OPENING REMARKS*

Susan Westerberg Prager†
& Hon. George H. King††

DEAN SUSAN WESTERBERG PRAGER: It is my privilege to welcome you all, bright and early this morning, to Southwestern, Los Angeles' second-oldest law school. Southwestern was the conception of John J. Schumacher, a visionary twenty-five-year-old who, more than 100 years ago, wanted to create a law school that would take advantage of the most modern teaching methods of the day. He wanted Los Angeles to have a law school that used the case method, so he was innovative from the beginning, and we would like to think that we have continued that tradition ever since.

Equally important, he passionately wanted a place where every person who was intellectually capable could study law, regardless of their gender, their race, or whether they were immigrants. That sounds rather normal to us today, but it was not at the time. His commitment to access is symbolized by the fact that Southwestern's first graduate was female. And remember, this was before women could vote in federal elections, so this was a radical act. She began, during law school, working in L.A.'s then-brand-new public defenders' office. After she graduated and was licensed, she went to that office and became the first female public defender in the nation.

Because of his mission of access, Schumacher created a law school where people who worked during the day could go to school at night, and people who worked at night could go to school during the day. To this day, of course, we have a wide variety of programs that are designed to accommodate everyone's circumstances. This is a place that has been innovative. It is no accident that Southwestern has the longest running two-year accelerated J.D. program in the nation.

* What follows is an edited and annotated transcript of the live introductory remarks made by Dean Susan Westerberg Prager and Chief Judge George King on March 18, 2016 during the Southwestern Journal of International Law's symposium, "The U.S. District Court for the Central District of California, 1966-2016: International Context."

† Dean, Chief Executive Officer, and Professor of Law, Southwestern Law School.

†† Chief Judge, United States District Court, Central District of California.

Over the decades, successive generations of immigrants have studied here, and we are also very proud that Southwestern continues to be one of the most racially diverse law schools in the nation. It seems particularly appropriate to mention that it was Southwestern graduates who achieved a number of "firsts" related to the judiciary. The first one that I will mention is actually here today. Judge Ron Lew became the first Chinese American Federal District Court judge in the continental United States. The first Native American judge appointed in California is a Southwestern graduate, as is the first Latina trial court judge in the nation. The first African American appellate justice in the nation, who is female: the wonderful Arleigh Woods, who continues as a member of our board, and is a former chair of our board. I could go on and on. Of course, our graduates include the remarkable man who, while a police officer, attended Southwestern at night. He became the first African American to serve as mayor of a major American city, that was not Washington D.C., and remains to this day, Los Angeles' longest serving mayor, Tom Bradley.

It is also my privilege to welcome you to this remarkable building. Bullock's Wilshire was the conception of an innovative businessman, John Bullock, who through this site and this building created the first department store in the nation built in a suburb. Students laugh when I talk about this being a suburb, but I hope that you will come up to the dean's office today at some point, and come out on the terrace and look at downtown. And as you will see it is a very long New Yorker's walk to downtown, and no one in L.A. would think of walking it. I am told that there were some farm fields between here and downtown at the time the building was constructed. Southwestern, of course, has been amazingly sensitive to this 1929 art deco masterpiece.

My most important welcome today, by far, is to those who have made this symposium possible. I particularly want to thank the two groups recognized on your program cover. The academic co-sponsors include the Ninth Judicial Circuit Historical Society and the Huntington-USC Institute on California & the West. The bar sponsors include the Beverly Hills Bar, the Federal Bar Association's Los Angeles Chapter and the Orange County Chapter, the International Law Section of the Los Angeles County Bar, the International Law Section of the California State Bar, and, of course, the International Law Section of the ABA. We all owe a debt of gratitude to our law firm sponsors who have made it possible for a number of students to attend, and for many judges to attend—O'Melveny & Myers and Manatt Phelps & Phillips for their leadership gifts, and Hadsell Stormer & Renick,

DLA Piper, and Jones Day, for their significant gifts. We are very grateful to you all.

It is not an exaggeration to say that we would not be here together today without Professor Jonathan Miller. He is the person who remembered the vibrancy of the program a decade ago, celebrating the fortieth anniversary. He is a very determined man, as some of you know. He has worked hard and thoughtfully to bring this about. He had an important collaborator however, and I believe that we could not have done this without the Central District's Chief Judge, George H. King. Judge King has offered, at every turn, wise advice and comments, and I think he has taken some flack because the theme of the conference meant that the program would not be as inclusive of the specialized aspects of the Central District. However, in this world of ever-increasing globalization, we chose to focus on the international aspects, and to use them to think about the history of this vibrant region.

Chief Judge King came to the judiciary with quite broad experience. He has a combined eleven years of civil litigation in business matters and four years of criminal law experience as an Assistant U.S. Attorney. That criminal law experience came in during the midpoint of his private practice experience. As a judge, his colleagues and others have appreciated his potential for leadership and the realization of that leadership. For example, he has been appointed to serve on important committees, and to chair them, for the Ninth Circuit and the Judicial Conference.

After eight years as a magistrate judge, Judge King was named Chief Magistrate Judge. Just in a matter of months, President Bill Clinton appointed him as a Federal District Judge in 1995. Our only regret at Southwestern is that his judicial appointments caused him to be an adjunct at Southwestern only briefly in the period before the judiciary, so it is especially nice, in historical and other terms, to reconnect with him today. Judge King was an adjunct in our trial practice curriculum, and we are very grateful for his service to Southwestern's students.

In the fall of 2012, Judge King was elected Chief Judge of the Central District to succeed then Judge, now Justice Audrey Collins, who is on our program later today. While I am sure that Audrey—I should explain that I call her Audrey because long ago she was my student—was a tough act to follow, but it is clear to me that Chief Judge King has been, without question, more than up to that task. Chief Judge King.

CHIEF JUDGE KING: Thank you so much, Dean Prager. Those are exceedingly kind words. I hope there is a transcript so I can show it to my wife as proof. You know, actually, being Chief Judge isn't what it sounds like because if you are a presiding judge of the Los Angeles Superior Court, your colleagues actually have to like you and elect you in an open and fair democratic style election. Well, we don't do that kind of stuff in the federal court. You become Chief Judge because of age and seniority, and that is all there is to it; it is not some election. If I had to put it to an election, I'm sure my colleagues would never have chosen me, so it's a good thing that Congress took it out of their hands and provided it by statute.

Anyway, good morning everyone, and welcome to the symposium honoring the fiftieth anniversary of the United States District Court for the Central District California. On behalf of all the judges of the court, I would very much like to echo what Dean Prager said in thanking the academic bar association, and other private law firm cosponsors of this very important program. Even more importantly, on behalf of the judges, I want to thank Dean Prager, as well as Professor Jonathan Miller, Southwestern Law School, all of its students, faculty, and staff, and the Southwestern Journal of International Law.

Throughout the day, there will be various panels that will specifically discuss cases that have been adjudicated in our court that have international significance, including the "Kiki" Camarena case,[1] the Armenian Genocide victims insurance claims case,[2] the El Monte garment workers case,[3] and the "Don't Ask, Don't Tell" case.[4] You might think the Don't Ask, Don't Tell case was really about domestic policy, but frankly, it is very clear the broader implications of that case reach far beyond the borders of our country. We also have a panel that will talk about the enormous contributions that some of our judges have made to the cause of the rule of law and the value of an independent judiciary in foreign countries.

It is interesting that our district has had so many cases of international significance, but when you look at the location and the demographics of our district, it becomes a little easier to understand why we are a leader on the cutting edge issues of international impor-

1. United States v. Caro-Quintero, 745 F. Supp. 599 (C.D. Cal. 1990); Alvarez-Machain v. United States, No. CV 93-4072 SVW (SHx), 1999 U.S. Dist. LEXIS 23304 (C.D. Cal. Mar. 18, 1999).

2. Marootian v. N.Y. Life Ins. Co., No. CV-99-12073 CAS (MCx), 2001 U.S. Dist. LEXIS 22274 (C.D. Cal. Dec. 3, 2001).

3. Bureerong v. Uvawas, 922 F. Supp. 1450 (C.D. Cal. 1996).

4. Log Cabin Republicans v. United States, 658 F.3d 1162 (9th Cir. 2011).

tance. The Central District of California is the most populous and most diverse district in the country. We serve more than nineteen million people in our district, which is roughly half the population of the state of California. If our district were a state, we would be the fifth most populous state in the country, just behind California, Texas, Florida, and New York.

In terms of our jurisdiction, we go from San Bernardino County, to Riverside, to Orange, to Los Angeles, to Ventura, all the way up to Santa Barbara, and San Luis Obispo Counties (all covering more than 42,000 square miles, which is almost exactly the size of the state of Virginia). As far as diversity is concerned, we have people from virtually every country in the world. In some instances, the Central District is home to the highest concentration of people of certain heritages, outside their home countries. If you take a drive down the streets of the Central District, you are likely to run into places like Chinatown, Koreatown, Thai Town, Filipinotown, Little Bangladesh, Little India, Little Persia (also known as Tehrangeles), Little Saigon, Little Tokyo, among others.

Our cases reflect that diversity and highlight the intersection of, and conflict in and between, those cultures. But we always have been, and continue to be, well-suited to address those issues and cases, in part because our judiciary and our bench officers reflect the diversity of our district. Now, a lot has changed in the last fifty years in our district, and in a few moments, our first panel will explore some of those changes that have happened since our founding in 1966. We are incredibly lucky to have Judge Manuel L. Real on this first panel because he will be able to speak authoritatively about the history of our district, inasmuch as he was one of the original three judges appointed to the Central District in 1966—he is the only one of those three judges who still presides on our court. I am really looking forward to a wonderful day in this symposium. Thank you all for coming, and let's get going with our first panel.

PANEL DISCUSSION: THOUGHTS ON FIFTY YEARS OF CHANGES IN THE CENTRAL DISTRICT*

Marc M. Seltzer, Hon. Manuel L. Real & William Deverell†

I. INTRODUCTION

MARC SELTZER: I have the distinct privilege of introducing our first distinguished panelists who will be providing their observations about the changes the Central District of California has undergone over its first fifty years. Our first panelist is the Honorable Manuel Real, Chief Judge Emeritus of the Court. Following his service as the U.S Attorney for what was then the Southern District of California, Judge Real was nominated to the Court by President Lyndon Johnson on September 26, 1966 and received his commission on November 3, 1966. That kind of quick action by the Senate is both a testament to Judge Real, and perhaps a reminder of a different time in our country's history.

Judge Real, in addition to his service on the National and Ninth Circuit Judicial Councils and Conferences, served as Chief Judge of the Central District for ten years. He will soon complete fifty years of service as an active judge of the Court, which means his tenure almost perfectly overlaps with the entire history of the Court since it came into existence. Later this year, the Court will be holding a special ceremony to mark that truly amazing milestone.

Our second panelist is Professor William Deverell, who is Professor and Chair of the Department of History at USC, Judge Real's alma mater. He is also the Director of the Huntington-USC Institute on California & the West. Professor Deverell is a historian with a fo-

* The following is an annotated and edited transcript of live remarks made during the panel, "Thoughts on Fifty Years of Changes in the Central District." This panel was held on March 18, 2016 during the Southwestern Journal of International Law's symposium, "The U.S. District Court for the Central District of California, 1966-2016: International Context."

† Marc Seltzer, Esq., Past Chair and current Board Member, Ninth Judicial Circuit Historical Society; and Partner, Susman Godfrey LLP. Judge Manuel Real and Professor William Deverell's introductions and short biographies appear in Mr. Seltzer's opening remarks.

cus on the nineteenth and the twentieth century American West. He is a graduate of the Stanford and Princeton Universities, and has offered many important works on the history of California and Los Angeles, among other places. Of course, the Central District has seen truly remarkable changes since it was first established by an Act of Congress, enacted on this very day, fifty years ago.

I would first like to turn to Judge Real to begin the discussion with his observations about those changes from his very unique ringside seat. There is no one who has seen it like Judge Real has. Judge Real.

II. PANEL DISCUSSION

JUDGE REAL: Good morning, and for those of you who don't know—I doubt there are very few in this gathering—I am Manuel Real, a proud Federal District Judge who has served the United States District Court for the Central District of California. On behalf of the District Judges, the Magistrate Judges, the Bankruptcy Judges, and the Central District staff (all of whom are an important part of our court), I would like to thank Professor Jonathan Miller and Dean Susan Prager for the great program we have today to present to you.

I have been asked briefly to speak about my thoughts on fifty years of changes in the Central District. I guess I am the most qualified to do this since the Central District and I share the exact anniversary year of my time on the bench. Today, the Central District of California serves seven counties: Los Angeles, Orange, Riverside, San Bernardino, San Luis Obispo, Santa Barbara, and Ventura. With more than 19 million people, our population is by far the largest of any judicial district in the country.

With our enormous growth, we have had some pretty significant changes during those fifty years. Fifty years ago, California only had two judicial districts: the Northern District of California and the Southern District of California. In order to truly understand how large our district is today, it is good to note that in the year 1886, there was only one District Judge for the top half of California, and one for the bottom half. Los Angeles, at that time, was part of the Southern District, and by 1924—the year that I was born—there were only three District Court Judges assigned to the Southern District of California.

