T, CRIME LABORATORY WEAPON ANALYSIS REPORT 1 (2014), <https://assets.documentcloud.org/documents/1371001/crime-lab-firearm-evidence.pdf> [<https://perma.cc/334R-ZSS7>] [hereinafter CRIME LABORATORY WEAPON ANALYSIS].

180. See Interview by Det. of St. Louis County Police Dep't, Bureau of Crimes Against Persons, with unnamed Witness at St. Louis County Police Headquarters 1 (Aug. 11, 2014, 11:39 AM), <https://assets.documentcloud.org/documents/1370946/interview-witness-10.pdf> [<https://perma.cc/QNM4-DYDE>] [hereinafter Witness Interview 10]; Interview by Det. of St. Louis County Police Dep't, Bureau of Crimes Against Persons, with unnamed Witness at St. Louis County Police Headquarters 7 (Aug. 9, 2014, 2:19 PM), <https://assets.documentcloud.org/documents/1370955/interview-witness-16.pdf> [<https://perma.cc/R7LB-SGR9>] [hereinafter Witness Interview 16].

ment addressed the situation of the eyewitnesses they questioned. The same crime scene detective later testified that only a few hours after the shooting, “a detective that had spoken with him [Darren Wilson] was now back at the scene giving us things to look for.”¹⁸¹ So after Darren Wilson gave his side of the story, the detective returned to the scene to start working on the case.¹⁸² Clearly, the “things to look for” concerned Wilson’s version of events. This approach, where Brown was considered a suspect, continued when Darren Wilson testified again the next day.¹⁸³

So we have the following situation: the police department that is controlling the crime scene, gathering all the forensic evidence through their correspondent specialists, and looking and talking to witnesses, are focusing on the entire incident as if the victim is Darren Wilson and the suspect is Michael Brown. All of this occurred in the first hours and days of the investigation when the most important evidence has to be gathered, and especially when witnesses are to be questioned so that their memory is as fresh as possible. Maybe this particular approach can explain how Darren Wilson was able to wash his hands before any photographs, samples, or other forensic evidence was taken and why it was not raised as an issue by the investigating officers or the prosecution.¹⁸⁴ Also, no one raised an issue when Wilson calmly described, in his second interview, how he sealed his own gun in an evidence envelope.¹⁸⁵ In short, Wilson, the shooter, washed the blood off his hands and “sealed” the murder weapon himself. Apparently, he also cleaned the gun as the Crime Laboratory Weapon Analysis Report stated “Defect: Apparent blood was cleaned from the firearm before analysis. The firearm is in otherwise normal firing condition.”¹⁸⁶ The sealing of the weapon by Wilson, and the fact that no fingerprints were taken from it, creates one simple possibility: to corroborate Wilson’s version of the story. In Wilson’s story, while

181. See Grand Jury Vol. II, *supra* note 178 at 126-27.

182. See ST. LOUIS COUNTY POLICE DEP’T, INVESTIGATIVE REPORT 14-43984, at 4 (2014), <https://assets.documentcloud.org/documents/1370990/14-43984-care-main.pdf> [<https://perma.cc/4Z7H-LDZ7>] [hereinafter INVESTIGATIVE REPORT].

183. See Interview by Det. of St. Louis County Police Dep’t, Bureau of Crimes Against Persons, with Darren Wilson, Police Officer, St. Louis Cty. Police Dep’t at St. Louis County Police Headquarters (Aug. 10, 2014 10:16 AM), <https://assets.documentcloud.org/documents/1370945/interview-po-darren-wilson.pdf> [<https://perma.cc/SXV5-DXQ2>] [hereinafter Darren Wilson Interview].

184. *Id.* (Darren Wilson stated that as soon as he got to the police station, “I went into the bathroom to wash the blood off and I had also realized I had blood on the inside of my left hand from my fingertips to about my wrists.”).

185. *Id.*

186. See CRIME LABORATORY WEAPON ANALYSIS, *supra* note 179, at 1.

Brown was attacking Wilson when he was still in the patrol car, Brown was able to grab Wilson's gun since his "hand was large enough to encompass the top of the slide, a large portion of the handgrips, and the trigger guard,"¹⁸⁷ according to Wilson for "Hmmm, ten seconds."¹⁸⁸ But ten seconds is more than enough time to leave fingerprints on a gun that Brown allegedly touched almost everywhere. However, the prosecutor did not address this issue and, therefore, only Wilson's allegations remained.¹⁸⁹

Neither the police investigating nor the prosecution raised any concern about the erased fingerprints from Wilson's weapon as a complainant victim would have. If evidence is lost, the complainant victim could have cross-examined Wilson and raised the issue in front of a jury so that it could determine whether the actions impacted Wilson's credibility. It is, therefore, natural to assume that following the story given by Darren Wilson only one or two hours after the shooting of Michael Brown, the police were trying to confirm Wilson's story, as the example of Witness 22 will later show. The police were not trying to discover the truth of what happened that day. They were clearly trying to corroborate the statements given by Police Officer Darren Wilson to other police officers of the same law enforcement agency investigating the crime; the way that the police intently focused on corroborating Wilson's version was not controlled by anyone. This is not to say that this was unmistakably wrong. Of course, Darren Wilson's statements should have been taken into consideration, but there should have been at least one more piece of evidence, one more possible way of how things occurred. It was not the one and only version to verify.

Enabling the complainant victim to have a voice in the proceedings would not have voided the focus that the police had in the first hours, maybe not even in the first two or three days. However, it could have altered the ensuing investigation as this approach was taken by the police until at least September 3, 2014, as the crime lab firearm report indicated.¹⁹⁰ By this time, the grand jury had already been empaneled.¹⁹¹ However, by this time, the complainant victim would be involved in the investigation, and any necessary shift in how

187. See INVESTIGATIVE REPORT, *supra* note 182, at 14.

188. See Darren Wilson Interview, *supra* note 183, at 11.

189. See Grand Jury Vol. II, *supra* note 178, at 43.

190. See CRIME LABORATORY ANALYSIS REPORT, *supra* note 152.

191. See Lauren Raab, *Q&A Grand Jury Starts on Michael Brown Case: What You Need to Know*, L.A. TIMES (Aug. 20, 2014, 10:36 PM), <http://www.latimes.com/nation/nationnow/la-nann-grand-jury-ferguson-michael-brown-20140820-story.html>.

the police and prosecutor were investigating the shooting would have occurred. If the police investigators were reluctant to make the proper shift, the complainant victim would have enough powers to focus the investigation differently. The complainant victim can interrogate witnesses on their own, or with the police investigators, and work with the crime scene investigators and forensic evidence analysts.¹⁹² They can also utilize their own experts if they believe the “official” experts are not working properly.¹⁹³ For example, if by questioning the witnesses, the complainant victim considers that the production of specific forensic analysis may be useful to corroborate or discard the different versions of how things happened, he has the authority to conduct a forensic analysis if the crime investigators or the prosecution decides not to do so.¹⁹⁴

A perfect example comes from the release of information that resulted from a second autopsy performed by a medical examiner on behalf of the family. According to the private autopsy, Michael Brown had seven entrance wounds instead of six as the Medical Examiner of the St. Louis County determined.¹⁹⁵ The missing entrance wound was only mentioned by the St. Louis Medical Examiner as a “tangential (graze) gunshot wound near the ventral surface of the right thumb,” and it states that “no powder stipple is identified. The exact directional path of the gunshot wound cannot be easily determined.”¹⁹⁶ Whereas, the private autopsy states that:

the first wound was in the right hand and occurred at the patrol car as confirmed by skin tissue on the car . . . police photographs taken before the first autopsy [the one performed by the St. Louis Medical Examiner] show black soot on skin and the microscopic sections

192. See Cód. Proc. Pen. art. 80, 259, 389 (Arg.); see also REDRESS & INSTITUTE OF SECURITIES STUDIES, VICTIM PARTICIPATION IN CRIMINAL LAW PROCEEDINGS, SURVEY OF DOMESTIC PRACTICE FOR APPLICATION TO INTERNATIONAL CRIMES PROSECUTIONS, 54, 67 (2015), <http://www.redress.org/downloads/1508victim-rights-report.pdf>.

193. See Cód. Proc. Pen. art. 259 (Arg.); see also CARRIÓ, *supra* note 5, at 72; CRIMINAL PROCEDURE: A WORLDWIDE STUDY, *supra* note 16, at 48.

194. See Cód. Proc. Pen. art. 80, 259 (Arg.); REDRESS & INSTITUTE OF SECURITIES STUDIES, *supra* note 192.

195. PRIVATE AUTOPSY REPORT OF MICHAEL BROWN (2014), <https://assets.documentcloud.org/documents/1371008/michael-brown-private-autopsy-report.pdf> [<https://perma.cc/8NRT-7CAX>] [hereinafter PRIVATE AUTOPSY REPORT]; SAINT LOUIS COUNTY HEALTH OFFICE OF THE MEDICAL EXAMINER, POST-MORTEM EXAMINATION (2014), <https://assets.documentcloud.org/documents/1370992/2014-5143-autopsy-report.pdf> [<https://perma.cc/5XNS-BX25>] [hereinafter ST. LOUIS POST-MORTEM EXAMINATION].

196. ST. LOUIS POST-MORTEM EXAMINATION, *supra* note 195.

show gunshot particulate matter under the skin that indicate that the gun was within inches of the hand when discharged.¹⁹⁷

This shows the difference between the autopsy that was done by the official examiner, which established six entrance wounds, and therefore, six shots that hit Michael Brown, whereas the autopsy completed by the private examiner clearly showed seven. This establishes an additional shot that hit Michael Brown's body. Another difference lies in the fact that one medical examiner did not identify any powder, but the other one did.¹⁹⁸ The potential significance, however, of these two differences in the investigation will now never be fully known. Maybe if the forensic analysts had photographs of the blood on Darren Wilson's hands and gun, they would have been able to estimate roughly the amount of blood Michael Brown had lost after the first shot he received, which would have been useful forensic evidence to consider. It would have also been useful to know for certain whether Michael Brown was already injured or not, and to what extent, when the following set of shots finally killed him. Also, it may have been useful for the grand jury to properly assess whether Brown represented a real threat to Wilson at that moment.

It is true that the medical examiner that performed the private autopsy, Dr. Michael Baden, testified before the grand jury.¹⁹⁹ This, however, does not change the fact that he was not allowed to see all the evidence necessary to perform a complete autopsy, or that he only testified as a witness to the autopsy he performed.²⁰⁰ He did not testify as an expert working for one of the parties of the procedure. If Michael Brown's family were a complainant victim, Dr. Baden would have played the role of private examiner to a party to the procedure. Furthermore, he would have had access to all the evidence available (as a medical examiner of the complainant victim the prosecutor cannot deny access to the evidence), and he would have participated in the autopsy with the Medical Examiner of St. Louis County. In any sense, his report and his testimony would automatically entail more gravity as "evidence" since the evidence is for a party of the proceed-

197. PRIVATE AUTOPSY REPORT, *supra* note 195.

198. *Id.* (finding gunshot particulate matter); ST. LOUIS POST-MORTEM EXAMINATION, *supra* note 195 ("no powder stipple is identified.").

199. Transcript of Grand Jury Trial Vol. XXIII, at 7-13, Missouri v. Wilson, WL 6657433 (2014) (No. GJ2014-0916), <https://assets.documentcloud.org/documents/1370560/grand-jury-vol-ume-23.pdf> [<https://perma.cc/84FV-PX4J>]; see John Eligon, *Pathologist is Witness in Ferguson Death Inquiry*, N.Y. TIMES, Nov. 13, 2014, at A16.

200. Letter from Forensic Pathologist to Prosecutor (Nov. 24, 2014), <https://assets.documentcloud.org/documents/1370988/11-24-14-letter.pdf> [<https://perma.cc/M24L-P8F2>].

ing. This would also mean that the difference between one autopsy and the other would be resolved by two medical examiners working together, and in the case they do not agree on the forensic analysis, both of them would be able to present to the jury their opinion with the same weight. Therefore, the ones deciding the issue would be the trier of fact, who it should be.

E. A Different Approach Regarding Witnesses

Another example of the complainant victim controlling the gathering of the evidence is related to witnesses. On the same day Michael Brown was shot, at 5:06 pm, a couple of hours after the incident, a detective of the St. Louis County Police Department questioned a witness, identified in the released documents as Witness 22.²⁰¹ The witness' testimony could easily be considered as contradicting Darren Wilson's version. Darren Wilson had reported that Michael Brown started running towards him.²⁰² However, Witness 22 stated that she saw everything after the first two shots and she "saw the young man grabbing his, either his stomach or his side and had it . . . then he put his hands up and then the man just keep aiming . . . um . . . firing . . . and then that was it. And then I went outside and saw the rest of it."²⁰³ She also added that after the first few shots Michael Brown "was kneeling" and she expressly mentioned, after the first "clarifying" question by the questioning Detective, that Brown was "grabbin' his self."²⁰⁴

The first significant issue that the complainant victim could have addressed was to further develop the questioning of this witness. This person clearly saw the most important part of the event—she saw Michael Brown put his hands up. Therefore, she contradicts Darren Wilson's version of the story, particularly on the issue of Brown charging towards Wilson. But her questioning by detectives lasted only four minutes (from 5:06 pm to 5:10 pm).²⁰⁵ This was one of the shortest questionings of the many witnesses the detectives interviewed, and therefore could have not properly and carefully developed what the witness saw. It is hard to properly assess the credibility of a witness in

201. Interview by Det. of St. Louis Cty. Police Dep't, Bureau of Crimes Against Persons, with unnamed Witness at St. Louis County Police Headquarters (Aug. 9, 2014, 5:06 PM), <https://assets.documentcloud.org/documents/1370956/interview-witness-22.pdf> [<https://perma.cc/U8LH-QK4U>] [hereinafter Witness Interview 22].

202. See Darren Wilson Interview, *supra* note 183.

203. Witness Interview 22, *supra* note 201.

204. *Id.*

205. *Id.*

only four minutes. On the contrary, for example, Witness 10, who gave an initial statement corroborating Wilson's version, was interviewed thoroughly for thirty-seven minutes.²⁰⁶ It might also be important to note that this witness showed up voluntarily, and when asked "what is your opinion of-of that incident itself," he stated that Wilson "handled the situation correct force wise [sic]."²⁰⁷

Secondly, it is important to take in consideration that the majority of the clarifying questions made by the Detective to Witness 22 were regarding the witness' mention of Michael Brown "grabbing his side." After her first time telling what she saw, the Detective clarified "at first, um, but then he went to his-his side or to his uh"²⁰⁸ She then clarified that he was grabbing himself, likely where Michael Brown received the first shots, but the Detective insisted, "Okay. So, kinda-kinda towards his waist on either side or the back. We're not sure why."²⁰⁹ She answered "uh huh. yeah" and the detective's immediate follow-up question was, "Uh, and then you saw how many more shots?"²¹⁰ The Detective focused primarily, and almost exclusively on, Michael Brown going to his waistband.²¹¹ Once he focused on that, he immediately asked about how many shots Wilson made.²¹² He asked almost no other question about the entire scene she witnessed.²¹³

An officer saying "I thought he was going for his waistband" is the usual explanation for an officer who shot an unarmed man.²¹⁴ This version is often used by officers, and relied on by the courts and juries, to find the actions of the officer "objectively reasonable."²¹⁵ Therefore, the case is either dismissed, probable cause could not be demonstrated, or at trial, the jury considers the officer's action within the

206. Witness Interview 10, *supra* note 180.

207. *Id.* at 15.

208. Witness Interview 22, *supra* note 201.

209. *Id.*

210. *Id.*

211. *See id.*

212. *See id.*

213. *See id.*

214. *See, e.g.,* Arthur Delaney, *The Most Dangerous Thing You Can Own is Your Waistband*, HUFFINGTON POST (Mar. 3, 2015, 1:54 PM), http://www.huffingtonpost.com/2015/03/03/waist-bands_n_6791990.html; Arthur Delaney & Diane Jeanty, *Police Shootings Of Unarmed Men Often Have Something In Common: The Waistband Defense*, HUFFINGTON POST (Dec. 10, 2014, 6:58 PM), http://www.huffingtonpost.com/2014/12/10/police-shootings_n_6303846.html; Cassandra Fairbanks, *Another Unarmed Man Killed by Police, After, You Guessed It, Reaching for His Waistband*, THE FREE THOUGHT PROJECT, (Dec. 3, 2014), <http://thefreethoughtproject.com/unarmed-man-left-dead-after-guessed-it-reaching-waistband/>.

215. *See* *Graham v. Connor*, 490 U.S. 386, 397, 399 (1989) (establishing the "objectively reasonable" standard to determine the legality of every use of force decision a law enforcement officer makes) (citing *Scott v. United States*, 436 U.S. 128, 137-39 (1978)).

law. This is also called “perception shooting”²¹⁶ or “threat perception failure”²¹⁷ and is a significant problem in police shooting cases, especially when the victim is black.²¹⁸ In fact, in his first interview, Wilson mentioned that Brown had placed his hand on his waistband just before Wilson shot him.²¹⁹ He confirmed this in his second interview, the next day.²²⁰ But surprisingly, on neither day did he say anything about Brown possibly carrying a gun whenever he describes the moment he first saw Brown walking in the middle of the street.²²¹ Yet, when Wilson recalled the struggle that happened while he was still in his patrol car, he stated that he believed Brown was going for his gun, and that he actually touched it.²²² This means Brown did not have any weapon that day, and if he actually did move his hand towards his waistband, as Wilson stated, he was clearly not intending to get to a gun. The issue here is that the questioning of Witness 22 happened only a few hours after the shooting, which means the detective was clearly trying to build the usual defense that police officers use when they shoot unarmed people.

The complainant victim, on the other hand, would have asked additional questions to make clear that the witness was only trying to convey that Michael Brown was not looking for a gun in his waist, but was reacting naturally to being shot by putting his hands in that area. The complainant victim could have cleared the path on this significant issue, which often occurs in police shooting cases, by eliminating the possibility of Wilson’s defense that Brown was going for his waistband.

With the presence of a complainant victim, the focus on gathering evidence would, therefore, not only be about the version that Darren Wilson provided. The focus would have been to find out what actually happened, not only to corroborate Wilson’s version. This may be considered a subtle difference, but it could have meant a big difference in

216. See, e.g., POLICE EXECUTIVE RESEARCH FORUM, CRITICAL ISSUES IN POLICING SERIES, AN INTEGRATED APPROACH TO DE-ESCALATION AND MINIMIZING USE OF FORCE 8, 36 (2012).

217. See, e.g., GEORGE FACHNER & STEVEN CARTER, COLLABORATIVE REFORM INITIATIVE, AN ASSESSMENT OF DEADLY FORCE IN THE PHILADELPHIA POLICE DEPARTMENT 3, 30-32, 71, 82 (2015); Charles M. Blow, *Officers’ Race Matters Less Than You Think*, N.Y. TIMES (Mar. 26, 2015), https://www.nytimes.com/2015/03/26/opinion/charles-blow-officer-race-matters-less-than-you-think.html?partner=rssnyt&emc=rss&_r=1.

218. FACHNER & CARTER, *supra* note 217 at 3, 31-33, 71, 82.

219. See INVESTIGATIVE REPORT, *supra* note 182 at 14.

220. See Darren Wilson Interview, *supra* note 183, at 10.

221. See INVESTIGATIVE REPORT, *supra* note 182, at 13; see also Darren Wilson Interview, *supra* note 183, at 10.

222. See Darren Wilson Interview, *supra* note 183.

the outcome of the investigation. It is impossible to know how different the investigation might have been with a broader approach of how things happened. But clearly, the outcome could have been avoided by the involvement of the complainant victim. The recourses the complainant victim has, the pressure they inherently put on the prosecutor, and how they choose to work are crucial in avoiding or limiting the consequences of this type of decisions.

F. The Questioning of Darren Wilson

This particularized focus on the police investigation, Darren Wilson as the victim and Michael Brown as the suspect, is directly related to something important—the questioning of Darren Wilson throughout the investigation. First, after the initial statement that was taken a few minutes after the shooting of Michael Brown, Wilson gave another statement at the offices of the St. Louis Police Department the day after.²²³ Wilson was questioned by two detectives of the St. Louis police, with the presence of his lawyer.²²⁴ The interview was brief, lasting only thirty-one minutes.²²⁵ During that brief interview, Darren Wilson was allowed to extensively explain how he believed things happened but was not questioned about any of the contradicting evidence already known by the detectives.²²⁶ Many witnesses had been interviewed the same day of the shooting, which contradicted several important parts of Wilson's story.²²⁷ However, the detectives that talked to him did not ask any questions about those interviews. They asked several questions about how and where Wilson was injured by Michael Brown and made some clarifying questions over his story, but nothing else.²²⁸

The same treatment continued when Darren Wilson testified before the grand jury. Wilson testified like someone who was not a defendant, or at least like someone who did not feel threatened by the ongoing investigation. In terms of facts, he was never a defendant. St. Louis County Prosecutor Robert McCulloch explained it perfectly: “It’s not unusual to ask someone who may be a target to testify; it is

223. *Id.*

224. *Id.*

225. *Id.*

226. See Witness Interview 16, *supra* note 180; *cf.* Darren Wilson Interview, *supra* note 183 (Witness 16 stated that Brown's hands were in the air while Wilson stated Brown's hands were on his waistband; the Detective did not address the differences).

227. See, *e.g.*, Witness Interview 10, *supra* note 180; Witness Interview 16, *supra* note 180; Witness Interview 22, *supra* note 201.

228. See Darren Wilson Interview, *supra* note 183.

unusual to have someone who is a target actually testify.”²²⁹ As we clearly see from the prosecutor’s statements as well as the fact that the police investigators did not consider Darren Wilson as an actual target, Wilson testified before the grand jury without risks. He was treated extremely gentle without cross-examination of evidence that contradicted his testimony.²³⁰ Everything looks like it was designed to get a “No Bill.” Maybe that is why Darren Wilson did not plead the 5th Amendment against compelled self-incrimination. For the prosecutor, Wilson was only someone who may be a target. But by the time of the Prosecutor’s October 1st interview and the start of the grand jury, we can be sure that the prosecutor already had the information that many witnesses said Darren Wilson was lying and that he unlawfully shot Michael Brown. He definitely knew that Wilson shot Brown at least six times and that Brown was unarmed.²³¹ Shouldn’t this be enough to treat Darren Wilson as an actual suspect, and therefore, not testify in front of the grand jury, giving his version of the facts, without any kind of cross-examination? Would this have been the scenario in a case not involving a police officer or with the involvement of a complainant victim? Probably not. How many homicides are there where the police were not involved, the prosecutor may have found contradicting evidence, but still got an indictment by presenting only the witnesses he chooses to? Maybe every other case except this one. In this kind of situation, the involvement of the complainant victim is crucial for the proper investigation of crimes like the one Darren Wilson committed.

The particularized focus during the investigation, the special treatment Darren Wilson received, the decision to present absolutely all witnesses before the grand jury, and every issue that could have been approached differently, would have been addressed by a complainant victim. The complainant victim would have been involved in the case with the prosecutor. They would have been aware of how things were being carried away, and with enough powers, could have

229. See Smith, *supra* note 163.

230. See Transcript of Grand Jury Trial Vol. V, at 234, *Missouri v. Wilson*, WL 6657433 (2014) (No. GJ2014-0916), <https://assets.documentcloud.org/documents/1370736/grand-jury-vol-ume-5.pdf> [<https://perma.cc/QVA4-EWRF>] [hereinafter Grand Jury Vol. V]; cf. Witness Interview 16, *supra* note 180 (indicating that, during Wilson’s testimony, Wilson was not questioned regarding the position of Brown’s hands, even though Witness 16’s account contradicted Wilson’s).

231. SAINT LOUIS COUNTY HEALTH OFFICE OF THE MEDICAL EXAMINER, NARRATIVE REPORT OF INVESTIGATION 1 (2014), <https://bloximages.newyork1.vip.townnews.com/stltoday.com/content/tncms/assets/v3/editorial/c/e0/ce018d0c-5998-11e4-b700-001a4bc6f878/5447202ea9b4e.pdf.pdf>.

done things on their own if they determined that the prosecution was not doing a thorough job. It is highly unlikely that a complainant victim would allow the prosecutor to make the suspect take the stand before the grand jury. Ultimately, the focus of the investigation would have been different once the complainant victim was formally admitted as a party to the procedure.

IV. DIFFERENT, NEW EVIDENCE

One of the biggest controversies within the different accounts was whether Michael Brown was facing Darren Wilson when he was shot, especially the first shot during the second set of shots, and whether he was running towards Wilson or simply standing with his hands in the air.²³² Furthermore, the actual body position of Michael Brown when he was shot was never determined.²³³ Therefore, this is one of the most important things that was left unsolved. Although in the public autopsy there were some indications about the apparent position of Michael Brown when he was shot and the trajectory of the wounds could enlighten us a little bit by providing some information for experts to analyze, the prosecutor made the decision not to try to determine precisely how Brown's body was positioned. Also, as explained above, there was a difference in the number of entrance wounds between the St. Louis Medical Examiner and the private examiner. This indetermination was presented to the grand jury and is probably one of the biggest reasons for the "No Bill" decision. If there was no evidence presented to the grand jury that conclusively contradicted Darren Wilson's version of Michael Brown's position when he started shooting, it is understandable that this particular issue might have influenced the grand jury's decision. This, of course, summed up with the fact that the prosecution did not cross-examine Darren Wilson on any substantive issue, particularly regarding the different version of events told by Dorian Johnson, the person who was with Michael Brown at the time of the shooting.

The complainant victim could have asked and worked on this issue. The complainant victim could have designated his own experts, and if the prosecutor was not willing to engage in a new kind of forensic evidence analysis, he could have asked the judge to order a new analysis. Therefore, the complainant victim could have offered and proposed a set of experts who could determine precisely how Michael

232. See generally Witness Interview 16, *supra* note 180; Grand Jury Vol. V, *supra* note 230, at 229.

233. See DEP'T OF JUST. REP., *supra* note 10, at 19.

Brown's body was positioned. Comparing and analyzing all the different testimonies against the entrance wounds found in Michael Brown's body, photographs of the scene, the blood patterns on Michael Brown's clothing, and so forth, the prosecution could have reasonably tried to determine how Brown's body was positioned. Furthermore, this could have given credit to Dorian Johnson's testimony, or on the contrary, to Darren Wilson's testimony.

The complainant victim could have not only proposed experts but could have also worked on the specific issues that the experts would later testify to. For example, they could have asked a specific and well-defined issue such as, whether by analyzing the injuries in Michael Brown's body and considering the characteristics of the entrance wound, would the order of impact match either the testimony of Darren Wilson, Dorian Johnson, or any other witnesses that testified on that issue. Second, they could have also seen if any of the injuries sustained by Michael Brown were consistent with any of the testimonies where precision regarding the order of the shots was mentioned by a witness. Third, they could have tried to corroborate or discard Wilson's testimony that Michael Brown was running towards him by matching it with the analysis of the presence (or absence) of abrasions or tattooing in the wounds, or the size of the entrance wound, and whether they were consistent with each other. The same could be said regarding Dorian Johnson's testimony or any other useful tactic a complainant victim could employ.

It is also a good option to try to work with computer experts to digitally recreate the event. Here, they could have digitally recreated the event according to the wounds in Michael Brown's body, the autopsy, the different testimonies on the issue, the photographs of the crime scene, the blood stains on the street, and so forth. A computer-generated animation ("CGA")²³⁴ can be an effective tool for a grand jury, or a jury, in their determination of what happened. Considering that the complainant victim is entitled to propose and produce different kinds of forensic evidence, this may have been a useful tool in determining what really happened on that day in Ferguson. Maybe, by recreating Darren Wilson's version and Dorian Johnson's version, it would have been easier for the grand jury to discard one testimony over the other.

234. See generally Victoria Webster & Fred E. (Trey) Bourn III, *The Use of Computer-Generated Animations and Simulations in Trial*, INTERNATIONAL ASSOCIATION OF DEFENSE COUNSEL, <http://www.iadclaw.org/publications-news/defensecounseljournal/the-use-of-computer-generated-animations-and-simulations-at-trial>.

Also, in the same sense, a reconstruction of the event could have been proposed by the complainant victim. With the participation of Darren Wilson, Dorian Johnson, and all other witnesses, they could have put the patrol-car in the same position as it was and reenacted how the events occurred according to the different witnesses. Therefore, a jury might have found that one particular version of the story seemed unrealistic or unbelievable, or found that a certain witness, from where they were located, could not have reasonably seen what they claimed.

The race factor in police shootings might also be something to consider in criminal proceedings. In this sense, the Federal Department of Justice engaged in an investigation surrounding the death of Michael Brown.²³⁵ The report's findings were released on March 4, 2015 and found that the Ferguson Police Department [FPD] engaged in everyday discrimination and abuse of force against black citizens.²³⁶ The Report made by the Department of Justice clearly stated, "Ferguson's approach to law enforcement both reflects and reinforces racial bias, including stereotyping. The harms of Ferguson's police and court practices are borne disproportionately by African Americans, and there is evidence that this is due in part to intentional discrimination on the basis of race."²³⁷ The report developed the percentages in disparities, and stated that, "these disparities are also present in FPD's use of force."²³⁸ The conclusion was simple:

Our investigation indicates that this disproportionate burden on African Americans cannot be explained by any difference in the rate at which people of different races violate the law. Rather, our investigation has revealed that these disparities occur, at least in part, because of unlawful bias against and stereotypes about African Americans.²³⁹

It is hard to say whether what Darren Wilson did was a hate crime, but it is undisputed that discrimination played a factor in what happened.²⁴⁰ If a complainant victim were a party to the proceeding, they could have introduced this issue in the criminal investigation. This could have been accomplished by the complainant victim actually making an argument on the issue, requesting the judge to issue sub-

235. DEP'T OF JUST. REP., *supra* note 10.

236. *Id.* at 5.

237. *Id.* at 4.

238. *Id.* at 5.

239. *Id.*

240. *Id.* at 62.

poena duces tecum²⁴¹ to the Ferguson Police Department for police reports, or by simply introducing the Department of Justice report as evidence. The latter could have only been done if the criminal investigation was not closed by March 4, 2015, a reasonable option if a trial would have occurred.

Given the situation, a careful analysis of all police reports filed by Darren Wilson, whether there were any complaints filed against him or if he was involved in any shooting situation in the past, the complainant victim could have introduced this information into the investigation. Of course, Darren Wilson's defense would probably have raised the question of inadmissibility of this evidence as character evidence, but the point here is that the prosecutor did not even consider this issue. A complainant victim participating in the procedure could have done it on their own. It is definitely an element that a grand jury or a jury in a trial might be interested in knowing and taking into consideration. With proper jury instructions, it might have been useful information for the grand jury. This information could have been the foundation for the introduction of bias-based police conduct to the grand jury. The information about discrimination based on race by the Ferguson Police Department could have been used by an expert witness to testify whether this was considered bias-based policing, and what it might mean to a police officer working on the streets. The complainant victim could have hired his own expert to let him explain the issue to the grand jury or jury in an upcoming trial so that they can, as their role of trier of fact, determine whether it played some part in how Darren Wilson acted on August 9, 2014.

Darren Wilson approached Michael Brown and Dorian Johnson apparently because they were just walking down the middle of the street.²⁴² That was the beginning of the encounter that ended only a few moments later in Brown's death.²⁴³ By considering the issues analyzed by the Federal Department of Justice mentioned above, it might be useful to take into consideration the following findings: "African Americans account for 95% of Manner of Walking charges; 94% of all Fail to Comply charges; 92% of all Resisting Arrest charges; 92% of all Peace Disturbance charges; and 89% of all Failure to Obey charges."²⁴⁴ Michael Brown was black and was walking in the middle on the street instead of the sidewalk. Apparently, Brown talked back

241. *Subpoena Duces Tecum*, BLACK'S LAW DICTIONARY (10th ed. 2014).

242. See Darren Wilson Interview, *supra* note 183, at 4.

243. *Id.*

244. See DEP'T OF JUST. REP., *supra* note 10, at 62.

to Darren Wilson when Wilson “gently” told them to stop walking in the middle of the street. The findings of the report made by the Federal Department of Justice could be another example of evidence that might show that Darren Wilson was not telling the truth, or that he was acting upon preconceived stereotypes and prejudices.

This issue, raised in the public discussion after the release of the report of the Federal Department of Justice, was not presented to the grand jury for its consideration. The complainant victim through subpoena *duces tecum* to the Ferguson Police Department as explained above, by calling witnesses to the stand to testify on Ferguson officer’s practices, or simply through an expert explaining the grand jury what is bias-raced policing, might have done it.

V. CONCLUSION

Ever since the killing of Michael Brown, all around the United States the issue of discrimination in police practices and racial profiling by law enforcement has been raised and the concern is still out there. Although the problem of discrimination by the police against black people cannot be considered new, since Michael Brown’s death, it has become more visible than it was in the last twenty years. This is a problem that concerns and affects the United States entirely.

As we saw, several critiques were made regarding the decisions the public prosecutor made in this case. We also saw that many things could have been dealt with differently. It is hard to say that justice was served in this case, as it is often the case in police shootings. This important issue can be better resolved with the involvement of the complainant victim in the criminal proceedings. The Argentinean experience is a good example of how the criminal system, and everyone involved in it, are benefited by the participation of the victim in the investigation.

MARTIAL LAW IN INDIA: THE DEPLOYMENT OF MILITARY UNDER THE ARMED FORCES SPECIAL POWERS ACT, 1958

*Khagesh Gautam**

ABSTRACT:

The question for inquiry in this article is whether the key provisions of the Armed Forces Special Powers Act, 1958 (“AFSPA”), an Indian Parliamentary legislation, amount to a de facto proclamation of Martial Law in India. The constitutional validity of AFSPA has been upheld by a unanimous constitution bench of five judges of the Supreme Court of India. But the AFSPA has not yet been examined from the Martial Law perspective. In order to engage in this inquiry, this article briefly traces the development of the idea of Martial Law and argues that military acting independent of the control of civilian authorities is the most important feature of Martial Law. This article also argues that in order for a geographical area to be under Martial Law, there is no need to have a formal promulgation of the same. In other words, an area can be under Martial Law without formally being so declared. The key feature to note is whether the military is acting independent of the civilian control or not. The AFSPA is then analyzed from this angle and it is concluded that when the AFSPA becomes applicable to any area in India, that area is under de facto Martial Law. The question of whether or not the Indian Constitution impliedly or expressly authorizes the proclamation of Martial Law is

* Stone Scholar, LL.M. (Columbia); LL.B. (Delhi), Associate Professor of Law & Assistant Dean (Research and Publications); Assistant Director, Center on Public Law and Jurisprudence, Assistant Director, Mooting and Advocacy Program, Jindal Global Law School, O.P. Jindal Global University, Sonapat, India. The author can be reached at kgautam@jgu.edu.in. The author is grateful to Alexander Fischer, Sarbani Sen, Satya Prateek, Aditya Swarup and other faculty members and students of the Center on Public Law and Jurisprudence for their helpful comments and criticisms, and to Raunaq Jaiswal for excellent research assistance. All the errors remain that of the author.

a natural follow-up question that is left for future examination. However, the Supreme Court’s decision upholding the constitutional validity of the AFSPA is criticized on the ground that the Court should have recognized and called the AFSPA as what it truly is—a legislation authorizing a de facto proclamation of Martial Law in India.