Of course, in the 1920s, Los Angeles County only had a population of less than one million, but by 1960, the number grew to over six million. In 1966, Congress, in its infinite wisdom (if we can call it that), created the Central and Eastern Districts of California. Los Angeles

was absorbed by the Central District, and the ten Southern District Judges were transferred to the new Central District. They were: Judges William Matthew, Thurmond Clarke, Albert Lee Stevens Jr., Charles Carr, Jesse Curtis, Avery Crary, Francis Whelan, Irving Hill, Andrew Hauk, and William Gray. Congress also appointed three more judges to the Central District: Judge Warren Ferguson, Judge Harry Pregerson, and myself.

This need for further division, and more judges, was largely due to the growing population, but many of these changes came as the result of the evolution of the Federal Bar, and the greater number of federal cases heard in this District. Most of my colleagues might not remember this, but in the years leading up to 1968, federal judges enjoyed the help of U.S Commissioners. The U.S. Commissioners were appointed by the District Courts and had the authority to try and sentence individuals for petty offenses. In 1968, however, the Federal Magistrates Act[1] abolished the Office for the U.S. Commissioner and replaced it with the Office of U.S. Magistrates, who carry much more jurisdiction than the Commissioners.

Similarly, prior to bankruptcy judges, we had bankruptcy referees who were appointed by the District Court. But after 1978, the Bankruptcy Reform Act[2] abolished the Office of Bankruptcy Referee, and established the now bankruptcy judgeships, which in 1978, were appointed by the Court of Appeals. This is strange because they have no relationship to our Bankruptcy Court, which we appointed in the first place. By 1990, the Central District of California served over fifteen million people, and was met with more cases of federal jurisdiction. Magistrate and bankruptcy judges have been important to the efficiency of our federal court system and play an ever-increasing role in the cases that come through the Central District by assisting with the jurisdiction and reports of bankruptcy judges.

Another change that I have seen over the decades involves the passing of the Sentencing Reform Act of 1984.[3] Prior to this, between 1970 and 1984, I had a program in my courtroom called "the 120-day program" for non-violent criminal defendants, through which I was able to sentence them to probation instead of prison time. To make sure that these defendants were keeping out of trouble, I ordered that

1. Fed. Magistrates Act of 1968, Pub. L. No. 90-578, 82 Stat. 1107 (1968) (codified as amended in 28 U.S.C. §§ 631-639 (2012)).

2. Bankr. Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (1978) (codified as amended in 11 U.S.C. §§ 101-112 (2012)).

3. Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (1984) (codified as amended in scattered sections of 18 U.S.C. and 28 U.S.C. (2012)).

they report to me personally every 120 days. I have been told that that program was a success, and of course, none of it would have been possible without the dedication of great probation officers. I personally saw the rehabilitation of hundreds of people in my courtroom. After the Sentencing Reform Act passed in 1984, I had to apply guidelines, which often provided for prison rather than probation, and were out of the hands of the judges of the court. I am pleased to say that some remnants of the 120-day program still exist today.

A couple of years ago, I received a letter from a man that I had sentenced in a fraud case. As part of his sentence, I ordered him to complete two years of volunteer work at the UCLA blood donation center. In his letter, he told me that after serving his court order, he continued to volunteer there for another sixteen years. I hope that we can find a way, once again, to connect with criminal defendants, and to assist them in the best we can in their path to rehabilitation.

Perhaps the most significant change I have experienced is the accessibility of legal documents on the computer. The shift from hardcover reporters to Westlaw and LexisNexis online has been incredible. Of course, I don't know how to use it, but my law clerks certainly tell me it's great, and I assume it is because I get many great reports from them that I have to deal with in my day-to-day. In 1966, my first year as a District Judge, not only did we not have the Internet, but we did not have computers. Instead, we had big, bulky typewriters, and everything we did was orally dictated and transcribed by secretaries; who are now called Judicial Assistants.

Today I am told you can just "Google it" (whatever that is), and that Google does it for us, I guess. As a result of these technological innovations, our district now uses the Internet for electronic filings. Many of you who are acquainted with me know that I highly value environmental cases. I have always discouraged lawyers from wasting thousands of pages of paper for frivolous filings or redundant declarations. A ton of paper is 17 green trees, and our district's shift to electronic filing has done tremendous work in reducing our district's environmental footprint. One unexpected consequence of electronics is a problem that pro se litigants now face—those with infrequent access to computers often fall behind and lose their cases at no fault of their own. Often, when you solve one issue, another presents itself. So I implore you all as lawyers, especially the young ones, to never stop searching for ways to improve our judicial system.

One change very dear to me during my fifty years on the bench has been the diversification of our federal judges. In 1969, three years

after I was appointed, the Central District added the first African American Federal Judge, west of the Mississippi, and that was Judge David Williams. Judge Williams actually had a fireplace put into his Spring Street chambers that, I am told, is still there today. Nine years after that, our first female judge, Judge Mariana Pfaelzer was appointed. We lost Judge Pfaelzer just last year after serving forty years on the bench. Today, many new and very bright women are now judges in the Central District. I have had the honor with working with some amazing people over the last fifty years, both judges and lawyers. It has been my privilege to serve the Central District of California, and I am confident that our judges, along with all of you, will lead this great district for the next fifty years. Thank you all.

MARC SELTZER: Thank you very much, Judge Real. There is no one who has your perspective, or your ability to see what has happened over the last fifty years. Now, I would like to ask Professor Deverell to add his comments to the discussion.

WILLIAM DEVERELL: Thank you. It is a real privilege to be here, just as it was to be involved ten years ago with the fortieth. Many thanks to Jonathan Miller and all the colleagues at Southwestern. It's a privilege to share the panel with Judge Real and Judge King. Note the astonishing changes in the fifty years, and in some respects, that is maybe the biggest takeaway—the demographic changes, and the social and cultural challenges. As historians, we try to provide a deeper context. So I thought what I would do with my remarks is to take a couple of leaps backward in fifty-year chunks, from 1966 back to the Progressive Era, and from that era back to the Civil War era to show the context of change in that long span of a century, perhaps a century and a half.

If we were to turn back a century before the founding of the court (the Civil War era), California became a state in 1850, and that regime change was fraught by the recent hostilities by the United States and the Republic of Mexico. It ended in 1848, and California moved into statehood with remarkable velocity, largely because of demographic changes provoked by the Gold Rush, as well as the gold itself. The 1850s and the 1860s, California is far removed from the theaters of war in the Civil War, but is remarkably affected by it.

Particularly here in the southern part of the state, northern and southern sympathizers were not at all friendly to one another, and the south makes a border attempt to punch across the Santa Fe Trail, and to come here in the 1850s during the war (largely in search of gold

coming out of the Sierras). In the 1850s, just prior to the outbreak of the Civil War, Los Angeles's violence (social, ethnic, and racial violence) was essentially a hangover from the Mexican War. The levels of violence in Los Angeles during this period were absolutely remarkable. I recommend to you all a new book by a colleague of mine who is a senior historian at Yale named John Faragher, called *Eternity Street: Violence and Justice in Frontier Los Angeles.*[4] It marks not only the unrelenting violence in Southern California at the moment of statehood, but the parallel tracks to establish judicial systems by brave individuals who tried to institute the infrastructure for adjudication of crimes, particularly of violence. Some landmark issues at stake there, in terms of establishment of judicial systems and oversight, revolve around the constant fight against vigilante movements. In many respects, the vigilantes of the 1870s and 1880s, who had been formed in a cauldron of violence, became the leaders of their day. Their roots in the vigilante movement were a part of their rise through the social networks.

If we move fifty years after that, Southern California during the Progressive Era was marked with individual acts of particularly brave, courageous, talented folks like Clara Foltz and the establishment of the first public defenders' office in the nation, the attempts to level the judicial playing fields, the establishment of urban democracies in the face of what they feared was the loss of the frontier, and the loss of that regeneration of democracy.

In Southern California, the Progressive Era (up to about 1920, or the rise of the Great Depression) was also marked with the establishment of infrastructural systems, largely for the delivery of power and water, and development of sophisticated transportation systems. The most marked developments in this era include: the paving of the Los Angeles River (for good or ill), the establishment of the Metropolitan Water District to tap the Colorado River; and the Los Angeles Aqueduct to tap the Owens River.

These are all fairly coincident acts. The Los Angeles River's paving, which sends the water out to sea, of course, is coincident with going to get the Owens River to replace it. It's a peculiar way to do business in a lot of ways, but Los Angeles was really good at that. That infrastructural system was established, in some respects, by the political and other leadership cadre's vision of the basin's growth, not quite to serve nineteen million people at the time, but to build the founda-

4. JOHN MACK FARAGHER, ETERNITY STREET: VIOLENCE AND JUSTICE IN FRONTIER LOS ANGELES (2016).

tion for what they self-consciously referred to as "the next century." So in this period, right up to today, much of the infrastructural systems that were laid into place, were built on a vision that the basin would in fact fill up, and they didn't even see the Second World War coming.

They recognized the attractions of Southern California, and they built the infrastructural landscape to absorb that kind of change. The Second World War of course does come. For all intents and purposes, the belief that Southern California is unplanned is wrong. Southern California is indeed planned. It's planned in suburban fealty to a smaller urban core, met by transportation linkages of largely the trolley system (Mr. Huntington's Pacific Electric and Los Angeles' Railway systems), but what happens in the Second World War and the aftermath is it fills in the emptiness between the suburbs and the urban core. It had the look of contiguous, unplanned chaos, but in fact, the separate suburban districts (and this building is classic for that) were planned as discreet, and the landscape filled in.

If we move towards the establishment of the District Court, and into the period of the 1950s and the 1960s, the Second World War is phenomenally important. Many historians teaching classes on California, or Southern California, will demarcate pre- and post-war as the absolute critical political-economic-demographic-munitions-manufacturing rupture. It makes a lot of sense. I am probably one of those who think that the Cold War is more important. The Cold War and the rise of the aerospace industry in Southern California is remarkable. Much that underlays the demographic growth of the post-war, or the 1950s and the 1960s, is employment in the aerospace and Cold War industries. For instance, in Burbank in the 1950s, Lockheed had ninety-six thousand employees working three eight-hour shifts by day—rising out of the Second World War, but continuing well into the Cold War—so that landscape is phenomenal.

At the establishment of the Court, in the mid-1960s, a period that is still, in many instants, in its infancy. For instance, housing covenants, miscegenation laws had only recently fallen away and school desegregation cases were just slowly picking up from *Brown v. Board*.[5] We had the LAUSD *Crawford* cases,[6] in Southern California, and the Pasadena cases[7] as well, but much tied to an earlier vision, or an ear-

5. Brown v. Bd. of Educ., 349 U.S. 294 (1955).

6. Crawford v. Bd. of Educ., 458 U.S. 527 (1982).

7. Spangler v. Pasadena City Bd. of Educ., 311 F. Supp. 501 (C.D. Cal. 1970); Jackson v. Pasadena City Sch. Dist., 382 P.2d 878 (Cal. 1963).

lier moment. The kind of infancy of that era is, in the legal system, trying to get its arms around an incredibly roiling and challenging demography. The mid-60s is, of course, marked by the Voting Rights Act,[8] the Civil Rights Act,[9] and immigration reform. The Immigration Reform Act[10] of the mid-1960s, underneath the great umbrella of society, is part and parcel to this breathtaking demographic and diversity change across the district, across Southern California, and all the way onto the Mexican border. That social and cultural demographic change is akin, in many respects, to what California had done in the 1840s and 1850s, which was to put itself on the map.

Northern California is the fastest growing metropolis in the history of the world. In Southern California, the growth is more countywide or multiple-countywide, and that growth in the post-Second World War period, the likes of which the country had never seen before, in many respects, is still continuing. The diversity of languages, and the diversity of social, cultural, ethnic, and national backgrounds have long been part of Southern California's history. In fact, it goes back to the incredible diversity of the indigenous peoples here, prior to contact. That diversity is only exponentially added to in the post-World War and post-Cold War period by virtue of the aerospace ingestion of brain-workers and others, as well as the continuing importance in Southern California of the oil industry (through the fairly recent past), and of course, Hollywood.

By the coming of the Great Depression, two of the five biggest industries that contributed to the United States GNP were the oil and film industries. Those were essentially brand new. Certainly, Hollywood was brand new, but oil had a little bit of a Pennsylvania background before it was found here. These industries rocketed the political economy here in the 1920s, but Los Angeles even before the 1920s was still an upstart place. It is entirely correct to visit the pre-war period as deeply agricultural. The San Fernando Valley was deeply agricultural well into the post-World War II period, but Hollywood and oil was beginning to draw an enormous workforce and created the cultural milieu for celebrity, fame, youth culture, et cetera. Aerospace, in some respects, was the next addition due to jet engine development at the tail end of the Second World War.

8. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (1965) (codified as amended in scattered sections of 52 U.S.C. (2012)).

9. Civil Rights Act of 1964, Pub. L. No 88-352, 78 Stat. 241 (1964) (codified as amended in scattered sections of 42 U.S.C. (2012)).

10. Immigration Reform Act of 1965, Pub. L. No. 89-236, 79 Stat. 911 (1965) (codified as amended in 8 U.S.C. § 1151 (2012)).

The aerospace diversification of the economy was profound. Aerospace created all kinds of globalization, surveillance, and secrecy issues that were oftentimes adjudicated in federal courts. We still have that. The aerospace industry is still here. It has migrated largely up to Palmdale and Lancaster, but now we have SpaceX and the other important private aerospace industries. That kind of generation of deep and profound change, accompanied by millions and millions of people of diverse backgrounds, led to the establishment of judicial systems that, in some respects, lagged behind a lot of the infrastructural growth that marked the 1920s.

The preparation for the delivery of services, and the legal community and legal frameworks will follow, in many respects. The fifty years of the distinction of the Court clearly shows us that many of those issues, collisions and conflicts, will find a place to be adjudicated in the Federal Court system. It is just a phenomenally interesting place. It is ever-dynamic, and trying to pigeonhole it in moments of rupture, or periodization, is almost always proven false. Thank you.

PANEL DISCUSSION: THE ENRIQUE "KIKI" CAMARENA MURDER AND ITS AFTERMATH*

Hon. Gary Feess, Hon. Robert C. Bonner, Paul Hoffman & Manny Medrano†

I. INTRODUCTION

JUDGE FEESS: Good Morning. My name is Gary Feess. I am a retired United States district judge for the Central District of California, and I will be moderating this panel today. This panel is going to discuss the prosecutions that arose from the kidnap, torture, and murder of Drug Enforcement Administration (DEA) Special Agent Enrique Camarena in Mexico. Our panelists are going to be Professor Arthur F. McEvoy,[1] Robert Bonner, Manny Medrano, and Paul Hoffman.

The Honorable Robert C. Bonner, whom I believe is most pertinent to today's proceedings, served as the United States Attorney for the Central District of California from 1984 to 1989. It was during that period that the U.S. Attorney's Office investigated and prosecuted some of the participants in the kidnap, torture, and murder of Enrique Camarena in Guadalajara, Mexico. In 1989, he was appointed to the United States District Court for the Central District of California where he served relatively briefly until President George H. W. Bush plucked him from the bench and appointed him as the Administrator of the DEA.

* What follows is an edited and annotated transcript of the live remarks made by selected panelists on March 18, 2016 during the Southwestern Journal of International Law's symposium, "The U.S. District Court for the Central District of California, 1966-2016: International Context."

† Judge Gary A. Feess, U.S. District Court, Central District of California. Introductions and short biographies for the included panelists appear in Judge Feess's introductory remarks.

1. Professor McEvoy's remarks have been omitted from the symposium transcript. His article, *The Martyrdom and Avenging of Enrique Camarena-Salazar: A Review of Caselaw and Scholarship After Thirty Years*, appears later in this issue.

Since then, he has served as Commissioner of the U.S. Customs Service, First Commissioner of U.S. Customs and Border Protection, a partner in Gibson, Dunn, and Crutcher, and a senior principal in the Sentinel HS Group, a homeland security consulting firm based in Washington, D.C. Judge Bonner received his undergraduate degree from the University of Maryland and his law degree from Georgetown University Law Center.

Manny Medrano is a graduate of Harvard Law School, which I guess means that he is the only panelist qualified to be on the Supreme Court, and a founding partner of Medrano and Carlton, a white collar litigation boutique in Pasadena. He served as a federal prosecutor in the United States Attorney's Office for the Central District of California for ten years. He was a lead prosecutor in the trials of defendants who were implicated in the Camarena murder. For his work, he was awarded the Department of Justice (DOJ) Director's Award for Superior Performance.

Since his departure from the U.S. Attorney's Office, he worked as a broadcast journalist and is an Emmy award winner in that capacity. He has served as an adjunct professor law of University of Southern California, Pepperdine, Loyola, and Southwestern Law Schools.

Paul Hoffman is a graduate of New York University School of Law and a partner at the firm of Schonbrun, DeSimone, Seplow, Harris and Hoffman. He represented Humberto Alvarez-Machain, one of the Camarena defendants in two different appearances before the United States Supreme Court. His legal career has included volunteer work at the American Civil Liberties Union (ACLU),[2] and a stint as the full-time legal director of the ACLU of Southern California. He has served two four-year terms on Amnesty International's nine-person international executive committee, and as chair and member of the Board of Amnesty International USA. He is presently the chair of the board of Innocence Matters, a local innocence project. Mr. Hoffman taught at Southwestern Law School early in his career and has since taught as an adjunct professor at the University of California Los Angeles, University of California Irvine, George Washington University, Loyola, and Stanford.

We are going to proceed this way. Judge Bonner will talk about the institution of the proceedings and details relating to that. Mr.

2. The American Civil Liberties Union is a non-profit organization that works "to defend and preserve the individual rights and liberties that the Constitution and the laws of the United States guarantee everyone in this country." *About the ACLU*, AMERICAN CIVIL LIBERTIES UNION, https://www.aclu.org/about-aclu (last visited Sept. 3, 2016).

Medrano will address questions and facts relating to the actual trials themselves, and then Mr. Hoffman will deal with the aftermath. Judge Bonner.

II. Panel Discussion

JUDGE BONNER: Thank you, Judge Feess. I am delighted to be here. I might note that since we are here to discuss the fifty-year history of the Central District of California, I actually began my legal career fifty years ago in the Central District of California as a law clerk to then-Judge Albert Lee Stevens, Jr. A few months after I became a law clerk, Judge Manny Real was appointed to the Court. I would like to note that Judge Real is the longest-serving active federal judge in the history of our nation. It is true and I know that because I just Googled it.

I will begin by providing you with a little bit of the background of the Camarena murder case. Right after DEA Agent Camarena was kidnapped off the streets of Guadalajara in February of 1985 by active duty Jalisco State Police in broad daylight (within two blocks of the U.S. Consulate), he was taken to a house at 881 Lope de Vega in Guadalajara where he was interrogated, tortured, and eventually murdered after about two days.

The DEA investigation of that case started right away because the first question was: "Where's our agent?" DEA and its then-Administrator who I succeeded, Jack Lawn, went to Mexico, demanding that the Mexican federal government find our Agent. We knew he had been kidnapped, but we did not know whether he had been murdered or was still alive. Suffice it to say that the government of Mexico, and I am probably understating this, basically stiffed the DEA. No information was provided to us about our agent's whereabouts. Nothing.

Jack Lawn went to the then-Commissioner of the United States Customs Service, Willy Von Raab, and asked, "Can you do anything to help here because I can't get any cooperation from the government of Mexico?" Von Raab said, "Well, I can do this. I can shut down the border with Mexico," and that is exactly what he did. For days nobody could come across from Mexico into the United States. That got the attention of the President of Mexico and the federal government of Mexico, I can assure you. And for reasons that later became clear, the Mexican government was able to tell the Guadalajara cartel: "You've got to produce the bodies here. You've murdered these people. You got to produce their bodies."

Shortly thereafter—about a week or two after the kidnapping—the cartel members of the Guadalajara cartel dug up the bodies. They were in a shallow grave about three feet deep in Primavera Park in Guadalajara. They dug up the bodies that had been wrapped in plastic shrouds. I say *bodies* because there were two bodies: the cartel also murdered a Mexican citizen named Zavala, the pilot for DEA Agent Camarena. They dug them up, drove them sixty-five miles south of Guadalajara to Zacatecas to a place called the Bravo Ranch, and dumped the bodies there. They blamed the kidnapping on the Bravo family, who were totally innocent, but of course to do that they murdered all five members of the Bravo family. Then, they said, "Well, we found the bodies. It must have been the Bravo family that killed your Agent. There he is." That is how we discovered the bodies. That is how we learned that Agent Camarena was dead.

By the way, there was some soil on the plastic shrouds. The Federal Bureau of Investigation (FBI) Forensics team, which was working with the DEA, identified soil samples that indicated that the bodies had never been buried at the Bravo Ranch. They had been buried at Primavera Park in Guadalajara. After the cartel members dug up the bodies and after they were forensically identified, ultimately the investigation revealed where the torture and the interrogation had taken place.

A few months later, Joyce Karlin and Jimmy Gurulé, two Assistant U.S. Attorneys (AUSAs) who worked for me during my time as the United States Attorney for the Central District of California showed up to my office and said, "Look, the DEA would like us to assist in the investigation of the kidnapping and murder of Agent Camarena. They'd like us to convene a grand jury and see what we can do to help them." Of course, that was a no-brainer for me. So I said, "Yes, we will do that and we'll staff as many AUSAs as we need to effectively investigate this case, and we will see if we can prosecute the people responsible for the murder of a federal agent."

We are here today to discuss this case because, in my view, it is probably the most significant criminal prosecution ever mounted in the history of the Central District of California, and it certainly was the most significant prosecution that I was involved in when I was the U.S. Attorney for the Central District. A DEA agent had been kidnapped and murdered in Mexico, and it was clear, I think, to everybody—certainly to the DEA and to the Justice Department—that the government of Mexico was both incapable and unwilling to bring to justice those responsible for Agent Camarena's murder in Mexico.

By the way, this was not too well known to the Mexicans, certainly not to the cartel members, but the murder of a federal official, a DEA agent, is a federal crime, a crime against the laws of the United States, no matter where in the world that crime is committed.[3] If just an ordinary American citizen gets murdered abroad, that is not a federal crime. You would need to depend solely upon the host government to do justice. If the murder is of a federal agent or official, then it is a federally prosecutable crime. For the law students here, Title 18 of the United States Code, Section 1114 is the federal crime, and Section 1117 makes conspiracy to commit murder of a federal agent or officer a federal crime.[4]

I believe that there are three reasons why the Camarena case[5] is significant. First of all, it was essential for the U.S. Government and the Department of Justice not to just thoroughly investigate this case, but to also indict everyone that we could determine was responsible for conspiracy to willfully and knowingly participate in the kidnapping or murder of Camarena.[6] It was important that we bring this prosecution and bring to trial all those that we could get into our custody.

The reason was not only to do justice for Kiki Camarena and the Camarena family. Of course, that was part of it, but it was more to it than that. Our prosecution was intended to send a message to criminal organizations that operated in Mexico, Columbia, and elsewhere in the world that you cannot just kidnap and murder a U.S. federal agent with impunity; something is going to happen to you even if your government does not take action. Our prosecution did much, in my opinion, to protect the lives of DEA agents, FBI agents, and other federal agents who serve our country overseas.

As the evidence developed through the grand jury and the DEA's investigation (dubbed Operation Leyenda), we were able to indict twenty-two defendants for conspiracy to kidnap and murder Agent Camarena.[7] Of those, we were able to get jurisdiction over thirteen, and twelve out of the thirteen were convicted by juries in the Central District of California.[8] The thirteenth, by the way, was Dr.

3. 18 U.S.C. § 1114 (2012).

4. 18 U.S.C. § 1117 (2012).

5. *E.g.*, United States v. Alvarez-Machain, 504 U.S. 655 (1992); United States v. Verdugo-Urquidez, 494 U.S. 259 (1990).

6. 18 U.S.C. § 1201(c) (2006).

7. United States v. Caro-Quintero, 745 F. Supp. 599, 602 (C.D. Cal. 1990); *e.g.*, Sixth Superseding Indictment at 7-28, United States v. Caro-Quintero, (CR 87-422(F)-ER) (C.D. Cal. 1989).

8. *See, e.g.*, United States v. Matta-Ballesteros, 71 F.3d 754, 760 (9th Cir. 1995) (affirming the appellant's conviction for his participation in the murder of Agent Camarena); United States

Alvarez-Machain, who was granted a Rule 29 motion,[9] or a judgment of acquittal, by U.S. District Judge Ed Rafeedie at the close of the government's case.[10]

By the way, I will just say that I know, and Manny probably knows this as well, that the jury would have convicted Dr. Machain in a nanosecond based upon the evidence presented to them. Some other defendants were tried with Machain and convicted, and in talking to the jurors after the case ended, they were surprised that they were not allowed to decide the Machain case, and that they would have found him guilty if given the chance. I have great respect for Judge Rafeedie, although he was also the judge who earlier had said that there was a violation of the U.S.-Mexico Extradition Treaty[11] and initially dismissed the case against Machain. That decision was reversed by the Supreme Court.[12] In sum, deterring further attacks on U.S. agents serving abroad is one reason the case was important.