- I. INTRODUCTION..... 118
- II. MARTIAL LAW 120
 - A. *Inability of Civilian Authorities and Courts to Function Effectively—A Precondition for Martial Law*..... 120
 - B. *Military Acting Independent of Civilian Authorities and Courts—A Consequence of Martial Law*..... 126
 - C. *Military Acting-in-Aid of Civilian Authority v. Martial Law* 128
- III. DEPLOYMENT OF MILITARY UNDER THE ARMED FORCES SPECIAL POWERS ACT, 1958 132
 - A. *The Armed Forces Special Powers Act, 1958*..... 132
 - B. *The Constitutionality of the Armed Forces Special Powers Act, 1958* 134
 - C. *De-Facto Proclamation of Martial Law under the AFSPA I* 137
 - D. *The Facts Behind the De-Facto Proclamation of Martial Law under the AFSPA* 140
- IV. CONCLUSION 144

I. INTRODUCTION

Use of the military acting independent of local civilian authorities and courts for domestic law enforcement in a country that is committed to democratic values and the ‘rule of law’ raises formidable ideological challenges.¹ Most pressing of these challenges arise in the context of the country’s military.² The question for inquiry in this paper is whether the key provisions of the Armed Forces Special Powers Act, 1958 (“AFSPA”), an Indian Parliamentary legislation, amount to a *de facto* proclamation of Martial Law in India. The constitutional validity of the AFSPA has been upheld by a unanimous constitutional bench of five judges of the Supreme Court of India.³ But the AFSPA

1. Colm Campbell & Ita Connolly, *A Model for the ‘War Against Terrorism’? Military Intervention in Northern Ireland and the 1970 Falls Curfew*, 30 J.L. & Soc’y 341, 342-43 (2003).

2. See *id.* at 346.

3. *Naga People’s Movement of Human Rights v. Union of India*, (1998) 85 AIR 431 (India).

has not yet been examined from the Martial Law perspective.⁴ In order to engage in this inquiry, this article briefly traces the development of the idea of Martial Law and argues that the military acting independent of the control of civilian authorities is the most important feature of Martial Law. This article also argues that in order for a geographical area to be under Martial Law, there is no need to have a formal promulgation of the same. In other words, an area can be under Martial Law without formally being so declared. The key feature to note is whether the military is acting independent of civilian control. The AFSPA is then analyzed from this angle and it is concluded that when the AFSPA becomes applicable to any area in India, that area is under *de facto* Martial Law. The question of whether or not the Indian Constitution impliedly or expressly authorizes the proclamation of Martial Law, which is the natural follow-up question that arises from this inquiry, is left for future examination. However, the Supreme Court's decision upholding the constitutional validity of the AFSPA is criticized on the ground that the Court should have recognized the AFSPA for what it truly is—a legislation authorizing a *de facto* proclamation of Martial Law in India.

Part II argues that the most important feature of Martial Law is the military acting independent of civilian authority and control. When a geographical area is put under Martial Law, the military is called out and the military commander is under no legal obligation to take his orders from the civilian authority of the area. The military commander might be required to cooperate with the civilian authorities in the area, but he is allowed to make his own decisions. To that extent, the military acting independent of any civilian supervision clearly distinguishes an area under Martial Law from the military merely acting as an aid to civilian authority (where the military acts under the supervision and command of the civilian authority). Having identified this key feature of Martial Law in Part II, Part III then applies this rule to the AFSPA. The Indian Parliament enacted the the AFSPA and, as previously mentioned, a constitutional bench of five judges of the Supreme Court of India unanimously upheld its constitutional validity.⁵ However, the AFSPA has never been examined, either academically or judicially, from the Martial Law angle. Part III discusses the key provisions of the AFSPA and the Supreme Court

4. Use of the AFSPA has been described as 'martial law regime' by only one commentator and that too was done in passing and without any detailed legal analysis that the subject deserves. See Hiren Gohain, *Post-Colonia Trauma?*, 41 *ECON. & POL. WKLY.* 4537, 4537 (2006).

5. *Naga People*, (1998) 85 AIR at 431.

decision that upheld the constitutionality of the AFSPA. After this, it applies the rule set out in Part II to the AFSPA and concludes that the ‘disturbed area notification’⁶ issued under the AFSPA that authorizes the calling out of the military to the disturbed area so notified is a *de facto* proclamation of Martial Law. Part IV concludes by briefly restating the key arguments made in the article. This paper concludes that the ‘disturbed area notification’ under the AFSPA amounts to a *de facto* proclamation of Martial Law and the Supreme Court should have recognized it and called it for what it truly was. Again, whether or not the Indian Constitution expressly or impliedly gives the authority to proclaim Martial Law is a natural follow-up question that arises from this discussion. This Paper leaves that inquiry for further examination in the future.

II. MARTIAL LAW

A. *Inability of Civilian Authorities and Courts to Function Effectively—A Precondition for Martial Law*

It has been understood for a long time now that Martial Law and Military Law are not the same things.⁷ Expounding the nature of Martial Law, Sir Matthew Hale in 1713⁸ observed that Martial Law, owing to the circumstances that make it necessary, “in Truth and Reality [is] not Law, but something indulged rather than allowed as Law.”⁹ Sir Matthew also observed that the exercise of Martial Law,

6. Armed Forces (Special Powers) Act, No. 28 of 1958, INDIA CODE, § 3, <http://indiacode.nic.in> (“Power to declare areas to be disturbed areas. If, in relation to any State or Union Territory to which this Act extends, the Governor of that State or Administrator of that Union Territory, as the case may be, is of the opinion that the whole or any part of such State or Union Territory, as the case may be, is in such a disturbed or dangerous condition that the use of armed forces *in aid of the civil power* is necessary, the Governor of that State or the Administrator of that Union Territory or the Central Government, as the case may be, may, by notification in the Official Gazette, declare the whole or such part of such State or Union Territory to be a disturbed area.”), amended by Armed Forces (Assam Manipur) Special Powers (Amendment) Act, No. 7 of 1972, INDIA CODE, § 4.

7. See, e.g., Charles M. Clode, *The Law Military as Distinct from Martial Law*, 29 L. MAG. & L. REV. Q. J. JURIS. 24, 25-27, 32 (1870). See generally J. V. Capua, *The Early History of Martial Law in England from the Fourteenth Century to the Petition of Right*, 36 CAMBRIDGE L. J. 152, 152 (1977), for an early history (from 1300 to 1628) of Martial Law in England.

8. See SIR MATTHEW HALE, *THE HISTORY OF COMMON LAW OF ENGLAND* 26 (Charles M. Gray ed., 3rd ed. 1971) (1739); Mark Neocleous, *From Martial Law to the War on Terror*, 10 NEW CRIM. L. REV. 489, 491 (2007) (indicating that Sir Matthew Hale’s book was published in 1713). *But see* George M. Dennison, *Martial Law: The Development of a Theory of Emergency Powers, 1776-1861*, 18 AM. J. LEGAL HIST. 52, 53 n. 2 (1974) (indicating the date of publication of Sir Matthew Hale’s book as 1820).

9. MATTHEW HALE, *THE HISTORY OF COMMON LAW OF ENGLAND* 40 (1713).

owing to its nature, is not to be permitted when civilian courts are functioning, “for Martial Law, which is rather indulg’d than allowed, and that only in Cases of Necessity, in Time of Open War, *is not permitted in Time of Peace, when ordinary Courts of Justice are open.*”¹⁰ In 1731, Congressman John Rowan of Kentucky expressed similar views: “Society will never submit life to the discretion of a military court, except under the most absolute and imperious necessity, *in which a civil court cannot interfere*, particularly during war.”¹¹

Confusion was caused by the 1792 opinion delivered by Lord Chief Justice Loughborough in *Grant v. Sir Charles Gould*¹² because in this case the phrase Martial Law was understood by Lord Loughborough as akin to what we today would call Military Law,¹³ i.e. laws that apply to members of the military and armed forces. By 1870, though, it was clearly understood that Martial Law and Military Law are not the same things.¹⁴ By 1902 this distinction became very clear, i.e. Military Law is statutory¹⁵ and is applicable to members of the military and armed forces¹⁶ and Martial Law is the law of necessity and exists for the protection of society when, and where, civilian authorities and courts are unable to function.¹⁷ However, in 1915 Albert Venn Dicey revived this confusion by stating that Martial Law as properly understood (i.e. suspension of civilian authority and courts and its substitution by military government), “is unknown to the law of England.”¹⁸ Dicey’s views are not really helpful because even though he denies the existence of Martial Law under English Law,¹⁹ he does concede that, “the common law right of the Crown and its servants to repel force by force . . . is essential to the very existence of orderly government, and is most assuredly recognized in the most am-

10. *Id.* at 42 (emphasis added).

11. Dennison, *supra* note 8, at 57-58 (emphasis added) (citing 18 ANNALS OF CONG. 1731 (1808) (Joseph Gales ed., 1852)).

12. *Grant v. Sir Charles Gould*, 126 Eng. Rep. 434, 449 (1792).

13. *Id.* at 449-50; *see also*; Clode, *supra* note 7, at 25-26; Dennison, *supra* note 8, at 54-55.

14. Where tribunals are established under martial law, in the strict sense of the term, as, for instance, where a colony is in a state of disaffection or open revolt, it by no means follows, as in the case of the administration of the law military, that the persons composing the Courts should be military persons, or that those over whom the jurisdiction is exercised should be soldiers. In truth, under martial law, the difference between a soldier and a civilian disappears, as we have said, before that overpowering necessity which calls such a state of things into existence.

Dennison, *supra* note 8, at 27-28.

15. W. S. Holdsworth, *Martial Law Historically Considered*, 18 L. Q. REV. 117, 122 (1902).

16. Frederick Pollock, *What is Martial Law?*, 18 L. Q. REV. 152, 153 (1902).

17. *See, e.g.*, 1 HORACE E. SMITH, *STUDIES IN JURIDICAL LAW* 113-14 (1902).

18. A. V. DICEY, *INTRODUCTION TO THE STUDY OF THE CONSTITUTION* 283 (8th ed. 1915).

19. *Id.* at 283, 287-89.

ple manner by the law of England.”²⁰ Incidentally, we may note that the incorrectness of Dicey’s position, at least to the extent it was to be of any comparative use, was demonstrated in 1812 by General Jackson when he declared Martial Law in New Orleans during the war with Dicey’s countrymen. Jackson proclaimed, “Why is martial law ever declared? Is it to make the enlisted or drafted soldier subject to it? He was subject to it before.”²¹ Dicey’s view gives the military, “a mandate for extensive action in situations of emergency, without the need for parliamentary approval, and with questionable regard to the wishes of the elected government.”²² Willoughby, in 1929, compounded the difficulty by defining Martial Law as inclusive of Military Law and calling Martial Law as understood in 1902 as ‘Martial Law *in sensu strictiore*.’²³ In England, a similar description was provided by Chalmers and Asquith in 1936.²⁴ Later, Willoughby did for US constitutional Law what Dicey had done for English constitutional law almost a decade and a half earlier, stressing on the circumstances that make the proclamation of Martial Law *in sensu strictiore* necessary.²⁵ Even though the text of the US Constitution does not talk about Martial Law, Willoughby found this power located in the bigger concept of Police Powers.²⁶ He also found some equivalence between the power to proclaim Martial Law and the power to suspend the writ of *habeas corpus*, something explicitly allowed by the US Constitution.²⁷

20. *Id.* at 284.

21. ROBERT STANLEY RANKIN, WHEN CIVIL LAW FAILS: MARTIAL LAW AND ITS LEGAL BASIS IN THE UNITED STATES 14 (Duke University Press 1939) (quoting the martial law proclamation made by General Jackson in New Orleans); *see also* H. Erle Richards, *Martial Law*, 18 L. Q. REV. 133, 133 (1902). *See generally* Wing Commander U. Ch. Jha, *Military Justice in Difficult Circumstances: The South Asian Countries*, 54 MIL. L. & L. WAR REV. 301 (2015) (making a similar point in the Indian context).

22. Campbell & Connolly, *supra* note 1, at 349.

23. WESTEL WOODBURY WILLOUGHBY, THE CONSTITUTIONAL LAW OF THE UNITED STATES 1586 (2d ed. 1929).

24. DALZELL CHALMERS & CYRIL ASQUITH, OUTLINES OF CONSTITUTIONAL LAW 363 (5th ed. 1936).

25. WILLOUGHBY, *supra* note 23, at 1602; *see also* United States v. Diekelman, 92 U.S. 520, 526 (1875) (defining Martial Law as the law of necessity in the actual presence of war).

26. WILLOUGHBY, *supra* note 23, at 1590-92; *see also* Robert Stanley Rankin, *The Constitutional Basis of Martial Law*, 13 CONST. REV. 75, 75 (1929) [hereinafter Stanley].

27. In time of war, or of domestic insurrection or disorder, when so-called martial law has been declared, the privilege of the writ of *habeas corpus*, together with all the other civil guarantees may, for the time being, be suspended; but, as we have learned in the preceding chapter, actual public necessity, and this alone, will furnish legal justification for this.

The existence of civil war operates as regards the enemy *ipso facto*, that is, without formal declaration, as a suspension of the privilege of the writ of *habeas corpus*, together with, as said, the suspension of the other guarantees to the individual against arbitrary executive action. In the preceding chapter the principle is argued that the

By the 1960s, it was generally agreed, at least in the United States, that Martial Law is distinct from Military Law.²⁸ Disagreement existed as to whether Martial Law is a “replacement for an otherwise functioning civil government”²⁹ or, as a “supplement only to those functions of civil government which have been disrupted by the disturbance.”³⁰ If the position before 1960 is consulted, we will see that the second view is consistent with the historically accepted position. Martial Law cannot be proclaimed to replace an otherwise functioning civilian government. Rather, it is proclaimed if the civilian government is unable to effectively discharge its functions. Thus proclaimed, if the civilian government is allowed to function, it is so allowed only because such is the will of the military commander. We will return to this idea later.

Whereas Military Law applies only to the members of the military and armed forces and is statutory and exists for the preservation of discipline and order in the military and armed forces, Martial Law puts the military in charge of an area that is under distress and where calling out the military to preserve order is necessary, thus making Martial Law a part of constitutional law.³¹ Martial Law, justified and continued only by necessity, is not statutory³² and can be proclaimed, in the words of Sir John Mackintosh, “When foreign invasion or civil war renders it impossible for the Courts of law to sit, or to enforce the execution of their judgments, [and] it becomes necessary to find a rude substitute for them, and to employ for that purpose the military, which is the only remaining force in the community.”³³ Those that govern a nation must decide, during times of peace as well as war,³⁴ whether or not to proclaim Martial Law. That decision depends on whether or not, in a given situation, it has become necessary to so proclaim,³⁵ thus

establishment of martial law may properly take place not only upon the theater of active hostilities, but elsewhere when the actual necessities of the case demand it.

The suspension of the privilege of the writ of habeas corpus falls short of the establishment of martial law, but to justify it there is required the same public necessity as that required for the enforcement of martial law.

WILLOUGHBY, *supra* note, 23, at 1612-13 (emphasis added).

28. See, e.g., Note, *Martial Law*, 42 S. CAL. L. REV. 546, 549 (1969) [hereinafter *Martial*] (first citing CHARLES FAIRMAN, *THE LAW OF MARTIAL LAW* 20-23, 31-43 (1930); and then citing FREDERICK BERNAYS WIENER, *A PRACTICAL MANUAL OF MARTIAL LAW* 6-14 (1940)).

29. See *Martial*, *supra* note 28, for a discussion of old US judicial authority on this point.

30. *Id.*

31. Clode, *supra* note 7, at 30-32.

32. See Stanley, *supra* note 26.

33. Clode, *supra* note 7, at 29 (emphasis added) (quoting Sir John Mackintosh).

34. See Stanley, *supra* note 26, at 76-77.

35. See Clode, *supra* note 7, at 32 (“For the proclamation which, under circumstances of admitted necessity, calls martial law into existence is not to be considered as the legal creation of

making the authority to proclaim Martial Law a part of constitutional law or public law.³⁶ In fact, the proclamation of Martial Law by General Jackson during the war (against the British) of 1812 in New Orleans and its continued operation, even after the British having been defeated and peace being restored, was justified by General Jackson by a direct reference to the US Constitution that allows the suspension of the writ of *habeas corpus*.³⁷ Once proclaimed, the military takes complete control and as the threat becomes bigger, necessity becomes graver and therefore discretion becomes freer.³⁸

At least since 1713, and certainly since 1731, the inability of the civilian authorities and courts to properly or effectively discharge their functions has been the hallmark of the necessity that makes a proclamation of Martial Law necessary.³⁹ Thus, if the civilian authorities and courts are open and able to effectively discharge their functions, Martial Law cannot be imposed for it is not necessary to do so.⁴⁰ In reverse, if Martial Law has been imposed, it stands to reason that civilian authorities and courts were not able to discharge their functions. We can therefore examine the genuineness of a proclamation of Martial Law by examining whether or not the civilian authorities and courts were able to carry out their functions.⁴¹ General Jackson's con-

that law, but is merely a statement of facts, which of their own force have already rendered that law necessary.”).

36. See WILLIAM E. BIRKIMER, *MILITARY GOVERNMENT AND MARTIAL LAW* 486-89 (3d ed. 1914); DICEY, *supra* note 18, at 280-90; SMITH, *supra* note 17, at 109-16; WILLOUGHBY, *supra* note 23, at 1587; Stanley, *supra* note 26, at 75.

37. RANKIN, *supra* note 21, at 12 (quoting General Order of March 14, 1815 issued by General Jackson) (“If [the US Constitution] authorizes the suspension of the habeas corpus in certain cases, it thereby impliedly admits the operation of martial law, when, in the event of rebellion or invasion, the public safety may require it.”) (emphasis added).

38. Holdsworth, *supra* note 15, at 129.

39. See, e.g., HALE, *supra* note 8; Neocleous, *supra* note 8.

40. *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 127 (1866) (“Martial rule can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction. It is also confined to the locality of actual war.”); see also SIMEON E. BALDWIN, *THE AMERICAN JUDICIARY* 299 (1905); CHALMERS & ASQUITH, *supra* note 24, at 368-69; WILLOUGHBY, *supra* note 23, at 1599; Holdsworth, *supra* note 15, at 129; Stanley, *supra* note 26, at 77.

41. The US Supreme Court in two classic expositions of law on the point *viz.* *Duncan v. Kahanamoku*, 327 U.S. 304, 313 (1946) and *Ex parte Milligan*, 71 U.S. at 127 did exactly that. A proclamation of martial law cannot be justified if civilian courts are ‘open and able to function as usual’ and the threat that necessitates the proclamation of martial law had ceased. See James D. Barnett, *Martial Law and Civil Courts*, 25 OR. L. REV. 135, 135 (1946). In fact, in a 1931 Bombay High Court opinion, where the proclamation of Martial Law under section 72 of the Government of India Act, 1919 by the Governor-General of India, Chief Justice Beaumont observed that under English constitutional law, Martial Law can be proclaimed by the executive branch where a state of war or a state of insurrection amounting to war exists but the Courts are competent, and indeed duty bound to review, “after the restoration of normal conditions to decide

tinued proclamation of Martial Law in New Orleans in 1812 was reviewed by the courts in a similar way, even after the war with the British had ended and peace had been restored.⁴² In other words, the military cannot be called out and allowed to exercise its authority independent of any control and supervision by the civilian authorities and courts in a given area, unless it can be shown that the civilian authorities and courts are unable to effectively discharge their functions.⁴³ When civilian authorities and the courts are unable to effectively function,⁴⁴ which necessitates, as a last resort, calling out the military and putting the entire area under military administration, we are in a state of Martial Law, notwithstanding whatever we might formally call the state that we are in.⁴⁵

whether and to what extent martial law was justified.” *Chanappa Shantirappa v. Emperor*, (1931) Bombay AIR 57, 58. (India).

42. See, e.g., RANKIN, *supra* note 21, at 17 (quoting Judge Martin in *Johnson v. Duncan*, 3 Mart. (o.s.) 530 (1815) (“The proclamation of martial law, if intended to suspend the functions of this Court or its members, is an attempt to exercise powers thus exclusively vested in the legislature. I therefore cannot hesitate in saying that it is in this respect null and void.”) (emphasis added) (internal citations omitted)).

43. Military troops are sometimes used as an aid to the civil authorities when martial law is declared. The troops then act a role similar to deputy sheriffs, and do nothing under their own responsibility but act directly under the civil power. This use of troops is easily recognizable from the use of troops under martial law because there is no declaration of martial law, and the troops act in entire subordination to the civil authorities.

Stanley, *supra* note 26, at 77.

44. Major Kirk L. Davies, *The Imposition of Martial Law in the United States*, 49 A.F. L. REV. 67, 85 (2000) (arguing that in the event of civilian agencies becoming overwhelmed in an environment of chaos and panic the President has the ‘obvious option’ to declare martial law). This position has been accepted since the ‘close of 17th century England’ where, “Never in peace-time—that is, so long as the ordinary courts were open—was government to resort to its armed forces to quell civil disturbances; nor could it otherwise take recourse to martial law.” See David E. Engdahl, *Soldiers, Riots, and Revolution: The Law and History of Military Troops in Civil Disorders*, 57 Iowa L. Rev. 1, 16 (1971). The Andhra Pradesh High Court in India has also accepted this view. See *Subba Rao v. Supreme Commander, Defense Forces*, (1980) 67 AIR 174, (India) (Justice Chowdary indicating that “[o]ne of the tests adopted to find out whether such a situation justifying imposition of Martial Law exists or not is to find out whether the Courts are open and are functioning regularly.”).

45. A state of Martial Law, given its nature, can proclaim itself and can exist with or without a formal declaration of the same. See BIRKHIMER, *supra* note 36, at 488; Frazer Arnold, *The Rationale of Martial Law*, 15 AM. BAR ASS’N J. 550, 552 (1929); Martial, *supra* note 28, at 548 n. 11 (citing WIENER, *supra* note 28, at 20); Richards, *supra* note 21, at 139. But see *United States ex rel. Palmer v. Adams*, 26 F.2d 141, 143, 145 (1927), where the absence of a proclamation of martial law was one of the factors which led the US federal district Court to conclude that no martial law existed in Colorado and that troops were therefore in action only in aid of civil authority.

B. Military Acting Independent of Civilian Authorities and Courts—A Consequence of Martial Law

In a state when the military acts independent of the civilian authorities and courts, the civilian authorities and courts may be allowed to function, but they function not “as of right” but, “in subordination to the military authority and to the will of the general or other officer in command, by whose permission it is exercised, and under whose direction they conduct judicial business and administer the law.”⁴⁶ Under Martial Law, “it may be . . . [a military commander’s] will to have it applied, so far as ordinary matters of litigation are concerned, by [civilian] courts.”⁴⁷ If civilian authorities and courts function in a state of Martial Law, they function because the military commander allows them function.⁴⁸ Two important British cases illustrate the point.

First case in point is the 1830 decision in *Elphinstone v. Bedreechund* from the Supreme Court of Bombay where Elphinstone, who was the sole commissioner of a territory in British India, proclaimed Martial Law in the said territory and appointed one Captain Robertson as the military commander of the area.⁴⁹ Captain Robertson seized and imprisoned the treasurer of the local prince (who surrendered one month after the treasurer was imprisoned) and forced the treasurer to give up money that was the property of the prince.⁵⁰ The executor of the treasurer sued Captain Robertson and Elphinstone for the money in the Supreme Court of Bombay.⁵¹ The court held that, “the Courts being open, the war was over at the time when [the treasurer] was thus imprisoned, that the property belonged to [the treasurer], and that therefore [the executor] could recover it.”⁵²

46. Clode, *supra* note 7, at 33.

47. BALDWIN, *supra* note 40, at 303.

48. A vast mass of matters intimately affecting the happiness of the governed, their liberties and property rights must hourly be cared for by duly constituted officers, or great suffering, inextricable confusion, and injustice to individuals will result. Property is entailed, marriages entered into, contracts made, and many other every-day domestic concerns must regularly and systematically pursue their accustomed course, or society receives a shock from which it but slowly and painfully recovers. It is not the policy of military commanders to bring about such a condition of affairs. On the contrary, it is a matter of deep solicitude with them to prevent it. The attainment of this end is most easily accomplished by the civil judicature, to the extent absolutely necessary, acting under military control.

BIRKHMIR, *supra* note 36, at 488-89.

49. See *Elphinstone v. Bedreechund*, 1 Knapp’s Rep. 316, 316-18 (1830); see also CHALMERS & ASQUITH, *supra* note 24, at 368-69; Holdsworth, *supra* note 15, at 129-30.

50. Holdsworth, *supra* note 15, at 129.

51. *Id.*

52. *Id.* at 129-30.

The decision was reversed on appeal by the Privy Council on the ground that just because civilian courts are sitting by themselves is not enough to conclude that a state of Martial Law does not exist because the key determining factor is whether the courts are sitting in their own right or as mere licensees of the military power.⁵³

The second is the 1901 case from another British colony: *Ex parte Marais*.⁵⁴ In 1901, during the Boer War, the petitioner Marais was arrested without warrant and detained in a town 300 miles away from where he was arrested.⁵⁵ When Marais petitioned the Supreme Court in Cape Town for his release, the jailer filed an affidavit before the Court stating that he was, “detained by an order of the military authorities for contravening martial law regulations.”⁵⁶ His lawyers argued that, since “civil courts were still exercising uninterrupted jurisdiction, which went to show that the ‘ordinary course of law could be and was being maintained[,]’ . . . a state of war did not exist and martial law could not be applied to civilians.”⁵⁷ The Privy Council was not impressed and held that, only on the basis of the fact that civilian courts have been permitted to pursue their ordinary course, it cannot be concluded that a proclamation of martial law is invalid.⁵⁸ The fact that Marais conceded in his petition that war was raging did not help either.⁵⁹ In the words of Frederick Pollock, “the absence of visible disorder and the continued sitting of the courts are not conclusive evidence of a state of peace.”⁶⁰ Therefore, the functioning of civilian authorities and courts does not mean we are not in a state of Martial Law.⁶¹ Rather, the important question is whether the military is under the control of the civilian authority or whether it is acting independent of the civilian authority.⁶² If the military is acting independent of the civilian authority and the courts, such would be a state of *de facto* Martial Law whether or not it is so called.

53. *Id.* at 130.

54. *Ex parte D. F. Marais* [1902] AC 109 (PC) (appeal taken from Sup. Ct. of the Cape of Good Hope).

55. David Dyzenhaus, *The Puzzle of Martial Law*, 59 U. TORONTO L. J. 1, 31 (2009).

56. *Id.*

57. *Id.* at 32.

58. *Ex parte Marais*, [1902] AC at 114; see Neocleous, *supra* note 8, at 497.

59. *Ex parte Marais*, [1902] AC at 114; see also Dyzenhaus, *supra* note 55, at 32

60. Pollock, *supra* note 16, at 157; see *Ex parte Marais*, [1902] AC.

61. See, e.g., WILLOUGHBY, *supra* note 23, at 1602.

62. See Stanley, *supra* note 26, at 77.

C. *Military Acting-in-Aid of Civilian Authority v. Martial Law*

Short of a proclamation of Martial Law, whereby the will of the military commander is supreme, there exists another concept of 'Military Acting-in-Aid of Civilian Authority.' The first traces of this concept may be found in the writings of William Birkhimer in 1914 when he observed that, "in time[s] of peace statutes authorizing the exercise of military power over civilians are to be construed strictly."⁶³ In fact, in 1915, Dicey gave a precursor to this concept (having denied the existence of Martial Law under English law) when he spoke of the common law right of the Crown and its servants to "repel force by force."⁶⁴ However, in England the distinction between war and civil disorder had been accepted since the 14th century.⁶⁵ In 1549 and 1553, Edward VI and Mary had created the institution of Lord-Lieutenants who were "chiefly of a military character" but were to be "appointed only in periods of stress."⁶⁶ As is usually the case with authorities of this kind, they were soon abused.⁶⁷ Later, in America, in the late 1700s, British soldiers and not civilian authorities were used by the British "with increasing regularity" for the suppression of civil disorders.⁶⁸

In 1929, views expressed by two leading American scholars gave shape to this concept. First was Dicey's American counterpart Willoughby who defined Martial Law as, "that law which has application when the military arm does not supersede civil authority but is called upon *to aid it* in the execution of its civil functions."⁶⁹ The other was Rankin who expressed the view much more clearly than Willoughby by emphasizing the distinction between Martial Law and Military Acting-in-Aid of Civilian Authority.⁷⁰ Rankin clarified that:

Military troops are sometimes used as an *aid to the civil authorities* when martial law is not declared. The troops then act a role similar to deputy sheriffs, and do nothing under their own responsibility but *act directly under the civil power*. This use of troops is easily recognizable from the use of troops under martial law because there is no

63. BIRKHIMER, *supra* note 36, at 484.

64. DICEY, *supra* note 18, at 183.

65. Engdahl, *supra* note 44, at 7.

66. *Id.* at 9.

67. *Id.* at 9-10 (citing F. W. MAITLAND, THE CONSTITUTIONAL HISTORY OF ENGLAND 267-288 (1st ed. 1919)).

68. Engdahl, *supra* note 44, at 26.

69. WILLOUGHBY, *supra* note 23, at 1586 (emphasis added).

70. Stanley, *supra* note 26, at 76-77.

declaration of martial law, and the troops act in *entire subordination* to the civil authorities.⁷¹

Rankin provides the key distinction between Martial Law (which he calls 'Punitive Martial Law'⁷²) and Military Acting-in-Aid of Civilian Authority (which he calls 'Preventive Martial Law'⁷³). Under the former, the military reigns supreme and the continued existence of civilian authority is only because the military commander allows it to exist,⁷⁴ whereas, under the latter, the military is not independent of the civilian authority and acts subordinate to it. There is historical evidence to support this well-accepted distinction⁷⁵ from the America of the mid-1800s.⁷⁶ The only criticism of Rankin's view is that he insists on a 'declaration' of Martial Law whereas we now know that a state of Martial Law can exist without a formal declaration.⁷⁷ In England, this concept of Military Acting-in-Aid of Civilian Authority was stated as a part of English constitutional law by Chalmers and Asquith in 1936.⁷⁸ The responsibility for maintaining order being vested with the local civilian authorities, the assistance of military should be invoked as a "last expedient" and having invoked it the military, "should act under the direction of civil authority . . . [and] should not, in ordinary cases, fire without his orders, nor omit to fire when ordered by him."⁷⁹ Just like Rankin, Chalmers and Asquith also accepted the distinction between Martial Law and Military Acting-in-

71. *Id.* at 77 (emphasis added).

72. *Id.* at 84 ("Punitive when the courts are not functioning in the proper manner . . .").

73. *Id.* ("and preventive when it is desired that the troops *act as aid* to the civil authorities.") (emphasis added).

74. BIRKHIMER, *supra* note 36, at 488.

75. This distinction has been drawn in the context of administration of criminal law during civil disorders. See A. Kenneth Pye & Cym H. Lowell, *The Criminal Process during Civil Disorders*, 1975 DUKE L.J. 581, 591-92, 596-97 (1975) (citing OTTO KERNER, REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 189 (1968)).

76. But far more common were the cases in which soldiers were called to aid civil officials in dispersing mobs or suppressing riots precipitated by hotly contested elections or other public issues, or in other ways to assist the civilian officers. It was well understood that when they were used under such circumstances the soldiers were not used in their military character, but merely as civilian assistants subject to the command of ordinary civil officers, and no more privileged in their use of force against citizens than the civil officers were themselves.

Engdahl, *supra* note 44, at 50 (first citing *United States v. Stewart* 2 Hay. & Haz. 280 (1857); and then citing *Ela v. Smith* 71 Mass. (5 Gray) 121 (1855)).

77. See BIRKHIMER, *supra* note 36, at 548, 548 n. 11 (quoting WIENER, *supra* note 28, at 20).

78. CHALMERS & ASQUITH, *supra* note 24, at 362.

79. *Id.*

Aid of Civilian Authority but they seem to allow much greater leeway to the military, even when acting in aid of civilian authority.⁸⁰

Military Acting-in-Aid of Civilian Authority is a dangerous concept and, unless close attention is paid to what it actually means and where its scope ends, it is a concept big enough to subsume within itself all the power and authority that the military commands under Martial Law and leave out the limitations imposed on the military under Martial Law.⁸¹ Professor Mark Neocleous notes, “the explicit declaration of martial law in situations which were understood implicitly to be emergencies of some sort has been transformed into the explicit use of emergency powers involving the implicit use of martial law powers.”⁸² Preserving and maintaining peace and order is generally the responsibility of the local civil authorities and courts⁸³ presumably because local authorities are better aware of local problems⁸⁴ and the military is not designed for this purpose anyway.⁸⁵ It might happen that, in order to maintain peace and order, circumstances may worsen to a point where the local civil authorities become overwhelmed and distressed. In such a situation the local civil authorities might deem it necessary to call out the military (which is under the control of federal authorities) for help and assistance with law enforcement functions.⁸⁶ However, calling out the military to aid the civilian authorities and courts at times when they are in distress does not, and has never been accepted to, amount to a proclamation of Martial Law.⁸⁷ During these times, the military’s assistance is generally requested by civilian authorities themselves and once called, the military acts under the command of the local civilian authorities.⁸⁸

80. *Id.* (citing WAR OFFICE, *MANUAL OF MILITARY LAW* (1907)) (“Still, circumstances may exist which make it the duty of the troops to ignore or act in independence of the orders of the magistrate, or, indeed, of their own superior officers.”).

81. *See, e.g.*, Neocleous, *supra* note 8, at 503-04.

82. *Id.* at 508; *see also* Jason Collins Weida, Note, *A Republic of Emergencies: Martial Law in American Jurisprudence*, 36 *CONN. L. REV.* 1397, 1400 (2004) (urging the US Supreme Court “to narrowly interpret congressional authorization of emergency powers as a means to limit excessive emergency measures imposed by the executive.”).

83. *See, e.g.*, Colonel L. J. Crum, *The National Guard and Riot Control: The Need for Revision*, 45 *J. URB. L.* 863, 864-65 (1968).

84. Note, *Riot Control and the use of Federal Troops*, 81 *HARV. L. REV.* 638, 640 (1968).

85. Campbell & Connolly, *supra* note 1, at 346-47 (citing ANTHONY BABINGTON, *MILITARY INTERVENTION IN BRITAIN: FROM THE GORDON RIOTS TO THE GIBRALTAR INCIDENT* (1990)).

86. *See, e.g.*, U.S. CONST. art. IV, § 4 cl. 6; 10 U.S.C.A. §§ 251, 254 (West 2016); *Luther v. Borden* 48 U.S. 1, 7-8 (1849).

87. *See* Engdahl, *supra* note 44, at 71.

88. *Id.*; *see* *Bishop v. Vandercook*, 200 N.W. 278, 280 (Mich. 1924); *State v. McPhail*, 180 So. 387, 390 (Miss. 1938). *But cf.* *Herlihy v. Donohue*, 161 P. 164, 167 (Mont. 1916) (explaining that “the inferior military officer may defend his acts against civil liability by reference to the order of

The danger arises as follows: If overwhelmed and under distress, the choice of calling out the military for assistance in law enforcement functions is a choice available to the local civil authorities. However, if the deployment of the military is authorized by a statute and in such a deployment the local civil authorities have no say, and once deployed the military and civil authorities both continue to function but the military acts independent of the civilian authorities and courts, we come dangerously close to a situation where we have in fact, knowingly or unknowingly, proclaimed Martial Law, although we call it Military Acting-in-Aid of Civilian Authority.⁸⁹ Consequently, we are liable to make the error of reviewing the legality of this act by applying an incorrect and inapplicable judicial standard of review. In other words, we end up reviewing the legality of a proclamation of Martial Law by analyzing whether or not it is a statutorily valid calling-out of the military to come and aid the civilian authorities. Meanwhile, the military, acting independent of the civilian authorities, continues to exercise its authority in complete disregard of the local civilian authorities, something that it can only do once Martial Law is proclaimed.⁹⁰

There is another problem. If the troops (as well as their officers) are not clear as to why they have been called out, they will be unclear as to whether they are supposed to enforce the law (i.e. act strictly as assistants of the local civilian authorities and courts, in other words, take their orders from civilian authorities) or maintain peace and order (i.e. act independently and exercise discretion in use of force), and the extent to which they are allowed to go in enforcing the law.⁹¹ One

his superior, unless such order bears upon its face the marks of its own invalidity or want of authority.”).