The second reason is this: There were rumors going back to the 1980s of official corruption within the Mexican government, but the Camarena investigation and prosecutions established with compelling evidence that there was pervasive corruption at all levels of government. At the very highest levels of the Mexican government,[13] and the lowest (the Jalisco State Police) were all working for the cartel.[14]

I will not go into the corruption chapter and verse except to say this: The Camarena indictment included charges against the head of the Mexican Federal Judicial Police, Manuel Ibarra.[15] It indicted other major high-level players as well, including two *comandantes* (commanders): one of the Mexican federal police and one of the Federal Security Directorate (DFS), an intelligence agency for the Mexican government.[16] There was evidence presented that the governor of Jalisco at that time was a participant in the discussions of kidnapping

v. Felix-Gutierrez, 940 F.2d 1200, 1203 (9th Cir. 1991) (affirming the appellant's conviction of assisting the kidnapping and murder of Agent Camarena); United States v. Vasquez-Velasco, 15 F.3d 833, 837, 848 (9th Cir. 1994) (affirming the appellant's conviction of committing violent crimes in aid of a racketeering enterprise).

9. FED. R. CRIM. P. 29.

10. United States v. Caro-Quintero, 745 F. Supp. 599, 601 (C.D. Cal. 1990).

11. Extradition Treaty, May 4, 1978, U.S.-Mex., T.I.A.S. No. 9656.

12. United States v. Caro-Quintero, 745 F. Supp. 599, 601 (C.D. Cal. 1990), *aff'd sub nom.* United States v. Alvarez-Machain, 946 F.2d 1466 (9th Cir. 1991), *rev'd*, 504 U.S. 655 (1992).

13. Those indicted in the Camarena murder case included Mexican Federal Judicial Police Officers, an officer of the Directorate of Federal Security in Mexico, and a Jalisco State Police Officer. Sixth Superseding Indictment, *supra* note 7, at 5-6.

14. *Id.*

15. *Id.* at 4.

16. *Id.*

Agent Camarena.[17] There was evidence that implicated the ministerial level of the Mexican government, *Gobernación*, which is basically the ministry of the interior.[18] This case was important because it exposed not just the corruption, but also the symbiotic relationship that existed between organized crime, major drug trafficking organizations, and the Mexican government.

The third reason I believe this case is important is because it is the only case I know of that has resulted in three separate Supreme Court decisions: the two *Machain* cases[19] and the *Verdugo* case.[20] Those are, from a legal point of view, very significant cases.

I don't know whether this story has ever been told, but the importance of this case might have been lost because there was a pretty good chance that it would not have happened. Why was that? Because if you are the United States Attorney, in most federal criminal cases, you decide whether they are going to the grand jury for indictment. But in this case, there was a separate, parallel investigation being done by the U.S. Department of Justice's Criminal Division. They had convened a grand jury down in San Diego and had determined that they did not think they could successfully prosecute the case.[21] We had all the same evidence they did, but we looked at the evidence differently. Jimmy Gurulé, Manny Medrano, John Carlton, and I believed that there was enough evidence to get convictions here, and that we should be able to go on with this case.

Incredibly, the head of the Criminal Division at the time, Bill Weld, said, "No. We're not approving an indictment." I said, "Well, look, we're going to take this to a higher level, Bill. We're going to the Associate Attorney General," who at the time was Steve Trott. Jimmy Gurulé and I went back to Washington and gave a three-hour presentation. It was Jimmy Gurulé, the lead AUSA on the case for my office, who led the presentation and explained why we can prosecute and get convictions in this case and why the DOJ should not block our indictment of the case. Steve Trott, bless his heart, had a lot of faith in the AUSAs of the Central District because he was my predecessor as U.S.

17. Jim Newton, *Camarena's Abduction and Torture Described*, L.A. TIMES, Dec. 10, 1992, at B1.

18. *See id.* at B4.

19. United States v. Alvarez-Machain, 504 U.S. 655 (1992); Sosa v. Alvarez-Machain, 542 U.S. 692 (2004).

20. United States v. Verdugo-Urquidez, 494 U.S. 259 (1990).

21. *See* Ronald J. Ostrow, *U.S. Grand Jury Quietly Investigates Killing of Drug Agent in Mexico*, L.A. TIMES (Feb. 1, 1986), http://articles.latimes.com/1986-02-01/news/mn-2931_1_u-s-grand-jury.

Attorney. He agreed and gave us the green light, and we went forward with the indictments. I am still astonished that we had to go back to Washington, D.C. to get authorization from the Justice Department to indict this case. It was so important and so significant not only to us but also to U.S. law enforcement worldwide. Thank you.

JUDGE FEESS: Manny, why don't you tell us about the trials?

MANNY MEDRANO: My law partner is John Carlton and it is with great regret he could not join me here today. He is a great human being. He was my co-prosecutor and we were the two lead prosecutors on the Camarena murder case back in the day.

Let me first start by telling you that this case is very, very personal for me, but not for a reason that you would normally expect. You see, over seventy years ago my grandfather, Pasqual Andujo, my mother's dad, was a cop in a small town in Chihuahua. He was an aberration on the small police force because he was not a corrupt officer. He did not take *la mordida*, the bite. He did not accept bribes.

On September 12, 1945, my grandfather, Pasqual Andujo, was out for a walk when a murder suspect that he had been pursuing confronted my grandfather and shot him, killing my grandfather. This happened in a very small town, so in no time word reached his twelve-year-old daughter, Elisa, who was able to rush to his side as he lay mortally wounded bleeding to death on the sidewalk in this small town in Chihuahua. He died, with his last breath cradled in the arms of my mother, Elisa.

Now I share that with you because when I had the privilege of being approached by my bosses at the U.S. Attorney Office to take over and start running the Camarena case along with John Carlton. I jumped at it because this was a case that cried for and demanded justice. This was a case that required anyone involved in it to put in their all because so much was at stake. This horrific event took place on February 7, 1985. Enrique Camarena walks out of the DEA office, which is a very nice, touristy area in Guadalajara, where the American Consulate was located; an area that you and I back then would not hesitate to go and visit.

At two o'clock he was kidnapped in broad daylight by corrupt cops and bodyguards for the cartel. He was taken to the palatial home on the outskirts of Guadalajara and put in a small room in the back of the house, a room that had walls that were about a foot thick to better muffle the screams. Agent Camarena was tortured by the cartel for

about thirty-six hours and ultimately murdered. The death blow was (and this is what we told the jury, but to this day we are still not sure) delivered by a piece of steel rebar or a tire iron, which they used to drive through the top of his skull into his brain and then took it out, killing Agent Camarena.

Kiki Camarena left behind a wife and three boys. The oldest, Kiki Junior, just to share parenthetically, he is now a San Diego Superior Court Judge, just elevated to the bench very recently. We are all very proud of Kiki Camarena. About two dozen people were indicted. We caught a bunch and convicted virtually everybody except for Dr. Humberto Alvarez-Machain, who was granted a Rule 29 acquittal by Judge Rafeedie.[22]

Let me just tell you a couple of things that stood out for me when I reflected on this case before I joined you this morning. This whole thing is like an out-of-body experience because it was a while ago, and when you reflect on it, think about it, and read about it, you go, "Dang, I was part of that team." It is a very strange, strange feeling. But nevertheless, I have been very blessed with my career. I have done a bunch of different things, including broadcast journalism, but hands-down what I am most proud of was the stint as an AUSA and the privilege of working on this investigation.

If you have ever been in law enforcement and you are working up a dope case or a murder case in a foreign jurisdiction, what is paramount and critical is the development of confidential informants (C.I.s). No one was better at that than Kiki Camarena. No one was better at that than the team of DEA agents that we had working for us to try to pull together this investigation. No one was better at developing C.I.s. That ultimately led to the demise of Camarena because he was so extraordinary in developing these C.I.s who provided the information which then led to massive seizures of marijuana and cocaine, resulting in over a billion dollars loss of the cartel's important product. That is a lot of dough, a lot of value. They did not take that lightly.

The drug cartel based out of Guadalajara—which at the time was the leading and most profoundly violent cartel in the world—gathered, conspired, and then pulled the trigger on the plan: the unbelievably brazen act of kidnapping an American federal agent off the streets in broad daylight in Guadalajara. Something of that magnitude had never been considered by the "bad guys" before and now it had

22. Criminal Minutes, United States v. Caro-Quintero, No. CR 87-422(C)-ER (C.D. Cal. Dec. 14, 1992).

transpired. Rob Bonner has already shared the difficulties of trying to get this investigation off the ground, which was like pulling teeth because the Mexican government, God bless it, was pretty corrupt back in the day at the time of this investigation.

Once they finally allowed us into the torture chamber at the home where Camarena was being held captive and tortured, they had already gotten in and painted all the walls, cleaned up and vacuumed. It was by the grace of God and an extraordinary FBI forensic team that our guys were able to go in and find hair samples, carpet fibers, fabric, and bed sheets, which we later provided to the trier of fact and established that Kiki Camarena had been held captive and tortured at that particular residence.[23]

Without informants, this case would never have gotten off the ground. I have to acknowledge our lead agent, Hector Berrellez, who is now retired. I often tell people that if a guy like Hector Berrellez had been a law partner at Gibson Dunn, he would have been the top rain-maker because he had the most extraordinary people skills to be able to go out in the field, develop the confidence of a target confidential informant, bring them on board, and get them to say, "Yes, I'll come and testify before the federal grand jury in L.A., and I'll even go to the witness security program." That is hard to do.

These events took place back when we all used pagers. If your pager went off at 3:00 a.m. in your apartment in West L.A., which is where I lived, that was never good news. We lost about a dozen informants who were found and murdered by the cartel.

The collateral damage was through the roof in this case. I already mentioned a number of informants that were taken out by the cartel, but many other innocent lives were taken as well. A few people know, but I know Rob will remember, that we actually convicted a cartel member who was also tied into the Camarena case for the murder of two American tourists in Guadalajara, one week before Camarena was kidnapped and murdered. Alberto Radelat, a dental medical student who wanted to study in Guadalajara; and John Walker, a former Marine Vietnam veterinarian who walked with a limp because he stepped on a land mine in Vietnam in the service of his country.[24] Both these guys, God bless them, walked into a restaurant, "La Langosta," in Guadalajara where one of the drug leaders, Rafael Caro

23. Brief of Appellant at 9–10, United States v. Matta-Ballesteros, 71 F.3d 754 (9th Cir. 1995) (No. 99-50054).

24. United States v. Vasquez-Velasco, 15 F.3d 833, 833 (9th Cir. 1994).

Quintero, was holding a meeting with his team.[25] They mistook the two Americans for DEA agents and took them to the kitchen where they murdered both tourists after torturing them for three hours.[26] Collateral damage abounded in this case, and it was a very, very difficult prosecution.

Let me close by sharing three final points: Number one, and I am not here to suck up to Rob Bonner, but I think the world of him. We (myself and John Carlton) would not have been able to do that case and devote our energies and time without his support. We had death threats and twenty-four-hour U.S. Marshal protection for quite a while. We carried firearms. It was a very difficult period in our lives, but without the backing of Rob Bonner, who literally had our back in dealing with the DOJ, the politics, and the news media, this case would never have happened. John Carlton, myself, and the entire DEA team are very, very grateful to Rob Bonner.

Point number two, I speak a lot about this case to different groups. I have always called Camarena the "Jesus of DEA," and I will tell you why: it is because he died so that other federal law enforcement officers can serve abroad proudly in service of you, me, and our country, and can continue to do their jobs in hot spots, such as Cali, Guadalajara, and Mexico City. Bad guys will not go after them because they know if you touch a hair on the head of one of our agents, we will come after you with everything we have.

The last point is this. I love Judge Rafeedie; he is a great human being and a terrific judge, and I have always respectfully disagreed with him on the Rule 29 issue because as Rob Bonner just shared with you previously, I was there. I tried the case. I put on the case in chief along with my co-prosecutor, John Carlton, and there was an abundance of evidence to convict had that case gone to the jury. But this is our system. I respect Judge Rafeedie, and that was the result with that case.

It is a pleasure to be here with you today. Thank you.

PAUL HOFFMAN: Obviously, I am outnumbered here, but that is not an unusual position for me to be in. Given what Judge Bonner and Manny just talked about, I just want to start by saying that personally, I thought that an aggressive law enforcement action in this case was obviously appropriate—the killing of a DEA agent is serious business. There is no issue about that.

25. *Id*. at 838.
26. *Id*.

Why did I get involved on the other side of the Alvarez-Machain case?[27] At the time I was the legal director of the ACLU, and from our standpoint, we saw the kidnapping of Dr. Alvarez-Machain as a violation of the rule of law, a violation of basic international law principles, and a violation of the U.S.-Mexico Extradition Treaty. It was a question of "Are you going to adhere to the rule of law in conducting this investigation and in pursuing it or not?" The ACLU's mission, of course, on both in civil liberties and to some degree in the international human rights world, is to try to obtain that kind of adherence to principle, even in the toughest cases, such as the one discussed today.

Obviously, you have now heard why it is the toughest case. You now know why there were a lot of convictions. You know the passion involved, from the beginning of the case to the end. There was also passion in the Mexican population, for example. There was outrage in Mexico over the kidnapping. Not so much over the investigation, generally, but over the kidnapping of Dr. Alvarez-Machain.

The press talked a little bit about these cases, and I will say a little bit more about them. I was trying to think about what to say about the legacy of these cases. You heard the first one was *U.S. v. Alvarez-Machain*, where Judge Rafeedie enforced the U.S.-Mexico Extradition Treaty.[28] And in a sense, from our standpoint, enforced international law because one of the basic international law principles is that one country cannot exercise law enforcement jurisdiction in the territory of another country without its consent.[29] That is just what international law is. Every extradition treaty is based on that background principle.

However, I think that the decision in *U.S. v. Alvarez-Machain* just cannot be sustained on any basis of reasonable international law. But sometimes the United States has a very ambivalent attitude towards international law. The judiciary has an ambivalent attitude towards international law and that is kind of what we were up against in that.

From a legacy standpoint, one of the things I reflect on is, had we won, whether it would have mitigated, what I would view as, the excesses of the war on terror? I would like to think that there would have been less extraordinary rendition and there would have been

27. United States v. Alvarez-Machain, 504 U.S. 655 (1992).

28. United States v. Caro-Quintero, 745 F. Supp. 599, 614 (C.D. Cal. 1990), *aff'd sub nom.* United States v. Alvarez-Machain, 946 F.2d 1466 (9th Cir. 1991), *rev'd*, 504 U.S. 655 (1992).

29. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES ch. 1, subch. A, intro. note (AM. LAW INST. 1987).

more attention to international law in that context. But it was a different context and it might have played out exactly the same. But sometimes I also wonder whether if the Supreme Court had made a strong statement about international law in *U.S. v. Alvarez-Machain*, whether that would have mitigated at least some of those, what I view as, international law violations that our country committed in the furtherance of the war on terror.

The other case, which I think in a lot of ways leaves more of a legacy, is *Sosa v. Alvarez-Machain*.[30] You had both Judge Rafeedie and Judge Wilson finding that the kidnapping violated international law.[31] You had many Ninth Circuit judges finding that the kidnapping violated international law. There are some differences about the rationale, but basically, all the rulings in the Ninth Circuit were in favor of Dr. Alvarez-Machain on these issues,[32] notwithstanding the passion and the context in which it unfolded. We had a little bit more difficulty when we went upstairs.

In *Sosa v. Alvarez-Machain*, again, I view it another missed opportunity in a lot of ways. That case was mostly about the enforcement of the Alien Tort Statute (ATS),[33] which in short was part of the Judiciary Act of 1789.[34] It gives aliens the right to bring cases for torts committed in violation of the law of nations.[35] When Judge Rafeedie acquitted Dr. Alvarez-Machain, it was our view that this was an opportunity to try and obtain accountability under the Alien Tort Statute for those involved in the kidnapping of Dr. Alvarez-Machain. Not just in that case, but in a broader context. The hope was that we would be able to use the Alien Tort Statute in a broader way to enforce international human rights in U.S. courts.

Now I would also just note parenthetically that we were following in the lead of what Judge Real had done in the *Marcos* case.[36] The Marcos case had been tried in the early 1990s, and reached a final judgment in 1995.[37] We were bringing this case in the same spirit as those other cases, because those of us that were bringing cases against people like Marcos were being criticized for not bringing international law cases against U.S. defendants for their violations of international

30. 542 U.S. 692 (2004).
31. Alvarez-Machain v. Sosa, 266 F.3d 1045, 1050 (9th Cir. 2001).
32. *Id*. at 1049.
33. 28 U.S.C. § 1350 (1948); *see Sosa*, 542 U.S. 692.
34. Judiciary Act of 1789, ch. 20, § 9, Stat. 73, 77 (1789).
35. 28 U.S.C. § 1350.
36. *In re* Estate of Marcos Human Rights Litig., 910 F. Supp. 1460 (D.C. Haw. 1995).
37. *Id*.

law; that there was some kind of double standard in the work that we did.

And so, we saw this as an opportunity because the entire world viewed these events as an international law violation. I wish I had known in 1993 what I was getting myself in for; this was a fourteen-year process—we went from 1990 to 2004 altogether. When we got to the Supreme Court in *Sosa,* this was the first case that had been decided by the Court on the Alien Tort Statute, so it was breaking completely new ground.[38] I think everybody realized that this case was going to determine whether the Alien Tort Statute could be used to enforce international law in U.S. courts at all, whether it could be expanded, and whether it could be narrowed. We had against us the Administration at the time wanting to wipe out the Alien Tort Statute and limit it to something that was a historical artifact.

So from the standpoint of the Alien Tort Statute, the *Sosa* decision was somewhere in the middle. Justice Souter's opinion was something that basically said, "No, the Alien Tort Statute was not a historical artifact; the founders actually intended to enforce international law."[39] Exactly what they intended to enforce and how we would do it in the twentieth and twenty-first centuries was a little bit up for grabs. And so they used cautionary language that identified all the different factors about whether you would enforce claims or not, and they left it to future decision to really figure out how that would work.[40] The Court specifically cited, for example, to the *Marcos* case as saying that it offered a way that they agreed was appropriate for the Alien Tort Statute, and that you could go after people for torture and summary execution and disappearances.[41] You go beyond that to maybe some more peripheral norms like the one they found in this case.[42]

One of the things that is always odd when doing a Supreme Court case, and I have done enough of them to know this, is that by the time they write about your case, it does not really look like your case anymore. All through this case we were talking about the fact that he was abducted from Mexico, the trans-border aspects of this. And so, when I read the opinion, it sounded to me like the Court found the trans-border aspect irrelevant, and that it reduced this case to somebody

38. *See Sosa*, 542 U.S. at 712-38.

39. *Id.* at 724.

40. *Id.* at 732-33.

41. *Id.* at 732.

42. *See id.*

being arrested by someone that the plaintiffs claim does not have legal authority—like somebody in Boston who was arresting somebody in New Hampshire, or something like that. I do not remember talking about New Hampshire and Connecticut. We are talking about taking some guy from Mexico. And so, you looked at that and you thought, "Wow, did I do that bad a job of explaining what this was about?"

Now the other missed opportunity is that in 2004, when we were doing this case, the argument that the presumption against extraterritoriality applied to the Alien Tort Statute was viewed as a laughable argument. The Justice Department filed a brief that said that the Supreme Court did not even bother mentioning it; no one bothered mentioning it.[43] And unfortunately, in 2013, my latest foray upstairs, in the *Kiobel* case,[44] the Court has applied the presumption against extraterritoriality to the ATS.[45] But, the *Sosa* case is still the main case in the Alien Tort Statute world, and so, from a legacy standpoint, it has been cited about a thousand times at last count, it might be 2,000.[46] The literature on the ATS part of *Sosa* is enormous, probably more articles than there are cases.[47]

JUDGE FEESS: If you wondered, from your Supreme Court experience, if the case that came down was the case that you argued, now you know what it is like to be a District Court judge in the Ninth Circuit.

III. Questions & Answers

JUDGE FEESS: I have a question that I would like to put first to Rob and Manny because I want to quibble a little bit with one of your premises, or at least as things have developed in more recent times, and that is the notion of deterrence, which I think probably was successful for some period of time. I would raise the *Zapata* case,[48] which is now the subject of civil litigation in the Southern District of Texas under the Anti-Terrorism Act,[49] brought by victims of violence in

43. Reply Brief for Petitioner at 9, United States v. Alvarez-Machain, 504 U.S. 653 (1992) (No. 03-485), 2004 WL 577655, at *9.

44. Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659 (2013).

45. *Id.* at 1669.

46. As of August 30, 2016, a search on the Westlaw database shows that *Sosa v. Alvarez-Machain* has been cited by 855 cases with regard to the Alien Tort Statute. *See, e.g.*, Teva Pharmaceuticals USA Inc. v. Sandoz, Inc., 135 S. Ct. 831 (2015); *Kiobel*, 133 S. Ct.

47. As of August 30, 2016, there are 2,160 secondary sources on Westlaw that have cited *Sosa*, 542 U.S. 692.

48. Complaint, Zapata v. HSBC Holdings PLC (No. 1:16-cv-30) (S.D. Tex. Feb. 9, 2016).

49. Anti-Terrorism Act, 18 U.S.C. § 2331 (1992).

Mexico, including Immigration and Customs Enforcement (ICE) agents, Jaime Zapata and Victor Avila. Zapata was killed and Avila was severely injured while driving a consulate car.[50] I wonder whether or not the deterrent objective has withstood the test of time.

JUDGE BONNER: Well, that is a good point and Agent Zapata was an ICE agent who was murdered in Mexico by people who were associated with one of the cartels.[51] I think it was Los Zetas.[52] This happened about four or five years ago. It is not that long ago.

First of all, Agents Zapata and Avila were driving a black Bronco along the highway in Mexico. It was a U.S. government vehicle, but it is not entirely clear from my examination of the facts that they actually knew these were U.S. federal agents. I think the cartel members were actually after the Bronco just to steal it, but I cannot state for certain. But, if you are asking about deterrence, I do not think they were targeting Agent Zapata, as had been the case with Agent Camarena, and I think it was a fluky situation.

Secondly, I agree with you: deterrence flowing from a prosecution can last only so long, and I would say it can last for a generation and now we are passed that generation. The Mexican cartels—in particular, the Zetas, La Familia Michoacana, and so forth—are extraordinarily violent, evil people that are engaged in killing. So far, other than Zapata, however, there have been no other killings of U.S. agents in Mexico since Agent Camarena in 1985. I do not know how long it will last, but I do think for at least a couple of decades. The fact that we were willing to do a really extraordinary investigation and bring indictments, with the persistence of the DEA and the DEA Administrator Mr. Lawn was very important to this happening. The investigation of the Camarena kidnap-murder and the subsequent prosecutions sent a message that reverberated in Mexico.

And I will say this about the rendition of Dr. Machain as well. I prefer to call that not so much as a "kidnapping" of Machain, but rather a unilateral extraterritorial extradition. It may well have been considered kidnapping in violation Mexican law,[53] no doubt about that. But the legal question for the U.S. courts was whether bringing somebody to the United States under those circumstances deprived the U.S. courts of jurisdiction because the extradition treaty was vio-

50. *See* Complaint, *supra* note 48, at 37–38.

51. *See id*. at 37, 38.

52. *Id*. at 37.

53. *See S*osa v. Alvarez-Machain, 542 U.S. 692, 754 (2004).

lated.[54] In that respect, let me just say this, so everybody knows (and I know Mr. Hoffman knows this) that there had never been a single extradition under the 1907 U.S.-Mexico Extradition Treaty of a Mexican citizen to the United States in the history of that treaty as of 1990.[55] So it was clear that we were not going to obtain custody of any of the indicted defendants via the extradition process.

Now, there have been some formal extraditions of Mexican nationals since then, but there had not been a single one to that point of time, and almost all "extraditions," before that were informal extraditions. The Mexican government, through a police agency, would produce somebody at the bridge or push them through the fence. That is what happened in the *Verdugo* case.[56] The Mexican government never protested Rene Verdugo's informal extradition, although Verdugo was not formally extradited. He was literally brought to us at the border and handed over to us.[57]

Although I digressed a little bit from your question, I think the Camarena prosecution has had a lot of deterrence, but eventually people forget and drug cartels, and organized criminals forget too. I just hope that we do not have to repeat the exercise.

MANNY MEDRANO: I have a quick thought on deterrence: I completely agree with Rob Bonner that a generation has passed and perhaps the deterrent value is not as profound or significant as before, but let me tell you what would be a greater deterrence.

First, a little background fact. One of the bad guys that the Mexican government never gave us, and ultimately convicted by a Mexican court,[58] was Rafael Caro Quintero, a top drug cartel leader for the Guadalajara cartel back then. I think he served twenty-eight years of a forty-year term for drug trafficking (not for the murder of Camarena). He was then, not too recently, released under the radar by a low-level judge, which I would say, was done under cover of darkness because he is gone now and a fugitive from justice again.[59] The Mexican Su-

54. United States v. Alvarez-Machain, 504 U.S. 655, 658 (1992).

55. *See id*. at 659.

56. United States v. Verdugo-Urquidez, 939 F.2d 1341 (9th Cir. 1991), *vacated*, 505 U.S. 1201 (1992).

57. *See id*. at 1343.

58. *See* Associated Press, *Mexico Supreme Court Overturns Drug Lord Release*, USA TODAY (Nov. 6, 2013 7:34 PM), http://www.usatoday.com/story/news/world/2013/11/06/mexico-supreme-court-drug-lord/3459127/.

59. *Id*.

preme Court then says, "Oh, that was a mistake, maybe we can correct it now. Let's find him."[60]

Look, you want the best deterrent in the world for these bad guys that are doing what they are doing with abandon? Tell Mexico, "Give us the bad guys, we'll prosecute them in the United States court. A bad guy, a drug dealer, has no greater fear in life than facing the American Bar of Justice, because you cannot corrupt it; you can't pay a bribe to the judge to walk out the door. You're going to be convicted and you're going to do hard time in a federal maximum security facility in the United States." So, my thought is if you want continued deterrence, let's have more bilateral cooperation with the Mexican government. Give us these guys; give them to us. We have indicted them. Let us do our job.