89. This point is illuminated by a similar scenario in Canada. The military could be called for assisting in law enforcement functions by the provincial Attorney General, but in 1998 the Canadian Parliament amended the law and vested this authority in the federal authorities. This was criticized as, “Unlike the traditional aid of civil power, there is no requirement that the provinces be consulted before the troops are called out.” Editorial, *Calling out the Troops*, 48 CRIM. L.Q. 141, 142 (2003). The Canadian Supreme Court also expressed its concerns as this move impinged the provincial jurisdiction over administration of justice. See *R v. Nolan*, [1987] 1 S.C.R. 1212 (Can.). These issues have been raised in Australia as well. See, e.g., Michael Head, *Calling out the Troops – Disturbing Trends and Unanswered Questions*, 28 UNSW L.J. 479, 480 (2005). The definition of Martial Law in a 1967 Michigan statute also supports this point. Here Martial Law is defined as, “exercise of partial or complete military control over domestic territory in time of emergency because of public necessity.” Mich. Compiled L. § 32.505(sec. 105)(j) (West 2013).

90. See, e.g., Campbell & Connolly, *supra* note 1, at 349.

91. This point has been noted by Colonel Robin Eveleigh (who was the Commanding Officer of an infantry battalion in Belfast, Ireland) in his book *PEACE-KEEPING IN A DEMOCRATIC SOCIETY* (1978) reviewed in, and quoted by, Book Review, 8 *ANGLO-AM. L. REV.* 65, 66 (1979).

proposed method to deal with this problem is to limit and clearly define the powers of the military when called out to act-in-aid of the civilian authorities.⁹²

III. DEPLOYMENT OF MILITARY UNDER THE ARMED FORCES SPECIAL POWERS ACT, 1958

A. *The Armed Forces Special Powers Act, 1958*

The AFSPA is a very peculiar piece of legislation. It was enacted in 1958 in the wake of violence that had become, “the way of life in north-eastern States of India[,]” which the state administration was unable to contain.⁹³ It therefore became *necessary* that the state administration be aided by the military in order to contain this violence (caused by the Naga rebellion⁹⁴) and restore normalcy in the state.⁹⁵ Accordingly, choosing a ‘quintessential military response,’⁹⁶ on September 11, 1958, the Indian Parliament enacted the AFSPA.

The phrase ‘armed forces’ is defined in the AFSPA to mean, “the military forces and the air forces operating as land forces, and includes other armed forces of the Union so operating.”⁹⁷ The AFSPA comes into force only when a normal law and order situation becomes so deteriorated that the state police force is not able to contain it.⁹⁸ When the AFSPA starts operating in an area, the military ‘virtually replaces’ the civilian administration.⁹⁹ It grants extraordinarily wide powers to commissioned officers, warrant officers and non-commissioned officers or any other officer of an equivalent rank of the mili-

92. See, e.g., Pye & Lowell, *supra* note 75, at 655, 690; Wing Commander U. C. Jha, *Special Laws and the Armed Forces in South Asia*, 10 ISIL Y.B. INT’L HUM. & REFUGEE L. 134, 147 (2010) [hereinafter *Special Laws*].

93. *The Armed Forces Special Powers Act, 1958*, GOV’T OF INDIA MINISTRY OF HOME AFF., http://mha.nic.in/sites/upload_files/mha/files/pdf/armed_forces_special_powers_act1958.pdf (last updated June 7, 2017).

94. See Gohain, *supra* note 4, at 4537.

95. See Surabhi Chopra, *National Security Laws in India: The Unraveling of Constitutional Constraints*, 17 OR. REV. INT’L L. 1, 6-7 (2015).

96. Manas Mohapatra, *Learning Lessons From India: The Recent History of Antiterrorist Legislation on the Subcontinent*, 95 J. CRIM. L. & CRIMINOLOGY 315, 327 (2004) (citing SOUTH ASIA HUMAN RIGHTS DOCUMENTATION CENTRE, ARMED FORCES SPECIAL POWERS ACT: A STUDY IN NATIONAL SECURITY TYRANNY § 4, http://www.hrdoc.net/sahrdc/resources/armed_forces.htm (last visited September 22, 2017)).

97. Armed Forces (Special Powers) Act, No. 28 of 1958, INDIA CODE, § 2(a), <http://indiacode.nic.in>.

98. See U.C. Jha, *Terrorism and Human Rights Law: A Comment*, 44 ECON. & POL. WKLY. 70, 70 (2009) [hereinafter *Terrorism*].

99. Gautam Navlakha, *On Ending the War against Our Own People*, 46 ECON. & POL. WKLY. 24, 26 (2011).

tary that are operating under this law.¹⁰⁰ In order to maintain public order, they are allowed to use deadly force on people who are violating the rule prohibiting assembly of five or more persons, or are carrying weapons or things capable of being used as weapons.¹⁰¹ The power to use deadly force is extraordinarily wide in its sweep prompting a legal commentator to repeatedly describe this power as a ‘license to kill,’ “so wide in its sweep, so shorn as it is of any curb on excess or any sense of proportion.”¹⁰² This ‘license to kill’ provision has been roundly criticized and it has been strongly urged that this provision be amended to bring it in line with the Life and Liberty Clause of the Indian Constitution.¹⁰³ Officers also have the power to arrest without warrant¹⁰⁴ and search without warrant.¹⁰⁵ The only limiting force on the exercise of these drastic powers is the individual sense of discretion of the officer in charge of the troops on the ground.¹⁰⁶ The other limitation is the Handing Over Provision (HOP) in the AFSPA

100. See Anil Kalhan et al., *Colonial Continuities: Human Rights, Terrorism, and Security Laws in India*, 20 COLUM. J. ASIAN L. 93, 114 (2006) (citing R. K. Raghavan, *The Indian Police: Problems and Prospects*, 33 PUBLIUS 119, 129 (2003)).

101. Armed Forces (Special Powers) Act § 4(a), <http://indiacode.nic.in> (“Special Powers of the Armed Forces. If [any commissioned officer, warrant officer, non-commissioned officer or any other person of equivalent rank in the armed forces] is of opinion that it is necessary so to do for the maintenance of public order, fire upon or otherwise use force, even to the causing of death, against any person who is acting in contravention of any law or order for the time being in force in the disturbed area prohibiting the assembly of five or more persons or the carrying of weapons or things capable of being used as weapons or of firearms, ammunition or explosive substances.”) (emphasis added).

102. A. G. Noorani, *Draconian Statute – Armed Forces (Special Powers) Act, 1958*, 32 ECON. & POL. WKLY. 1578, 1578 (1997) [hereinafter *Draconian*]; A. G. Noorani, *Supreme Court on Armed Forces Act*, 33 ECON. & POL. WKLY. 1682, 1682 (1998) [hereinafter *Supreme*]; A. G. Noorani, *Armed Forces (Special Powers) Act: Urgency of Review*, 44 ECON. & POL. WKLY. 8, 9 (2009) [hereinafter *Armed*].

103. *Armed*, *supra* note 102, at 8. See generally INDIA CONST. art. 21 (“No person shall be deprived of his life and personal liberty except according to the procedure established by law.”).

104. Armed Forces (Special Powers) Act § 4(c), <http://indiacode.nic.in> (“Special Powers of the Armed Forces. [Any commissioned officer, warrant officer, non-commissioned officer or any other person of equivalent rank in the armed forces may, in a disturbed area,] arrest, without warrant, any person who has committed a cognizable offence or against whom a reasonable suspicion exists that he has committed or is about to commit a cognizable offence and may use force as may be necessary to effect the arrest.”) (emphasis added).

105. Armed Forces (Special Powers) Act § 4(d), <http://indiacode.nic.in> (“Special Powers of the Armed Forces. [Any commissioned officer, warrant officer, non-commissioned officer or any other person of equivalent rank in the armed forces may, in a disturbed area,] enter and search without warrant any premises to make any such arrest as aforesaid or to recover any person believed to be wrongfully restrained or confined or any property reasonably suspected to be stolen property or any arms, ammunition or explosive substances believed to be unlawfully kept in such premises, and may for that purpose use such force as may be necessary.”) (emphasis added).

106. *Draconian*, *supra* note 102, at 1578; *Supreme*, *supra* note 102, at 1683.

whereby, “any person arrested and taken into custody under [the AFSPA] shall be made over to the officer in charge of the nearest police station with the least possible delay, together with a report of the circumstances occasioning the arrest.”¹⁰⁷ This is consistent with the view that when acting under the color of Martial Law, “It is the function of the military forces to hold the prisoner until order is restored and he can be safely turned over to the civil authorities for trial. Martial law prevents but it does not punish.”¹⁰⁸ However, the AFSPA does provide full legal immunity to any person who acts under its authority.¹⁰⁹

The Governor of the State, Administrator of the Union Territory, or the Union Government in New Delhi can issue a Disturbed Area Notification, which in turn triggers the deployment of the military under the AFSPA to aid civilian authority.¹¹⁰ The Disturbed Area Notification is not required to be reviewed periodically, but one legal commentator has argued that, given the nature of this notification, “the making of the declaration carries within it an obligation to review the gravity of the situation from time to time and the continuance of the declaration has to be decided on such a periodic assessment of the gravity of the situation.”¹¹¹

B. *The Constitutionality of the Armed Forces Special Powers Act, 1958*

In *Naga People*¹¹² the constitutional validity of the infamous Armed Forces Special Powers Act, 1958 (AFSPA) was challenged before the Supreme Court of India.¹¹³ Since the case involved a ‘sub-

107. Armed Forces (Special Powers) Act § 4(d), <http://indiacode.nic.in>.

108. RANKIN, *supra* note 21, at 179 (citing L. K. Underhill, *Jurisdiction of Military Tribunals in the United States over Civilians*, 12 CAL. L. REV. 159, 178 (1923-1924)).

109. Armed Forces (Special Powers) Act § 6, <http://indiacode.nic.in> (“Protection to persons acting under the Act. No prosecution, suit or other legal proceeding shall be instituted, except with the previous sanction of the Central Government, against any person in respect of anything done or purported to be done in the exercise of the powers conferred by this Act.”).

110. *Id.* at § 3 (“Power to declare areas to be disturbed areas. If, in relation to any State or Union Territory to which this Act extends, the Governor of that State or Administrator of that Union Territory, as the case may be, is of the opinion that the whole or any part of such State or Union Territory, as the case may be, is in such a disturbed or dangerous condition that that the use of armed forces *in aid of the civil power* is necessary, the Governor of that State or the Administrator of that Union Territory or the Central Government, as the case may be, may, by notification in the Official Gazette, declare the whole or such part of such State or Union Territory to be a disturbed area.”) (emphasis added).

111. *Supreme*, *supra* note 102, at 1682.

112. *Naga People’s Movement of Human Rights v. Union of India*, (1998) 85 AIR 431 (India).

113. This was not the only law that was challenged in this case. Along with Armed Forces Special Powers Act, 1958, which was enacted by the Union Parliament, the validity of the Assam

stantial question of interpretation' of the Indian Constitution and, as required by the Indian Constitution,¹¹⁴ the case was referred to a Constitution Bench of five judges of the Supreme Court.¹¹⁵ The Court delivered a unanimous opinion. Justice Agrawal delivered the opinion of the Court in which all four other judges concurred.¹¹⁶ The unanimous Court upheld the validity of the AFSPA and rejected all constitutional challenges raised in the case.¹¹⁷

In *Naga People*, out of the several grounds on which the constitutionality of the AFSPA was assailed, a key ground was the vesting of the control and supervision of the military.¹¹⁸ It was argued in this case that the military cannot act independent of the control and supervision of the civilian state authority.¹¹⁹ Since the military has been called out to act in aid of the civilian authority, which has been overwhelmed with the violence and thus has not been able to contain such violence, the military, during its deployment in the state, must always be under the control and supervision of the civilian state authority. In other words, the civilian state authority will always retain, "a final directorial control [over the military] to ensure that the armed forces act in aid of civil power and do not supplant or act in substitution of the civil power."¹²⁰ These arguments were rejected, and the unanimous Court held that:

We are, however, unable to agree with the submission of the learned counsel for the petitioners that during the course of such deployment the supervision and control over the use of armed forces has to be with the civil authorities of the State concerned, or that the State concerned will have the exclusive power to determine

Disturbed Areas Act, 1955 (which was enacted by the State Legislature of Assam) was also challenged. *Naga People*, (1998) 85 AIR at 440.

114. INDIA CONST. art. 143, § 2.

115. The Constitution Bench comprised of Chief Justice J. S. Verma, Justices M. M. Punchhi, S. C. Agrawal, Dr. A. S. Anand, & S. P. Bharucha. See *Naga People*, (1998) 85 AIR at 431.

116. *Id.* at 440.

117. *Id.* at 462-64.

118. *Id.* at 446 (On behalf of the petitioners, Shanti Bhushan argued that, "the use of the Armed Forces in aid of the civil power contemplates the use of Armed Forces under the control, continuous supervision and direction of the executive power of the State and that Parliament can only provide that whenever the executive authorities of a State desire, the use of Armed Forces in aid of the civil power would be permissible but the supervision and control over the use of armed forces has to be with the civil authorities . . .") (emphasis added).

119. *Id.*

120. *Id.* (On behalf of the petitioners, Dr. Rajiv Dhavan argued that, "the State in whose aid the Armed Forces are so deployed shall have the exclusive power to determine that purpose, the time period and the areas in which the Armed Forces should be requested to act in aid of civil power and that the State remains a final directorial control to ensure that the armed forces act in aid of civil power and do no supplant or act in substitution of the civil power.").

the purpose, the time period and the areas within which the armed forces should be requested to act in aid of civil power.¹²¹

However, the Court unanimously interpreted the phrase ‘in aid of civil power’ in the AFSPA.¹²² Incidentally, this phrase is also mentioned twice in the Indian Constitution.¹²³ The Court held that:

The expression “in aid of the civil power” in Entry 1 of the State List and in Entry 2A of the Union List implies that deployment of the Armed Forces of the Union shall be for the purpose of enabling the civil power in the State to deal with the situation affecting maintenance of public order which has necessitated the deployment of the Armed Forces in the State. *The word “aid” postulates the continued existence of the authority to be aided.* This would mean that even after deployment of the Armed Forces the civil power will continue to function. The power to make a law providing for deployment of the Armed Forces of the Union in aid of the civil power in the State does not comprehend the power to enact a law which would enable the Armed Forces of the Union to supplant or act as a substitute for the civil power in the State.¹²⁴

We may in passing also note that the AFSPA was not examined on the touchstone of the Life and Liberty Clause of the Indian Constitution.¹²⁵ The AFSPA needs to be re-reviewed so as to determine

121. *Id.* at 447.

122. Armed Forces (Special Powers) Act, No. 28 of 1958, INDIA CODE, § 3, <http://indiacode.nic.in>.

123. See generally INDIA CONST. sched. 7, list I, entry 2A. (“Deployment of any armed force of the Union or any other force subject to the control of the Union or any contingent or unit thereof in any State *in aid of the civil powers*; powers, jurisdiction, privileges and liabilities of the members of such forces while on such deployment.”) (emphasis added); *Id.* at list II, entry 1 (“Public Order but not including the use of naval, military or Air force or any other armed force of the Union or any other force subject to the control of the Union or of any contingent or unit thereof *in aid of the civil power.*”) (emphasis added).

124. Naga People’s Movement of Human Rights v. Union of India, (1998) 85 AIR 431, 447 (India) (emphasis added).

125. See generally INDIA CONST. art. 21. (“No person shall be deprived of his life or personal liberty except according to procedure established by law.”); see *Maneka Gandhi v. Union of India*, (1978) 2 SCR 621, 668 (India) (the Supreme Court held that the ‘procedure established by law’ under article 21 must be a ‘just, fair and reasonable’ procedure); see also *State of Punjab v. Dalbir Singh*, (2012) 99 AIR 1040, 1060 (India) (holding that, “in our Constitution the concept of ‘due process’ was incorporated in view of the judgment of this Court in *Gandhi*.”); *Selvi v. State of Karnataka*, (2010) 97 AIR 1974, 2009 (India) (where the Supreme Court interpreted the “right against self-incrimination” through the ethos of “substantive due process” and “right to fair” trial); *Sunil Batra v. Delhi Admin.*, (1978) 67 AIR 1675, 1690 (India) (holding that, “[t]rue, our Constitution has no ‘due process’ clause . . . ; but, in this branch of law, after [*R. C. Cooper v. Union of India*, (1970) 3 SCR 530 (India)] and *Gandhi* . . . the consequence is the same.”); *Vijayashri Sripati, Toward Fifty Years of Constitutionalism and Fundamental Rights in India: Looking Back to See Ahead (1950-2000)*, 14 AM. U. INT’L L. REV. 413, 439 (1998); Mohapatra, *supra* note 96, at 325.

whether it can withstand scrutiny under the Life and Liberty Clause, and it has been suggested that it might not.¹²⁶ It is beyond the brief of this article to examine this question in detail.¹²⁷ There is, however, an inherent contradiction in these two holdings. In its first holding, the Court clearly rejects the view that the control and supervision of the military deployed in aid of civilian authority in a state can be with such civilian authority in the state.¹²⁸ This means that once deployed, the military will be independent of the civilian authority in the state. However, in its second holding, the Court interprets the phrase “in aid of the civil power” to mean that the deployment of the military to aid the civilian authority does not mean that the military can act as a substitute for the civilian authority in the state.¹²⁹ The Court, it seems, was mindful of this contradiction and tried to reconcile these two holdings by further observing that:

In our opinion, what is contemplated by Entry 2-A of the Union List and Entry 1 of the State List is that in the event of deployment of the armed forces of the Union in aid of the civil power in a State, the said forces shall operate in the State concerned in cooperation with the civil administration so that the situation which has necessitated the deployment of the armed forces is effectively dealt with and normalcy is restored.¹³⁰

C. *De-Facto Proclamation of Martial Law under the AFSPA*

When called to aid the civilian authority of a state, the military can either act independent of that civilian authority or it can act under its supervision. So long as the civilian authority continues to exist and function, the military cannot act independent of the civilian authority when deployed to aid that civilian authority. In a situation where the civilian authority either ceases to exist or is so overwhelmed that it is unable or incapable of functioning, the military can be deployed to act independent of the civilian authority. In such a situation, there is effectively no functioning civilian authority left, therefore to insist of control and supervision by the civilian authority of the state would be pointless. A situation where, in a geographical area, civilian authority

126. See, e.g., Chopra, *supra* note 95, at 14-15, 25-26; Armed, *supra* note 102, at 9-11.

127. However, it has been noted that use of the military in ordinary law enforcement has not had its desired effects. See, e.g., Mohapatra, *supra* note 96, at 342 (“While the Indian government has endowed its law enforcement and military with more and more power to extinguish the threat of terrorism, there is scant evidence that this increase in privileges has had its desired effect.”).

128. *Naga People*, (1998) 85 AIR at 447.

129. *Id.*

130. *Id.*

has, for all practical purposes, ceased to exist and the military is deployed to take charge and restore normalcy to the area in order for the civilian authority to be established again, is a situation where Martial Law has been proclaimed.

Martial Law may be imposed consequent to a formal declaration of the same, or it may arise out of necessity, but where, on facts that the military is in charge (in the event of all civilian authority ceasing to exist) or the military is acting independent of the civilian authority (in the event of civilian authority being totally helpless), the area would be under Martial Law. The Court's Cooperation Holding, whereby, once deployed (admittedly to aid the civilian authority), the military must act in cooperation with the civil administration, is inconsistent with the legal conclusion that obtains once the doctrinal position on Martial Law is consulted. The military can act independent of the local or state civilian authority, but this can happen only when Martial Law is proclaimed in an area. In absence of a proclamation of Martial Law, the military, when called to aid the civilian authority in a state, must act under the control and supervision of the civilian authority of the state. The Court's first holding (as reproduced above), in effect, amounts to a judicial sanctioning of a *de facto* proclamation of Martial Law¹³¹ whereby the military is allowed to operate in a notified disturbed area without any control or supervision of the state or local civilian authority—the very authority the military is supposed to aid.¹³²

As stated above,¹³³ Military Acting-in-Aid is a dangerous concept unless close attention is paid to its scope. While judicially reviewing the legality of the military being called out to aid the civil authorities, we are liable to make the error of reviewing the legality of this act by applying an incorrect and inapplicable judicial standard of review. We can end up reviewing the legality of a proclamation of Martial Law by analyzing whether or not it is a statutorily valid call out of the military to come and aid the civilian authorities. Meanwhile, the military, act-

131. Use of the phrase '*de facto*' to characterize the Indian Parliament or Union Government's actions in dealing with national security situations is not new. Commenting on other Indian national security legislations, Chopra has characterized several of them as authorizing '*de facto* preventive detention'. *E.g.*, Chopra, *supra* note 95, at 19 (citing Unlawful Activities (Prevention) Act, No. 37 of 1967, INDIA CODE, § 43D(2), <http://indiacode.nic.in>). Kalahan et al. have also said that several Indian national security legislations, "to a considerable degree . . . [function] more as preventive detention laws than as laws intended to obtain convictions for criminal violations . . ." Kalhan et al., *supra* note 100, at 173.

132. *See* Chopra, *supra* note 95, at 13-14 ("AFSPA authorizes the military to use force in [the disturbed] area far in excess of what ordinary criminal law authorizes, without being invited to do so by the civil administration.").

133. *Supra* Part II, Sub-Part C.

ing independent of the civilian authorities continues to exercise its authority in complete disregard of the local civilian authorities,¹³⁴ something that it can only exercise once Martial Law is proclaimed.¹³⁵ Martial Law can be invoked in circumstances where the civilian authority, for all practical purposes, has ceased to exist and there is no other option left but to call out the military to maintain peace and order. Civilian authority will then be allowed to function but that is completely dependent on the will of the military commander. In fact, it has been shown that, when the AFSPA is invoked, civilian authorities “start playing second fiddle” and, “instead of ‘coming to the aid of civil administration’, the armed forces virtually replace it.”¹³⁶ Courts have held consistently that the continued existence of civilian authority is no basis to conclude that a proclamation of Martial Law was invalid.¹³⁷ Thus, the presence or absence of civilian authority is not helpful in determining whether or not an area is under Martial Law. The key factor is the degree of control that the civilian authority exercises over the military. As per *Naga People*, once deployed, subsequent to the issuance of a ‘disturbed area notification,’ the military is not required to act under the civilian authority.¹³⁸ This holding of the Court therefore amounts to a *de facto* sanctioning of a proclamation of Martial Law.

The deployment of the military to aid the civilian authority under section three of the AFSPA is triggered by the issuance of a Disturbed Area Notification, which can be issued by the Governor of the State, Administrator of the Union Territory or the Union Government in New Delhi.¹³⁹ The difficulty with section three is that it does not

134. The abuses of the AFSPA are too numerous and well recorded, several of those allegations have been denied by the Army whereas in several other instances the Army has been forced to take action. See, e.g., Uttam Sengupta, ‘*The ULFA Boys are not amateurs*’, INDIA TODAY (Dec. 31, 1990, 11:15 AM), <http://indiatoday.intoday.in/story/ulfacertainlyhavethebenefitofverygoodintelligenceltgenbaljitsingh/1/316031.html> (where Lieutenant General Baljit Singh, then Chief of Staff of Eastern Command, denied allegations of power abuse by the Army under the AFSPA). But see, Gohain, *supra* note 4, at 4537 (describing at least three events of power abuse where in one incident of custodial torture, specifically that “[t]here was such a public outrage that the army general in charge of operations in Assam was forced to visit the bereaved family and apologise.”).

135. See, e.g., Campbell & Connolly, *supra* note 1, at 349.

136. Navlakha, *supra* note 99, at 26.

137. Campbell & Connolly, *supra* note 1, at 348-49.

138. See *Naga People’s Movement of Human Rights v. Union of India*, (1998) 85 AIR 431, 447 (India).

139. Armed Forces (Special Powers) Act, No. 28 of 1958, INDIA CODE, § 3, <http://indiacode.nic.in> (“Power to declare areas to be disturbed areas. If, in relation to any State or Union Territory to which this Act extends, the Governor of that State or Administrator of that Union Territory, as the case may be, is of the opinion that the whole or any part of such State or Union

clearly describe the circumstances under which the issuance of a Disturbed Area Notification is justified.¹⁴⁰ So long as the Notification is statutorily valid, and the statute's constitutionality is already upheld, it will be very difficult to examine the true nature of this Notification.¹⁴¹ This is exactly what we found in our analysis in the preceding part, i.e. we are in a situation where we end up reviewing the legality of a proclamation of Martial Law by analyzing whether or not it is a statutorily valid call-out of the military to come and aid the civilian authorities. Meanwhile, the military, acting independent of the civilian authorities, continues to exercise its authority in complete disregard of the local civilian authorities, something that it can only exercise once Martial Law is proclaimed.¹⁴² Furthermore, the use of the military in a situation that does not warrant a proclamation of Martial Law is bound to have adverse impact on the military itself that has, in this case, led to soldiers committing suicide and killing their own, prompting the army generals to urge a political solution.¹⁴³ Some retired officers have also said that by making the military focus on its secondary role (i.e. aiding civilian administration in conflict), the military's primary responsibility has been compromised and its discipline affected.¹⁴⁴

D. *The Facts Behind the De-Facto Proclamation of Martial Law under the AFSPA*

It appears from *Naga People* that the real reason the Supreme Court declared that the military should be independent of the civilian authority is because of the complete and utter failure of the civil authority in that state.¹⁴⁵ The Governor of the state of Assam said in his report, "Magnitude of loot and plunder, however, became colossal in due course of time, presumably in view of the State Government's

Territory, as the case may be, is in such a disturbed or dangerous condition that that the use of armed forces *in aid of the civil power* is necessary, the Governor of that State or the Administrator of that Union Territory or the Central Government, as the case may be, may, by notification in the Official Gazette, declare the whole or such part of such State or Union Territory to be a disturbed area.") (emphasis added).

140. See *Special Laws*, *supra* note 92, at 135.

141. One commentator noted that in "declaring Assam a 'Disturbed Area' nowhere has the government referred to any outbreak of violence or armed insurrection in the state." Udayon Mishra, *Worse than Emergency Days*, 16 *ECON. & POL. WKLY.* 731, 732 (1980). If the disturbed area notification is recognized for what it truly is, the standard of judicial review applicable would be different.

142. See, e.g., Campbell & Connolly, *supra* note 1, at 349.

143. Gohain, *supra* note 4, at 4537.

144. Navlakha, *supra* note 99, at 27.

145. See *Naga People's Movement of Human Rights v. Union of India*, (1998) 85 AIR 431 (India).

failure to act. . . . The holders of public [offices] have been rendered totally ineffective. The statutory authorities are in a state of panic incapable of discharging their functions.”¹⁴⁶ Directly referring to certain secessionist groups¹⁴⁷ like United Liberation Front of Assam (ULFA),¹⁴⁸ the Governor’s report noted, “‘The loss of faith is the efficacy and the credibility of the Government apparatus is so great that the thin distinction between ULFA,¹⁴⁹ AASU¹⁵⁰ and AGP [Asom Gana Parishad] which existed at some stage, stands totally obliterated. Gloom [sic] hangs over the whole state. By the fall of dusk, the people are huddled in their homes. Nobody’s life, property or honour is safe. The basic attributes of a civilised and orderly society stand annihilated.’”¹⁵¹

In a media interview, the then Governor of Assam, D. D. Thakur, said that, at the time he took over as the Governor, the entire administration was “defunct and demoralized” and even pointed out that the police had failed in arresting the violent activities of the ULFA.¹⁵² The government’s loss of its grip on administration further resulted in a popular loss of faith in the Constitution and law of the country and the constitutional process as well.¹⁵³ Historically, a proclamation of

146. *Id.*

147. See Gohain, *supra* note 4, at 4537, which critically describes the enactment of the AFSPA that was, “Originally calculated to suppress the Naga rebellion, [but] is now being applied liberally wherever in this region insurgency raises its head.” *Id.*

148. Shekhar Gupta & Uttam Sengupta, *A Violent Mess*, INDIA TODAY (Sept. 15, 1990, 5:52 PM), <http://indiatoday.intoday.in/story/assaminturmoilgovernmentstruggleshopelesslyytoestablishsemblanceofauthority/1/315549.html>.

149. ULFA stands for United Liberation Front of Assam. To put the Governor of Assam’s report in context, it is important to remember that in the early 1990s, ULFA rejected the demands to hold talks with the Indian Government to discuss their grievances on the ground that, “ULFA will ‘consider’ holding talks with ‘India government’ if the agenda for such talks has at the top the question of the restoration of the lost sovereignty of the Asom People of Asom, whose unchallenged and sole representative, in ULFA’s view, is naturally the organisation itself.” Kamaroopi, *Enigma of ULFA*, 26 ECON. & POL. WKLY. 1786, 1786 (1991).

150. AASU stands for All Assam Student Union. In 1989, AASU along with All Bodo Students Union (ABSU), “successfully paralysed life in Kokrajhar and Darrang districts and, for various periods of time, cut off the entire North-east from the rest of the country. . . . The actions of the state’s police are certainly not such as to encourage an early end to the agitation. In retaliation to violence against policemen, they have gone on a rampage in Bodo-dominated villages in Kokrajhar and Darrang districts. Thereby they may have destroyed whatever chances existed of isolating the militants and may[,] in fact, have helped broaden the militants’ base.” Farzand Ahmed, *Turn for the Worse*, INDIA TODAY (Apr. 30, 1989, 1:47 PM), <http://indiatoday.intoday.in/story/bodolandagitationassaminforalongperiodofturmoil/1/323415.html>.

151. *Id.* at 462.

152. See Farzand Ahmed, *I’m Having a Trying Time, Says Governor D. D. Thakur*, INDIA TODAY (Mar. 31, 1991, 10:33 AM), <http://indiatoday.intoday.in/story/evenstatepolicehasbeenactedandiscapturingulfaactivistsaysdthakur/1/318081.html>.

153. Gupta & Sengupta, *supra* note 148.

Martial Law has generally followed circumstances like these because, not only has the local administration failed to maintain law and order, there has also been no faith left in the local administration to be able to effectively discharge those functions. Negotiating with the ULFA was not a viable option in face of ‘killings and violence,’¹⁵⁴ especially when the ULFA did not hesitate in killing even a Russian technician Sergei Gritchenko employed by Coal India in the region.¹⁵⁵ One 1989 special news report described the situation as follows: “So complete is the sense of insecurity, so complete the acceptance of the inevitability of utter chaos in the coming months that each community is busy forming its own private army and collecting arms.”¹⁵⁶ The police chief was assassinated and businessmen of non-Assamese ethnicity were forced to leave the state and were forced to transfer their properties to local Assamese before leaving.¹⁵⁷ The following paragraph from a news report clearly shows that the factual situation would have justified the proclamation of Martial Law even if it was invoked expressly:

ULFA’s writ is taken more seriously than the state Government’s. The organisation openly runs military camps in the Brahmaputra valley. Its cadres have received their basic training from the Kachin Independent Army in the adjoining Burmese jungles, where they shop for arms with extorted money. Intelligence agencies say ULFA has forged links with other extremist groups, particularly Nagas, and there are indications of links with extremists in Punjab and Kashmir.¹⁵⁸

In fact, Lieutenant General Baljit Singh, the then Chief of Staff of Eastern Command, when asked “whether the police could have been used against ULFA[,]” categorically stated that the ULFA was an insurgent organization and to handle the ULFA, “would have been beyond the capabilities of the police.”¹⁵⁹

These facts, as narrated in *Naga People*, and also otherwise, clearly indicate that the civilian authority was completely unable to function. The AFSPA, as has been noted before, comes into force only when a normal law and order situation becomes so deteriorated that the state police force is unable to contain it.¹⁶⁰ This was a classic case of calling out and handing over the state of affairs to the mili-

154. See Ahmed, *supra* note 152.

155. See Kamaroopi, *supra* note 149.

156. Gupta & Sengupta, *supra* note 148.

157. See *id.*

158. *Id.*

159. Sengupta, *supra* note 134.

160. See *Terrorism*, *supra* note 98, at 70.

tary—a proclamation of Martial Law by whatever name it is called. On such facts, the Supreme Court had no other option but to declare that the military is not subject to the control and direction of the civil authority in that state. But, in doing so, the Court made an error. It did not call a section three notification for what it truly was, and what could only be its most fair characterization under the circumstances; it was a *de facto* proclamation of Martial Law. The military might be enforcing civilian law, and it might even be cooperating with the civilian authority in the disturbed area but the fact remains that the military is under no obligation to answer to civilian authorities as regards their conduct in the disturbed area. The military personnel, exercising powers under the AFSPA, take orders from and are answerable only to the military authorities.¹⁶¹ Responding to the UN Human Rights Committee in March 1991 in regards to the Second Periodic Report under the International Covenant on Civil and Political Rights,¹⁶² the then Attorney General stated that, given the infiltration and secessionist activities in the north-east part of India, the AFSPA was necessary.¹⁶³ The Attorney General's justification before the Supreme Court and then before the Human Rights Committee was the same—the AFSPA is necessary.¹⁶⁴ This is the classic justification for Martial Law. It is further remarkable that in the long and chequered history of the AFSPA, only a few commentators have examined the use of the AFSPA from an angle that comes close to this analysis,¹⁶⁵ and only one commentator has so far called the use of the AFSPA for what it truly is (albeit in passing and without any analysis)—a law that imposes Martial Law on the disturbed area so notified under the Act.¹⁶⁶

161. See, e.g., *id.* at 71 (“Since March 1993, a human rights cell has been functioning in the army headquarters under the additional director general (discipline and vigilance). In the last 15 years, it has received more than 1,200 cases from the north-east and J&K for alleged violations of human rights. Only 54 cases have been found true, wherein 115 personnel have been punished and in 17 cases compensations have been awarded.”). Note that even in the case of alleged human rights violations from the areas where the AFSPA is applicable, it is the military that decides the claims presented by the petitioners, and not the civilian administration. See *id.*

162. See *Naga People's Movement of Human Rights v. Union of India*, (1998) 85 AIR 431 (India).

163. *Terrorism*, *supra* note 98, at 71.

164. *Naga People*, (1998) 85 AIR at 464.

165. See, e.g., Chopra, *supra* note 95, at 6-7; *Armed*, *supra* note 102, at 8.

166. Gohain, *supra* note 4 (“The army is virtually imposing a martial law regime on areas regarded as infested with insurgents.”).

IV. CONCLUSION

Use of the military in a domestic crisis is nothing new.¹⁶⁷ In *Moyer*,¹⁶⁸ even though there was no formal declaration of Martial Law by the Governor of Colorado, he still had the petitioner “Moyer summarily arrested and imprisoned.”¹⁶⁹ The Governor had determined, though, that a state of insurrection existed because of a violent labor strike. In such circumstances, the US Supreme Court held that the Governor’s determination of the state of insurrection was conclusive.¹⁷⁰ Much water has flown under the proverbial bridge since *Moyer* was decided in 1909. However, compared with the facts in context of the AFSPA noted above, clearly the situation was much more critical as compared to *Moyer*. Whether it is still the same situation is, however, arguable.

The AFSPA authorizes the deployment of the military in any area that has been so notified under the disturbed area notification issued under section three of the AFSPA. When the military is so deployed, it is supposed to cooperate with the civilian authorities but there is no need for the military to act under their command and control. Clearly then, the military acts independent of the civilian authority in the area where the military is deployed. Is the issuance of a disturbed area notification, therefore, a *de facto* proclamation of Martial Law? This article argues that it is. The existence of civilian authority in an area where the military has been deployed to maintain law and order is no ground to conclude that the area is not under Martial Law. The key factor is whether the military is acting under the command and control of the civilian authority or independent of it. Obviously, the military will act in cooperation with the local civilian authority once it is deployed in the area, but there is no legal obligation for the military to do so. In the case of a conflict, the military commander will clearly outrank and out-command the civilian authority. If such is the situation, then the area is under Martial Law, by whatever name we call it.

167. See Note, *Rule by Martial Law in Indiana: The Scope of Executive Power*, 31 IND. L. J. 456, 456 (1995); Note, *Martial Law and the National Guard*, 18 N.Y. L. F. 216, 220-223 (1972). These two articles document the extensive use of Martial Law by State Governors in the United States where they declared Martial Law and called in the National Guard to handle domestic situations like strikes and other like instances of public unrest. See also Note, *Constitutional Law – Martial Law – Preserving Order in the State: A Traditional Reappraisal*, 75 W. VA. L. REV. 143, 144 (1972) [hereinafter *Preserving Order*] (citing KERNER, *supra* note 75).

168. *Moyer v. Peabody*, 212 U.S. 78 (1909).

169. *Preserving Order*, *supra* note 167, at 158.

170. *Moyer*, 212 U.S. at 83 (1909).

Given the grave circumstances that necessitate putting an area under Martial Law, this is not only desirable but necessary—it would not work otherwise. But calling it what it truly is, is important to ensure that the proper standards of judicial review are applied when the matter reaches the courts. When the Supreme Court upheld the constitutionality of the AFSPA, it failed to realize the disturbed area notification for what it truly was—a *de facto* proclamation of Martial Law. It is beyond the scope of this article to examine what might have happened should the Court have realized this. But the settled legal position going back more than two centuries, and, the facts as they are borne out from the Court’s opinion and other reliable sources, clearly indicate that the circumstances on the ground were such that nothing less than calling in the military would have helped. The necessary precondition of ‘necessity’ was therefore factually fulfilled—it was necessary to proclaim Martial Law, and that’s exactly what the Indian Parliament did. Was the proclamation of a *de facto* Martial Law by way of the AFSPA necessary? I think it was, at least when the AFSPA was first enacted and enforced. But is it necessary in 2018 to keep areas of the Indian Republic under *de facto* Martial Law? That might be a tough ask for the government. Is there any constitutional authority with the Indian Parliament to provide for a declaration of Martial Law by legislation? That is the natural follow-up question that arises, but, being beyond the scope of this paper, is left for future examination.

A CRITIQUE OF *PERİNÇEK V. SWITZERLAND*: INCORPORATING AN INTERNATIONAL AND HISTORICAL CONTEXT IS THE MORE PRUDENT APPROACH TO GENOCIDE DENIAL CASES

*Shant N. Nashalian**

I.	INTRODUCTION.....	148
II.	BACKGROUND	150
	A. <i>History of the Genocide</i>	150
	B. <i>Present-day Turkey and the State of Denial</i>	155
	C. <i>The ECtHR, Perincek, and its Legal Context</i>	157
	1. Freedom of Expression in the European Convention on Human Rights and the ECtHR’s Two-Tier System of Analysis.....	158
	2. Freedom of Expression/Incitement to Hatred Cases Decided by the ECtHR	160
	3. <i>Perinçek v. Switzerland</i>	162
III.	JUSTIFICATIONS FOR PROSECUTING GENOCIDE DENIAL.	166
	A. <i>Justification #1: The Prevention of Immediate Violence Within the Borders of a State</i>	167
	B. <i>Justification #2: The Prevention of Violence, Even Extraterritorially</i>	167
	C. <i>Justification #3: Prevention of Future Violence and Oppression by Restricting Rhetoric That may Lead</i>	

* J.D., May 2018, Southwestern Law School; Editor-in-Chief, Southwestern Journal of International Law. I would like to thank my family for supporting me through the writing process and, particularly, my parents, Suzy and Haig, and my brother, Ardo. I would also like to thank the Journal’s faculty advisors, Professor Johnathan Miller and Professor Silvia Faerman, for helping me develop and sharpen the arguments made in this paper. I dedicate this paper to the loving memory of my grandmother, Arpig, and to the millions who suffered and perished as a result of the atrocities commenced in 1915, some of whom were my ancestors.

	<i>to the Rekindling of the Group or Ideology That Carried out the Massacres at Issue</i>	169
D.	<i>Justification #4: Protection of the Dignity of Survivors and Their Subsequent Generations</i>	169
IV.	CRITIQUE OF THE ECtHR'S DECISION IN <i>PERİNÇEK</i> ...	170
V.	PROPOSED APPROACH TO GENOCIDE DENIAL LAWS....	172
A.	<i>The Test For Determining Whether A Statement Amounts To a Criminal Violation Should Consist of a Balancing Test</i>	172
	1. Objective Intent	172
	2. Domestic and International Effect	173
	3. Severity Among Historical Context	174
B.	<i>Courts Should be Limited to Only Prosecuting the Denial of Genocides with Enough of a Historical Consensus</i>	174
VI.	CONCLUSION	175

I. INTRODUCTION

Armenians have long sought international acknowledgment of the 1915 mass-killings of Armenians in the Ottoman Empire as genocide.¹ Several countries, including many European countries and an overwhelming majority of U.S. states, have classified the events as an instance of genocide.² However, a recent European Court of Human Rights (“ECtHR”) Grand Chamber decision, *Perinçek v. Switzerland*,³ has taken the conversation of acknowledgment a step in the wrong direction. In *Perinçek*, Switzerland prosecuted Doğu Perinçek, a Turkish politician, for proclaiming, while speaking at a conference in Switzerland, that “the allegations of the ‘Armenian genocide’ are an international lie” and commanding individuals to not “believe the Hitler-style lies such as that of the ‘Armenian genocide.’”⁴ After Perinçek’s appeal, the ECtHR held that his statements were protected as free expression under Article 10 of the European Convention on

1. See, e.g., Thomas de Waal, *The G-Word*, 94 FOREIGN AFF. 136, 143-46 (2015) (discussing the Armenian-American case for their government to recognize the events of 1915 as genocide).

2. Dennis Lynch, *Who Recognizes Armenian Genocide? 20 States That Formally Acknowledge 1915 Events*, INT’L BUS. TIMES (Apr. 21, 2015, 10:32 PM), <http://www.ibtimes.com/who-recognizes-armenian-genocide-20-states-formally-acknowledge-1915-events-1891494>; David Steinberg, *Forty-Three U.S. States Recognize Armenian Genocide . . . But Obama Won’t*, PJ MEDIA (Apr. 22, 2015), <https://pjmedia.com/blog/forty-three-u-s-states-recognize-armenian-genocide-but-obama-wont/>.

3. *Perinçek v. Switzerland*, App. No. 27510/08 (Eur. Ct. H.R. Oct. 15, 2015), HUDOC, <http://hudoc.echr.coe.int/eng?i=001-158235>.

4. *Id.* para. 13, 17-21.

Human Rights (“Convention”).⁵ The Court, in determining whether Perinçek’s statements violated the Convention, focused on the limited effects of the statements within Switzerland, while superficially considering the potential effect of inciting hatred in Turkey.⁶ The ECtHR has recognized that genocide denial laws have an important purpose in stopping hate speech, but, often, hate speech is directed toward an audience outside the place where the statements are made. Therefore, because the ECtHR evaluated the effects of hate speech solely, or even mostly, in the country where the speech was made and gave little weight to the historical context surrounding the statements, it failed to adequately achieve the aims underlying genocide denial laws. Ultimately, in addition to considering the effects of speech within the country where it was made, any court evaluating hate speech—in this context, genocide denial—and its effects should incorporate into its analysis the broader historical and international contexts surrounding the statement at issue.

I will begin with a brief summary of the events leading up to and constituting the Armenian Genocide. I will then discuss the modern Turkish approach to discussions of the Genocide, followed by the ECtHR’s approach toward hate speech and genocide denial and how its approach somewhat changed in *Perinçek*. Subsequently, I will introduce and offer support for four justifications for the existence and enforcement of genocide denial prosecution laws: (1) preventing immediate violence within the borders of a state; (2) preventing violence, even extraterritorially; (3) preventing future violence and oppression by restricting rhetoric that may lead to the rekindling of the group or ideology that carried out the massacres at issue; and (4) protecting the dignity of genocide survivors and their subsequent generations. Using those justifications, I will critique the *Perinçek* decision. Finally, with the above mentioned justifications in mind, I will provide my own take on a more prudent approach to determining whether particular instances of genocide denial amount to prosecutable offenses. Generally, the approach consists of a three-part, judicially-determined balancing test that seeks to evaluate the speaker’s objective intent in making the statement, the statement’s domestic and international effect, and the statement’s severity when juxtaposed alongside its surrounding historical context. In addition, I propose that courts, as a threshold matter, should determine whether

5. *Id.* para. 1-9, 300.

6. *Id.* para.146-53, 245-47.

the occurrence of the denied event has enough of a historical consensus to warrant the imposition of a fine or a criminal conviction.

II. BACKGROUND

One must not examine *Perinçek* in a vacuum. To fully grasp *Perinçek*'s effect on Turkey and the international Armenian community, and where the *Perinçek* decision fits in the Armenian-Turkish narrative, the ECtHR should have more extensively considered the history of the Armenian Genocide and the long history of denial in Turkey. Without a development of such historical background, any discussion determining whether the denial of a mass killing equates to hate speech fails to capture the true international effect of hate speech. As will be further illustrated below, the events surrounding *Perinçek* can be characterized as a distant echo of the Ottoman Empire's dangerous ideology towards its minority, specifically Armenian, population. Ottoman policies and, after the fall of the Empire, Turkish policies and government actions effectuated an anti-Armenian ethno-nationalism,⁷ resulting in the Armenian Genocide, which continued afterwards as a state supported program of denial and censorship.

A. History of the Genocide

In 1375, the Armenian sovereign state fell, not forming again until a short lived stint in 1918 and then again in 1991.⁸ Less than a hundred years after the 1375 collapse, the Ottoman Empire took control of the area, leaving the Armenians under Ottoman rule.⁹ The Ottomans eventually placed their minority residents in their own millet system, "which involved a structured organization of non-Muslim communities autonomous in their internal affairs and answerable to the central government through patriarchs."¹⁰ By the late eighteenth century, ethnic minorities, including Armenians, "played an important role in the Ottoman social structure," securing key positions in trade

7. See Guenter Lewy, *The First Genocide of the 20th Century?*, 120 COMMENTARY, Dec. 2005, at 47-48; Waal, *supra* note 1, at 139.

8. See GEORGE A. BOUMOUTIAN, A CONCISE HISTORY OF THE ARMENIAN PEOPLE 297 (5th ed. 2006); Lewy, *supra* note 7, at 48; Sergey Minasyan, *Multi-Vectorism in the Foreign Policy of Post-Soviet Eurasian States*, 20 DEMOKRATIZATSIYA 268, 269 (2012).

9. See Lewy, *supra* note 7, at 48-49; Sergey, *supra* note 8, at 268-69.

10. Suraiya Faroqhi, *Ronald Jennings*, 15 TURK. STUD. ASS'N BULLETIN 217, 218 (1991); see also Lewy, *supra* note 7, at 48.

and finance as merchants, bankers, and artisans.¹¹ In fact, by the end of the nineteenth century, Armenians made up a significant portion of the total population in the Ottoman capital city of Istanbul.¹² Despite the social prominence of ethnic minorities, Ottomans viewed non-Muslim millets, including the Armenians, as inferior to Muslims.¹³ As such, some ethnic minorities in the Ottoman Empire demanded reform, while others demanded independence.¹⁴

In 1876, Sultan Abdul Hamid II became the leader of the Ottoman Empire.¹⁵ Feeling pressure both internally—from Ottoman ethnic minorities—and externally—from western European Powers, Hamid repressed the Empire's non-Muslim population.¹⁶ Paranoid of losing control of his Empire, Hamid conducted a series of Armenian massacres in the eastern province, resulting in approximately 90,000 deaths.¹⁷ As a result of Hamid's bloody attempt to solve the "Armenian question," he became mockingly known as the "Red Sultan."¹⁸

Ultimately, in 1908, the Young Turks cut short Hamid's political reign when they took control of the Empire through a military coup.¹⁹ Known as a constitutional movement, the Young Turks' uprising was a response to the inefficiencies of Hamid's rule and a call to reestablish the constitution of 1876, which Hamid had ignored since two years after its signing.²⁰ This change in leadership may have ostensibly seemed like a positive development for the struggling ethnic minorities in the Empire. However, the Young Turks' approach to the failing Empire's problems was arguably even more radical than Hamid's.²¹ In 1909, Ottoman forces, under the command of the Young Turks' corresponding political association, the Committee of Union and Progress

11. Berch Berseroglu, *Nationalism and Ethnic Rivalry in the Early Twentieth Century*, 52 *INDIAN J. POL. SCI.* 458, 468-69 (1991); Lewy, *supra* note 7; see Hans Kohn, *Ten Years of the Turkish Republic*, 12 *FOREIGN AFF.*, 141, 145 (1933).

12. Berseroglu, *supra* note 11, at 469.

13. Robert Melson, *Paradigms of Genocide: The Holocaust, the Armenian Genocide, and Contemporary Mass Destructions*, 548 *ANNALS AM. ACAD. POL. & SOC. SCI.* 156, 158 (1996) (citing Roderic H. Davison, *Turkish Attitudes Concerning Christian-Muslim Equality in the Nineteenth Century*, 4 *AM. HIST. REV.* 844, 845 (1954)).

14. See Donald Boxham, *The Armenian Genocide of 1915-1916: Cumulative Radicalization and the Development of a Destruction Policy*, 181 *PAST & PRESENT* 141, 147-48 (2003).

15. Melson, *supra* note 13, at 159.

16. *Id.*

17. Boxham, *supra* note 14, at 149.

18. Sir Valentine Chirol, *The Downfall of the Khalifate*, 2 *FOREIGN AFF.* 571, 572 (1924).

19. Boxham, *supra* note 14, 149; see also Feroz Ahmad, *The Young Turk Revolution*, 3 *J. CONTEMP. HIST.*, 19, 19-20, 24-25 (1968).

20. Ahmad, *supra* note 19, at 20.

21. See Melson, *supra* note 13, at 158-59.

(“CUP”), massacred 20,000 Armenians in the Adana province of Cilicia as a reactionary crackdown to “supposedly . . . repress increasingly forthright calls for Armenian separatism.”²²

Despite the Ottoman Empire’s new leadership, the start of the twentieth century ushered an era of continued Ottoman destabilization.²³ In 1908, the same year as the Young Turks’ coup, Austria-Hungary annexed Bosnia-Herzegovina from the Ottoman Empire.²⁴ Additionally, between 1910 and 1911, the Empire experienced revolts by the Druses, Albanians, and Yemenis.²⁵ Eventually, both Bulgaria and Albania seceded from the Empire.²⁶ Adding even more fuel to the fire, in 1913, Russia, with the encouragement of the Armenian Catholicos (the head bishop of the Armenian Apostolic Church), suggested a reform plan aimed to “curb abuses against . . . Christians [in the Empire].”²⁷ The reform plan called for the creation of two zones that comprised the provinces with the highest proportions of Armenian residents;²⁸ these two zones would be administered by European inspectors to ensure “greater social justice and security of life and property.”²⁹ The Ottomans viewed the reform plan as a challenge to their sovereignty in the eastern provinces.³⁰ The reform plan and the sociopolitical unrest legitimized Ottoman paranoia towards its Armenian population in the eyes of many Turks.

As World War I approached, the Young Turks and the CUP successfully aligned with Germany as an anti-Russian alliance.³¹ At the same time, Armenians, with their population concentrated in the eastern provinces of the Empire, near the Russian border, became known as an alien nationality.³² With the ever-growing fear of a Russian-Armenian alliance, the Young Turks identified and labeled the Armenians as an existential threat to the Empire and, more fundamentally, to Ottoman national identity.³³ Accordingly, the Young Turks, soon after

22. Boxham, *supra* note 14, at 149.

23. *See id.*

24. *Id.*

25. *Id.*

26. *Id.* at 149-50.

27. *Id.* at 150.

28. *Id.* at 150-51.

29. *Id.* at 151.

30. *Id.* at 150.

31. Melson, *supra* note 13, at 159.

32. *Id.*

33. *See* Boxham, *supra* note 14, at 148.

taking control of the Empire, implemented policies motivated by xenophobia, uber-nationalism, and the goal of Turkic homogeneity.³⁴

The events collectively known as the Armenian Genocide followed. In 1915, a majority of Armenian soldiers in the Ottoman army were either worked to death or killed.³⁵ In the same year, the government passed the Tehcir Law, which implemented “a policy of enforced relocation . . . of the ‘entire Armenian population of the war zone to [Der] Zor . . . in the heart of the Syrian desert.’”³⁶ The deported Armenians left their homes, leaving behind their families and belongings, and marched through the desert.³⁷ Along the way, many deportees perished and all suffered inhumane treatment.³⁸ Moreover, Turkish and Kurdish villagers, typically incited and led by CUP killing squads, terrorized those who remained.³⁹

The Genocide had a noticeable and lasting effect on the cultural makeup of the crumbling Ottoman Empire.⁴⁰ Before the commencement of the Genocide, in the later years of the Ottoman Empire, the Ottoman Armenian population had peaked at approximately 2.5 million;⁴¹ however, after the Young Turks’ and CUP’s program of expulsion, destruction, and decimation, the same Armenian population suffered nearly 1.5 million deaths, while most of the survivors spread across the Middle East.⁴² Even with nearly three-quarters of the Ottoman Armenian population deceased, the Young Turks still sought to control the Armenians who survived exile, particularly those who en-

34. Melson, *supra* note 13, at 158-59.

35. *See id.* at 159-60.

36. Can Erimtan, *Hittites, Ottomans and Turks: Ağaoğlu Ahmed Bey and the Kemalist Construction of Turkish Nationhood in Anatolia*, 58 *ANATOLIA STUD.* 141, 153 (2008) (citing ERIK J. ZÜRCHER, *TURKEY: A MODERN HISTORY* 115, 120 (1993)).

37. *See* Melson, *supra* note 13, at 160.

38. *See* Stephan Astourian, *The Armenian Genocide: An Interpretation*, 23 *HIST. TEACHER*, 111, 114 (1990) (“Armenians were driven out of their homes . . . [as] adult and teenage males, . . . separated from the deportation caravans, were killed a few kilometers away. The worst suffering befell women and children, forced as they were to march for weeks.” Those who survived and marched through the Syrian desert were “beaten by [Ottoman soldiers], attacked by irregular troops and nomads, deprived of food and water, and often stripped of their clothes.”).

39. Melson, *supra* note 13, at 160 (citing Vahakan N. Dadrian, *Genocide as a Problem of National and International Law: The World War I Armenian Case and Its Contemporary Legal Ramifications*, 14 *YALE J. INT’L L.* 221 (1989)).

40. *See, e.g.,* Waal, *supra* note 1, at 148 (discussing what little Armenian culture survived in modern-day Turkey as a result of the Genocide).

41. Berseroglu, *supra* note 11, at 472 (citing VARTAN ARTINIAN, *THE ARMENIAN CONSTITUTIONAL SYSTEM IN THE OTTOMAN EMPIRE, 1839-1863: A STUDY OF ITS HISTORICAL DEVELOPMENT* (1988) (originally written as a Ph.D. dissertation in 1970, Brandeis University)).

42. *See* Berseroglu, *supra* note 11, at 481; Melson, *supra* note 13, at 160.

ded up in Aleppo, Syria, limiting their ability to move around the area.⁴³

As World War I came to a close, the world's powers failed to effectively address the Armenian plight due to the attention and resources consumed by the war.⁴⁴ Originally, the Ottoman Empire signed the Treaty of Sèvres in 1920, ending its hostilities with the Allied Powers.⁴⁵ This treaty partitioned the Ottoman Empire, partly ceding its eastern territories to Armenia and its north-western territories to Greece.⁴⁶ Shortly after signing this treaty, the Turkish War of Independence broke out, led by Mustafa Kemal Atatürk.⁴⁷ As a result, the Republic of Turkey, viewed as a more modern national state, rose out of the ashes of the Ottoman Empire as the successor Turkish state.⁴⁸ In 1923, the newly formed Republic of Turkey signed the Treaty of Lausanne, arguably canceling the effect of the formerly executed Treaty of Sèvres.⁴⁹ As the Allied Powers and the U.S. failed to effectively intervene, assist, or advocate for the Armenians,⁵⁰ the 1923 treaty included no mention of the Armenians or the creation of an Armenian state.⁵¹

43. *Talaat Pasha's Directive to Aleppo Governorate: Displaced Armenians Shall Remain in Places of Exile*, NEWS.AM (Mar. 15, 2017, 11:11 AM), <https://news.am/eng/news/378600.html> (discussing a translating a telegram sent by Talaat Pasha, the Ottoman Empire's Minister of the Interior and a member of the three-headed Young Turks regime, to the Governorate of Aleppo, Syria, where many exiled Armenians ended up, that instructed the Governorate to keep all Armenians "in their places of exile, and [to not issue] . . . letter[s] of permission . . . that will enable them to go elsewhere.").

44. See Melson, *supra* note 13, at 166.

45. Treaty of Peace with Turkey—Sèvres, Aug. 10, 1920, T.S. No. 11 [hereinafter Treaty of Sèvres]; *World War I: Treaties And Reparations*, U.S. HOLOCAUST MEMORIAL MUSEUM, <https://www.ushmm.org/wlc/en/article.php?ModuleId=10007428> (last visited Dec. 2, 2017).

46. Treaty of Sèvres, *supra* note 45, art. 84, 88, 89, 90; Philip Marshall Brown, *From Sevres to Lausanne*, 18 AM. J. INT'L L. 113, 113-16 (1924) (discussing partitioning of Ottoman Empire).

47. See Walter F. Weiker, *Atatürk as a National Symbol*, 6 TURK. STUD. ASS'N BULLETIN 1, 1-2 (1982).

48. See Berseroglu, *supra* note 11, at 468-69; Kohn, *supra* note 11, at 145.

49. Treaty of Peace with Turkey—Lausanne, Fr. -Gr. Brit. -Greece -It. -Japan -Kingdom of Serb., Croat., and Slovn. -Rom. -Turk., July 24, 1923, 28 L.N.T.S. 11. See generally Treaty of Sèvres, *supra* note 45.

50. 2 RICHARD G. HOVANNISIAN, *THE REPUBLIC OF ARMENIA* 322-23, 402-03 (1982); 3 RICHARD G. HOVANNISIAN, *THE REPUBLIC OF ARMENIA* 50-53, 87-90 (1996); 4 RICHARD G. HOVANNISIAN, *THE REPUBLIC OF ARMENIA* 1, 12, 15, 23-24, 28 (1996).

51. See, e.g., 117 *British And Foreign State Papers* 308-09, 543-91 (His Majesty's Stationery Office 1926); LAUSANNE CONFERENCE ON NEAR EAST AFFAIRS: RECORDS OF PROCEEDINGS AND DRAFT TERM OF PEACE, TURKEY No. 1, CMD. 1814 (His Majesty's Stationery Office 1923) (indicating no mention of the people of Armenia or Armenia as a state throughout the entire work, which is a collection of the records, letters, documents, and proceedings associated with the Lausanne Conference and its resulting Treaty).

While the deadly ethnic cleansing program of the Ottoman Empire subsided, the spirit of removing and exiling Armenians from previously Ottoman controlled territories remained alive in subsequent Turkish policies. The Turkish cleansing program soon took the shape of institutional exclusion of Armenians from the country.⁵² Turks began coercing the remaining Armenians into leaving the country and signing away their rights to any present and future claims.⁵³ Furthermore, those who left the country without receiving official permission, including those who were involuntarily deported, had their citizenship revoked and were not allowed back in the country.⁵⁴ Such deported individuals also lost their property rights to the belongings they left behind.⁵⁵ Essentially, after the Ottomans brutally expelled a large chunk of its Armenian population, the new Turkish Republic locked the door behind them. All of these post-Republic policies were either issued or facilitated by Mustafa Kemal Atatürk, also known as the forefather and founder of the modern Republic of Turkey.⁵⁶

B. *Present-day Turkey and the State of Denial*

With Atatürk held as such a prominent figure in modern-day Turkey,⁵⁷ as well as the government's emphasis on national and historic pride, denial of the Armenian Genocide has swept across Turkey as almost synonymous with Turkish patriotism.⁵⁸ The ideas of Turkification, seemingly carried over from the ideology underlying the program of ethnic cleansing pushed by the Young Turks in the 1910s and continued by Atatürk, run through Turkish society, particularly its government, today.⁵⁹ Since the Young Turks set in motion what Ata-

52. See, e.g., Vahram L. Shemmassian, *The Exodus of Armenian Remnants from The Interior Provinces of Turkey, 1922-1930*, in ARMENIAN TSOPK/KHARPERT 389-413 (Richard G. Hovannisian ed., 2002).

53. E.g., *id.* at 394-95.

54. See TANER AKÇAM & ÜMIT KURT, SPIRIT OF THE LAWS 69-75 (Aram Arkun trans., 2012).

55. *Id.*

56. See Kohn, *supra* note 11, at 154.

57. See Weiker, *supra* note 47.

58. See, e.g., Thomas W. Smith, *Civic Nationalism and Ethnocultural Justice in Turkey*, 27 HUM. RTS. Q. 436, 443 (2005) (first citing TURK. OSMANLI ARŞIVI DAİRE BAŞKANLIĞI, OSMANLY BELGELERİNDE ERMENİLER, 1915–1920 (1994); then citing TURK. OSMANLI ARŞIVI DAİRE BAŞKANLIĞI, ERMENİ OLAYLARI TARİHİ (1998); then citing TURK. OSMANLI ARŞIVI DAİRE BAŞKANLIĞI, ERMENİ MESELESİNİN SİYASİ TARİHÇESİ, 1877–1914 (2001); and then citing Directorate General of Press and Information, Office of the Prime Minister, Genocide Statue and Museum Opens in Iğdir, TURK. PRESS REV., 6 Oct. 1999, available at <http://www.hri.org/news/turkey/trkpr/1999/99-10-06.trkpr.html#20>).

59. See Kohn, *supra* note 11.

türk would eventually mold into the Republic of Turkey, Turks view the Armenian claims of genocide as a threat to their national identity and, more directly, their national historical legitimacy.⁶⁰ This is evinced by the Turkish government's active program of ensuring silence both within its own borders and throughout the international community.⁶¹

The Turkish program of silencing its own residents has a long and sometimes bloody history. At its root, Article 301 of the Turkish Penal Code, formerly Article 159 (originally enacted in 1926⁶²), criminalizes any open statement "denigrating Turkishness" or denigrating any institution of the Turkish government, including the judicial and military institutions.⁶³ The crime of denigrating Turkishness carries with it a punishment of between six months and two years if committed by a Turkish resident;⁶⁴ the punishment is increased by one-third if a Turkish citizen commits the crime outside of Turkey.⁶⁵

The history of Article 301 prosecutions includes an overwhelming record of Turkish residents discussing their opinions, beliefs, and historical findings on the issue of the Genocide.⁶⁶ For example, in 2006, Turkey prosecuted Orhan Pamuk, a famous novelist, for simply mentioning the Armenian Genocide committed by Ottoman Turks during an interview with a Swiss magazine.⁶⁷ Another case in 2005 involved Hrant Dink, an Armenian journalist and columnist for the Turkish-Armenian newspaper, *Agos*.⁶⁸ The Turkish government charged Dink with insulting Turkishness, a violation of Article 301 of the Turkish Penal Code, for writing several articles addressing the Genocide of the Armenians and the cultural identity of Armenians living in Turkey.⁶⁹ Shortly after his conviction, a young Turkish nationalist assassinated

60. *See id.*

61. Ronald Grigor Suny, *Truth in Telling: Reconciling Realities in the Genocide of the Ottoman Armenians*, 114 AM. HIST. REV. 930, 938 (2009).

62. Jahnisa Tate, *Turkey's Article 301: A Legitimate Tool For Maintaining Order Or A Threat To Freedom Of Expression?*, 37 GA. J. INT'L & COMP. L. 181, 197 (2008-2009) (citing Yasemin Celik Levin, *The Effect of CEDAW on Women's Rights, in HUMAN RIGHTS IN TURKEY* 202, 210 (Zehra F. Kabasakl Arat ed., 2007)).

63. TURK. PENAL CODE, Art. 301 (2005) (amended 2008); *see also* Tate, *supra* note 62, at 182-83.

64. TURK. PENAL CODE, Art. 301 (2005) (amended 2008).

65. *Id.*

66. *See* Tate, *supra* note 62, at 198.

67. *Id.* (citing VERITY CAMPBELL ET AL., *TURKEY* 51 (10th ed. 2007)).

68. *Turkish-Armenian Writer Shot Dead*, BBC NEWS (Jan. 19, 2007, 6:58 PM), <http://news.bbc.co.uk/2/hi/europe/6279241.stm> [hereinafter *Turkish-Armenian Writer Shot Dead*].

69. *Id.*

Dink.⁷⁰ Although it may seem as though the Turkish government had no culpability in Dink's assassination, as it vowed to prosecute the orchestrators and perpetrators of Dink's murder, the ECtHR had a different opinion.⁷¹ In *Dink v. Turkey*, the ECtHR found that Turkish officials, including the police in both Trabzon and Istanbul, and the Trabzon gendarmerie, had been informed of the likelihood of an assassination attempt and even of the identity of the suspected instigators, providing the Turkish government with ample reason to protect Dink.⁷² Among other issues considered, the Court concluded that the Turkish government violated Dink's Article 2 right to life by not protecting Dink from a known, imminent threat.⁷³ Even more disturbing, upon taking Dink's assassin into custody, officers at the Turkish police station welcomed the murderer as a hero, posing for pictures with him while hoisting the Turkish flag.⁷⁴

Turkey's silencing of the truth about the Genocide goes beyond domestic bounds, as seen by the extraterritorial scope of Article 301 of Turkey's Penal Code.⁷⁵ Furthermore, Turkey has engaged in an active international campaign in spreading its own, softened version of the story, while keeping the Armenian cause at bay.⁷⁶

C. *The ECtHR, Perincek, and its Legal Context*

As the historical and international contexts of *Perincek* have now been sufficiently developed, I will move on to discuss the case and its legal context. As will be implied in this section, and expanded in greater detail in later sections, courts need to examine the effects of

70. Holly Case, *Two Rights and A Wrong: On Taner Akçam*, THE NATION (Mar. 13, 2013), <https://www.thenation.com/article/two-rights-and-wrong-taner-akcam/>.

71. See *Dink v. Turkey*, App Nos. 2668/07, 6102/08, 30079/08, 7072/09, 7124/09, para. 139 (Eur. Ct. H.R. Dec. 14, 2010), HUDOC, <http://hudoc.echr.coe.int/eng?i=001-100383>; see also *Turkish-Armenian Writer Shot Dead*, *supra* note 68.

72. *Dink*, App Nos. 2668/07, 6102/08, 30079/08, 7072/09, 7124/09, para. 67, 88 (2010).

73. *Id.* para. 139.

74. *New video shows hero's welcome at police station for Hrant Dink's murderer – VIDEO*, TURKISH MINUTE (Sept. 9, 2016), <https://www.turkishminute.com/2016/09/09/new-video-shows-heros-welcome-police-station-hrant-dinks-murderer/>.

75. TURK. PENAL CODE, Art. 301 (2005) (amended 2008).

76. See, e.g., Suny, *supra* note 61 (indicating that the Turkish ambassador to Washington prompted an editor of the Microsoft Encarta encyclopedia to remove any mention of "genocide" in the 1915 events, and that Turkish money financed powerful lobbyists in Washington to work against a U.S. House of Representatives resolution in 2000 that would have recognized the mass killings of Armenians in the Ottoman Empire as a genocide); *Turkish Group Sponsors Genocide Denial Ads, Prompts Outrage*, THE ARMENIA WEEKLY (Apr. 22, 2016), <https://armenianweekly.com/2016/04/22/genocide-denial-ads/> (indicating that, near the time of the centennial commemoration of the Armenian Genocide, Turkish funded ads placed in weekly publications claimed that the Armenian position on what actually transpired during the 1915 events is a fabrication).

hate speech internationally and not just in the country where the speech takes place, especially when considering statements denying extraterritorial genocides. Any other approach disregards the justifications underlying genocide denial laws.

1. Freedom of Expression in the European Convention on Human Rights and the ECtHR's Two-Tier System of Analysis

The Convention—the binding authority for the ECtHR—has established several freedoms and restrictions.⁷⁷ Since Article 10 and Article 17 of the Convention relate to freedom of expression and its limits, the two Articles are the most relevant here and will therefore be discussed more extensively below. Article 10 ensures individuals' freedom of expression.⁷⁸ Specifically, Article 10 (1) ensures individuals the right to freely express themselves while it mandates a negative obligation for party countries to not interfere with such expression.⁷⁹ Article 10 (2), on the other hand, allows party countries to prescribe limits on individuals' expression to maintain social harmony and prevent chaos.⁸⁰ Article 17 bars individuals' Article 10 (1) freedom of expression where speech runs contrary to the fundamental values of the Convention.⁸¹

In terms of procedure, the ECtHR has developed a two-tier analysis in handling freedom of expression cases.⁸² When an applicant files a claim with the ECtHR, asserting that a state has unjustly punished them for their speech, the Court first determines whether the speech in question contravenes the Convention's underlying values under Ar-

77. Council of Europe, European Convention on Human Rights (Nov. 4, 1950) [hereinafter European Convention on Human Rights].

78. *Id.* art. 10 (1)-(2) (“1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions . . . without interference by public authority 2. The exercise of these freedoms . . . may be subject to such . . . conditions [or] restrictions . . . as are . . . necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others[.]”).

79. *Id.* art. 10 (1).

80. *Id.* art. 10 (2).

81. *Id.* art. 17 (“Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.”); see also Paolo Lobba, *Holocaust Denial before the European Court of Human Rights: Evolution of an Exceptional Regime*, 26 EUROPEAN J. INT'L L. 237, 249 (2015).

82. See Lobba, *supra* note 81, at 241-42.

ticle 17.⁸³ This Article is known as the abuse clause or, more informally, the guillotine effect, since, if the Court preliminarily determines that the applicant's speech violated Article 17, it need not analyze whether prosecution of that speech violated the applicant's Article 10 freedom of expression.⁸⁴ The ECtHR has employed the guillotine effect of Article 17 in several cases where freedom of expression has been at issue and the speech in question has crossed the threshold of conventional protection.⁸⁵

If, however, an applicant's claim passes the muster of the guillotine effect, the ECtHR analyzes the claim under Article 10 (1) and Article 10 (2).⁸⁶ The Court determines whether prosecution of the speech was pursuant to a state law that could have put a reasonable person on notice of possible criminal liability, whether a criminal penalty for the statements was necessary in a democratic society, and whether the "‘restrictions’ or ‘penalties’ imposed . . . [were] proportionate to the legitimate aim pursued."⁸⁷ For instance, in the portion of *Dink* addressing Dink's conviction, under Article 301 of the Turkish Penal Code, the ECtHR concluded that Turkey violated Dink's Article 10 right to freedom of expression.⁸⁸ It reasoned that the journal articles issued by Dink did not seek to offend, insult, or incite violence against a group of people; therefore, although the Turkish court based its ruling on Turkish Penal Code, Article 301, the ECtHR held that prosecuting Dink was neither necessary in a democratic society nor

83. *Seurot v. France* (No. 2), App. No. 57383/00 (Eur. Ct. H.R. May 18, 2004), HUDOC, <http://hudoc.echr.coe.int/eng?i=001-45005> ("[T]out propos dirigé contre les valeurs qui sous-tendent la Convention se verrait soustrait par l'article 17 à la protection de l'article 10[.]") translated to "[A]ny statement directed against the values ??that underlie the Convention would be removed by Article 17 to the protection of Article 10"); see also *Lobba, supra* note 81, at 243.