AUDIENCE MEMBER: If, as Judge Bonner said, the jury would have convicted one of the defendants who was granted the Rule 29 motion in a nanosecond, could you give some insight on why the motion was granted? Secondly, the five members of the Bravo family were murdered. Do you have information on who murdered them? Were they Mexican government murderers who tried to ostensibly create this image that the Bravo family was involved in the killing of Agent Camarena?

JUDGE BONNER: I cannot remember the specifics involving the Bravo family, but maybe Manny does. From what I recall, the Bravo family killings may have been carried out by cartel members, but it could have also been the Jalisco State Police who worked for the cartel. But I am not sure we ever found out. We just knew that the Guadalajara cartel—Caro Quintero, Ernesto Fonseca, Felix Gallardo, and so forth—ran and directed it. But I do not really recall who specifically murdered the Bravo family.

In regards to the Rule 29 motion, you almost always get into trouble speculating why judges make a certain ruling. I would think that Judge Rafeedie—who I have always admired—looked at the evidence himself. This case had a long history. He had dismissed it once, it had gone up to the Supreme Court, and it came back down. But I think he genuinely thought that the evidence did not meet the Rule 29 standard. I knew Judge Rafeedie. He was a straight-arrow kind of guy and that that was his conclusion. We had twelve jurors who would have said, "No, we thought the evidence was sufficient." But look, a

60. *Id*.

federal judge has the prerogative to take a case from the jury in certain situations. There is a standard that they apply: whether they think a reasonable jury could reasonably convict on the evidence presented, and I think that is how he decided that a Rule 29 was appropriate. I will always think that he genuinely believed that the evidence was insufficient to permit the jury to decide. I will particularly think that because Judge Rafeedie is not here to defend himself if I said something else.

MANNY MEDRANO: I have a little bit of a different take. First of all, our evidence suggested that it was corrupt Mexican cops that took out the Bravo family and tried to tie it up to suggest that the Bravo family was responsible for Camarena's kidnapping and murder. Of course, they had nothing to do with it. They were truly innocent victims.

On the Rule 29 issue, many of you may know this, but double-jeopardy attaches when you lose that Rule 29 motion when you are a federal prosecutor. You have no appellate review.[61] That is all she wrote, all right? This is just Manny's personal opinion because I was there. I tried the damn case and put on our case in chief for the trier of fact. Let me just say that I love Judge Rafeedie. If we had to try that case over again, I would go back to Judge Rafeedie in a heartbeat because he was very fair with us. But I am of the belief that in his core, he had great difficulty with the concept of renditions and kidnappings. It just did not sit well with him. Ultimately, I think that was the engine driving the machine for his ultimate decision. How do I know? That is just my speculation and belief for what it is worth.

AUDIENCE MEMBER: I do not want to be misunderstood, so you should know that I was with the State Department when all this happened. I have close friends in the consulate in Guadalajara who were friends with Kiki. On the other hand, I would like to hear your opinion specifically about whether these decisions have now formed the basis for a lot of what we have done in the last several years, which today can be referred to as informal rendition. Granted, there was huge passion that was at stake with the Kiki case, but do you see what you did as part of a trend from where we are now and how we seem to just almost laugh at international law?

61. CHARLES A. WRIGHT & PETER HENNING, FEDERAL PRACTICE AND PROCEDURE: FEDERAL RULES OF CRIMINAL PROCEDURE 2A §469, at 384-85 (4th ed. 2009).

JUDGE BONNER: By the way, I am certainly not prescient so I was not thinking at all about 9/11 or renditions. Those aspects are interesting. Although there is a level of passion that surrounds the Camarena case, I would never suggest that the ends justify the means. That troubles me, and so how do you reconcile a unilateral rendition with the rule of law? But the reality is, if you want to talk about passion, one of the extraordinary renditions—I do not know whether the Pakistani government was consulted or concurred in it—was that of Khalid Sheikh Mohammed.[62] He was the master mind of the 9/11 attack and he was taken to one of the Central Intelligence Agency (CIA) places, I believe, and so forth. He was water boarded.[63] If that is torture under the law, it is torture. I do not know; I am an agnostic on that issue.

Leaving aside the issue of torture, was unilateral rendition a bad thing? That is a profound question in the sense that, as Paul Hoffman suggested, had the *Machain* Supreme Court decision gone the other way, then maybe it would have undermined the legal basis for later, post 9/11 renditions. Is it Professor Yoo who is up at Berkeley now? Maybe he would not have been able to write the memo when he was at the DOJ's Office of Legal Counsel that justified the renditions of 9/11 conspirators.[64] I do not know. In fact, that would be a wonderful discussion for about an hour program just to discuss the consequences, good, bad, or indifferent, of the Supreme Court decisions that flowed from the Camarena prosecutions.

Here is the thing: if you look at all difficult prosecutions, the important ones, you are likely to find law favorable to the government. I will just talk about the Ninth Circuit from *Carbo v. United States*[65] to the *Tokyo Rose* case[66]—they went up to the Ninth Circuit. They were hard cases because we wanted the conviction to be affirmed. And so

62. Khalid Sheikh Mohammed was a co-conspirator in the 9/11 attacks. After the attack, he was held at a CIA site by extraordinary rendition where he was water boarded along with other interrogation techniques. *See* Victor Hansen, *Use and Misuse of Evidence Obtained During Extraordinary Renditions: How Do We Avoid Diluting Fundamental Protections?*, 35 NOVA L. REV. 281, 283, 292 (2010).

63. *Id.* at 283.

64. *See* Memorandum from John Yoo and Robert J. Delahunty to William J. Haynes II, Gen. Counsel, Dep't of Def., *in* THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB 38-79 (Karen J. Greenberg & Joshua L. Dratel eds., 2005).

65. Carbo v. United States, 314 F.2d 718 (9th Cir. 1963) (rejecting the Appellant's argument regarding hearsay instructions and affirming the district court's decision that the jury did not have to make an independent finding that there was a conspiracy).

66. Iva Ikuko Toguri D'Aquino v. United States, 192 F.2d 338 (9th Cir. 1951) (holding that the defendant guilty of treason for aiding and comforting enemies of the United States through her radio broadcasts between 1943 and 1945).

almost all the favorable government law comes out of these kinds of hard cases. I saw Ken Starr argue the *Machain* case and did a wonderful job. On the narrow issue presented in *Machain*, I think the Supreme Court made the right ruling and I am going to leave to others to speculate on the long-term effect of the *Machain* case. I am sure, Paul, you probably think it has been a disaster, right, in terms of let's say, CIA renditions of international terrorists?

PAUL HOFFMAN: I think what it did in effect is that it undermined the fabric of international law. Certainly around the world it was viewed as the Supreme Court disregarding basic international law principles in the heat of the moment.[67] If I could just say one other thing, one other context of this, which I have always found interesting and probably important in the way *Sosa v. Alvarez-Machain* was decided, is that the panel decision affirming Judge Wilson's judgment that this violated international law came down on the morning of September 11, 2001. I remember getting a call from Henry Weinstein, a L.A. Times reporter, who I guess had not been watching the television, when he called and said, "You've won!" while I am sitting there, just witnessing the first tower going down.

I think that it transformed this case from one that had to do with the kidnapping of a Mexican doctor, albeit in that fashion and context, to a case with a much different context. It became a war on terror case. I think that part of the caution that the Supreme Court probably exhibited in *Sosa v. Alvarez-Machain* was because of this additional context we were living in the immediate aftermath of that attack.

JUDGE FEESS: Thank you, Paul. I want to thank the panelists for two things: one for the content of what they have said; and two, for demonstrating that notwithstanding whatever goes on in the political world, intelligent people with strongly held opposing views can speak to each other in civility.

67. *See, e.g.*, Hernan de J. Ruiz-Bravo, *Monstrous Decision: Kidnapping Is Legal*, 20 HASTINGS CONST. L.Q. 833, 835-37 (1993).

THE MARTYRDOM AND AVENGING OF ENRIQUE CAMARENA-SALAZAR: A REVIEW OF CASELAW AND SCHOLARSHIP AFTER THIRTY YEARS

*Arthur F. McEvoy**

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* Professor of Law, Southwestern Law School, Los Angeles, California. J.D., Stanford University, 1989; Ph.D. (History), University of California, San Diego, 1979. This Article grew out of remarks prepared for the Southwestern Journal of International Law Symposium, "The U.S. District Court for the Central District of California, 1966-2016: International Context," held at Southwestern Law School, Los Angeles, March 18, 2016. Thanks to Jonathan Miller and the members of the symposium panel for the opportunity to take part, and to the staff of the Southwestern Journal of International Law for their help in bringing the article to fruition. Mistakes and infelicities of style are my responsibility.

INTRODUCTION

This symposium celebrates the fiftieth anniversary of the creation of the U.S. District Court for the Central District of California, which serves seven Southern California counties and, with a population of over nineteen million people, is the largest and most diverse federal judicial district in the country.[1] Its heart is the city of Los Angeles, the second-largest city in the United States and a focal point of social change, not only for the country but for the entire world. The symposium's organizers built the program around a selection of internationally significant cases that have been litigated in the Central District Court. These include a suit in which heirs of people killed in the Armenian genocide of 1915 successfully recovered claims on more than 2,000 policies issued by the New York Life Insurance Company,[2] a series of civil and criminal cases that arose out of the enslavement of Thai immigrants in an El Monte garment factory,[3] and challenges to the constitutionality of the U.S. military's ban on openly lesbian, gay, or bisexual personnel.[4] A fourth panel concerned the murder of Enrique "Kiki" Camarena-Salazar, a Special Agent for the United States Drug Enforcement Administration (DEA) who was kidnapped and tortured by members of a Mexican drug cartel in 1985.[5]

The effort to bring Agent Camarena's murderers to justice left a deep imprint on the Central California District's institutional memory. The investigation, which was run out of the U.S. Attorney's Office in Los Angeles, was one of the largest in the DEA's history and "marked a turning point in the war on drugs," according to the agency's official history.[6] On the symposium panel were three of the principal actors in the case: Robert Bonner, who was both a U.S. Attorney for the Central District and DEA Administrator while the Camarena investigation went on; Manuel Medrano, an Assistant U.S. Attorney at the time who prosecuted the criminal cases to which the investigation led;

1. *The United States Attorney's Office, Central District of California: Our District*, U.S. DEP'T OF JUST. (Jan. 22, 2016), https://www.justice.gov/usao-cdca/our-district.

2. Henry Weinstein, *Insurer Settles Armenian Genocide Suit,* L.A. TIMES, Jan. 29, 2004, at B1.

3. *See* Teresa Watanabe, *Home of the Freed*, L.A. TIMES, Aug. 14, 2008, at A1.

4. Log Cabin Republicans v. United States, 658 F.3d 1162 (9th Cir. 2011); *see* John Schwartz, *U.S. Judge Halts 'Don't Ask' Law for the Military*, N.Y. TIMES, Oct. 13, 2010, at A1.

5. United States v. Alvarez-Machain, 542 U.S. 655 (1992); Chris Kraul, *From Torture to Terrorism*, L.A. TIMES, Feb. 26, 2015, at A2.

6. U.S. DRUG ENF'T ADMIN., DRUG ENFORCEMENT ADMINISTRATION 1985-1990, at 64, https://www.dea.gov/about/history/1985-1990.pdf; *see also* Jerry Seper, *Brutal DEA Agent Murder Reminder of Agency Priority*, WASH. TIMES (Mar. 5, 2010), http://www.washingtontimes.com/news/2010/mar/05/dea-has-25-year-burning-reminder/.

and Paul Hoffman, an American Civil Liberties Union lawyer who represented one of the defendants in the Central District, Ninth Circuit, and U.S. Supreme Courts. The investigation generated three appeals to the Supreme Court, the last of which was heard in 2004, nearly twenty years after Agent Camarena's death.[7] The thirtieth anniversary of the murder, in 2015, was the subject of observances in many parts of the country.[8]

The martyrdom of Enrique Camarena also left a significant impact on the American law of criminal procedure; that impact and the evolution of our understanding of it over time is the subject of this Article. The point to be made is that Camarena's death was tragic in the classical sense: he met his end while serving bravely and with integrity in a cause whose fundamental contradictions exposed him to danger. In Mexico, Camarena became a target because he was good at his job; official ambivalence toward his mission, however—from his own government as well as that of his hosts—both enabled the threat to grow and left him exposed to it.[9] The talented investigators and lawyers charged with bringing the murderers to justice likewise struggled under the contradiction between the worthwhile goal of avenging his death and the felt necessity to sacrifice, in the process, the rule-of-law principles for which he died.[10] Like any great tragedy, finally, Camarena's death raised important questions about the nature of American criminal justice: questions that have led scholars to new insights about our justice system as the response to his death changed it over time.[11] In the end, Agent Camarena's story leaves the rest of us both with a cautionary lesson about the risks of pride and, perhaps, a guide to reconciliation and renewal.