84. See *Lobba, supra* note 81, at 239.

85. See, e.g., *Pavel Ivanov v. Russia*, App. No. 35222/04, para. 1-3 (Eur. Ct. H.R. Feb. 20, 2007), HUDOC, <http://hudoc.echr.coe.int/eng?i=001-79619> (holding that a series of articles calling out Jews as the source of evil in Russia and calling for their exclusion from social life did not warrant the protection of Article 10 because it constituted a vehement attack on one ethnic group, which is contrary to the Convention's values of tolerance and social peace); *Norwood v. The United Kingdom*, 2004-X1 Eur. Ct. H.R. 343, 348-49 (holding that publicly displaying a poster with an illustration of the Twin Towers burning and a message stating "Islam out of Britain – Protect the British People" constituted a vehement attack against a religious group, which is contrary to the Convention's values of tolerance and social peace).

86. *Seurot*, App. No. 57383/00, (2004).

87. *Erbakan v. Turkey*, App. No. 59405/00, para. 56 (Eur. Ct. H.R. July 6, 2006), HUDOC, <http://hudoc.echr.coe.int/eng?i=001-76232>.

88. *Dink v. Turkey*, App Nos. 2668/07, 6102/08, 30079/08, 7072/09, 7124/09, para. 139 (Eur. Ct. H.R. Dec. 14, 2010), HUDOC, <http://hudoc.echr.coe.int/eng?i=001-100383>.

was the restriction of his speech proportionate to the legitimate aim pursued.⁸⁹

To clarify the ECtHR's use of the two-tier analysis for freedom of expression cases, an additional examination of the ECtHR's case-law will follow. Specifically, the next section will examine two cases that, respectively, illustrate facts sufficient to prompt the ECtHR to release Article 17's guillotine (and its accompanying analysis on anti-conventional speech) and facts sufficient to prompt the ECtHR to withhold an application of Article 17, opting, instead, for an application of Article 10.

2. Freedom of Expression/Incitement to Hatred Cases Decided by the ECtHR

Garaudy v. France,⁹⁰ a case decided in 2003, involved the denial of the Holocaust.⁹¹ Roger Garaudy, who published a book in which he denied the Holocaust, was charged and convicted by the Paris Court of Appeal on five counts of "denying crimes against humanity, publicly defaming a group of persons, namely the Jewish community, and inciting to racial discrimination and hatred."⁹² Garaudy appealed his conviction to the ECtHR, claiming that France had violated his Article 10 right to freedom of expression.⁹³ The European Court held that Garaudy's book did not warrant the protection of Article 10, but instead triggered the guillotine effect of Article 17 since the language and sentiment used in the book amounted to a clear invocation of racial hatred and an accusation of falsifying history.⁹⁴ As stated by the Court, "[d]enying crimes against humanity is . . . one of the most serious forms of racial defamation of Jews and of incitement to hatred of them."⁹⁵ The Court concluded by asserting that Article 17 applied in this case because the denial of the occurrence of established historical atrocities instantiated anti-conventional values such as racial hatred.⁹⁶

In a 2010 hate speech case, *Le Pen v. France*, the applicant's claim survived the Court's Article 17 analysis, but ultimately failed the Arti-

89. *Id.* para. 134-36.

90. *Garaudy v. France*, 2003-IX Eur. Ct. H.R. 369 (2003).

91. *See id.* at 375, 390-91.

92. *Id.* at 371.

93. *Id.* at 381.

94. *See id.* at 397.

95. *Id.*

96. *See id.*

cle 10 test and was thus inadmissible.⁹⁷ In *Le Pen*, the French government charged the applicant, Jean-Marie Le Pen, who was the president of the French National Front party, with incitement of discrimination, hatred, and violence against the Islamic community.⁹⁸ The conviction arose from Le Pen's statements during an interview,⁹⁹ where he said "the day there are no longer 5 million but 25 million Muslims in France, they will be in charge."¹⁰⁰ Le Pen later urged that the French must "watch [their] step" with the ever-increasing population of Muslims in the country, implying a social rejection of an entire group of people.¹⁰¹ The ECtHR held that the restrictions imposed on Le Pen's freedom of expression were proportionate to the legitimate aims cited by the French court.¹⁰² Additionally, the Court held that France's prosecution of Le Pen was necessary in a democratic society because his statements were likely to give rise to feelings of rejection and hostility.¹⁰³ Ultimately, the Court concluded that France had not violated Le Pen's Article 10 (1) freedom of expression, rejecting further review of his case.¹⁰⁴

In sum, from *Garaudy*, we can conclude that the ECtHR applies Article 17 to statements inciting racial hatred or advocating a revision of the history of an atrocity, both of which run contrary to conventional values. Additionally, from *Le Pen*, we can conclude that statements not necessarily contrary to conventional values can still prompt just punishment by a state, under Article 10 (2), when such statements give rise to feelings of rejection and hostility towards a group of people. Nevertheless, even though the facts in *Perinçek* seemingly fit the holdings of both *Garaudy* and *Le Pen*, the ECtHR decided *Perinçek* inconsistent with both precedents. Although not clearly evident at this point, the ECtHR's decision on whether Article 17 applies or whether a state infringed upon one's Article 10 right to freedom of expression depends, at least partly, on the temporal and geographic proximity of the event or circumstance the speaker referred to.

97. *Le Pen v. France*, App. No. 18788/09 (Eur. Ct. H.R. Apr. 20, 2010), HUDOC, <http://hudoc.echr.coe.int/eng?i=001-98489>.

98. *Id.* at 2.

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.* at 5, 7 (noting that, in this case, the needs of a democratic society outweighed the need to allow the applicant's freedom of expression).

103. *Id.* at 7.

104. *Id.* ("It follows that this complaint must be rejected as being manifestly ill in accordance with Article 35 §§ 3 and 4 of the Convention.").

3. *Perinçek v. Switzerland*

The central case for this discussion, *Perinçek v. Switzerland*, falls under a unique procedural category. The Court in *Perinçek* stated that Article 17 is only applicable on an exceptional basis,¹⁰⁵ seemingly retracting from its position in *Garaudy* concerning Article 17's applicability to the denial of the occurrence of historically established atrocities.¹⁰⁶ The *Perinçek* Court also found that a determination of whether *Perinçek's* statements were contrary to the values of the Convention (Article 17) overlaps with a determination of whether the restriction of his statement was necessary in a democratic society and proportionate to a legitimate aim (Article 10).¹⁰⁷ Therefore, the Court joined its Article 17 discussion to the merits of *Perinçek's* Article 10 violation claim, essentially avoiding the guillotine effect.¹⁰⁸

Perinçek is the founder and chairman of the Turkish Patriotic Party, formerly known as the Turkish Workers' Party.¹⁰⁹ In 2008, a Swiss court held that three Turks, including the European representative of the Turkish Workers' Party, Ali Mercan, were guilty of racial discrimination after claiming the Armenian Genocide was an "international lie."¹¹⁰ This indicates that *Perinçek* was well aware of the law which he later violated.

In *Perinçek*, Switzerland convicted *Perinçek* of hate speech.¹¹¹ During three conferences in Switzerland, between May and October of 2005, *Perinçek* repeatedly asserted that the mass killings of 1915 did not amount to genocide, referring to the events as "an international lie."¹¹² *Perinçek* stated, in pertinent part:

Let me say to European public opinion . . . : the allegations of the 'Armenian genocide' are an international lie . . . Imperialists from the West and from Tsarist Russia were responsible for the situation boiling over between Muslims and Armenians. The Great Powers,

105. *Perinçek v. Switzerland*, App. No. 27510/08, para. 114 (Eur. Ct. H.R. Oct. 15, 2015), HUDOC, <http://hudoc.echr.coe.int/eng?i=001-158235> ("In cases concerning Article 10 . . . [Article 17] should only be resorted to if it is immediately clear that the impugned statements sought to deflect this Article from its real purpose by employing the right to freedom of expression for ends clearly contrary to the values of the Convention").

106. See *Garaudy v. France*, 2003-IX Eur. Ct. H.R. 369, 394, 397-98 (2003).

107. *Perinçek*, App. No. 27510/08, para. 115 (2015).

108. *Id.*

109. *Id.* para. 10-11.

110. *Swiss Court Confirms Conviction of Turks for Denying Armenian Genocide*, ASBAREZ (Feb. 11, 2010), <http://asbarez.com/77511/swiss-court-confirms-conviction-of-turks-for-denying-armenian-genocide/>.

111. *Perinçek*, App. No. 27510/08, para. 17-22 (2015).

112. *Id.* para. 12-16.

which wanted to divide the Ottoman Empire, provoked a section of the Armenians, with whom we had lived in peace for centuries, and incited them to violence. The Turks . . . defended their homeland from these attacks. . . . It should not be forgotten that Hitler used the same methods . . . [of] exploiting ethnic groups . . . to divide up countries for his own imperialistic designs . . . Don't believe the Hitler-style lies such as that of the 'Armenian genocide.' Seek the truth like Galileo, and stand up for it.¹¹³

Perinçek appealed his conviction to the ECtHR as a violation of his Article 10 right to freedom of expression.¹¹⁴ After an initial ruling by a panel of the ECtHR, finding a violation of Perinçek's Article 10 right, Switzerland appealed the case to the Grand Chamber of the ECtHR, which accepted the case for consideration.¹¹⁵

As mentioned above, the Grand Chamber bypassed a thorough preliminary analysis of Article 17 because, the Grand Chamber claimed, determining whether Perinçek relied on the Convention to infringe on the conventional rights and freedoms of others overlapped with an Article 10 analysis of whether Switzerland's interference with Perinçek's freedom of expression was necessary in a democratic society.¹¹⁶ Thus, the Court went on to apply the three factors of Article 10. First, the Court determined that Switzerland's interference with Perinçek's speech was pursuant to Swiss state law—Article 261 *bis* §4.¹¹⁷ It also held that, even if Perinçek did not actually know that making his statements about the Genocide would lead to criminal liability (despite Switzerland's unclear case-law on whether the Armenian Genocide would fall within the meaning of Article 261 *bis* §4¹¹⁸), obtaining legal counsel would have sufficiently put Perinçek on notice; essentially, Perinçek carried the burden of the risks associated with making his statements.¹¹⁹

Then, the Court considered the legitimate aims factor of the Article 10 analysis. In arguing their case to the ECtHR, the Swiss government asserted that it could interfere with Perinçek's right to freedom of expression in pursuance of two legitimate aims under Article 10 (2): (1) “the prevention of disorder[;]” and (2) “the protection of the . . .

113. *Id.* para. 13.

114. *Id.* para. 1-9, 23.

115. *Id.* para. 4.

116. *Id.* para. 115.

117. *Id.* para. 137-38.

118. Code Pénal Suisse [CP] [Criminal Code] Jan. 1, 2017, art. 261 bis (Switz.), <https://www.admin.ch/opc/en/classified-compilation/19370083/201709010000/311.0.pdf>.

119. *Perinçek*, App. No. 27510/08, para. 138-40 (2015).

rights of others.’”¹²⁰ With regard to the first legitimate aim, the Court stated that Switzerland must show that “[Perinçek]’s statements were capable of leading or actually led to disorder . . . and that in acting to penalize [him], the Swiss authorities had [this aim] in mind.”¹²¹ It pointed out that, besides presenting evidence of two opposition rallies to conferences attended by Perinçek in Switzerland a year before the events at issue, Switzerland failed to show that, in punishing Perinçek, it sought to prevent disorder.¹²² Therefore, the Court held that Switzerland had not pursued the legitimate aim of preventing disorder.¹²³ Instead, the Court found that the Swiss government pursued the legitimate aim of protecting the rights of others, specifically the dignity of the local Armenian community.¹²⁴

Finally, the Court considered the necessity of the Swiss government’s interference with Perinçek’s right to freedom of expression in a democratic society, ultimately concluding that interference was not necessary.¹²⁵ The Court reached its conclusion on the issue of the necessity of interference by first assessing the following two aspects, among other aspects less relevant to this paper: (1) the nature of Perinçek’s statements to determine whether they were entitled to heightened protection under Article 10; and (2) with regard to the context of Switzerland’s interference, geographical and historical factors to determine whether there existed a pressing social need for interference.¹²⁶

The Court’s assessment of the first aspect—that is, the nature of Perinçek’s statements and, accordingly, what degree of protection it deserved—rested on an important distinction.¹²⁷ The Court noted that “expression[s] on matters of public interest” prompt a higher degree of protection, while “expression[s] that promote . . . or [justify] violence [or] hatred” do not prompt such protection.¹²⁸ In concluding that Perinçek’s statements required a greater degree of protection, the Court reasoned that Perinçek neither justified the killing of the

120. *Id.* para. 145.

121. *Id.* para. 152.

122. *Id.* para. 153.

123. *Id.* para. 154.

124. *Id.* para. 156-57.

125. *Id.* para. 158, 226, 239-41 (the court balanced Perinçek’s Article 10 right to freedom of expression and the Armenian community’s Article 8 right to respect for private life. I have omitted, for the most part, any mention of the Court’s Article 8 discussion since it does not relate to my paper in any significant way).

126. *Id.* para. 229-30, 242.

127. *Id.* para. 229.

128. *Id.* para. 230.

Armenians nor called for hatred, violence, or intolerance against the Armenians.¹²⁹ It also noted that this case was different from Holocaust denial cases, where an incitement of hatred or intolerance is presumed, because “the applicant [in *Perinçek*] spoke in Switzerland about events which had taken place on the territory of the Ottoman Empire”¹³⁰

The Court’s assessment of the second aspect resulted in no finding of such a pressing social need as to require an interference with Perinçek’s right to freedom of expression.¹³¹ A satisfaction of the necessity of interference factor, the Court asserted, requires a rational connection between the measures taken and the ultimate aim sought.¹³² With that in mind, the Court considered whether the situation in Turkey justified Perinçek’s punishment in Switzerland.¹³³ Despite conceding that instantaneous electronic communication leaves no statement purely local, the Court found no causal link between the oppression faced by the minority Armenian population in Turkey and the statements made by Perinçek.¹³⁴

Furthermore, the Court expanded on the idea of a “direct link,” which is seemingly central to their conclusion in the geographical and historical factors section.¹³⁵ As mentioned above, the Court differentiated the present case from Holocaust denial cases, where, regardless of form, a statement made in Western Europe (particularly in those states involved or affected by the Holocaust) denying the Holocaust presumptively implies “an anti-democratic ideology and anti-Semitism.”¹³⁶ The Court points out that, unlike the events of the Holocaust and the states involved or affected by it, there is no direct link between Switzerland and the events of 1915 in the Ottoman Empire, besides an Armenian community in Switzerland.¹³⁷

With a vote of ten-to-seven, the ECtHR held that Switzerland violated Perinçek’s Article 10 right by unjustly interfering with his freedom of expression.¹³⁸ The next section provides justifications for

129. *Id.* para. 239-41.

130. *Id.* para. 234.

131. *Id.* para. 242-48.

132. *Id.* para. 245-46.

133. *Id.* para. 245.

134. *Id.* para. 246-47 (asserting, dismissively, that, with regard to the facts of *Perinçek* causing the events in *Dink*, “this can hardly be regarded as a result of [Perinçek]’s statements in Switzerland.”).

135. *Id.* para. 243-44.

136. *Id.* para. 243.

137. *Id.* para. 244.

138. *Id.* para. 140.

having genocide denial laws to bolster my critique of *Perinçek* and provide backing for my genocide denial approach proposal.

III. JUSTIFICATIONS FOR PROSECUTING GENOCIDE DENIAL

Surveying international law and jurisprudence regarding genocide,¹³⁹ it is evident that four primary reasons underlie the purpose of having genocide denial laws. In order of immediacy and, as a result, importance to respective lawmaking bodies, they are: (1) to prevent immediate violence within the borders of a state; (2) to generally prevent violence, even extraterritorially; (3) to prevent future violence and oppression by restricting rhetoric that may lead to the rekindling of the group or ideology that carried out the massacres at issue; and (4) to protect the dignity of survivors and their subsequent generations. These justifications are unique in the realm of criminal law because the crime of genocide usually carries with it a deep-seated effect on society as a whole, especially on those in the alleged perpetrating group and those in the alleged victim group.

Admittedly, the ordering and mere presence of some of these justifications may cause disagreement and, hence, require further support. Specifically, it is foreseeable that some critics may contest placing the second justification before the third, or even having the second or fourth justifications in the list at all. On its face, the potential concern over the second justification is understandable because states are commonly expected to prioritize the protection of their own citizens and the maintenance of peace within their own borders before addressing extraterritorial concerns. Moreover, the second justification may prompt an issue of legislative jurisdiction. The fourth justification may also prompt one to question why the feelings or dignity of an event distant in time and space should even concern a state. However, I will argue, the above mentioned justifications are crucial in maintaining social peace, integrity, and civility.

139. See, e.g., Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951) [hereinafter Genocide Convention]; Rome Statute of the International Criminal Court art. 6, 25, July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002); see also Gregory H. Stanton, *The Ten Stages of Genocide*, GENOCIDE WATCH, <http://genocidewatch.org/genocide/tenstagesofgenocide.html> (last visited Oct. 20, 2017) (“DENIAL is the final stage that lasts throughout and always follows a genocide. It is among the surest indicators of further genocidal massacres.”).

A. *Justification #1: The Prevention of Immediate Violence Within the Borders of a State*

The prevention of both temporally and spatially immediate violence is the highest priority for any state, since the immediate safety of citizens is of utmost concern to governments. Hateful genocide denial carries with it a risk of inciting immediate violence against the group targeted by the statement and/or retaliation by that group. Therefore, governments should prosecute speech when it rises to this level.

For instance, in U.S. jurisprudence, speech is protected at a much higher degree than in Europe.¹⁴⁰ However, the U.S. does not have a completely hands-off approach to speech regulation.¹⁴¹ Despite the extensive scope of one's freedom of speech in the U.S., the Supreme Court has limited free speech where speech has the capacity to cause immediate danger by using the "Brandenburg test."¹⁴² The test, articulated by the U.S. Supreme Court in the 1969 case of *Brandenburg v. Ohio*, limits the protection of the first amendment where: (1) a statement "is directed to inciting or producing imminent lawless action[;]" and (2) that statement "is likely to incite or produce such action."¹⁴³ The idea underlying the "Brandenburg test" parallels the justification I propose here.

However, although the U.S. only goes this far in justifying the restriction of speech, the courts of Europe as well as other jurisdictions go further in scrutinizing the admissibility of speech. As controversial as it sounds, I argue that U.S. policies are too lax and allow too much freedom at the cost of safety, security, and dignity, both domestically and abroad.¹⁴⁴ For this reason, I will continue providing justifications for restrictions on speech with genocide denial in mind.

B. *Justification #2: The Prevention of Violence, Even Extraterritorially*

The general prevention of international violence and hatred should also be a concern for law-making bodies around the world. The world is a much smaller place now than before, due to the advance-

140. See Isabelle Rorive, *What Can Be Done Against Cyber Hate? Freedom Of Speech Versus Hate Speech In The Council Of Europe*, 17 CARDOZO J. INT'L & COMP. L. 417, 420-21 (2009).

141. See *id.* at 421.

142. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

143. *Id.*

144. See JEREMY WALDRON, *THE HARM IN HATE SPEECH* 18 (2012); Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, 445 (1990); Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2321 (1989).

ment of communication technologies. A statement made on one side of the world can end up on the other side of the world, whether or not sent intentionally. As the means of communication become more sophisticated and immediate, so too does the risk of violence. For example, a recent survey conducted by security firm, Trend Microof, found that alleged terrorists utilize email account applications such as Gmail and Yahoo.¹⁴⁵ ISIS, the Islamic terrorist organization in the Middle East, is estimated to have approximately 46,000 Twitter accounts, using the internet as its main source of recruitment.¹⁴⁶ Gmail, Yahoo, and Twitter are not bound by international borders, accordingly, neither is the threat of the incitement of violence. Law-making bodies should adapt accordingly in order to maintain security and preserve accountability for their citizens.

Additionally, an underlying purpose for human rights is to address wrongful and hurtful conduct and to promote more peaceful communities. However, the principles of promoting peacefulness and preventing harm to others only goes as far as a law enforcing that principle can reach. As mentioned in the dissenting opinion of Judges Spielmann, Casadevall, Berro, De Gaeto, Sicilianos, Silvis, and Kûris in *Perinçek*: placing a geographical limit on the determination of the effects of a statement “amounts to seriously watering down the universal, *erga omnes* [which means “towards all” in Latin] scope of human rights.”¹⁴⁷

Generally, legislative bodies pass laws that are enforceable and only prompt considerations of conduct occurring within their own, respective, jurisdictions.¹⁴⁸ Therefore, passing and enforcing laws that seek to prevent extraterritorial violence prompts an issue of legislative jurisdiction. However, certain exceptions apply to this principle: namely, certain crimes of extreme depravity trigger universal jurisdiction. For instance, “[t]he Genocide Convention, which refers explicitly to territorial jurisdiction, has been interpreted [so as part of customary international law] as not prohibiting the application of the principle of

145. Don Reisinger, *The Many Ways Terrorists Communicate Online*, FORTUNE (May 3, 2016), <http://fortune.com/2016/05/03/terrorists-email-social-media/>.

146. Duane Bean, *How ISIS Made Twitter One of Its Main Recruiting Tools – And What Can Be Done About It*, INDEP. J. REV. (Aug. 11, 2015), <http://ijr.com/2015/08/380544-how-isis-made-twitter-one-of-its-main-recruiting-tools-and-what-can-be-done-about-it/>.

147. *Perinçek v. Switzerland*, App. No. 27510/08, para. 6 (Eur. Ct. H.R. Oct. 15, 2015), HUDOC, <http://hudoc.echr.coe.int/eng?i=001-158235> (Spielmann, Casadevall, Berro, De Gaetano, Sicilianos, Silvis, and Kûris dissenting).

148. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 402-03 (AM. LAW INST. 1986) [hereinafter RESTATEMENT OF U.S. FOREIGN RELATIONS].

universal jurisdiction to genocide.”¹⁴⁹ Since denial is known as the final stage of genocide and is a sure sign that more mass atrocities are to follow¹⁵⁰ and since genocide prevention and prosecution is a common goal of the international community,¹⁵¹ genocide denial should also trigger universal jurisdiction insofar as it allows a court to consider conduct and the effects of that conduct within and beyond the borders of their immediate jurisdiction.

C. Justification #3: Prevention of Future Violence and Oppression by Restricting Rhetoric That may Lead to the Rekindling of the Group or Ideology That Carried out the Massacres at Issue

While prevention of future violence or oppression seems more attenuated than preventing imminent violence on the surface, it has the most potential for damage. This is because, as mentioned above, genocides or mass killings have a deep rooted effect on society. Remnants of hateful regimes, unfortunately, still linger, even after governments punish perpetrators for committing crimes against humanity.¹⁵² Allowing hateful genocide denial, in the context of this justification, carries the risk of rekindling the sentiment that motivated the mass killing to begin with, thus, having the potential of reenergizing a movement that may have otherwise withered into non-existence. Laws should, whenever possible, diminish the resurgence of old nationalist death programs.¹⁵³

D. Justification #4: Protection of the Dignity of Survivors and Their Subsequent Generations

Finally, protecting and upholding the dignity of genocide survivors as well as their descendants is, admittedly, the weakest justification of the bunch. Despite this, there is real concern over the well-being of groups who have suffered targeted killings. Such hateful actions, sanctioned by a government or institutional organization, and

149. *Rule 157: Jurisdiction over War Crimes*, INT'L COMM. OF THE RED CROSS, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_cha_chapter44_rule157 (last visited Oct. 21, 2017); see also Genocide Convention, *supra* note 139, art. VI; *Jorgic v. Germany*, 17 Eur. Ct. H.R. 1165, 1167 (2006); L.C. Green, *The Eichmann Case*, 23 MOD. L. REV. 507, 513 (1960).

150. Stanton, *supra* note 139.

151. See Genocide Convention, *supra* note 139, art. I, IV, V; RESTATEMENT OF U.S. FOREIGN RELATIONS, *supra* note 148, § 404.

152. See Anie Kalayjian & Marian Weisberg, *Generational Impact of Mass Trauma: The Post-Ottoman Turkish Genocide of the Armenians*, in *JIHAD AND SACRED VENGEANCE* 254, 268 (Jerry S. Piven et al. eds., 2002).

153. See, e.g., *Garaudy v. France*, 2003-IX Eur. Ct. H.R. 369, 396-98 (2003).

directed at a particular group of people, even affect survivors' subsequent generations.¹⁵⁴ In fact, Article 8 of the Convention implicitly recognizes this concern as it protects the private life of individuals.¹⁵⁵

As has become clearer at this point, an international context is imperative in ensuring a reasonable and all-encompassing analysis of the effects of hate speech, particularly genocide denial.

IV. CRITIQUE OF THE ECtHR'S DECISION IN *PERİNÇEK*

The *Perinçek* Court asserted that Perinçek's speech did not have the capacity to incite violence or cause public unrest mainly because it took the limited approach of overemphasizing the importance of effects, or lack thereof, in Switzerland.¹⁵⁶ The Court's determination was limited to Switzerland, when it should have given more weight than it did to the context of modern-day Turkey's treatment of its minority-Armenian population and even non-Armenians who attempt to comment on the occurrence of the Genocide. In fact, among the several hundred violations of Article 10 freedom of expression cases in the ECtHR, Turkey has over 400 cases lodged against it.¹⁵⁷ In this case, the Court should have considered the Turkish political context mentioned in Section 2-B of this paper because Perinçek, as the founder and leader of the Turkish Workers' Party, represented the government of Turkey, albeit to a small degree, and, to some extent, the will of its people. The Court should have considered Perinçek's speech a propagation of the Turkish agenda to accuse the Armenians of fabricating history or, even more disrespectful, to allege that Armenians killed more Turks than vice versa merely as a means to escape the legal and political consequences of committing genocide.¹⁵⁸

154. See Kalayjian & Weisberg, *supra* note 152.

155. European Convention on Human Rights, *supra* note 77, art. 8.

156. *Perinçek v. Switzerland*, App. No. 27510/08, para. 196-97 (Eur. Ct. H.R. Oct. 15, 2015), HUDOC, <http://hudoc.echr.coe.int/eng?i=001-158235>.

157. See *European Court of Human Rights Document Search*, HUDOC, <https://goo.gl/psNumA> (last visited Oct. 21, 2017), for a list of all article 10 cases filed against Turkey through the European Court of Human Rights.

158. See, e.g., Sevgi Ertan & Cagri A. Savran, *Turks Died Too*, THE TECH, Apr. 30, 1999, at 5; Nick Danforth, *Opinion: What we all get wrong about Armenia, Turkey and genocide*, AL JAZEERA AMERICA (Apr. 24, 2015, 5:00 AM), <http://america.aljazeera.com/opinions/2014/4/what-we-all-get-wrongaboutthearmeniangenocide.html> (“[T]he one thing both Turks and Armenians in this debate implicitly agree on is that any historical evidence of Turkish victimhood somehow negates Turkish guilt. Thus, Turks tend to highlight examples of crimes committed against them . . . in order to refute accusations of genocide.”).

Additionally, as mentioned above, *Garaudy*¹⁵⁹ seems to rest on an unstated premise, which is more expressly pronounced in *Perinçek*: the allowable severity of a state's action in prosecuting genocide denial rests on the temporal and geographic proximity of the occurrence.¹⁶⁰ That is, in cases where an extra-European genocide is denied in a European country that did not have any relation to the perpetrators, the Court would not affirm the prosecution of denial, sans an explicit incitation of violence or a call to arms. This is especially troubling when considering justifications two and four mentioned above. Denial of mass killings and accusations of falsifying its history may occur in European countries that had no affiliation with the perpetrators, while still tarnishing the surviving generations' dignity.¹⁶¹ The Armenian Genocide, the Cambodian Genocide, the Rwandan Genocide, and many others have occurred outside the bounds of the European Union. Excluding the prosecution of deniers of any of those genocides on the basis of their location undermines the maintenance of peace and the protection of surviving members' and their descendants' dignity.

Even after considering the foregoing list of justifications and their suggested order of legislative priority, *Perinçek*, undoubtedly, falls short of being an open-and-shut case, unlike, say, *Garaudy*.¹⁶² Nonetheless, although I critique the ECtHR's reasoning and holding in *Perinçek*, I do not do so for its own sake. On the contrary, I will use the shortcomings identified in the ECtHR's approach in *Perinçek*, detailed above, as a means to advocate for a fairer and more just approach to genocide denial laws and adjudicative matters arising from them. Namely, I propose, courts should incorporate the historical and international contexts that surround a statement when determining whether the statement rises to the level of punishable hate speech.

159. See *Garaudy*, 2003-IX Eur. Ct. H.R. at 394, 397-98, <http://hudoc.echr.coe.int/eng?i=001-23829> (holding that the denial of the Holocaust was a violation of Article 17, indicating that Garaudy could not depend on his Article 10 freedom of expression for such statements, and stating that disputing the existence of "crimes against humanity [was] . . . one of the most serious forms of racial defamation . . . and . . . incitement to hatred . . .").

160. See *Perinçek*, App. No. 27510/08, para. 6-8 (2015) (Spielmann, Casadevall, Berro, De Gaetano, Sicilianos, Silvis, and Kûris dissenting).

161. See, e.g., *Perinçek*, App. No. 27510/08 (2015).

162. Compare *id.* para. 10-27 (indicating that the applicant, Perinçek, declared the Armenian Genocide an "international lie"), with *Garaudy*, 2003-IX Eur. Ct. H.R. at 375-81 (indicating that the applicant, Roger Garaudy, wrote and published a book that adopted revisionist theories about the Holocaust and disputed the existence of the crimes against humanity committed by the Nazis against the Jewish community of Europe); see also *supra* Part II., Section C., Subsections ii.-iii.

V. PROPOSED APPROACH TO GENOCIDE DENIAL LAWS

Beyond the ECtHR, I will provide a framework for approaching genocide denial cases that sufficiently touches upon the four justifications mentioned above. The approach is not the perfect conception of a universally applicable genocide denial law; however, it is a good starting point. The framework consists of a three part, judicially-determined balancing test that seeks to determine the speaker's objective intent, the statement's domestic and international effect, and the cruelty of the statement when placed in its surrounding historical context. Additionally, I propose that courts, as a threshold matter, should determine whether the occurrence of the denied event has enough of a historical consensus to warrant the imposition of a fine or a criminal conviction. By providing a court with ample historical background of the event, such a determination will also assist a court in determining the third factor of the proposed test, that is, the severity of the statement when considered among its historical context.

A. *The Test For Determining Whether A Statement Amounts To a Criminal Violation Should Consist of a Balancing Test*

A useful test for determining whether an instance of genocide denial constitutes hate speech, subjecting the speaker to criminal liability, should include a determination of: (1) the objective intent of the speaker; (2) the domestic and international effect of the statement; and (3) the severity of the statement when placed in the historical context. This test would allow for a court to make a determination with all four of the justifications underlying genocide denial laws in mind, unlike the determination made in *Perinçek*.

1. Objective Intent

Similar to the first element of the "Brandenburg test,"¹⁶³ the objective intent factor I propose here seeks to determine the speaker's intent, with the backdrop of the four justifications proposed above.¹⁶⁴ Under the objective intent factor, a court will determine, through inferences made through circumstantial facts and evidence, whether the speaker intended to: (1) cause or justify immediate violence within the borders of the prosecuting state; (2) cause or justify extraterritorial violence; (3) cause violence or oppression in the future by rekindling or justifying the ideology underlying the massacres at issue; or (4) tar-

163. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

164. See *supra* Part III.

nish the dignity of survivors of the massacres at issue and their subsequent generations. Of course, these justifications, as stated above, vary in their degree of importance. Therefore, a court analyzing the objective intent factor should assign varying degrees of culpability based on what it concludes the speaker intended by making their statement(s).

Perinçek, for instance, seemingly intended to further spread the Turkish program of denial and suppression throughout the world,¹⁶⁵ thus perpetuating the Young Turks' and Atatürk's destructive and repressive ideology still present in Turkey today.¹⁶⁶ Therefore, if the ECtHR in *Perinçek* analyzed Perinçek's statements using the objective intent factor, it would have likely found that Perinçek intended to cause violence or oppression in the future by rekindling or justifying the ideology underlying the Armenian Genocide and that Perinçek intended to tarnish the dignity of Genocide survivors and their subsequent generations. Additionally, Perinçek arguably intended to cause or justify violence or, at the very least, oppression outside the borders of Switzerland, specifically, within Turkey.

2. Domestic and International Effect

The domestic and international effect of a statement can be seen by surveying the immediate result of the domestic and international landscape and how such statements are used or taken throughout the world. In the context of *Perinçek*, for example, genocide denial is used as a means of silencing opposition in modern day Turkey,¹⁶⁷ resulting in the death of journalists¹⁶⁸ and the prosecution and harassment of its historians¹⁶⁹ and novelists.¹⁷⁰ Although no direct causal link exists between Perinçek's statements and violence occurring either within

165. See *Perinçek*, App. No. 27510/08, para. 13 (2015) (“*Let me say to European public opinion . . . : the allegations of the ‘Armenian genocide’ are an international lie . . . Don’t believe the Hitler-style lies such as that of the ‘Armenian genocide.’*”) (emphasis added).

166. See Weiker, *supra* note 47, at 1; Kaya Genc, *After the Failed Coup, Many Young Turks are Yearning for Independence*, HUFFINGTON POST: THE WORLD POST (Oct. 19, 2016, 5:06 PM), https://www.huffingtonpost.com/entry/failed-coup-turkey-independence_us_58057c32e4b0180a36e600ec.

167. See, e.g., *Perinçek*, App. No. 27510/08, para. 1-5 (2015) (Spielmann, Casadevall, Berro, De Gaetano, Sicilianos, Silvis, and Kûris dissenting); *Turkish-Armenian Writer Shot Dead*, *supra* note 68.

168. See *Turkish-Armenian Writer Shot Dead*, *supra* note 68.

169. See Case, *supra* note 70 (indicating that Taner Akçam, a Turkish historian who studies the Armenian Genocide, “was subjected to various . . . forms of official and unofficial harassment and humiliation” after publishing “his book *A Shameful Act: The Armenian Genocide and the Question of Turkish Responsibility* . . .”).

170. See Tate, *supra* note 62, at 198.

Switzerland or in Turkey, the statements and the ECtHR's weak response to it surely sent a message to the Turkish government and other governing bodies—namely, that the denial and marginalization of a traumatic and atrocious event, in an attempt to shed culpability, are permitted and even lauded as exercises of free expression. Therefore, the domestic and international effects of Perinçek's statements triggered both the third and fourth justifications. Specifically, Perinçek's statements rekindled or justified the ideology underlying the Armenian Genocide, which had the propensity to lead to further violence or oppression, and tarnished the dignity of Genocide survivors and their subsequent generations.

3. Severity Among Historical Context

Finally, determining the severity of a statement in its historical context can be determined by studying the history of the events and how, or if, such statements were used in the perpetration, execution, or cover-up of the mass killing. This factor is less rigid than those preceding it, providing a court with discretion as to what it considers severe when taking into account a statement's historical context. For instance, a court could consider whether, after the mass killing, the perpetrating group denied the occurrence of the event (known as the last stage of genocide) or whether racist rhetoric led to the mass killings and whether the statement fits with such history. In determining this factor, courts will likely be most efficient when using the evidence gathered from the evaluation of the threshold 'historical consensus' matter, discussed further below.

B. Courts Should be Limited to Only Prosecuting the Denial of Genocides with Enough of a Historical Consensus

Since criminal liability can have substantial consequences and because such liability would result merely from one's statement, potentially leaving much room for speculation, it is important to mark barriers for the scope of the test. Accordingly, it should first be determined, as a threshold matter, whether there exists a historical consensus of the mass killing in question. In making such a determination, two potential concerns arise. First, one must avoid a determination method with the potential meddling of unwanted, outside influences, including: political, economic, religious, or nationalistic biases. Second, one must avoid a determination method that is cumbersome, would be difficult to ascertain, or would cause an undue burden of a court's time. Below, I will propose two types of determination meth-

ods. Ultimately, I will conclude that a court-employed committee of lawyers/court attorneys is the best option available. I propose that the ECtHR adopt this approach for future genocide denial cases that require such a determination.

The first option is testimony provided by historians or experts in the field of history directly to the court. Historians could be called in or introduced by each party, or parties, to testify to their opinions of the available records. Historians may also consider and testify to survivors' stories and evaluate their significance. Since the Court would make the final decision on the consensus, there would be little to no concern of outside influence, as long as judges can withhold any cultural, ethnic, or social biases they may have from their legal determinations. However, this option would be too cumbersome and unwieldy since the testimony of multiple history experts would take an extremely long time and has the potential to convolute the issue. Therefore, this option is often not viable.

The best option for making a determination as to the historical consensus of the occurrence of a mass killing is through a court-employed committee of lawyers/court attorneys. This option, unlike the independent committee mentioned above, eliminates the concern of impartiality since the members of such a committee would be directly under the control of the court, which itself is a neutral body. This committee, like the one mentioned above, can make its determination by considering governmental and institutional records and individual accounts. If need be, the committee can hear from historians or experts in the field of history. This option, assures the timeliness and accuracy of the determination because of the familiarity of the subject to the committee, whose members are already trained in the study of history.

VI. CONCLUSION

Unfortunately, mass killings occur periodically throughout human history and are bound to be repeated in the future. Furthermore, for every mass killing that occurs, statements denying the event or attempting to diminish the gravity of the event seem to follow. Denial statements have the risk of affecting society in an anti-social way. Hence, the importance of genocide denial laws is four-fold: (1) preventing imminent violence; (2) preventing violence extraterritorially; (3) preventing future acts of violence; and (4) avoiding the re-opening of still-healing psychological wounds caused by a mass killing. For the sake of upholding justice and peace and preserving the dignity of European genocide survivors and their descendants, no matter

where that mass killing occurred, the ECtHR must broaden its focus in a more serious manner, beyond the bounds of Europe, when determining the effects of a statement outright denying or downplaying the destructiveness of a mass killing. Finally, a court should rely on an internally employed committee of lawyers/court attorneys to confirm that a minimally sufficient historical consensus exists as to the occurrence of a mass killing to ensure that genocide denial laws are not stretched beyond their intended scope.

A CUTE COWBOY STOLE OUR MONEY: APPLE, IRELAND, AND WHY THE COURT OF JUSTICE OF THE EUROPEAN UNION SHOULD REVERSE THE EUROPEAN COMMISSION’S DECISION

*Chantal C. Renta**

INTRODUCTION	178
I. BACKGROUND	179
A. <i>EU Law</i>	179
B. <i>Organisation for Economic Co-operation and Development (OECD)</i>	183
C. <i>Ireland vs. US Tax Law</i>	186
D. <i>Apple in Ireland</i>	187
E. <i>The Commission vs. Apple</i>	190
II. APPLE DID NOT RECEIVE STATE AID	193
A. <i>Undertaking</i>	194
B. <i>Advantage</i>	195
C. <i>From the State or Through State Resources</i>	197
D. <i>Selective</i>	197
E. <i>Distorts or Attempts to Distort Competition</i>	200
III. JEOPARDIZES US-EU RELATIONS.....	202
A. <i>Discriminatory Targeting of US-Headquartered Companies</i>	202
B. <i>Hinders U.S. Repatriation</i>	204
C. <i>May Reduce Apple’s Investment in US Treasury Bonds</i>	206
CONCLUSION	207

* LL.M. in Taxation, May 2018, Georgetown University Law Center; J.D., May 2017, Southwestern Law School. I want to thank my mother, Susan, and my father, Juan, for their guidance and support. I also want to thank my faculty advisors Silvia Faerman and Jonathan Miller, the Law Journal Staff, Tax Law Society, Daria and Quinn Morgendorffer, and every person fighting for comprehensive tax reform.

Abbreviations

AEHT: Amazon Europe Holding Technologies
 AJCA: America Jobs Creation Act
 AOE: Apple Operations Europe
 AOI: Apple Operations International
 APA: Advance Pricing Arrangement
 ASI: Apple Sales International
 BEPS: Base Erosion Profit Shifting
 CEO: Chief Executive Officer
 CJEU: Court of Justice of the European Union
 CUP: Comparable Uncontrolled Price Method
 EU: European Union
 IRS: Internal Revenue Service (US)
 MEO: Market Economy Operator
 OECD: Organisation for Economic Co-operation and Development
 ORC: Office of the Revenue Commissioners
 TFEU: Treaty on the Functioning of the European Union
 TNMM: Transactional Net Margin Method
 TRE: United States Department of the Treasury
 US: United States of America
 VAT: Value Added Tax

INTRODUCTION

As more countries participate in the global economy, multinational corporations look to countries with tax advantages to establish foreign offices. The Republic of Ireland's 12.5% corporate tax rate has drawn some of the largest multinational corporations in the world to its shores, including Apple.¹ While Ireland does not offer the lowest corporate tax rate in the European Union (EU), its resident-based tax system provides corporations like Apple with the "holy grail" of corporate tax loopholes.² Since Apple first entered Ireland in the 1990s, it has grown into one of the most valuable companies in the Fortune 500.³ While Apple's success has earned it a devoted following, it has also placed the company under scrutiny for its tax practices.

1. David Haugh, *Ireland's Economy: Still Riding the Globalisation Wave*, 305 OECD OBSERVER 36, 36-37 (2016); see also *Apple Tax Case: Why Is Ireland Refusing Billions?*, BBC NEWS (Sept. 7, 2016), <http://www.bbc.com/news/world-europe-37299430>; *Cork as a Business Location*, CORK CHAMBER, http://www.corkchamber.ie/corks_economy.cfm (last visited Dec. 18, 2016).

2. *Offshore Profit Shifting and the U.S. Tax Code - Part 2 (Apple Inc.) Before the Permanent Subcomm. on Investigations of the Comm. on Homeland Sec. and Governmental Affairs U.S. Senate*, 113th CONG. 3 (2013) (statement of Sen. Carl Levin, Chairman, Permanent S. Comm. on Investigations) [hereinafter *Permanent Subcommittee*].

3. Stephen Gandel, *These Are the 10 Most Valuable Companies in the Fortune 500*, FORTUNE (Feb. 4, 2016) <http://fortune.com/2016/02/04/most-valuable-companies-fortune-500-apple/>;

Recently, the EU attacked Apple's tax structure in Ireland and found the company liable for more than €13 billion in back taxes, even though the company never violated Irish tax laws.⁴ The European Commission (hereinafter the Commission) attacked Apple's tax structure in Ireland as violating state aid under the Treaty on the Functioning of the European Union (TFEU).⁵ Both Apple and Ireland appealed the decision to the Court of Justice of the European Union (CJEU).⁶ On appeal, the CJEU should reject the Commission's decision against Apple and Ireland since it violates EU member states' sovereign rights; Apple did not receive state aid within the meaning of TFEU, and the decision negatively impacts United States of America (US)-EU relations.

Part one of this comment provides background into EU laws, its implications for EU member states, Apple's structure in Ireland, and the European Commission's decision against Apple. Part two contends that Apple did not receive state aid since it did not receive an "advantage" which was "selective" within the meaning of the TFEU. Part three asserts that the CJEU should reject the Commission's decision since it jeopardizes US-EU relations because: 1) the Commission tends to target US-headquartered corporations; 2) the US will be unable to collect tax revenue when Apple repatriates its Irish earnings; and 3) the US has a financial interest in Apple's structure in Ireland. Part four consists of the conclusion and discusses the possible future of tax avoidance in the EU.

I. BACKGROUND

A. *EU Law*

The institutional framework of the EU consists of the European Parliament, the European Council, the Commission, the CJEU, the European Central Bank, and the Court of Auditors.⁷ The Commis-

see James Cook, *A Deal Made in 1991 Paved The Way For Apple's Current Tax Issue*, BUSINESS INSIDER (Aug. 30, 2016, 5:22 AM), <http://www.businessinsider.com/how-apple-managed-to-get-its-tax-deal-in-ireland-in-1991-2016-8?r=UK&IR=T>.

4. European Commission Press Release IP/16/2923, State Aid: Ireland Gave Illegal Tax Benefits to Apple Worth up to €13 Billion (Aug. 30, 2016) [hereinafter Press Release on Ireland].

5. European Commission on State Aid – Ireland, Alleged aid to Apple SA.38373, 2014 O.J. (C 369) 22, 22-23 [hereinafter Ireland Alleged Aid to Apple].

6. Natalia Drozdiak, *European Commission Decision Isn't Endgame for Apple, Ireland*, WALL STREET J. (Sept. 8, 2016, 2:00 AM), <http://www.wsj.com/articles/european-commission-decision-isnt-endgame-for-apple-ireland-1473314400>.

7. Consolidated Version of the Treaty on European Union art. 13, Oct. 26, 2012, 2012 O.J. (C 326) 22 [hereinafter Treaty on European Union].

sion has the sole power to create proposals for new legislation, and the sole law-making power for competition law policy.⁸ The Commission was originally comprised of two commissioners from each member state, however, as the EU grew, it became unfeasible for each member state to have two commissioners; consequently, they currently only have one each.⁹ It is the duty of the commissioners to ensure that EU law is upheld.¹⁰ In order to uphold EU law, the Commission has the power to represent the EU externally and prosecute member states for breaches of EU law.¹¹

For the Commission to prosecute a member state, the EU must have competence to act. Competence can only be granted to the EU by the member states' transfer of sovereign power.¹² Any power not transferred remains with the member state.¹³ The EU does not have exclusive competence in controlling the internal market; rather, the member states and the EU share that competence.¹⁴ If the EU acts when there is shared competence, then it assumes exclusive power under pre-emption.¹⁵ However, the EU has not officially acted to set a uniform system for the internal market. Instead, member states must agree to establish national laws and policies that do not distort competition.¹⁶ Prior to the EU, many member states had multi-level taxes on goods and services resulting in tax being paid upon tax.¹⁷ The EU eventually agreed to adopt France's taxation system for goods and services, which is known as the Value Added Tax (VAT) system.¹⁸ VAT was the result of negotiations among member states since they retain the sole power to create tax legislation.¹⁹ This is an area where the US and the EU greatly differ.

8. *Id.* art. 17; Consolidated Version of the Treaty on the Functioning of the European Union art. 288, Oct. 26, 2012, 2012 O.J. (C 326) 172 [hereinafter TFEU].

9. *Fact Sheets on the European Union*, EUROPEAN PARLIAMENT, http://www.europarl.europa.eu/atyourservice/en/displayFtu.html?ftuId=FTU_1.3.8.html (last visited Sept. 9, 2017); see TFEU, *supra* note 8, art. 244.

10. *Institutional Affairs*, EUROPEAN UNION, https://europa.eu/european-union/topics/institutional-affairs_en (last visited Sept. 2, 2017).

11. *See id.*

12. TFEU, *supra* note 8, art. 1-4.

13. Treaty on European Union, *supra* note 7, art. 4-5.

14. TFEU, *supra* note 8, art. 4.

15. NIGEL FOSTER, *FOSTER ON EU LAW* 80-81 (5th ed. 2015).

16. DAVID W. WILLIAMS, *EC TAX LAW* 82-84 (1998).

17. *Id.* at 80-81.

18. *Id.*; see TFEU, *supra* note 8, art. 121.

19. See Cecille Remeur, *Tax Policy in the EU*, EUROPEAN PARLIAMENT, PE 549.001, 6 (Feb. 2015).

In the US, there is a Federal tax code that is applicable to all US citizens and residents, regardless of their state of residence.²⁰ The Internal Revenue Service (IRS) is responsible for enforcing and collecting Federal taxes.²¹ In addition to the Federal tax code, each state has its own tax code.²² State taxes are only applicable to residents of the state. There is no uniformed collection agency for state taxes. When there is a conflict between Federal tax and State tax, the Federal tax code takes precedence under the US Constitution's supremacy clause.²³

While the US operates under federalism, the EU does not. Although the EU founders envisioned federalism, years of negotiations and agreements ultimately resulted in the rejection of such a system.²⁴ As a result, the EU does not impose a tax on EU citizens and instead each EU citizen is taxed in his/her respective member state.²⁵ The Commission may only make proposals for tax legislation and in order for those proposals to become law, every member state must unanimously agree to adopt the law.²⁶ The EU hoped to operate under federalism, as in the US, in the form of a supreme European Constitution.

The EU hoped the Treaty Establishing a Constitution for Europe²⁷ (hereinafter the Constitutional Treaty) would not only symbolize a unified European identity, but also facilitate future growth and cooperation within the EU.²⁸ The Constitutional Treaty would empower EU institutions to enact laws governing EU citizens; in similar fashion, the US Congress enacts legislation that impacts all US citi-

20. *Frequently Asked Questions (FAQs) About International Individual Tax Matters*, IRS, <https://www.irs.gov/individuals/international-taxpayers/frequently-asked-questions-about-international-individual-tax-matters> (last updated Aug. 27, 2017).

21. *The Agency, its Mission and Statutory Authority*, IRS, <https://www.irs.gov/about-irs/the-agency-its-mission-and-statutory-authority> (last updated Aug 6, 2017).

22. See *Tax Policy Center's Briefing Book: State (and Local) Taxes*, TAX POL'Y CTR. (2016), <http://www.taxpolicycenter.org/briefing-book/what-are-sources-revenue-state-governments>; see, e.g., CAL. REV. & T. CODE §17041(a)(1) (2010 & West Supp. 2017) ("There shall be [taxes] imposed for each taxable year upon the entire taxable income of every resident of this state . . .").

23. U.S. CONST. art. IV, § 2; see also *Bank v. Supervisors*, 74 U.S. 26, 26-27 (1868).

24. FOSTER, *supra* note 15, at 14-15.

25. WILLIAMS, *supra* note 16, at 23-25.

26. EUROPEAN COMMISSION, *THE EUROPEAN UNION EXPLAINED: PROMOTING THE INTERNAL MARKET AND ECONOMIC GROWTH—TAXATION* 5 (Jan. 2015).

27. Treaty Establishing a Constitution for Europe, Dec. 16, 2004, 2004 O.J. (C 310) 1, 9.

28. Anca M. Pusca, *Is the Constitutional Project Dead? An Introduction*, in *REJECTING THE EU CONSTITUTION?: FROM THE CONSTITUTIONAL TREATY TO THE TREATY OF LISBON* 1, 3 (Anca M. Pusca ed., 2009).

zens.²⁹ Unfortunately, many EU citizens viewed European federalism as infringing upon member states' sovereignty.³⁰ The failure of the Constitutional Treaty to provide concrete reasoning for its need led to the EU's ultimate failure to pass such a constitution.³¹

After a failed attempt to establish a European Union Constitution,³² the Treaty of Lisbon was pushed through to incorporate many of the principles in the EU Constitution.³³ All member states agreed to push the treaty through their respective parliaments, except for Ireland.³⁴ The Treaty of Lisbon was subjected to a public vote in Ireland, which ultimately resulted in a two-thirds "no" vote due to concerns over loss of Irish sovereignty.³⁵ The incorporation of a treaty into EU law requires the unanimous agreement of all member states.³⁶ As a result of Ireland's vote, the Treaty of Lisbon was not ratified and therefore did not become part of EU law.³⁷ Thus, the EU was forced to make specific concessions to Ireland to encourage a "yes" vote in a second referendum.³⁸

The most important concession made to Ireland was regarding its tax law. In exchange for a "yes" vote, Ireland and other European leaders agreed to a special protocol,³⁹ specific only to Ireland and hav-

29. U.S. CONST. art. I, § 1; Stephen C. Sieberson, *How the New European Union Constitution Will Allocate Power Between the EU and its Member States—A Textual Analysis*, 37 VAND. J. TRANSNAT'L L., 993 (2004); Elisabeth Zoller, *The Treaty Establishing a Constitution for Europe and the Democratic Legitimacy of the European Union*, 12 IND. J. GLOBAL LEGAL STUD., 391, 393 (2005).

30. *French Say Firm 'No' to EU Treaty*, BBC NEWS, <http://news.bbc.co.uk/2/hi/europe/4592243.stm> (last updated May 30, 2005, 10:12 AM); Nicholas Watt, *EU Constitution a Grandiose Project that Failed, Says Beckett*, THE GUARDIAN (Oct. 17, 2006, 7:19 PM), <https://www.theguardian.com/politics/2006/oct/18/uk.eu1>.

31. See Soeren Kern, *Why Irish Voters Rejected the Lisbon Treaty*, THE BRUSSELS J. (June 16, 2008, 1:40 PM), <https://www.brusselsjournal.com/node/3340>.

32. Andrea Broughton, *European Council Fails to Agree on Constitutional Treaty*, EUROFOUND (Dec. 16, 2003), <http://www.eurofound.europa.eu/observatories/eurwork/articles/european-council-fails-to-agree-on-constitutional-treaty>.

33. See Henry McDonald, *Irish Voters Reject EU Treaty*, THE GUARDIAN (June 13, 2008, 4:08 AM), <https://www.theguardian.com/world/2008/jun/13/ireland>.

34. FOSTER, *supra* note 15, at 38; see McDonald, *supra* note 33. See generally *Crotty v. An Taoiseach*, [1987] 1 I.R. 713, 713 (H. Ct.) (Ir.) (indicating that public referenda are required for all EU treaties).

35. See Cathal M. Brugha, *Why Ireland Rejected the Lisbon Treaty, in REJECTING THE EU CONSTITUTION?: FROM THE CONSTITUTIONAL TREATY TO THE TREATY OF LISBON* 127 (Anca M. Pusca ed., 2009); Kern, *supra* note 31; McDonald, *supra* note 33.

36. See McDonald, *supra* note 33.

37. *Id.*

38. Simon Taylor, *Irish secure concessions on Lisbon treaty*, POLITICO, (Dec. 11, 2008, 5:47 PM), <http://www.politico.eu/article/irish-secure-concessions-on-lisbon-treaty/>.

39. Protocol on the concerns of the Irish people on the Treaty of Lisbon, 2013 O.J. (L60) 132, 132-33.

ing no effect on other EU member states.⁴⁰ Ireland was provided several guarantees including competence over its tax laws.⁴¹ After receiving the protocol, two-thirds voted “yes” to ratify the Treaty of Lisbon.⁴² Although the EU still lacks competence over its member states’ tax codes, it participates on behalf of the EU in the Organisation for Economic Co-operation and Development (OECD).⁴³

B. Organisation for Economic Co-operation and Development (OECD)

The OECD provides influential tax policies and guidelines that have facilitated the elimination of harmful tax laws.⁴⁴ Over thirty nations, including several EU member states, participate in the OECD and assist in the development of policies and practices for greater economic cooperation.⁴⁵ The OECD’s Model Convention with Respect to Taxes on Income and on Capital (hereinafter the Model Convention) facilitated international tax cooperation.⁴⁶ Following its release, the Model Convention facilitated the growth of bilateral tax agreements—from less than one-hundred, prior to its publication, to over three-thousand since many nations relied on it as a model for treaty

40. *Id.*

41. *Id.*; see FOSTER, *supra* note 15, at 38; see also Ece Özlem Atikcan, *Asking the Public Twice: Why do Voters Change Their Minds in Second Referendums on EU Treaties?*, EUROPP (Oct. 19, 2015), <http://blogs.lse.ac.uk/europpblog/2015/10/19/asking-the-public-twice-why-do-voters-change-their-minds-in-second-referendums-on-eu-treaties/> (“Ireland, on the other hand, gained guarantees concerning . . . competency over tax rates . . . and workers’ rights after the Lisbon referendum.”); Ian Traynor, *Promises Made to Irish on Lisbon Treaty to Become EU Law*, THE GUARDIAN (June 19, 2009, 1:32 PM), <https://www.theguardian.com/world/2009/jun/19/lisbon-treaty-ireland-eu-law>.

42. *Ireland Backs EU’s Lisbon Treaty*, BBC NEWS, <http://news.bbc.co.uk/2/hi/8288181.stm> (last updated Oct. 3, 2009, 10:45 PM).

43. ELI HADZHIEVA, POLICY DEP’T ECON. & SCI. POLICY, EU PARLIAMENT, THE EUROPEAN UNION’S ROLE IN INTERNATIONAL ECONOMIC FORA PAPER 3: THE OECD 14, 42 (Karine Gauffillet ed., 2015), [http://www.europarl.europa.eu/RegData/etudes/STUD/2015/542192/IPOL_STU\(2015\)542192_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2015/542192/IPOL_STU(2015)542192_EN.pdf).

44. Traynor, *supra* note 41.

45. OECD, OECD TRANSFER PRICING GUIDELINES FOR MULTINATIONAL ENTERPRISES AND TAX ADMINISTRATIONS 2 (OECD Publishing 2010) [hereinafter OECD Report 2010] (“The OECD member countries: are Australia, Austria, Belgium, Canada, Chile, the Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, [South] Korea, Luxembourg, Mexico, the Netherlands, New Zealand, Norway, Poland, Portugal, the Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Turkey, the United Kingdom and the United States.”).

46. OECD, MODEL CONVENTION WITH RESPECT TO TAXES ON INCOME AND ON CAPITAL CONDENSED VERSION 9 (OECD Publishing 2014).

text.⁴⁷ The OECD has not only impacted bilateral treaties, but also sovereign states' national tax laws.⁴⁸

In its 1998 project, the OECD asked member nations to analyze their own domestic tax policies and identify any tax laws that may harm tax competition.⁴⁹ The report led to forty-seven tax laws being deemed potentially harmful to tax competition.⁵⁰ In 2004, the OECD published an update to its 1998 harmful tax competition project.⁵¹ The update demonstrated that OECD member nations took notice of the 1998 project and worked to change harmful tax laws.⁵² Eighteen of the forty-seven harmful tax policies were abolished or were on the verge of being abolished; fourteen were revised to eliminate the possibility of a negative impact on tax competition; and thirteen were deemed not harmful.⁵³

One of the OECD's most profound contributions to international tax has been its transfer pricing guidelines. Transfer pricing is the process multinational corporations use to assign values to goods and/or services that involve international transactions between related corporations.⁵⁴ The OECD's 1979 Transfer Pricing and Multinational Enterprises report (1979 Report) created the arm's length principle, which provides that transactions between associated corporations "should not be treated differently for tax purposes from similar transactions between independent parties solely by virtue of the fact that the enterprises are associated."⁵⁵ There are five methods to determine if transfer pricing conforms to the arm's length principle: 1) the comparable uncontrolled price method (CUP);⁵⁶ 2) the cost-plus

47. Mary Bennett, *The OECD's BEPS Final Report, Part II: OECD as a Standard-Setting Organization: Question Remains on Cultural Acceptance*, 67 *TAX EXECUTIVE* 22, 22 (2015).

48. *See id.* at 22-23.

49. OECD, *HARMFUL TAX COMPETITION: AN EMERGING GLOBAL ISSUE* 73-78 (OECD Publishing 1998).

50. OECD, *THE OECD'S PROJECT ON HARMFUL TAX PRACTICES: THE 2004 PROGRESS REPORT* 4-6 (OECD Publishing 2004).

51. *See id.* at 4.

52. *Id.* at 5.

53. *Id.* at 7-10.

54. *See WILLIAMS, supra* note 16, at 146.

55. OECD, *THE COMMITTEE ON FISCAL AFFAIRS, TRANSFER PRICING GUIDELINES FOR MULTINATIONAL ENTERPRISES AND TAX ADMINISTRATIONS (DRAFT TEXT OF PART II)* 9 (1995).

56. OECD Report 2010, *supra* note 45, at 24 ("A transfer pricing method that compares the price for property or services transferred in a controlled transaction to the price charged for property or services transferred in a comparable uncontrolled transaction in comparable circumstances.").

method;⁵⁷ 3) the resale price method;⁵⁸ 4) the transactional net margin method (TNMM);⁵⁹ and 5) the transaction profit method.⁶⁰ Even after the 1979 Report was officially repealed in 1995, the arm's length principle remained the standard in evaluating transfer pricing arrangements.⁶¹

The 2010 Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (hereinafter the Transfer Pricing Guidelines) reaffirmed the arm's length principle as the appropriate standard for evaluating transfer pricing.⁶² Although OECD member nations are not required to formally adopt the Transfer Pricing Guidelines, many of the nations incorporated the guidelines into their national laws.⁶³ The OECD grew in importance following the 2008 global crisis as many nations faced a growing fiscal crisis.

In response, the OECD identified Base Erosion and Profit Shifting (BEPS) as a problem and created the BEPS project to address the mismatches in tax rules that allow a corporation to pay low-tax or no-tax on its profits.⁶⁴ The OECD published fifteen action plans for developing and developed countries to follow.⁶⁵ Actions 8-10 set out new guidelines for transfer pricing in hopes of assuring that pricing allocations are in line with the economic reality of value creation.⁶⁶ The BEPS project held its first meeting in 2016 and more than eighty countries participated including Ireland and the US.⁶⁷ While the BEPS project strives to reduce global tax avoidance, many corpora-

57. *Id.* at 26 ("A transfer pricing method using the costs incurred by the supplier of property (or services) in a controlled transaction. An appropriate cost plus mark up is added to this cost, to make an appropriate profit in light of the functions performed (taking into account assets used and risks assumed) and the market conditions.").

58. *Id.* at 28 ("A transfer pricing method based on the price at which a product that has been purchased from an associated enterprise is resold to an independent enterprise. The resale price is reduced by the resale price margin.").

59. *Id.* at 30 ("A transactional profit method that examines the net profit margin relative to an appropriate base (e.g. costs, sales, assets) that a taxpayer realises from a controlled transaction . . .").

60. *Id.* at 30 ("A transfer pricing method that examines the profits that arise from particular controlled transactions of one or more of the associated enterprises participating in those transactions.").

61. *See id.* at 32, 36-41.

62. *Id.* at 31-32.

63. *See id.* at 36.

64. OECD, OECD/G20 BASE EROSION AND PROFIT SHIFTING PROJECT EXPLANATORY STATEMENT: 2015 FINAL REPORTS 4-5 (OECD Publishing 2015).

65. *Id.* at 5, 13-18.

66. *Id.* at 15-16; *see also* OECD, ALIGNING TRANSFER PRICING OUTCOMES WITH VALUE CREATION (OECD Publishing 2015).

67. ERNST & YOUNG, GLOBAL TAX ALERT: BEPS ASSOCIATED INCREASED TO 82 COUNTRIES (June 30, 2016), http://www.ey.com/Publication/vwLUAssets/BEPS_associates_in

tions take advantage of differences between nations' tax systems, including Apple, which utilized the difference between the US and the Irish tax systems.⁶⁸

C. *Ireland vs. US Tax Law*

The difference between US corporate law and Irish corporate tax law creates an ideal tax haven for corporations. The US has an incorporation-based tax code, while Ireland has a residency-based tax code. Under the US incorporation system, a corporation is only subject to US tax when it is incorporated in the US.⁶⁹ Under the Irish tax system, a corporation is only subject to Irish tax when it resides in Ireland.⁷⁰ To further illustrate, ABC Corp. is incorporated in New York which subjects it to the US 35% corporate tax rate (since it is incorporated in the US). Now, let's say ABC Corp. is also incorporated in Ireland. The fact that ABC Corp. is incorporated in Ireland does not automatically subject it to the 12.5% Irish corporate tax; for ABC Corp. to be subject to Irish tax, it would need to meet the requirements for Irish residency.

Ireland differs from the international tax residence definition. Under international tax law, residence is decided by the taxpayer's physical and economic presence in a state.⁷¹ Ireland's tax code did not define residence and instead adopted the United Kingdom's judicially-created residency test.⁷² In *De Beers Consolidated Mines Ltd. v. Howe*, De Beers was incorporated in South Africa where it operated several diamond mines, and also had an office in London, where nine of the company's sixteen board members were located.⁷³ The court found that a corporation is a resident where its central management and control were located; therefore, De Beers was a resident of the United Kingdom.⁷⁴

created_to_82_countries/\$FILE/2016G_01859-161Gbl_BEPS%20associates%20increased%20to%2082%20countries.pdf.

68. Chris William Sanchirico, *As American as Apple Inc.: International Tax and Ownership Nationality*, 68 N.Y.U. TAX L. REV. 207, 207-09 (2015) (citing *Permanent Subcommittee*, *supra* note 2, at 284-89).

69. 26 U.S.C.A. § 7701(a)(4) (West 2014); see *Classification of Taxpayers for U.S. Tax Purposes*, IRS, <https://www.irs.gov/individuals/international-taxpayers/classification-of-taxpayers-for-us-tax-purposes> (last visited Sept. 2, 2017).

70. Taxes Consolidation Act 1997 (Act No. 39/1997) (Ir.), <http://www.irishstatutebook.ie/eli/1997/act/39/enacted/en/pdf>.

71. WILLIAMS, *supra* note 16, at 16.

72. W.J. Tipping v. Louis Jeancard [1947] 2 ITC 360 (H. Ct.) 365 (Ir.).

73. *De Beers Consolidated Mines Ltd. v. Howe* [1905] 2 KB 612 (AC) 612 (UK).

74. *Id.* at 631-32.

The court later clarified what constituted central management and control of a corporation. *Bullock v. Unit Construction Co. Ltd.* involved an English company operating three subsidiaries which were incorporated and operated in Kenya.⁷⁵ The subsidiaries were eventually managed and controlled by the English parent company.⁷⁶ The court found that the determination of where a corporation's central management and control reside is a question of fact.⁷⁷ The court then examined several factors including where major contracts are negotiated, where board meetings are held, and where the important questions of policy are addressed in determining that Unit Construction Co. was a resident of the United Kingdom.⁷⁸ Ireland officially adopted the UK central management and control test for its own tax code in the case *WJ Tipping v. Louis Jeancard*.⁷⁹

Now, let's say that ABC Corp. is incorporated in Ireland with its central control and management based out of its New York office. Under Irish tax law, the fact that ABC Corp. is incorporated in Ireland does not automatically subject it to the 12.5% Irish corporate tax. Instead, ABC Corp.'s central control and management are determinative for Irish tax purposes. As a result, ABC Corp. could effectively avoid being liable to any sovereign state for corporate taxes. The difference between the nations' tax systems helped Ireland attract some of the largest multinational corporation in the world, including Apple.

D. *Apple in Ireland*

In 1980, Apple went public on the NASDAQ and then CEO Steve Jobs announced the company's first manufacturing plant outside of the US, located in Hollyhill, Ireland.⁸⁰ Apple incorporated Apple Operations International (AOI), Apple Operations Europe (AOE), and Apple Sales International (ASI) in Ireland.⁸¹ AOI was a wholly-owned subsidiary of Apple and AOE and ASI were wholly-owned subsidiaries of AOI.⁸² The central management and control of all

75. *Unit Constr. Co. Ltd. v. Bullock* [1960] AC 351 (HL) 352 (UK).

76. *Id.* at 353.

77. *Id.* at 354.

78. *Bullock v. Unit Constr. Co. Ltd.* [1959] 2 WLR 437 (CA) 352 (UK) 444-45.

79. *W.J. Tipping v. Louis Jeancard* [1947] 2 ITC 360 (H. Ct.) 365 (Ir.).

80. James Cook, *A Deal Made in 1991 Paved the Way for Apple's Current Tax Issue*, BUS. INSIDER (Aug. 30, 2016, 5:22 AM), <http://www.businessinsider.com/how-apple-managed-to-get-its-tax-deal-in-ireland-in-1991-2016-8?r=UK&IR=T>; Suzanne Deffree, *Apple IPO makes instant millionaires*, DEC. 12, 1980, EDN NETWORK (Dec. 12, 2016), <http://www.edn.com/electronics-blogs/edn-moments/4403276/Apple-IPO-makes-instant-millionaires-December-12-1980>.

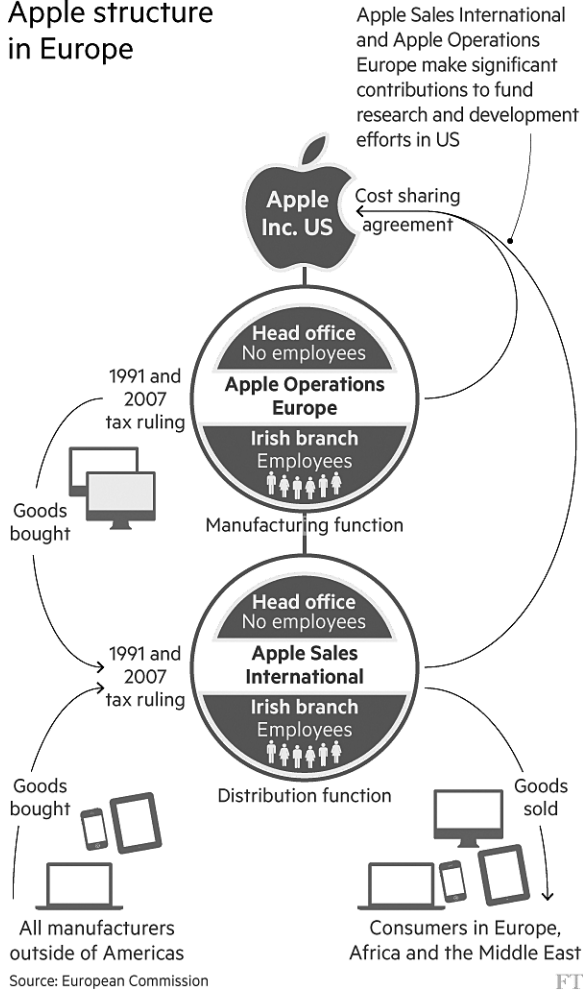
81. Ireland Alleged Aid to Apple, *supra* note 5, at 26.

82. *Id.* at 27.

three corporations were out of Apple’s Cupertino, California headquarters.⁸³

Since AOI, AOE, and ASI were all incorporated in Ireland, none of the subsidiaries were subject to US corporate tax. Under Irish residency requirements, AOI, AOE, and ASI were not subject to Irish tax since their central management and control were located in Apple’s headquarters in the US. Apple’s structure in Ireland allowed it to create and operate three subsidiaries without a single tax residency; further legitimizing Apple’s structure as a bilateral tax treaty between the US and Ireland.

Apple structure in Europe



83. See *id.* at 26; *Apple Corporate Info*, INVESTOR APPLE, investor.apple.com/faq.cfm (last visited Sept. 3, 2017).

Utilizing the Model Convention, the 1997 US Tax Convention with Ireland (Tax Convention) codified Apple's tax loophole.⁸⁴ Article 4 provides that a corporation will be a resident based on the laws of the state in which it has residence, for Ireland, or place of incorporation, for the US.⁸⁵ Article 4 clarifies that a corporation will not be deemed a resident simply because it earns income in either state due to a permanent establishment.⁸⁶ That article left the loophole open for Apple to incorporate in Ireland while failing the Irish residency test, thus allowing its subsidiaries to have no tax residency.

While Apple was one of the top computer companies during the 1980s, Microsoft and Windows dominated the 1990s, causing Apple to restructure pricing allocation among its Irish subsidiaries.⁸⁷ In 1990, Apple met with the Irish Government to receive a tax ruling⁸⁸ regarding its proposed cost and revenue allocations for AOE and ASI.⁸⁹ In the 1991 ruling, Ireland agreed to Apple allocating 65% of operating expenses to AOE for revenue, up to \$60-70 million and 20% of operating expenses for any excess revenue.⁹⁰ In 2007, Ireland approved Apple's reduced operating expenses allocation of 10-20% and its inclusion of a 1-9% Intellectual Property (IP) return to its AOE branch.⁹¹ The 1991 ruling stated that all revenue attributed to ASI would be taxed at the 12.5% Irish tax and the 2007 ruling allocated 8-18% of operating costs to ASI.⁹² It is those allocations that first caught the attention of the US government.

In 2013, the Permanent Subcommittee on Investigations of the United States Senate Committee on Homeland Security and Governmental Affairs (hereinafter the Subcommittee) opened an investigation looking into the off-shore profit sharing schemes of Apple.⁹³ Current Apple Chief Executive Officer (CEO) Tim Cook testified in

84. Tax Convention with Ireland, Ir.-U.S., art. IV, July 28, 1997, S. TREATY DOC. NO. 105-31 (entered into force Jan. 1, 1998).