I. The Martyrdom of Enrique Camarena

Special Agent Enrique Camarena lost his life while working out of the DEA office in Guadalajara, Jalisco, Mexico; his job was to investigate and interdict the smuggling of marijuana into the United

7. United States v. Verdugo-Urquidez, 494 U.S. 259 (1990); United States v. Alvarez-Machain, 504 U.S. 655 (1992); *see* Sosa v. Alvarez-Machain, 542 U.S. 692 (2004).

8. Kraul, *supra* note 5; *see DEA Atlanta Office Observes 30th Anniversary of Slain Special Agent*, U.S. Drug Enforcement Admin. (Mar. 5, 2010), https://www.dea.gov/divisions/atl/2015/atl030515.shtml; *see 30th Anniversary: Red Ribbon Week Kicks off*, El Centro Chamber of Commerce & Visitors Bureau (Oct. 27, 2015), http://www.elcentrochamber.org/news/details/30th-anniversary-red-ribbon-week-kicks-off.

9. *See infra* Part I.

10. *See infra* Part II.

11. *See infra* Part III.

States.[12] An exceptionally large bust in November 1984 drew the ire of traffickers headquartered in Guadalajara, who kidnapped Agent Camarena on February 7 of the following year, interrogated him and one of his informants under torture for three days, and finally killed the two men and left their bodies where they would not be found until some weeks later.[13] U.S. and Mexican authorities responded to the crime immediately and energetically, although bureaucratic tangles and official corruption ensured that the investigation would not be as successful as it might have been.[14] Hindrances to the investigation were not peculiar to the particular case, but were intrinsic to the so-called "War on Drugs" in which Camarena was a soldier.[15] The investigation did, however, lead to a number of significant convictions,[16] as well as to a handful of appeals that worked their way through the federal courts and left important legal changes in their wake.[17]

A. The Abduction of "Kiki" Camarena

At the time of his murder, Special Agent Enrique Camarena-Salazar was thirty-seven years old.[18] He had a wife, Geneva, and three children.[19] Although born in Mexicali, Camarena graduated from high school in Calexico, California, and served two years in the Marine Corps.[20] After separating from the service as a corporal in 1970, he worked as a firefighter and a police officer in Calexico and as a drug investigator for Imperial County in nearby El Centro.[21] In 1974, Camarena went to work for the DEA, first at the agency's Calexico office and later in Fresno.[22] In 1981, the agency transferred him to its

12. *See* U.S. DRUG ENF'T ADMIN., *supra* note 6, at 63.

13. Seper, *supra* note 6.

14. U.S. DRUG ENF'T ADMIN., *supra* note 6, at 64.

15. The first "War on Drugs" was officially declared by President Richard Nixon in 1971. *See* Gary S. Becker & Kevin M. Murphy, *Have We Lost the War on Drugs?*, WALL ST. J., Jan. 5-6, 2013, at C1; Kraul, *supra* note 5.

16. *See, e.g.*, United States v. Zuno-Arce, 44 F.3d 1420 (9th Cir. 1995).

17. *See* United States v. Alvarez-Machain, 542 U.S. 655 (1992); Sosa v. Alvarez-Machain, 542 U.S. 692 (2004).

18. *Kiki and the History of Red Ribbon Week*, U.S. DRUG ENFORCEMENT ADMIN., https://www.dea.gov/redribbon/RedRibbon_history.shtml (last visited Oct. 26, 2016).

19. *Id*.

20. *Id*.

21. *Id.*; Roman Flores, *A Look into Slain DEA Agent Enrique Camarena's Story During Red Ribbon Week,* IMPERIAL VALLEY PRESS (Oct. 27, 2011), http://articles.ivpressonline.com/2011-10-27/dea-agent_30330461.

22. *Kiki and the History of Red Ribbon Week*, *supra* note 18.

Resident Office in Guadalajara.[23] Camarena was a good investigator and won several awards during his eleven years with the DEA.[24]

In November 1984, Camarena's investigation led to what one State Department official called "the Bust of the Century:"[25] DEA and Mexican officers raided a network of marijuana plantations in the state of Chihuahua and seized more than 10,000 tons of marijuana with an estimated value of $2.5 billion.[26] The plantations, which covered more than 700 acres and employed a workforce variously estimated at six or seven thousand, belonged to a ring based in Guadalajara. The *narco* in charge was Rafael Caro-Quintero, a thirty-two-year-old Sinaloa native who was one of the early leaders of the Mexican drug trade.[27] This was by some distance the largest drug seizure the DEA had made until that point: it uncovered an elaborate industry for growing, processing, and smuggling marijuana, whose existence had hitherto been unknown to U.S. officials.[28] It suggested not only that the DEA had grossly underestimated the amount of marijuana used in the United States, but also a need for the federal government to revise its statistical methods for estimating levels of drug production and drug use around the world.[29] In particular, it forced U.S. officials to reassess their position that they were making progress in controlling the drug trade, especially from Mexico.[30]

Three months later, on February 7, 1985, a group of men abducted Camarena from a Guadalajara street while he was walking from his office at the U.S. Consulate to meet his wife for lunch.[31] His captors took him to a private residence in Guadalajara, where they tortured and interrogated the agent over a thirty-hour period before

23. *Id*.

24. *Id*. The investigation of Camarena's abduction and murder is the focal point of Elaine Shannon's book on the War on Drugs. *See* ELAINE SHANNON, DESPERADOS: LATIN DRUG LORDS, U.S. LAWMEN, AND THE WAR AMERICA CAN'T WIN (2015); *see also* the memoir by James Kuykendall, JAMES KUYKENDALL, ¿O PLATA O PLOMO? "SILVER OR LEAD?" (2005).

25. The phrase was that of Jon R. Thomas, Assistant Secretary of State for International Narcotics Matters. *See* Joel Brinkley, *Vast, Undreamed-of Drug Use Feared*, N.Y. TIMES, Nov. 23, 1984, at A3; *see also* Jacob V. Lamar Jr., *The Bust of the Century*, TIME, Dec 3, 1984, at 26; *Kiki and the History of Red Ribbon Week*, *supra* note 18.

26. Brinkley, *supra* note 25; *Thirty Years of America's Drug War: A Chronology*, PBS, http://www.pbs.org/wgbh/pages/frontline/shows/drugs/cron/index.html#39 (last visited Oct. 26, 2016).

27. Brinkley, *supra* note 25; Kraul *supra* note 5; Juan Vasquez, *Mexican Tied to Agent's Death May Be Gone but He Isn't Forgotten*, L.A. TIMES, Apr. 2, 1985, pt. 1, at 10.

28. *Thirty Years of America's Drug War: A Chronology*, *supra* note 26.

29. Brinkley, *supra* note 25, at A3.

30. *Id*.

31. Richard J. Meislin, *U.S. Drug Agent Kidnapped*, N.Y. TIMES, Feb. 12, 1985, at A6; *Kiki and the History of Red Ribbon Week*, *supra* note 18.

killing him.[32] Alfredo Zavala Avelar, a pilot for the Mexican Agriculture Department and one of Camarena's informants was abducted later the same day and likewise interrogated under torture before being killed.[33] Testimony showed that officers of the Jalisco State Police took part in the abduction, that Caro-Quintero and other Guadalajara *narcos* planned and executed the murders in retaliation for the raids of the previous November, and that some half-dozen or more high-ranking Mexican political and law-enforcement officials were in the house during the interrogation.[34] A Guadalajara physician, Humberto Álvarez-Machaín, reportedly medicated Camarena so as to keep him alive and conscious during the three-day ordeal.[35] Camarena's and Zavala's bodies were first buried in Guadalajara and later moved to a rural area in the neighboring state of Michoacán, where authorities found them a month later in the wake of a shoot-out between police and the property owners.[36]

B. Operation Leyenda

The torture and murder of a U.S. federal law-enforcement agent was a shocking event, one that laid bare the dysfunction of both Mexican and U.S. efforts against the drug trade as much as the raids of the previous November uncovered the magnitude of the trade itself. Mexican authorities began arresting suspects within a few weeks of Camarena's abduction and eventually convicted some two dozen people in the case, including Rafael Caro-Quintero.[37] The DEA organized a task force under the name "Operation Leyenda," which worked on the case for several years, indicted another score of suspects, and ultimately secured convictions against fourteen of them in the U.S. District Court for the Central District of California.[38] In the end, the

32. Jim Newton, *Camarena's Abduction and Torture Described*, L.A. TIMES, Dec. 10, 1992, at B1; Seper, *supra* note 6.

33. Marjorie Miller & Juan M. Vasquez, *DEA Agent, Pilot's Bodies Positively Identified*, L.A. TIMES, Mar. 8, 1985, pt. 1, at 3; *Body of U.S. Drug Agent Believed Found in Mexico*, L.A. TIMES, Mar. 6, 1985, pt. 1, at 1.

34. Juan M. Vasquez, *Mexican Police Drug Link Told*, L.A. TIMES, Mar. 19, 1985, pt. 1, at 1; Newton, *supra* note 32.

35. Kraul, *supra* note 5.

36. William A. Orme Jr., *Body of DEA Agent Is Found in Mexico*, WASH. POST (Mar. 7, 1985), https://www.washingtonpost.com/archive/politics/1985/03/07/body-of-dea-agent-is-found-in-mexico/58bd7a28-57bf-4eb3-931f-0a64dc5fcf12/; Newton, *supra* note 32, at B3; U.S. DRUG ENF'T ADMIN., *supra* note 6, at 63.

37. U.S. DRUG ENF'T ADMIN., *supra* note 6, at 64.

38. *Id*.; Tracy Wilkinson, *DEA Agent 'Kiki' Camarena's Mexico Slaying Called a Game Changer*, L.A. TIMES (Aug. 9, 2013), http://articles.latimes.com/2013/aug/09/world/la-fg-wn-dea-agent-killing-a-game-changer-20130809; Kraul, *supra* note 5, at A2. The Spanish word *leyenda*

response was less successful than Camarena's friends might have wished, limited as it was by tensions between U.S. and Mexican authorities as well as within the U.S. legal system itself — tensions that the Camarena investigation exacerbated but did little to resolve.[39]

Mexican authorities quickly arrested seven present and former officers of the Jalisco State Judicial Police for the kidnapping of Agent Camarena; one of the suspects died under interrogation for undisclosed reasons.[40] Testimony from the arrested officers showed that the Jalisco state police "functioned as a private army for narcotics traffickers in Guadalajara," and were, in the words of *The Los Angeles Times*, "virtually at the beck and call of the drug dealers," who "were, in effect, the real bosses of the state police."[41] Although DEA and Mexican authorities had already identified Caro-Quintero as a likely suspect, Mexican federal police allowed him to escape to Costa Rica after a brief standoff at the Guadalajara airport, two days after the kidnapping.[42] With the help of DEA investigators, Costa Rican police arrested Caro-Quintero and returned him to Mexico, where in 1989 a Guadalajara criminal court sentenced him and twenty-four others to prison for their roles in the Camarena killing: Caro-Quintero and his lieutenant Ernesto Rafael Fonseca-Carrillo to forty years and the others to lesser sentences.[43] To the outrage of U.S. officials, another Mexican court ordered Caro-Quintero's release in 2013, on the ground that he had been improperly tried in federal rather than state court.[44] Although the Mexican Supreme Court reversed the ruling, Caro-Quintero disappeared immediately after walking out of prison

can mean either "legend" or "lawman," depending on the context. NEW REVISED VELÁZQUEZ SPANISH AND ENGLISH DICTIONARY 427 (1985). For an overview of the "Operation Leyenda" task force, *see* Paul Lieberman, *Camarena Case Spotlight Shifts to L.A. Unit's Tactics*, L.A. TIMES, May 7, 1990, at A1.

39. Kraul, *supra* note 5, at A2.

40. Vasquez, *supra* note 27.

41. Juan M. Vasquez, *Mexican Police Drug Link Told*, L.A. TIMES, Mar. 19, 1985, at 1.

42. Ronald J. Ostrow & Paul Houston, *Camarena Case Suspect Caught in Costa Rica*, L.A. TIMES, Apr. 5, 1985, at 1.

43. *See id*. Caro-Quintero's total sentences in relation to convictions of kidnapping, drug trafficking, and weapons smuggling added up to 116 years, but the court ordered concurrent service of sentences due to a Mexican constitutional provision that prohibits terms longer than 40 years for a single conviction. Hector Tobar, *Drug Lord Convicted in Camarena's 1985 Murder*, L.A. TIMES, Dec. 13, 1989, at A3.