85. *See id.* § 1.

86. *See id.* § 2.

87. *See Permanent Subcommittee, supra* note 2, at 11, 39; Cook, *supra* note 80.

88. Commission Notice on the Notion of State Aid as Referred to in Article 107(1) of the Treaty on the Functioning of the European Union, 2016 O.J. (C 262) 36 [hereinafter Notion of Aid Notice] ("The function of a tax ruling is to establish in advance the application of the ordinary tax system to a particular case in view of its specific facts and circumstances.")

89. Ireland Alleged aid to Apple, *supra* note 5, at 22, 24, 29. Advance Pricing Arrangements (APAs) allow for a corporation to get advance approval for intra-group transactions. *Id.* APAs set out the criteria for determining the transfer pricing over a specified period. *Id.*

90. *Id.* at 29.

91. *Id.*

92. *Id.*

93. *Permanent Subcommittee, supra* note 2, at 2.

front of the Subcommittee that offshore operations, such as AOI, provide cash management for Apple's international operations and are currently financing an expansion plant in Cork, Ireland.⁹⁴ Cook denied Apple's use of illegal tax schemes and suggested that US corporate tax law should be reformed to keep up with the new digital age.⁹⁵ Ultimately the Subcommittee found that current laws did not prohibit Apple's tax structure in Ireland.⁹⁶ However, the Subcommittee investigation led to further international scrutiny and eventually caught the attention of the Commission.

E. The Commission vs. Apple

In 2014 the Commission opened an investigation to determine if the 1991 and 1997 Irish tax rulings provided to Apple constituted state aid in violation of the TFEU.⁹⁷ A violation of EU state aid exists when there is a selective advantage granted by a member state which distorts or attempts to distort competition.⁹⁸ The Commission distinguishes between tax rules that impede the functioning of the internal market and those that distort competition;⁹⁹ the latter are considered a violation of state aid. All member states are required to receive the Commission's approval prior to granting state aid.¹⁰⁰ If a member state grants state aid in violation of the TFEU, it must recover the illegal state aid from the recipient.¹⁰¹

There is no equivalent for EU state aid in the US; as a matter of fact, the US takes a different approach to corporate subsidies. Corporations in the US enjoy a unique position because they can often receive subsidies in the form of grants, loans, and/or tax breaks from both the Federal and state governments.¹⁰² Federal government

94. *See id.* at 37.

95. *Id.*

96. *Id.* ("The facts are mighty clear to me that loopholes in our tax laws and regulations allow many companies, including Apple, to shift enormous amounts of income from this country to other countries where they pay little or no tax.")

97. *See EU Panel Says Apple Gets Illegal Tax Benefits in Ireland*, NBC NEWS (Sept. 30, 2014, 5:43 PM) <http://www.nbcnews.com/business/taxes/eu-panel-says-apple-gets-illegal-tax-benefits-ireland-n215281>.

98. TFEU, *supra* note 8, art. 107.

99. Commission Notice on the Application of the State Aid Rules to Measures Relating to Direct Business Taxation, 1998 O.J. (C 384) 3, 3.

100. *Id.* at 8.

101. *Id.*

102. *See* Tom Cahill, *10 Taxpayer Handouts to the Super Rich That Will Make Your Blood Boil*, US UNCUT (Oct. 28, 2015), <http://usuncut.com/class-war/10-corporate-welfare-programs-that-will-make-your-blood-boil/> [<https://web.archive.org/web/20170126004740/http://usuncut.com/class-war/10-corporate-welfare-programs-that-will-make-your-blood-boil/>]; Niraj Chokshi,

grants and tax credits to corporations often total billions of dollars, while Federal loans and bailouts exceed trillions.¹⁰³ It should be noted that the US Federal Government provides grants, credits, and loans to foreign corporations operating in the US, as well.¹⁰⁴ This is unlike the EU, which adopted strict guidelines on the use of government subsidies to corporations.¹⁰⁵

Subsidies to corporations in the EU are subject to heavy scrutiny from the Commission which even scrutinizes areas where the U.S. often provides subsidies, such as transportation, energy, and agriculture.¹⁰⁶ For US multinationals operating in the EU, state aid rules are difficult to navigate, especially when they come from a country that provides corporations with a tax credit for burning livestock feces.¹⁰⁷ Thus, the Commission's decision in Apple was uncharted territory for the US corporation.

In examining the Irish tax rulings, the Commission found that Apple received state aid in violation of the TFEU.¹⁰⁸ According to the decision, the tax rulings provided to Apple allowed for transfer pricing that did not reflect the economic realities of the transactions.¹⁰⁹ In doing so, Apple was able to allocate millions in profits to specific Irish subsidiaries, particularly AOI and ASI, which were not subject to taxation in any nation.¹¹⁰ The Commission found that in

The United States of Subsidies: The Biggest Corporate Winners in Each State, THE WASHINGTON POST (Mar. 18, 2015), <https://www.washingtonpost.com/blogs/govbeat/wp/2015/03/17/the-united-states-of-subsidies-the-biggest-corporate-winners-in-each-state/>.

103. Philip Mattera & Kasia Tarczynska, *Uncle Sam's Favorite Corporations: Identifying the Large Companies that Dominate Federal Subsidies*, GOOD JOBS FIRST 2, 8 (2015), <http://www.goodjobsfirst.org/sites/default/files/docs/pdf/UncleSamsFavoriteCorporations.pdf>.

104. *Id.* at 10.

105. Nicholas J. DeNovio, et al., *State Aid: What It Is, and How It May Affect Multinationals and Tax Departments*, 68 TAX EXECUTIVE, Mar.–Apr. 2016, at 15, 15.

106. See European Commission on State Aid – France, Restructuring aid to Areva SA.44727, 2016 O.J. (C 301) 2, 3 (scrutinizing France for providing €4 billion in aid to restructure Areva's energy operations); European Commission on State Aid – Austria, Klagenfurt Airport – Ryanair and Other Airlines Using the Airport SA.24221, 2012 O.J. (C 233) 28, 28-29 (scrutinizing the Austrian state government's direct payments to Ryanair to improve travel between Austria and the United Kingdom); see also DeNovio, *supra* note 105.

107. 26 U.S.C. § 45 (2012 & Supp. III 2015).

108. *European Commission Statement by Commissioner Vestager on State Aid Decision that Ireland's Tax Benefits for Apple were Illegal*, EUROPA (Aug. 30, 2016), http://europa.eu/rapid/press-release_STATEMENT-16-2926_en.htm [hereinafter Commissioner Vestager Press Release].

109. KPMG, EURO TAX FLASH ISSUE No. 300 (Aug. 30, 2016), <https://assets.kpmg.com/content/dam/kpmg/xx/pdf/2016/08/etf-300-state-aid-decision-in-the-apple-case.pdf>.

110. *Id.*

2011, Apple's tax rate was only 0.05% and dropped to 0.005% in 2014, well below Ireland's 12.5% corporate tax rate.¹¹¹

In determining that Apple's transfer pricing was not proper, the Commission relied on the 2010 OECD Transfer Pricing Guidelines. The Commission found that Apple did not provide the Office of the Revenue Commissioners (ORC) with the proper documentation supporting its transfer pricing tax proposal, which went against Section V of the Transfer Pricing Guidelines.¹¹² Under the first tax ruling issued to Apple in 1991, ASI would only be allocated 12.5% of all operating costs, which changed in 2007 to 8-18%.¹¹³ Ireland and Apple further agreed that the cost plus for ASI would be \$28-38 million with capital allowances not exceeding \$8-18 million.¹¹⁴ Both agreed to a mark-up of 20% on costs that exceed \$60-70 million.¹¹⁵

AOE was granted a similar ruling with 10-20% operating costs allocated to its branch.¹¹⁶ Once again the Commission found that Apple did not provide proper documentation to the ORC in its allocation.¹¹⁷ The Commission noted that the ruling complied with the TNMM method of calculating allocations; however, there did not appear to be a viable reason for the allocation.¹¹⁸ Additionally, the Commission found that AOI had no employees and no real activities, further demonstrating the lack of economic justification for the allocation.¹¹⁹

Also, particularly concerning to the Commission was the fact that both rulings were for an open-ended duration while other member states limited the duration of their tax rulings.¹²⁰ The Commission noted that several other member states restricted tax rulings to a fixed

111. Commissioner Vestager Press Release, *supra* note 108 ("Let me illustrate this for one tax year: In 2011, Apple Sales International made profits of 16 billion euros. Less than 50 million euros were allocated to the Irish branch. All the rest was allocated to the "head office", where they remained untaxed. This means that Apple's effective tax rate in 2011 was 0.05%. To put that in perspective, it means that for every million euros in profit, it paid just 500 euros in tax. This effective tax rate dropped further to as little as 0.005% in 2014, which means less than 50 euros in tax for every million euro in profit.").

112. Ireland Alleged Aid to Apple, *supra* note 5, at 39.

113. *Id.* at 30.

114. *Id.*

115. *Id.*

116. *Id.* at 31.

117. *Id.* at 30.

118. *Id.* at 33.

119. Commissioner Vestager Press Release, *supra* note 108.

120. Ireland Alleged Aid to Apple, *supra* note 5, at 34.

period; the allowable duration for tax rulings in other member states does not exceed five years.¹²¹

The Commission then turned to whether the aforementioned facts constituted state aid.¹²² Under the rules for state aid, it was apparent to the Commission that Apple received state aid from Ireland.¹²³ The Irish tax rulings were found to be selective since they were solely directed toward Apple.¹²⁴ Furthermore, the rulings provided Apple with an advantage in the EU since it was able to pay significantly lower taxes, allowing it to allocate more money to furthering its global operations.¹²⁵ The ability to avoid taxes allowed Apple to receive a significant benefit compared to other businesses, which in itself distorted competition in the internal market.¹²⁶ Apple was ordered to pay back €13 billion plus interest in back taxes to Ireland.¹²⁷ Both Ireland and Apple appealed the decision to the CJEU.¹²⁸

II. APPLE DID NOT RECEIVE STATE AID

Apple's tax structure in Ireland did not constitute state aid within the meaning of the TFEU since it fails to meet the "selective" requirement. Alternatively, even if the Irish tax rulings meet the "selective advantage" requirement, they cannot be deemed to distort or attempt to distort competition without a unified EU tax system. Articles 107 through 109 of the TFEU outline the rules governing state aid.¹²⁹ To determine if state granted aid violates the TFEU, the Commission must find that undertakings received constitute an advantage from the state or through state resources and that the measure was selective

121. *Id.* at 31-32 (indicating that France, Germany, and Hungary permit an APA validity duration of 3-5 years while Portugal does not allow the duration to exceed 480 days).

122. *Id.* at 35.

123. *Id.*

124. *Id.*

125. Commissioner Vestager Press Release, *supra* note 108.

126. *Id.*

127. *Id.* It should be noted that under EU procedure, the ruling is against the member state, although the recipient of the illegal state aid may challenge the Commission's decision as well; however, failure to comply with the decision will fall solely on the member state. DeNovio, *supra* note 105, at 18.

128. Tom Bergin, *Apple Appeal Against EU Tax Demand Would Break New Ground*, REUTERS (Sept. 2, 2016, 3:04 AM), <http://www.reuters.com/article/us-eu-apple-taxavoidance-court-idUSKCN118155>; Mark Scott, *Dublin Appeals \$14.3 Billion Tax Charge Against Apple*, N.Y. TIMES, Nov. 10, 2016, at B6.

129. TFEU, *supra* note 8, art. 107-09.

and distorted or attempted to distort competition.¹³⁰ The Commission found that Apple's tax treatment in Ireland met the requirements for state aid and thus violated the TFEU.¹³¹ However, under review, the European Court of Justice should find that Apple did not receive state aid because the Irish tax rulings were not an "advantage" and did not meet the "selective" requirement of the TFEU.

A. Undertaking

AOI, AOE, and ASI all constitute a single undertaking under the TFEU. Undertakings are entities engaged in an economic activity regardless of their legal status and the way in which they are financed.¹³² The Commission must look at the nature of the entity's activities regardless of whether the entity was designed to generate profits or not.¹³³ Undertakings may be comprised of several separate entities, which will then be deemed to constitute a single economic unit in applying state aid principles.¹³⁴

It is clear that AOI, AOE, and ASI were engaged in economic activity. Although AOE and ASI have no head office employees, their Irish branch has several employees. AOE's employees handle manufacturing of Apple products in Europe.¹³⁵ AOE's manufacturing operations have contributed significantly to the economic growth of Cork, Ireland.¹³⁶ AOE's and ASI's employees manage the distribution of Apple products outside of North and South America.¹³⁷ Furthermore, an examination of AceaElectrabel Produxine SpA (ACEA SpA)¹³⁸ makes it clear that AOI, AOE, and ASI constitute a single undertaking.

In *AceaElectrabel Produxine SpA v. Commission*, Belgium electricity company Electrabel SA was the parent corporation of Elec-

130. Case C-393/04 & C-41/05, *Air Liquide Indus. Belgium SA v. Ville de Seraing & Province de Liege*, 2006 E.C.R. I-5293, para. 38.

131. *Ireland Alleged Aid to Apple*, *supra* note 5, at 35.

132. *Notion of Aid Notice*, *supra* note 88, at 3.

133. *Id.*

134. Case C-480/09, *AceaElectrabel Produzione SpA v. European Comm'n*, 2010, E.C.R. I-13358, para. 47-50; Case C-222/04, *Ministero dell'Economia e delle Finanze v. Cassa di Risparmio di Firenze SpA and Others*, 2006 E.C.R. I-325, para. 112-14.

135. *Ireland Alleged Aid to Apple*, *supra* note 5, at 28.

136. *Id.* at 29.

137. European Commission Bouchtaou, *Apple to Repay €13 Billion in Tax, Commissioner Rules*, KNECT365 (Aug. 30, 2016), <https://knect365.com/tp-minds-hub/article/3d76403f-1aae-45db-a83f-0e63784191c7/apple-to-repay-e13-billion-in-tax-commissioner-rules>.

138. *AceaElectrabel Produzione SpA*, 2010, E.C.R. at I-13358, para. 3 (defining AceaElectrabel Produxine SpA as an electricity generating company controlled equally by two other companies Electrabel Italia and AceaElectrabel).

trabel Italia.¹³⁹ AceaElectrabel was a joint venture between ACEA SpA, an independent Italian energy corporation, and Electrabel Italia.¹⁴⁰ The parties agreed to form two tiers of subsidiaries and transfer specific electricity generating assets through the subsidiaries.¹⁴¹ ACEA SpA was the majority owner (59.41%) of the joint venture.¹⁴² AceaElectrabel was sole owner of AE Energia and AE Elettricit . AceaElectrabel also owned an interest in two additional companies, AceaElectrabel Produzione SpA and AceaElectrabel Trading.¹⁴³

In court, ACEA SpA argued that AceaElectrabel Produzione SpA and ACEA SpA could not constitute an undertaking as part of the joint venture because AceaElectrabel only owned 70% of AceaElectrabel Produzione SpA, which caused ACEA to only own 30% of AceaElectrabel Produzione SpA.¹⁴⁴ Since the Court of Justice determined that ACEA SpA and AceaElectrabel Produzione SpA constituted a single undertaking under the TFEU, then, it is clear that AOI, AOE, and ASI constitute a single undertaking.

B. Advantage

Apple did not receive an advantage within the meaning of the TFEU. An advantage is defined as “any economic benefit which an undertaking could not have obtained under normal market conditions.”¹⁴⁵ To determine if the same benefit could be obtained under normal market conditions, the court uses the market economy operator (MEO) test.¹⁴⁶ When the economic position of an undertaking improves as a result of the state, an advantage is deemed to be present.¹⁴⁷ The Commission must only look at the effect on the undertaking in question, regardless of whether the undertaking could refuse

139. *Id.* para. 5-7.

140. *Id.* para. 5.

141. *Id.*

142. *Id.*

143. *Id.* para. 6.

144. *Id.* para. 32-35 (“On the other hand, in a case where, as here, an undertaking is controlled by a joint venture, which itself is controlled by two separate groups, it cannot be inferred from that case-law that the Commission is entitled to conclude that there is an economic unit between the controlled undertaking and one of the two companies which control the joint venture.”).

145. Notion of Aid Notice, *supra* note 88, at 15.

146. *Id.* (“The decisive element is whether the public bodies acted as a market economy operator would have done in a similar situation. If this is not the case, the beneficiary undertaking has received an economic advantage which it would not have obtained under normal market conditions, placing it in a more favorable position compared to that of its competitors.”).

147. See Case C-480/98, Spain v. Commission, 2000 E.C.R. I-8733, para. 19.

or avoid the advantage.¹⁴⁸ Since Apple could obtain the same tax benefits under normal market conditions, it did not receive an advantage within the meaning of the TFEU. To avoid paying taxes in both the US and Ireland, Apple simply needed to take advantage of the difference between the US and Irish tax systems.

Apple incorporated AOI, AOE, and ASI in Ireland. In doing so, all three subsidiaries were not subject to US corporate tax. To avoid subjecting AOI, AOE, and ASI to Irish tax, Apple did not utilize head offices at the three subsidiaries. Instead, Apple's headquarters in Cupertino, California were deemed to be the head office for all three subsidiaries.¹⁴⁹ This allowed the subsidiaries to be classified as managed and controlled outside of Ireland. As a result, none of the subsidiaries were subject to Irish tax on that basis alone. Therefore, Apple could receive the same economic benefit, tax avoidance, in normal market conditions without receipt of the two Irish tax rulings.

On the other hand, there is the contention that Apple did receive an advantage since the structure was not available to Irish corporations; that argument is simply unfounded. Irish corporations could incorporate in Ireland and establish management and control outside of Ireland. In doing so, they would escape Irish corporate tax. The fact that Irish corporations or any other corporation did not take advantage of the Irish residency tax system should not automatically create an advantage within the meaning of the TFEU for corporations utilizing the system.

If we applied to the weather the same logic used in the aforementioned argument, proponents of the argument would allege that any person that utilized the weather report to know when it was going to rain received an advantage of knowing when to use an umbrella. As a result, people who did not check the weather were unfairly unable to compete for taxi cabs since they could not stand out in the rain to hail a cab. Should we punish the people for checking the weather report and bringing an umbrella? Of course not! Similarly, the Court of Justice should not punish a corporation for doing its due diligence and utilizing a bona fide tax loophole.

148. See Case 173/73, *Italy v. Commission*, 1974 E.C.R. 710, 718; see also Case C-251/97, *France v. Commission*, 1998 E.C.R. I-6641, I-6651.

149. Commission Decision on State Aid (EU) No. 2017/1283 of 30 Aug. 2016, 2017 O.J. (L 187) 1, 7.

C. *From the State or Through State Resources*

If the Irish tax rulings were an advantage, it would be deemed to be granted by Ireland. A member state may provide aid through the direct or indirect use of its resources.¹⁵⁰ State resources include central bank credits and public sector resources.¹⁵¹ When a public authority grants an advantage to an undertaking, the act is imputable to the state.¹⁵²

The ORC granted the two Irish tax rulings to Apple.¹⁵³ The Irish Government established the ORC in 1923 “to serve the community by fairly and efficiently collecting taxes and duties and implementing Customs controls.”¹⁵⁴ Since the ORC is a public authority, if the Irish rulings were to constitute an advantage to Apple, then the act would be imputable to Ireland.

D. *Selective*

Even if the Irish tax rulings constituted an advantage to Apple, they would fail to meet the selective requirement. For an advantage to be selective, it must be granted “in a selective way to certain undertakings or categories of undertakings or to certain economic sectors.”¹⁵⁵ There are two types of selectivity: material and regional. Material selectivity applies to a particular undertaking or specific sectors of the economy within the member state.¹⁵⁶ To establish material selectivity the Commission may use *de jure* and *de facto* selectivity.¹⁵⁷ Regional selectivity involves measures that apply to the entire member state or a specific region within it.¹⁵⁸ If the member state can demonstrate that the region possessed institutional, procedural, or ec-

150. Notion of Aid Notice, *supra* note 88, at 10.

151. *Id.* at 11.

152. *Id.* at 9.

153. Ireland Alleged Aid to Apple, *supra* note 5, at 22.

154. *Role of Revenue*, REVENUE: IRISH TAX AND CUSTOMS, <http://www.revenue.ie/en/corporate/information-about-revenue/role-of-revenue/index.aspx> (last visited Aug. 28, 2017).

155. Notion of Aid Notice, *supra* note 88, at 27; *see also* Case C-15/14 P, *Commission v. MOL Magyar Olaj-és Gázipari Nyrt.*, 2015 E.C.R. I, 9 (“[R]equirement as to selectivity under Article 107(1) TFEU must be clearly distinguished from the concomitant detection of an economic advantage . . .”).

156. Notion of Aid Notice, *supra* note 88, at 27.

157. *See id.* at 27-28 (“*De jure* selectivity results directly from the legal criteria for granting a measure that is formally reserved for certain undertakings only *De facto* selectivity may be the result of conditions or barriers imposed by Member States preventing certain undertakings from benefitting from the measure.”); *Joined Cases C-78/08 to C-80/08, Paint Graphos, et al.*, 2011 E.C.R. I-7641, I-7663; *see also* *Joined Cases T-92/00 and T-103/00, Ramondin SA and Ramondin Cápsulas SA v Commission*, 2002 E.C.R. II – 1407.

158. *See* Notion of Aid Notice, *supra* note 88, at 32.

onomic and financial autonomy, then the measure will not be deemed to constitute state aid.¹⁵⁹ In the case of Apple, we are concerned with material selectivity since Apple is a particular undertaking.

Tax rulings generally are not considered state aid. Tax rulings are provided when a taxpayer wishes to establish in advance how specific tax rules or transfer pricing principles will apply to a specific transaction.¹⁶⁰ However, a member state must comply with state aid rules in granting tax rulings.¹⁶¹ If the tax ruling creates a result that would not be possible without the grant of such ruling, then the ruling may be considered selective.¹⁶² For intra-group transactions, if the tax ruling does not resemble what would be available to the taxpayer in the free market, then it will be deemed to be selective.¹⁶³

Revenue collecting agencies often enter into advance pricing arrangements (APAs) with corporations.¹⁶⁴ APAs provide corporations with an advance determination of intra-group transactions. Revenue agencies examine the factual issues of the intra-group transactions in determining whether proposed transactions conform to the nation's tax laws and international transfer pricing principles.¹⁶⁵ The intra-group transaction's commercial and financial relations should not differ from relations that would exist between independent corporations.¹⁶⁶ For APAs that are designed to allocate profits within an intra-group transaction, it must conform to the arm's length principle.¹⁶⁷

The Commission relied on the OECD Guidelines in determining if the Irish tax rulings were selective within the meaning of the TFEU.¹⁶⁸ In doing so, the Commission relied heavily on the docu-

159. See *id.* at 32-33.

160. See *id.* at 36-37.

161. See *id.* at 37.

162. See *id.*

163. See *id.* at 37; see also *id.* at 38 (“In sum, tax rulings confer a selective advantage on their addressees in particular where: (a) the ruling misapplies national tax law and this results in a lower amount of tax . . .”).

164. OECD Report 2010, *supra* note 45, at 23 (“An arrangement that determines, in advance of controlled transactions, an appropriate set of criteria (*e.g.* method, comparables and appropriate adjustments thereto, critical assumptions as to future events) for the determination of the transfer pricing for those transactions over a fixed period of time.”).

165. See Ireland Alleged Aid to Apple, *supra* note 5, at 24 (“Transfer pricing refers in this context to the prices charged for commercial transactions between various parts of the same corporate group, in particular prices set of goods sold or services provided by one subsidiary of a corporate group to another subsidiary of that same group.”).

166. See OECD Report 2010, *supra* note 45, at 32.

167. See *id.* at 172.

168. Ireland Alleged Aid to Apple, *supra* note 5, at 24.

mentation guidelines required in granting APAs.¹⁶⁹ The issue is that, at the time Apple first negotiated with the ORC, the OECD only had two published reports. The first was the 1979 Report which established the arm's length principle as the appropriate test for transfer pricing.¹⁷⁰ The 1979 Report was not designed to provide detailed guidance on transfer pricing, but rather, addressed several emerging issues in the multinational corporations.¹⁷¹ The second OECD report was published in 1984 and, once again, did not provide detailed guidance on transfer pricing.¹⁷² The 1984 Report focused on transfer pricing within the banking sector.¹⁷³ Apple entered negotiations with the ORC in 1990 with the Irish tax ruling being granted in 1991.¹⁷⁴ At the time of negotiations there were no guidelines regarding the documentation required to determine if cost allocation provided in an APA to a non-bank intra-group transaction would be available in the free market; the same applies to the 1997 Irish tax ruling.

In 2006 when Apple and the ORC entered negotiations, the 1984 Report was still in effect. The OECD did not publish an additional transfer pricing report until 2010, after Apple and the ORC came to an agreement.¹⁷⁵ The OECD Reports and Guidelines were not designed to act as law, let alone to be applied retroactively to transactions.¹⁷⁶ In doing so, the Commission is attempting to retroactively harmonize sovereign nations' tax codes to benefit the EU.¹⁷⁷ This is

169. See OECD Report 2010, *supra* note 45, at 168; see also Ireland Alleged Aid to Apple, *supra* note 5, at 24.

170. MARLIES DE RUITER, OVERVIEW OF THE OECD WORK ON TRANSFER PRICING, WRITTEN CONTRIBUTION TO THE CONFERENCE "ALTERNATIVE METHODS OF TAXATION OF MULTINATIONALS" 1 (2012), https://www.taxjustice.net/cms/upload/pdf/Marlies_de_Ruiter_1206_Helsinki_text.pdf.

171. U.N. Secretariat, Ad Hoc Group of Experts on International Cooperation in Tax Matters Tenth meeting, Transfer Pricing: History C State of the Art C Perspectives, 7, U.N. Doc. ST/SG/AC.8/2001/CRP.6 (Sep. 10-14, 2001).

172. See *id.* at 8.

173. *Id.*

174. See Commission Decision on State Aid (EU) No. 2017/1283 of 30 Aug. 2016, 2017 O.J. (L 187) 1, 10; Press Release on Ireland, *supra* note 4.

175. See OECD Report 2010, *supra* note 45.

176. See OECD, THE OECD REPORT ON REGULATORY REFORM SYNTHESIS 2 (1997); OECD, OECD PRINCIPLES OF CORPORATE GOVERNANCE 3 (2004); OECD Report 2010, *supra* note 45, at 3; see also Dominic Rushe, *European commission unfairly targeting US companies over taxes, official says*, THE GUARDIAN (Jan. 29, 2016, 4:52 PM), <https://www.theguardian.com/world/2016/jan/29/european-commission-unfairly-targeting-us-companies-starbucks-mcdonalds-amazon-apple-taxes-treasury>.

177. Rushe, *supra* note 176.

in violation of not only the aforementioned Irish sovereignty, but also of international tax principles.¹⁷⁸

The Commission determined that Irish tax rulings did not comply with modern OECD Guidelines because they were selective; this was an error.¹⁷⁹ Ireland expressed that APAs were available to any corporate taxpayer.¹⁸⁰ It was the sole burden of the corporate taxpayer to initiate APA negotiations. Apple utilized the APA system to ensure its proposed cost allocation was in accordance with Irish tax law. After several months of negotiations, the ORC reached an agreement with Apple and issued the 1991 tax ruling, and later the 2007 tax ruling. Therefore, the Commission could not reasonably find that the allocation methods assigned in the 1991 and 2007 tax rulings were not available on the free market since there were no detailed transfer pricing guidelines available prior to 2010.

A further indication of the Commission's failure to determine if the cost allocation was available on the free market was its focus on the lack of a fixed period in the rulings. The 2010 Guidelines provided the definition for APAs, which included the requirement of a "fixed period of time."¹⁸¹ Thus, the definition set out in the 2010 Guidelines should not apply to the Apple Irish tax rulings for the aforementioned reasons that the guidelines should not apply to the cost allocation. Furthermore, the Commission acknowledges that Ireland does not have a statutory requirement for APAs.¹⁸² Therefore, if Apple wanted to keep the 1991 tax ruling indefinitely, it could do so without violating Irish tax law.

E. Distorts or Attempts to Distort Competition

If the tax rulings were an advantage that was selective, then competition was distorted. Competition is distorted "when the State grants a financial advantage to an undertaking in a liberalised sector

178. Tim Worstall, *Ireland And Apple Ready Their Appeals Against The EU Commission's \$14 Billion Tax Decision*, FORBES (Dec. 19, 2016, 3:57 AM), <https://www.forbes.com/sites/tim-worstall/2016/12/19/ireland-and-apple-ready-their-appeals-against-the-eu-commissions-14-billion-tax-decision/#3515d8b7498d>.

179. *See id.*

180. *See id.*

181. OECD Report 2010, *supra* note 45, at 168.

182. Ireland Alleged Aid to Apple, *supra* note 5, at 31 n.19 ("International Transfer Pricing 2013/2014, PwC and Information on bi- or multilateral mutual agreement procedures under double taxation agreements for reaching Advance Price Agreements ('APA') aimed at granting binding advance approval of transfer prices agreed between international associated enterprises, 5 October 2006, German Federal Ministry of Finance.").

where there is, or could be, competition.”¹⁸³ The distortion can occur even when an undertaking does not gain a substantial portion of the market share.¹⁸⁴ The avoidance of tax liability may be considered a distortion of competition since it provides an undertaking with “an advantage by relieving it of expenses it would otherwise have had to bear in the course of its day-to-day business operations.”¹⁸⁵

If Apple were to owe back taxes to Ireland, then it would have avoided an expense that naturally arises from day-to-day operations. As a result, Apple’s competitors, assuming none have similar APAs, were at a disadvantage since Apple could spend larger amounts on research and development. Of course, that argument is true from a purely economic view, but consumer behavior does not fall in line with the purely economic view.

For example, when Google released its Nexus 7 tablet to compete with Apple’s iPad, the Google tablet was priced at \$199, well below Apple’s iPad.¹⁸⁶ Despite the price difference, Apple’s iPad was more successful than the Nexus 7 without Apple ever altering the iPad’s price.¹⁸⁷ Then there is the Apple iPhone. One of Apple’s largest competitors, Samsung, was expected to cut into Apple’s iPhone market share with its Samsung Galaxy. Apple still consistently outsells Samsung in the mobile phone market.¹⁸⁸ In 2016, Samsung became the creator of the only mobile phone that Homeland Security banned from airplanes.¹⁸⁹ So the question remains, did Apple outsell its competitors because it avoided taxes or did Apple outsell its competitors because consumers prefer Apple products?

183. Case T-6/98 & T-23/98, *Alzetta v. Comm’n of European Cmty.*, 2000 E.C.R. II-2325, 2352, 2353-56, 2357; Case C-280/00, *Magdeburg v. Nahverkehrsgesellschaft*, 2003 E.C.R. I-7810, para. 45, *aff’d*, Case C-298/00 P, *Alzetta v. Comm’n of European Cmty.*, 2003 E.C.R. I-4092; *Notion of Aid Notice*, *supra* note 88, at 47, 47 n.246.

184. *Notion of Aid Notice*, *supra* note 88, at 47-48.

185. *Id.* at 48.

186. Daniel Eran Dilger, *Apple’s competition is going to have a tough year in 2016*, APPLEINSIDER (Jan. 9, 2016, 1:23 PM), <http://appleinsider.com/articles/16/01/09/apples-competition-is-going-to-have-a-tough-year-in-2016>.

187. *Id.*

188. Daniel Eran Dilger, *Samsung Mobile smartphone profits decline; unit sales to shrink for 2015*, APPLEINSIDER (Oct. 28, 2015, 9:27 PM), <http://appleinsider.com/articles/15/10/29/samsung-mobile-smartphone-profits-decline-unit-sales-to-shrink-for-2015>.

189. Bart Jansen, *Samsung Galaxy Note 7 banned on all U.S. flights due to fire hazard*, USA TODAY (Oct. 14, 2016, 3:46 PM), <http://www.usatoday.com/story/news/2016/10/14/dot-bans-samsung-galaxy-note-7-flights/92066322/>.

III. JEOPARDIZES US-EU RELATIONS

Global tax avoidance is one of the largest problems facing nations and requires global cooperation. US corporations are estimated to hold \$2.4 trillion in offshore accounts.¹⁹⁰ The majority of that money is estimated to either have been subject to no-tax or subject to 10% or less tax rates.¹⁹¹ The US and EU cannot reduce tax avoidance without collaborating with sovereign nations to adopt tax policies that are in line with the global economy. Many US government officials have formally condemned the Commission's decision against Apple.¹⁹²

A. *Discriminatory Targeting of US-Headquartered Companies*

The Commission is targeting US-headquartered corporations' tax structures in EU member states. The US Department of the Treasury (TRE) announced that it believed the EU was reaching into US corporations to take US tax revenue.¹⁹³ In addition, other sources have examined the Commission's investigations into US corporations' tax structures in EU member states as discriminatory litigation.¹⁹⁴ The Commission's investigations have targeted some of the largest corporations in the world.

Indicative of the Commission's discriminatory practices against US companies are its recent investigations into Google and Amazon. Google was previously the subject of investigations for antitrust and data privacy violations.¹⁹⁵ Currently Google is under investigation regarding three member states' tax policies: United Kingdom, Spain,

190. *Fortune 500 Companies Hold a Record \$2.5 Trillion Offshore*, CITIZENS FOR TAX JUSTICE (Mar. 3, 2016), <http://ctj.org/pdf/pre0316.pdf>.

191. *Id.*

192. John Engler, *EU Has Gone Too Far Targeting US Companies*, CNBC (Feb. 24, 2016, 12:32 PM), <http://www.cnn.com/2016/02/24/eu-has-gone-too-far-targeting-us-companies-commentary.html> ("While we recognize that state aid is a longstanding concept, pursuing civil investigations — predominantly against U.S. companies — under this new interpretation creates disturbing international tax policy precedents."); Naomi Jagoda, *Ryan: EU's \$14.5B Tax Ruling Against Apple 'Awful'*, THE HILL (Aug. 30, 2016, 2:28 PM), <http://thehill.com/policy/finance/293829-ryan-eu-tax-ruling-against-apple-awful> ("Slamming a company with a giant tax bill — years after the fact — sends exactly the wrong message to job creators on both sides of the Atlantic," Ryan said in a statement.)

193. Ali Breland, *Chamber Official: EU 'Targeting' US Companies*, THE HILL, (Sept. 1, 2016, 1:18 PM), <http://thehill.com/policy/technology/294125-chamber-official-eu-targeting-us-companies>; Rushe, *supra* note 176.

194. Breland, *supra* note 193.

195. European Commission Press Release IP/17/1784, *Antitrust: Commission fines Google €2.42 billion for abusing dominance as search engine by giving illegal advantage to own comparison shopping service* (June 27, 2017), http://europa.eu/rapid/press-release_IP-17-1784_en.pdf.

and France.¹⁹⁶ The Commission is concerned with a tax settlement agreement between the United Kingdom and Google requiring the latter to pay £130 million in back taxes, an effective tax rate of approximately 2.77%, which is well below the United Kingdom's 28% corporate tax rate; the Commission considers this to be state aid.¹⁹⁷ Google is also under investigation in Spain and France for alleged tax evasion on the basis of its corporate structure in those countries.¹⁹⁸ Google's offices in Madrid, Spain and Paris, France were raided in 2016 as part of the investigation.¹⁹⁹

Although Amazon has yet to have its offices raided, it too is under investigation for an alleged violation of state aid.²⁰⁰ The Commission is currently looking into Amazon's tax structure in Luxembourg. Under Project Goldcrest, Amazon shifts its revenues to its subsidiary in Luxembourg, Amazon Europe Holding Technologies (AEHT), through a series of intra-group transfers of intellectual property.²⁰¹ Amazon's other Luxembourg subsidiary, Amazon EU Sarl, pays large royalties to AEHT to avoid paying taxes on its own revenue.²⁰² AEHT then avoids paying taxes in Luxembourg by claiming it must pay a large licensing fee to Amazon for the use of intellectual property; the cycle then repeats.²⁰³ Following the investigation, Amazon changed its tax structure in Luxembourg to avoid future investigations.²⁰⁴

196. Kelly Couturier, *How Europe is Going After Apple, Google and Other U.S. Tech Giants*, N.Y. TIMES (Dec. 20, 2016), http://www.nytimes.com/interactive/2015/04/13/technology/how-europe-is-going-after-us-tech-giants.html?_r=0.

197. See Corporation Tax Act 2010, c. 4, Part 1, Chapter 2 (Eng.); *Corporate Tax Rates*, FIGUREWIZARD (last visited Aug. 25, 2017, 1:07 PM), <https://www.figurewizard.com/list-uk-corporation-tax-rates.html>; Daniel Boffey & Jill Treanor, *Google £130m UK Back-Tax Deal Lambasted as 'Derisory' by Expert*, THE GUARDIAN (Jan. 23, 2016, 5:05 PM), <https://www.theguardian.com/technology/2016/jan/23/google-uk-back-tax-deal-lambasted-as-derisory>.

198. Couturier, *supra* note 196.

199. Simon Goodley, *Spanish Tax Investigators Raid Google's Madrid Offices*, THE GUARDIAN (June 30, 2016, 7:29 AM), <https://www.theguardian.com/technology/2016/jun/30/spain-tax-investigation-raid-google-madrid-offices>.

200. Tax Analyst, *EU to Investigate Amazon Tax Ruling for state and breach*, EY (Oct. 2014), http://www.ey.com/lu/en/newsroom/pr-activities/articles/article_201410_eu-to-investigate-amazon-tax-ruling-for-state-and-breach; *EU Commission publish a decision on its state aid investigation into Luxembourg tax rulings issued to Amazon*, KMPG (Jan. 16, 2016), <https://home.kpmg.com/content/dam/kpmg/pdf/2014/11/etf-244.pdf>.

201. Simon Marks, *Amazon: How the World's Largest Retailer Keeps Tax Collectors at Bay*, NEWSWEEK (June 13, 2016, 5:10 AM) <http://www.newsweek.com/2016/07/22/amazon-jeff-bezos-taxes-479814.html>.

202. *Id.*

203. *Id.*

204. *Id.*

The Commission's investigations into US corporations has resulted in the US retaliating against the EU. The TRE and the IRS issued Notice 2016-52 addressing proposed regulations for foreign tax credits used to offset US tax obligations.²⁰⁵ The US is concerned that since the tax years the Commission is assessing are more than two prior to the current tax year, that US corporations will be able to offset current US tax obligations further reducing US tax revenue.²⁰⁶ This means that if the Commission continues to target US corporations and assesses back taxes on the basis of state aid, the US will have a windfall in tax revenue loss as a result of foreign tax credits.

To avoid the tax credit windfall, the TRE and the IRS are taking preemptive measures to reduce foreign tax credits. In doing so, the limited use of foreign tax credits could reduce foreign investment as US corporations may be faced with the prospect of paying double taxation on certain foreign earnings. Since both the US and EU cannot afford reductions in their respective economies, it is best that the CJEU rejects the Commission's decision assessing Apple owes €13 billion in back taxes; this would serve to discourage the Commission's attack against US corporations and, in turn, reduce further US retaliation.

B. *Hinders U.S. Repatriation*

When US multinationals' foreign operations earn money abroad, the foreign-based income is subject to US tax.²⁰⁷ However, the US will not tax the foreign revenue until it is repatriated to the US.²⁰⁸ To encourage US corporations to repatriate foreign revenue, the US Senate often proposes "repatriation tax holidays."²⁰⁹ Under the 2004

205. INTERNAL REVENUE SERVICE, NOTICE 2016-21 FOREIGN TAX CREDIT GUIDANCE UNDER SECTION 909 RELATED TO FOREIGN-INITIATED ADJUSTMENTS (2016).

206. *Id.* at 3 ("If accrued foreign taxes of a section 902 corporation are paid more than two years after the close of the taxable year to which such taxes relate, section 905(c)(2)(B)(i)(I) provides that such taxes are taken into account in the taxable year in which the foreign taxes are paid.").

207. 26 USC 901 (2014); see also *Tax Policy Center's Briefing Book: Key Elements of the U.S. Tax System*, TAX POL'Y CTR. (2016) [hereinafter *Key Elements of the U.S. Tax System*], <http://www.taxpolicycenter.org/briefing-book/how-does-current-system-international-taxation-work>.

208. TAX POL'Y CTR., *supra* note 207.

209. Javier E. David, *Tim Cook Addresses Apple's US Taxes, Says No Repatriation Without 'Fair Rate'*, CNBC (Aug. 14, 2016, 2:38 PM), <http://www.cnbc.com/2016/08/14/tim-cook-addresses-apples-us-taxes-says-no-repatriation-without-fair-rate.html>; see also Richard Rubin, *U.S. Companies are Stashing \$2.1 Trillion Overseas to Avoid Taxes*, ACCOUNTINGTODAY (March 5, 2015, 9:40 AM), <https://www.accountingtoday.com/news/us-companies-are-stashing-21-trillion-overseas-to-avoid-taxes>; Robert W. Wood, *Trump Tax Plan Could Impact 2016 Year-End Planning*, FORBES (Nov. 14, 2016, 9:06 AM), <http://www.forbes.com/sites/robertwood/2016/11/14/trump>

America Jobs Creation Act (AJCA), corporations were able to repatriate offshore profits while incurring only 5.25% tax liability instead of 35%.²¹⁰ The US Senate hoped that the lower repatriation tax rate would encourage US corporations to repatriate foreign money and re-invest in the US economy.²¹¹

Ultimately, the AJCA led to the repatriation of \$312 billion generating tax revenues of approximately \$ 16.38 billion.²¹² However, the long-term effect of the AJCA tax holiday was not known until 2011. The Joint Tax Committee estimated that the AJCA resulted in the loss of an estimated \$3.3 billion in tax revenue.²¹³ Additionally, the limited number of corporations that participated in the AJCA reduced their US workforce.²¹⁴ Although the Permanent Subcommittee on Investigations recommended against enacting additional repatriation tax holidays, repatriation itself is still feasible for the US.²¹⁵

Corporate tax reform is essential to successful future repatriations. Instead of the US granting short-term tax holidays, it needs to move toward comprehensive corporate tax reform. In doing so, proponents of such tax reform, including former President Barack Obama, hope Congress will close tax loopholes allowing US corporations to store profits in offshore tax havens.²¹⁶ This will cause US corporations to repatriate offshore profits and increase tax revenue. However, in doing so, proponents also argue for a reduction in the corporate tax rate to encourage further economic growth.²¹⁷

Whether the US solves its corporate tax repatriation problem will not matter if Apple is required to pay back taxes to Ireland. If Apple

tax-plan-could-impact-2016-year-end-planning/#1facb2fb530d (proposing an additional tax repatriation holiday under his administration).

210. CARL LEVIN, S. REP. PERM. SUBCOMM. ON INVESTIGATIONS, REPATRIATING OFFSHORE FUNDS: 2004 TAX WINDFALL FOR SELECT MULTATIONALS 10 (Comm. Print 2011).

211. CONFERENCE COMMITTEE, "AMERICAN JOBS CREATION ACT OF 2004," CONFERENCE REP. accompanying H.R. 4520, H.R. REP. NO. 108-755, at 314-15 (2004).

212. LEVIN, *supra* note 210, at 1.

213. *Id.*; see JOINT COMMITTEE ON TAXATION, JCX-69-04, Item IV.22, ESTIMATED BUDGET EFFECTS OF THE CONFERENCE AGREEMENT FOR H.R. 4520, "THE AMERICAN JOBS CREATION ACT" 10 (2004).

214. CONFERENCE COMMITTEE, *supra* note 211 (explaining that stock repurchases and executive compensation increased after repatriation).

215. *Id.*

216. Lindsay Drunsmuir, *Obama Urges Congress to Take Action on Corporate Tax Reform*, HUFFINGTON POST (Apr. 5, 2016, 1:18 PM), http://www.huffingtonpost.com/entry/obama-corporate-tax_us_5703e9c1e4b0a06d580701ce.

217. *Id.*; see also Zachary A. Goldfarb, *Obama Proposes Lowering Corporate Tax Rate to 28 Percent*, THE WASHINGTON POST (Feb. 22, 2012), https://www.washingtonpost.com/business/economy/obama-to-propose-lowering-corporate-tax-rate-to-28-percent/2012/02/22/gIQA1sjsdSR_story.html.

is required to pay Ireland the estimated \$14.5 billion in back taxes, that is revenue the US can no longer collect taxes on. Under US tax law, corporations are granted dollar-for-dollar tax credits for taxes paid on revenue abroad.²¹⁸ This allows corporations to avoid paying double taxes on international earnings. As a result, Apple will be able to take a credit to offset its US tax liability when it repatriates its Irish revenues.

Therefore, if the CJEU upholds the Commission's decision it may result in a windfall of tax revenue loss for the US. If the US is unable to collect the revenue upon repatriation, it will negatively impact the US-EU relationship. The TRE stated that the US may no longer honor bilateral tax treaties with the EU if the decision against Apple is upheld.²¹⁹ In addition, risking the relationship of both nations is the use of Apple's foreign earnings to finance the US Federal Government.

C. *May Reduce Apple's Investment in US Treasury Bonds*

The US has a financial interest beyond repatriation of Apple's Irish revenues. Apple is the parent corporation of Nevada-based Braeburn Capital, Inc. (Braeburn), which was incorporated in 2006 and is responsible for managing Apple's investments.²²⁰ One of Apple's largest investment is in US Treasury Bonds (T-Bond), which provide revenue to support the government's expenditures in return for interest income.²²¹ On Apple's annual 10-K report for the 2006 Fiscal Year it reported \$234 million in T-Bond investments;²²² ten years later, Apple's investment in T-Bonds was reported in excess of \$41 billion.²²³ Apple's purchase of T-Bonds is significant since the US possesses unsustainable debt.

Following the September 11, 2001 attacks, the US increased its spending, focusing on the wars in Iraq and Afghanistan without in-

218. 26 U.S.C. § 901 (2014).

219. Craig Rose, *The EU Takes a Bite Out of Apple: But is the Commission's Legal Analysis Flawed?*, BLOOMBERG BNA (Sept. 2, 2016), <https://www.bna.com/eu-takes-bite-b73014447171/>.

220. See APPLE, INC., FORM 10-K: ANNUAL REPORT (2006); NEVADA SECRETARY OF STATE, BRAEBURN CAPITAL, INC., <http://nvsos.gov/sosentitysearch/CorpDetails.aspx?l x8nvq=7JyakIER4jQ8UonRIZOPSw%253d%253d> (last visited Sept. 18, 2017); see also Tyler Durden, *Apple Owns the World's Largest Hedge Fund*, BUSINESS INSIDER (Oct. 3, 2012, 7:04 AM), <http://www.businessinsider.com/apple-owns-the-worlds-largest-hedge-fund-2012-10>.

221. APPLE, INC., *supra* note 220, at 83-84, 101.

222. *Id.* at Exhibit 21.

223. APPLE, INC., FORM 10-K: ANNUAL REPORT 49 (2016).

creasing taxes.²²⁴ As a result, US national debt has reached almost \$20 trillion causing scholars to debate the future of the US economy.²²⁵ As long as the US Government chooses to keep tax rates low and amass large amounts of debt, the sale of T-Bonds is an important aspect of the short-term financing of the US government. Just to put it into perspective, if Apple were a sovereign nation it would be the 27th largest holder of T-Bonds behind Mexico.²²⁶ So where does Apple's money to purchase the T-Bonds come from?

Braeburn uses money from Apple's Irish subsidiaries to buy T-Bonds.²²⁷ As the manager of Apple's investments, Braeburn manages money from Apple and its subsidiaries including AOE and ASI.²²⁸ Braeburn uses revenues from AOE and ASI to purchase T-Bonds, which are held in New York.²²⁹ In exchange for purchasing the T-Bonds, Apple receives interest payments from the US Federal Government, which are estimated at \$600 million to date, and are returned to its Irish subsidiaries.²³⁰ While this practice is extremely costly to the US Government, as it is not only incurring an obligation to Apple but also losing tax revenue from Apple's international revenues, as long as corporate tax laws are not reformed this system may be one of the few ways for the US Government to supplement its tax revenues.

CONCLUSION

The CJEU should reject the Commission's decision against both Ireland and Apple because the Irish tax rulings did not constitute state aid and the decision jeopardizes US-EU relations. By doing so, the CJEU will help encourage countries to turn to global economic cooperation efforts, such as the OECD and BEPS project, which will help harmonize tax laws over time. If the CJEU leaves the Commission's decision intact, the EU may face backlash from foreign corporations

224. Thomas Grennes, *Diminishing Quality of Fiscal Institutions in the United States and European Union*, 33 CATO J. 91, 95 (2013).

225. See James Lankford, *The National Debt's Long Shadow*, THE WASHINGTON TIMES (Nov. 27, 2016), <http://www.washingtontimes.com/news/2016/nov/27/there-are-20-trillion-things-that-have-not-changed/>; see also David R. Henderson & Jeffrey Rogers Hummel, *The Inevitability of a U.S. Government Default*, 18 INDEP. REV. 527, 530-31 (2014); Michael Tanner, *Is America Becoming Greece?*, 33 CATO J. 211, 211 (2013).

226. UNITED STATES DEPARTMENT OF THE TREASURY, MAJOR FOREIGN HOLDERS OF TREASURY SECURITIES (2017), <http://ticdata.treasury.gov/Publish/mfh.txt>.

227. Andrea Wong, *Americans are Paying Apple Millions to Shelter Overseas Profits*, BLOOMBERG TECH. (Dec. 7, 2016), <https://www.bloomberg.com/graphics/2016-apple-profits/>.

228. *Id.*

229. *Id.*

230. *Id.*

and governments. At a time when economic uncertainty lingers over both the US and the EU, it is imperative that countries work together to solve revenue and debt issues instead of embracing unilateral solutions.

BOOK REVIEW

PHILIPPE SANDS, *EAST WEST STREET: ON THE ORIGINS OF “GENOCIDE” AND “CRIMES AGAINST HUMANITY”*
(ALFRED A. KNOPF ED., 2016)

*Vik Kanwar**

In one of the final scenes of Phillippe Sands’s *East West Street*, the author stands upon the site of a mass grave where an entire branch of his family had been executed during the Holocaust, interred along with 3500 Galician Jews, including the families of the subjects of his book.¹ Having already sorted through some of their stories in detail, Sands finds in their entangled remains a metaphor linking their singular lives to their collective fate: “individuals each, together a group.”² This phrase, with all its intended duality, is also as close as the author comes to reconciling two competing legal narratives about the crime that consigned them to that grave: were they victims of “genocide” a crime aimed against a group, or a “crime against humanity,” a mass extermination of individuals? The book, which ends at this grave, begins with the discovery that the authors of these two legal concepts led parallel lives and careers on their way to these differing conceptions, and by the time they introduced these theories at Nuremburg,³ they had both lost their immediate family members to that same mass grave.⁴

East West Street, already the recipient of major literary awards and significant critical acclaim,⁵ is a milestone among recent writings

* Associate Director of International Programs, Southwestern Law School, Los Angeles.

1. PHILIPPE SANDS, *EAST WEST STREET: ON THE ORIGINS OF “GENOCIDE” AND “CRIMES AGAINST HUMANITY”* 372 (Alfred A. Knopf ed., 2016).

2. *Id.*

3. See Charter of the International Military Tribunal, Annex to the Agreement for the Prosecution and the Prosecution and Punishment of the Major War Criminals of the European Axis, art. 6, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279 [hereinafter Nuremburg Charter].

4. See SANDS, *supra* note 1.

5. James Douglas, *Philippe Sands donates his £30,000 prize to refugee charities – Baillie Gifford matches donation*, THE BAILLIE GIFFORD PRIZE FOR NON-FICTION (Nov. 18, 2016, 9:39

on international law, expanding the stylistic possibilities available to the discipline, even if its role in advancing substantive knowledge of legal topics is modest in comparison. It offers glimpses into intellectual history and legal history, and links these effectively to the immediate social and political stakes of the ideas and doctrines. What the book lacks has been covered elsewhere, both in scholarly texts⁶ and works intended for general audiences.⁷ What it adds, however, can be found nowhere else.

Sands, a leading human rights lawyer and international legal scholar,⁸ plots the book as a family memoir in the shape of a detective story, intercut with biographies of key individuals and the history of a region and a people. Despite its layers, the story can be summarized succinctly. Beginning in the period between the world wars, the lives and legacies of three Galician Jews and a Nazi officer intersected (even if they likely never met) in a provincial city that passed between regimes and nationalities over the last century.⁹ The stories of three of the men—Hersch Lauterpacht (1897-1960), the legal scholar who formulated the notion of “crimes against humanity,”¹⁰ Raphael Lemkin (1900-1959), the inventor of the term “genocide,”¹¹ and the author’s own grandfather Leon Bucholz¹²—proceed in parallel and primarily

AM), <http://thebailliegiffordprize.co.uk/news/philippe-sands-donates-his-%C2%A330000-prize-refugee-charities-%E2%80%93-baillie-gifford-matches-donation>; Daniel Martini, *Winners of the 40th Anniversary JQ-Wingate Prize 2017*, JEWISH Q. (Feb. 24, 2017), <http://jewishquarterly.org/2017/02/winners-40th-anniversary-jq-wingate-prize-2017/>; *British Book Award Shortlist Announced*, FOYLES (Mar. 15, 2017), <http://www.foyles.co.uk/news/British-Book-Award-Shortlists-2017-Announced>.

6. See, e.g., DOUGLAS IRVIN-ERICKSON, RAPHAËL LEMKIN AND THE CONCEPT OF GENOCIDE (2016); MARTTI KOSKENNIEMI, THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870-1960 (2001); Martti Koskenniemi, *Hersch Lauterpacht (1897–1960)*, in JURISTS UNROOTED: GERMAN-SPEAKING ÉMIGRÉ LAWYERS IN TWENTIETH-CENTURY BRITAIN 601 (J. Beatson & R. Zimmerman eds., 2004); WILLIAM A. SCHABAS, GENOCIDE IN INTERNATIONAL LAW: THE CRIME OF CRIMES (2009); Mira L. Siegelberg, *Unofficial Men, Efficient Civil Servants: Raphael Lemkin in the History of International Law*, 15 J. GENOCIDE RES. 297 (2013); Ana Filipa Vrdoljak, *Human Rights and Genocide: The Work of Lauterpacht and Lemkin in Modern International Law*, 20 EUROPEAN J. INT’L L. 1163 (2009).

7. See, e.g., SAMANTHA POWER, A PROBLEM FROM HELL: AMERICA IN THE AGE OF GENOCIDE (2002); GEOFFREY ROBERTSON, CRIMES AGAINST HUMANITY: THE STRUGGLE FOR GLOBAL JUSTICE (4th ed. 2013).

8. *Philippe Sands QC*, UCL FAC. L., <https://www.laws.ucl.ac.uk/people/philippe-sands/> (last visited Nov. 30, 2017); Lisa Appignanesi, *East West Street by Philippe Sands review – putting genocide into words*, THE GUARDIAN (May 22, 2016), <https://www.theguardian.com/books/2016/may/22/east-west-street-origin-genocide-crimes-against-humanity-philippe-sands-review>.

9. SANDS, *supra* note 1, at xi.

10. See Vrdoljak, *supra* note 6 at 1164, 1189.

11. *Id.* at 1164.

12. SANDS, *supra* note 1, at xiii.

in exile, in tragic contrast to the larger community and families they leave behind in the years before the Holocaust.¹³ The final character, the Nazi administrator Hans Frank, bears responsibility for the destruction of their families and community,¹⁴ which can be viewed either as an extermination of a massive number of individuals (a crime against humanity) or as a systematic crime against a people (genocide). The setting as much as the *dramatis personae* tells a complicated story about the recent history of international law. The city, in turns, Austrian, Polish, and Ukrainian, and alternately under the control of the Hapsburgs, nationalists, Nazis, and Soviets, has been known as Lviv, Lwow, or Lemberg; even if its residents had not crossed borders, the borders would have crossed them, repeatedly throughout the century.

The book elaborates on a lecture, published in a US law review, but originally delivered in Lviv itself at the very law faculty Lauterpacht and Lemkin both studied (but where, astonishingly, they had been largely forgotten).¹⁵ The earlier lecture explores some of the narrative possibilities of the present book; it sketches the main characters, with a few crucial differences. There, the accounts of Lauterpacht and Lemkin are limited to existing biographical accounts,¹⁶ without any of the additional archival research that enriches *East West Street*. Perhaps more significantly, the lecture provided an occasion for Sands to begin to uncover his own family history. Whereas the lecture intersects with Sands's journey as a lawyer, the book uncovers connections to his larger family, details which were at the time of the lecture unknown to Sands himself. He also exchanges Louis B. Sohn, another prominent international lawyer with origins in Lviv, for an antagonist Hans Frank. Though absent in the lecture, Frank is central to another Sands project, the documentary film *What our Fathers Did: A Nazi Legacy*, which relates the story of Lviv/Lemberg from the point of view of the sons of two Nazi officers involved in the atrocities, and in coming to a reckoning, leading Sands and his subjects inevitably to visit that same mass grave.¹⁷ Unlike the lecture and the film, in *East West Street* Sands brings doctrines back into the drama. Some of the most compelling discussions are not about the lives, but the

13. *Id. passim*.

14. *Id.* at xiii, 236-40.

15. Philippe Sands, *A Memory of Justice: The Unexpected Place of Lviv in International Law - A Personal History*, 43 CASE W. RES. J. INT'L L. 739, 739, 740 (2011).

16. E.g., JOHN COOPER, RAPHAEL LEMKIN AND THE STRUGGLE FOR THE GENOCIDE CONVENTION (2008); ELIHU LAUTERPACHT, THE LIFE OF HERSCH LAUTERPACHT (2010).

17. WHAT OUR FATHERS DID: A NAZI LEGACY (Wildgaze Films 2015).

worldviews leading to the formulations of two of the most significant concepts in international law and human rights discourse.

As expanded in the book, the characterizations of Lauterpacht and Lemkin remain consistent with the secondary sources, but a sharper contrast is drawn between them. Lauterpacht is steady, scholarly, and cautious to a fault in avoiding any appearance of overreaching into purely moral territory. Lemkin is impatient, obsessed and slightly tragic in his lack of self-awareness, qualities that befit a prophet nonetheless. So pronounced are these traits that we might miss the fact that Lauterpacht is a believer in natural law, and Lemkin in positivism. The former's caution and the latter's zeal act as checks against the excesses of their theoretical orientations. Without being reductive, Sands helps us understand the temperaments and commitments of the two men, and makes at least a basic case that each of the men derived their legal innovations from their respective views of individual dignity and community.¹⁸ Over the decades, their reputations and relative influence have waxed and waned. Lemkin had been taken less seriously among the tribe of international lawyers but has, in recent years, emerged as a hero of the human rights and anti-impunity movements, canonized in Samantha Power's prize-winning *A Problem from Hell*, and the subject of a number of biographies.¹⁹ Finally, in this book, their legacies are assessed side by side, and it is hard to believe that this has not been attempted earlier.

What hooks the reader early on is exactly what motivated the author to write the book in the first place—the striking coincidence that these significant doctrines should originate in a single provincial city in the center of Europe. How could two men living on opposite ends of a market street, far from the centers of power and influence, and schooled in the municipal laws of an obscure region, go on to develop ideas that have been so important to the 20th century and

18. Taking up two incredibly complex lives, Sands does not attempt to include every major life event or nuance of character. Instead, he foregrounds any aspect of their stories that would account for the genesis of their theories or, sometimes less convincingly, link them to each other. An example of the latter is the effort to locate a common ancestor or mentor to both men in their university days. SANDS, *supra* note 1, at 148-50. The effort bears fruit (in a way—the criminal law professor who taught both men is a provincial anti-Semite with no demonstrable link to the two theories). *See id.* Missing, however, are accounts of Lauterpacht's youthful Zionism, which might have added some complicating texture to the claims that Lauterpacht was opposed to nationalism in all its forms. Also brushed aside as irrelevant are Lemkin's various experiments with spirituality, and though a few guesses are made about his sexuality, the only identity that seems to interest Sands is an émigré with Galician Jewish roots, Leon. *Id. passim.*

19. SAMANTHA POWER, "A PROBLEM FROM HELL" AMERICA AND THE AGE OF GENOCIDE (2013).

beyond? As one learns more about the distinctive character of the region, the coincidences are less compelling. Indeed, one begins to get a sense that only in a place like this, in the near-periphery of great power realpolitik, could innovations take place. For one thing, this region was a laboratory of the interwar minority treaties, which continue to hold an ambivalent legacy in the later articulation of human rights.²⁰ For another, a number of intellectuals (ranging from theologian Martin Buber to the political economist Ludwig Von Mises) as well as international lawyers (such as Sohn or C.H. Alexandrowicz) walked these streets in the same years,²¹ and whatever ideas they formed in exile may well have taken shape in reaction to the fate of their homeland. Sands establishes Lemberg/Lviv as Vienna writ small, an outpost of the intellectual currents of the time. The unravelling empire was a halfway house between orthodoxy and pragmatism, tradition and experimentation,²² and a significant number of émigrés during this period left a mark on the past century of thought and practice. Still, there are certain elements of coincidence that remain difficult to ignore, and intriguing enough to puzzle over. The proximity of the notions “crimes against humanity” and “genocide” and the debate over their applicability to the very same acts is indeed striking, when we look at the parallels in the lives of their authors. Both Lauterpacht and Lemkin studied at the law faculty before emigrating and exerting an influence on the Nuremburg prosecutorial teams,²³ offering their differing conceptions of the crimes being committed in their city and beyond. Lauterpacht was involved in drafting the Nuremburg Charter along with his mentor Sir Hartley Shawcross and the American Robert Jackson,²⁴ who interacted with Lemkin as well. Lemkin attempted

20. See generally Nathaniel Berman, *A Perilous Ambivalence: Nationalist Desire, Legal Autonomy, and the Limits of the Interwar Framework*, 33 HARV. INT'L L.J. 353 (1992).

21. See C. H. ALEXANDROWICZ, *THE LAW OF NATIONS IN GLOBAL HISTORY* 3, 19 (David Armitage & Jennifer Pitts eds., 2017) (indicating that C.H. Alexandrowicz was born in “October 1902 in Lemberg”); Tamra Wright, *Martin Buber*, in 5 *TWENTIETH-CENTURY PHILOSOPHY OF RELIGION: THE HISTORY OF WESTERN PHILOSOPHY OF RELIGION* 91, 91 (Graham Oppy & N. N. Trakakis eds., 2014) (indicating that Martin Buber was born in 1878 in Vienna); Daniel Barstow Magraw, *Louis B. Sohn: Architect of the Modern International Legal System*, 48 HARV. L.J. 1, 3 (2007) (indicating that Louis Sohn was “[b]orn in Lwov in what was then Austria-Hungary” and that Sohn received degrees in science and law in 1935 while studying in Poland); Richard M. Ebeling, *Ludwig von Mises and The Vienna of His Time (Part I)*, FOUND. FOR ECON. EDUC. 24, 26 (Mar. 1, 2005), <https://fee.org/media/4449/ebeling0305.pdf> (indicating that Ludwig von Mises was born in Lemberg in 1881 and that he often wrote for *New Free Press*, a “Viennese newspaper . . . in the 1920s and 1930s.”).

22. See, e.g., PETER WATSON, *THE MODERN MIND: AN INTELLECTUAL HISTORY OF THE 20TH CENTURY* 26-38 (2001).

23. Vrdoljak, *supra* note 6, at 1168, 1185-86.

24. *Id.* at 1185-90.

to shape the views of the same prosecutorial team with more limited success.²⁵

The intellectual puzzle at the center of the book is the divergence between crimes against humanity and genocide. Both crimes were, as legal scholar William Schabas put it, “forged in the same crucible and were used at Nuremberg almost as if they were synonyms.”²⁶ Even today, to the non-specialist the terms will tend to converge. This is not the first time that the two have been in close proximity. In the crucial Article 6 of the Nuremberg Charter, a section titled “Crimes against Humanity” seems to subsume or preempt the scope of genocide:

murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.²⁷

But if genocide is subsumed under this section, the kind of intent Lemkin conceptualized is missing.²⁸ The word genocide was itself not included in Article 6, where it arguably belongs, but as count 3 of “war crimes,” which limited its intended meaning and its applicability.²⁹ Yet Nuremberg was not the end of the story. In December of 1946, the United Nations General Assembly passed two resolutions: Resolution 95, affirming that “crimes against humanity” were part of international law,³⁰ and Resolution 96 clarifying that genocide is “a crime under international law.”³¹ Subsequently, due to Lemkin’s efforts, the General Assembly adopted the Genocide Convention.³² Today, the two crimes sit co-equally in the Rome Statute of the International Criminal Court.³³

Sands dramatizes the stakes of choosing between the two doctrines by referring, wherever possible, to an unsubstantiated rivalry

25. *Id.* at 1191-92.

26. William A. Schabas, *Origins of the Genocide Convention: From Nuremberg to Paris*, 40 CASE WESTERN RES. J. INT’L L. 35, 53 (2007) (“The distinction only emerged because of the nexus with armed conflict that Nuremberg had imposed upon crimes against humanity,” which by the 1990s was dropped).

27. Nuremberg Charter, *supra* note 3.

28. Vrdoljak, *supra* note 24, at 1184.

29. Nuremberg Charter, *supra* note 3.

30. G.A. Res. 95 (I) (Dec. 11, 1946).

31. *Id.*

32. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951).

33. Rome Statute of the International Criminal Court art. 6, 25, July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002).

between Lemkin and Lauterpacht.³⁴ As a narrative device, this is satisfying enough. Doubtless, as Schabas has said, “over the decades that followed adoption of the Genocide Convention, the two concepts had an uneasy relationship.”³⁵ In Sands’s narrative, this uneasy relationship is projected upon Lemkin and Lauterpacht. What evidence is there that either man held any opinion of the other, negative or positive? Well, Lauterpacht had reviewed one of Lemkin’s books, with a cool and dismissive tone (we are told), and what’s more, he never referred to Lemkin by name, attributing the work to the organization that had commissioned the study.³⁶ The remaining evidence is adduced from stray comments, letters, and remembrances (particularly one by Eli, Lauterpacht’s son) that Lauterpacht may not have regarded Lemkin very highly and was suspicious from the start of the notion of “genocide.”³⁷ There is a quotation or two, but misgivings are either half-remembered, or attributed to Lauterpacht’s interlocutors, such as his mentor Sir Hartley Shawcross during the drafting and adoption of the Nuremburg Charter.³⁸ Shawcross wrote to Lauterpacht that the charter introduces allegations which “hardly pass the test of history, or indeed, of any serious legal examination.”³⁹ To fit the story, Sands needs the reader to believe Shawcross is referring to “genocide” and that Lauterpacht’s attitudes mirror his own skepticism. For Lemkin’s part, at Nuremburg, he served as adviser to the chief prosecutor, Justice Robert Jackson (one of the few men who worked with Lauterpacht as well).⁴⁰ We are told he was deeply disappointed that while reference was made to genocide in individual indictment, overall preference was given to the concept of crimes against humanity, which did not require proof of atrocity being committed against a particular group.⁴¹ The drama of rivalry, two upstarts from Lviv (a kind of *Wittgenstein’s Poker* on the outskirts of the same empire), is compelling in the sense that since the reader already knows the lives of the two men, there is a narrative investment in seeing each of them succeed, and a resulting tension when their goals are

34. See, e.g., SANDS, *supra* note 1, at 347.

35. Schabas, *supra* note 26.

36. See SANDS, *supra* note 1, at 109-10.

37. It is probably worth mentioning that Eli did not consider these details worthy of inclusion in his own biography of Lauterpacht. See generally LAUTERPACHT, *supra* note 16.

38. SANDS, *supra* note 1, at 116.

39. *Id.*

40. John Q. Barrett, *Raphael Lemkin and ‘Genocide’ at Nuremberg, 1945–1946*, in *THE GENOCIDE CONVENTION SIXTY YEARS AFTER ITS ADOPTION* 35, 44-45 (Christoph Safferling & Eckart Conze eds., 2010).

41. See *id.* at 45-47.

set in opposition. But this would of course be more convincing if the two men had at any point met or cited one another. Any such rivalry, conceivable or semi-fictional, is rendered partially moot in a world where it is rare to see any instances of an actual conflict between the two provisions in international law.

In the end, it is neither coincidence nor rivalry, but revelation that drives the narrative to its multiple, satisfying conclusions. Having set out early on the terms of possible coincidence, beginnings and common fates, along with significant divergences, each page is suffused with the possibility of revelation, and for stretches, every page delivers. Lemkin and Lauterpacht discover, only through their participation in the Nuremberg trials, the ultimate fate of their families.⁴² In this way, Sands is constantly one step ahead of his protagonists, but when it comes to the fate of his own family, Sands as detective and narrator is in lock step with the reader. Close kinship is established, photographs, and significant members of each of the families are separated from one another, and too soon, we see their lives end. The journey is complementary but self-contained, and takes full advantage of a story spanning decades and continents, pulling in a supporting cast ranging from novelist Stefan Zweig to bodybuilder Charles Atlas.⁴³ At the same time, from his intellectual forefathers, he draws a shorter line to his grandfather, who was not a lawyer (Sands never quite resolves what he actually did, smuggler or resistance fighter) but a silent witness to the destruction of his family. Following closely, one family member is born on the same street as the Lauterpachts and sees his end in the same concentration camp as the Lemkin family;⁴⁴ as coincidences stack up, we wonder whether this is due to intimacy of close community (numbering at 100,000 people) or the scale of mass extermination (3,500 on one day alone). What it all adds up to is the feeling that in narrating the story of his own family, Sands must make a choice between Lauterpacht's and Lemkin's characterization of this atrocity.

Finally, standing at the edge of a mass grave, with which intellectual forefather does Sands choose to stand? It would seem like Sands, in his commitments to human rights narrative and his distrust of the excesses of group identity, has a greater affinity for Lauterpacht⁴⁵ but by the time in the book the moment of choosing comes around, to

42. See SANDS, *supra* note 1, at 345-47.

43. *Id.* at 26, 76, 124-25, 287.

44. *Id.* at 346-47.

45. *Id.* at 365.

actually choose would seem graceless and unpoetic. So we are left with the felicitous phrase “individuals each, together a group,”⁴⁶ which is as evasive as Sands intends it to be. Readers taking pleasure in the arc of the book will not fault him for it. In the end, it is not faint praise to say the book’s greatest contribution is a stylistic one. Here it joins a handful of genre-bending experimental works covering international legal topics, from within the discipline⁴⁷ as well as outside,⁴⁸ rooted in memoir, anecdote, and aphorism. What is common to such works is the sense that one must not simply provide answers, but also seek new ways of pursuing them. In this important sense, the book’s formal accomplishments far exceed its limitations.

46. *Id.* at 372.

47. *See, e.g.*, PHILIP ALLOTT, *HEALTH OF NATIONS: SOCIETY AND LAW BEYOND THE STATE* (2002); DAVID KENNEDY, *THE RIGHTS OF SPRING: A MEMOIR OF INNOCENCE ABROAD* (2009). While much of what happens in law review articles is more diverse than what one might expect, book-length treatments of these issues remain steadfastly academic or quasi-academic in tone.

48. *See, e.g.*, SVEN LINDQVIST, *A HISTORY OF BOMBING* (Linda Haverty Rugg trans., 2003); LAWRENCE WESCHLER, *VERMEER IN BOSNIA* (2004).