44. Randal C. Archibold & Karla Zabludovsky, *Mexican Tied to Killing of D.E.A. Agent Is Freed*, N.Y. TIMES, Aug. 10, 2013, at A4; Peter Baker & Randal C. Archibold, *U.S. Asks for Arrest of Mexican Kingpin Who Was Freed in American's Murder*, N.Y. TIMES, Aug. 14, 2013, at A8; Randal C. Archibold, *U.S. Officials Return to Pursuit of 1985 Killer of American Agent*, N.Y. TIMES, Aug. 28, 2013, at A4.

and remains a fugitive at the time of this writing.[45] Corruption in Mexican law enforcement hampered the efforts of both Mexican and U.S. agencies to prosecute the Camarena murder; Robert Bonner, who led the investigation as U.S. Attorney for Los Angeles, remembered that "[t]he Mexican government was either unwilling or unable to investigate or bring to justice those involved" in the case.[46]

U.S. prosecutors were likewise frustrated by their inability to secure Mexican cooperation in the extradition of suspects for trial in U.S. federal court.[47] First to go to trial, before Central District Judge Edward J. Rafeedie in July 1988, were Raul López Álvarez and René Verdugo-Urquídez in connection with the kidnap and murder of Agent Camarena, and Jesús Felix Gutiérrez for helping Caro-Quintero escape to Costa Rica immediately after the abduction.[48] On his conviction after an eight-week trial, Judge Rafeedie sentenced Verdugo, a "top lieutenant" to Caro-Quintero, to a total of 240 years in prison.[49] López-Álvarez, a state police officer, likewise received 240 years, while Gutiérrez drew a ten-year sentence.[50] These were the only three of nine people indicted in the first round whom prosecutors were able to bring before the court. The others, including Caro-Quintero himself and another leading Guadalajara *narco*, Ernesto Fonseca Carrillo, were all in Mexican custody on charges stemming from the Camarena abduction.[51] At trial, the three convicted men alleged that Mexican officials, from the state police to the highest levels of govern-

45. Karen McVeigh, *U.S. 'Deeply Concerned' over Freeing of Mexico Drug Lord Rafael Caro Quintero*, GUARDIAN (Aug. 11, 2013 3:14 PM), https://www.theguardian.com/world/2013/aug /11 /mexico-frees-drugs-rafael-caro-quintero; Baker & Archibold, *supra* note 44; Tracy Wilkinson, *Fugitive Drug Lord to Mexican President: Reject U.S. Extradition Bid*, L.A. TIMES (Dec. 3, 2013), http://articles.latimes.com/2013/dec/03/world/la-fg-wn-fugitive-drug-lord-mexico-president-20131203; *Veteran Drug Lord Still Trafficking After Prison Release, US Treasury Says*, GUARDIAN (May 11, 2016, 4:52 PM), https://www.theguardian.com/world/2016/may/11/rafael-caro-quintero-resumed-drug-trafficking-mexico; *World Briefing: Mexico: Fugitive Denies Tiff with Cartel*, L.A. TIMES, July 25, 2016, at A5.

46. Kraul, *supra* note 5; Mary Thornton, *Drug Slaying Embitters U.S. Agents*, WASH. POST (Mar. 18, 1985), https://www.washingtonpost.com/archive/politics/1985/03/18/drug-slaying-embitters-us-agents/d884df3a-de2b-4d2b-84e8-7a71c55772ad/.

47. Kim Murphy, *Suspects in DEA Slaying Charge Massive Cover-up*, L.A. TIMES, July 29, 1988, at 3.

48. *Trial Opens in Death of Tortured Drug Agent*, N.Y. TIMES, July 31, 1988, at 25.

49. Kim Murphy, *Mexican Drug Figure Found Guilty in Death of U.S. Agent*, L.A. TIMES, Sept. 27, 1988, at 3; Edward J. Boyer, *Drug Trafficker Gets Life Plus 240 Years in U.S. Agent's Killing*, L.A. TIMES (Oct. 28, 1988), http://articles.latimes.com/1988-10-28/local/me-320_1_drug-trafficker.

50. Paul Feldman, *Camarena's Killer Gets 240-Year Prison Term*, L.A. TIMES, Oct. 29, 1988, Metro pt. 2, at 1; Tobar, *supra* note 43.

51. Feldman, *supra* note 50; *see Ernesto Fonseca Carrillo, Another Mexican Drug kingpin in DEA Killing, May Go Free, Lawyer Says*, CBS NEWS (Aug. 10, 2013, 6:14 PM), http://

ment, had from the beginning frustrated U.S. efforts to apprehend and extradite the real killers so as to conceal what they called "massive corruption" in Mexican law-enforcement and military agencies.[52]

High-value defendants remained frustratingly out of reach for the U.S. Attorneys in Los Angeles.[53] One successful prosecution, however, was that of Rubén Zuno Arce, son of a former governor of Jalisco and brother-in-law of former-President of Mexico Luis Echeverría Álvarez.[54] Zuno Arce was an alleged intermediary between the Guadalajara *narcos* and corrupt officials in the Mexican judiciary and military, although he was not charged with Camarena's murder.[55] He reportedly sold the house in which Camarena and Zavala were murdered to Caro-Quintero.[56] In July 1990, in a case prosecuted before Judge Rafeedie by Assistant U.S. Attorney Manuel Medrano, the jury found Zuno Arce guilty of violent acts in aid of racketeering, conspiracy, and kidnapping in connection with the abduction.[57] Zuno Arce was convicted a second time after a successful appeal. He died in prison in 2012.[58]

Less successful was the U.S. Attorney's effort to prosecute Humberto Álvarez-Machaín, the Guadalajara physician who allegedly medicated Agent Camarena in order to keep him alive and conscious during his interrogation.[59] Unable to secure Álvarez-Machaín's extradition through normal channels, DEA agents paid $50,000 in 1990 to have him abducted from his Guadalajara office and flown in a private plane to El Paso, where U.S. Marshals arrested and transferred him to Los Angeles for prosecution.[60] Álvarez was one of three suspects that Operation Leyenda brought to trial after abducting them from

www.cbsnews.com/news/ernesto-fonseca-carrillo-another-mexican-drug-kingpin-in-dea-killing-may-go-free-lawyer-says/.

52. Murphy, *supra* note 47.

53. Kraul, *supra* note 5.

54. *Passings: Rubén Zuno Arce, Convicted in Death of Drug Agent*, L.A. TIMES, Sept. 22, 2012, at AA5.

55. *See* William Yardley, *Rubén Zuno Arce, Guilty in Drug Killing, Dies at 82*, N.Y. TIMES, Sept. 20, 2012, at B19.

56. *Passings: Rubén Zuno Arce*, *supra* note 54.

57. *Central Figure Is Convicted in '85 Killing of Drug Agent*, N.Y. TIMES, Aug. 1, 1990, at A10.

58. Yardley, *supra* note 55; *Passings: Rubén Zuno Arce*, *supra* note 54.

59. Kraul, *supra* note 5.

60. KUYKENDALL, *supra* note 24, at 217-218; Henry Weinstein, *Witness Tells of Kidnaping Payout*, L.A. TIMES, May 26, 1990, at A26; *see* United States v. Caro-Quintero, 745 F. Supp. 599, 602-04 (C.D. Cal. 1990) (detailing the Álvarez-Machaín prosecution history). *See also* Alvarez-Machain v. United States, 107 F.3d 696, 699 (9th Cir. 1996). Weinstein's article quotes a witness as saying that the payoff amounted to $60,000, although later testimony and the District Court itself used the lower figure. See *Caro-Quintero*, 745 F. Supp. at 603. *See also infra* note 117.

abroad. Another was René Martín Verdugo-Urquídez, taken from his car in 1986 by Baja California state police and turned over to the Border Patrol at Mexicali. The third was Juan Ramón Matta Ballesteros, a Honduran trafficker whom local police put on a plane to the Dominican Republic, where authorities promptly put him on another to Puerto Rico, on which flight U.S. marshals placed him under arrest.[61] The abductions in particular heightened tensions between U.S. and Mexican authorities, saber-rattling from the former matching threats of retaliation from the latter.[62]

In what was probably the most important Constitutional case to emerge from the Camarena investigation, the U.S. Supreme Court ultimately approved the informal rendition of Álvarez-Machaín, who finally stood trial after two years in U.S. custody and ultimately won a judgment of acquittal.[63] In the end, although seven people were convicted in U.S. courts for their roles in the abduction, torture, and murder of Enrique Camarena, none were convicted of the murder itself, and the instigators of the crime remained out of reach.[64] The DEA's official history summarized Operation Leyenda as "a long and complex investigation, made more difficult by the fact that the crime was committed on foreign soil and involved major drug traffickers and government officials from Mexico."[65]

C. The War on Drugs

Enrique Camarena found himself in Guadalajara in 1984 as U.S. drug interdiction policy entered a new, more militant phase. Federal efforts to regulate commerce in psychoactive drugs date back to the late nineteenth century, although the tumultuous changes that disrupted American society and culture in the 1960s both changed the nature of the drug trade and enhanced its political significance.[66] One source of instability was the contradiction between the traditional association between drug use and criminality, on one hand, and on the other an increased tolerance of so-called "softer" drugs like marijuana

61. Paul Lieberman, *Camarena Case Spotlight Shifts to L.A. Unit's Tactics*, L.A. TIMES, May 7, 1990, at A1.

62. *Id*.

63. United States v. Alvarez-Machain, 504 U.S. 655, 670 (1992); Seth Mydans, *Judge Clears Mexican in Agent's Killing*, N.Y. TIMES, Dec. 15, 1992, at A20.

64. Wilkinson, *supra* note 38; Kraul, *supra* note 5; *e.g.*, *Honduran Guilty of Kidnapping, Not Murder, of U.S. Drug Agent*, N.Y. TIMES, July 27, 1990, at A14 (reporting acquittal of Juan Ramón Matta Ballesteros on a charge of murdering Camarena).

65. U.S. DRUG ENF'T ADMIN., *supra* note 6, at 64.

66. SHANNON, *supra* note 24, at 28-39; *Thirty Years of America's Drug War: A Chronology*, *supra* note 26.

and cocaine among middle-class people not usually associated in popular culture with the criminal underworld.[67] Another contradiction was between the older strategy of criminalizing the use of drugs and newer policies aimed at the treatment and rehabilitation of drug users. Successive federal Administrations from the late 1960s onward tried with little success to synthesize the two policies, although law enforcement was usually easier to sell, politically, than rehabilitation.[68] The Nixon Administration gave more lip service to treatment than any previous administration but, at the same time, found drug enforcement an effective way to energize its law-and-order constituency as well as to harass its political enemies in the anti-war and Black liberation movements.[69] Still a third source of internal conflict was rivalry between different parts of government: between the Customs, CIA, and the Justice Department;[70] and between Northeast regional offices used to dealing with heroin from Europe and those in the West and South confronting new and different problems with marijuana and cocaine from Latin America.[71] When the Nixon Administration created the DEA "superagency" by cobbling together various executive-

67. SHANNON, *supra* note 24, at 32-33; *Thirty Years of America's Drug War: A Chronology*, *supra* note 26.

68. *See Thirty Years of America's Drug War: A Chronology*, *supra* note 26; SHANNON, *supra* note 24, at 37, 38.

69. For example, the now-famous testament by John Ehrlichman, President Nixon's Assistant for Domestic Affairs, who in 1994 explained to an interviewer that:

> The Nixon campaign in 1968, and the Nixon White House after that, had two enemies: the antiwar left and black people. You understand what I'm saying? We knew we couldn't make it illegal to be either against the war or black, but by getting the public to associate the hippies with marijuana and blacks with heroin, and then criminalizing both heavily, we could disrupt those communities. We could arrest their leaders, raid their homes, break up their meetings, and vilify them night after night on the evening news. Did we know we were lying about the drugs? Of course we did.

Dan Baum, *Legalize It All: How to Win the War on Drugs*, HARPER'S MAG., Apr. 2016, at 22. *See also* Emily Dufton, *The War on Drugs: How President Nixon Tied Addiction to Crime*, ATLANTIC (Mar. 26, 2012), http://www.theatlantic.com/health/archive/2012/03/the-war-on-drugs-how-president-nixon-tied-addiction-to-crime/254319/; SHANNON, *supra* note 24, at 33-34.

70. *See* SHANNON, *supra* note 24, at 34. *See, e.g*, COMPTROLLER GEN., U.S. GEN. ACCOUNTING OFFICE, GGD-75-80, PROBLEMS IN SLOWING THE FLOW OF COCAINE AND HEROIN FROM AND THROUGH SOUTH AMERICA 16-31 (1975), http://www.gao.gov/assets/120/112354.pdf (discussing problems in slowing drug trades from and through South America due to inter-agency disagreements); COMPTROLLER GEN., U.S. GEN. ACCOUNTING OFFICE, B-164031(2), HEROIN BEING SMUGGLED INTO NEW YORK CITY SUCCESSFULLY 68-71 (1972), http://www.gao.gov/ assets/200/199036.pdf (indicating the existence of jurisdictional conflicts between the Bureau of Customs and the Bureau of Narcotics and Dangerous Drugs).

71. *See* SHANNON, *supra* note 24, at 34; Charles R. Babcock & Joel Kotkin, *Opium: Troubling Export from Troubled 'Golden Crescent'*, WASH. POST (Jan. 31, 1980), https:// www.washington post.com/archive/politics/1980/01/31/opium-troubling-export-from-troubled-golden-crescent/db16fa33-1e7b-48c7-bf55-14eaf344b684/; Leslie Maitland, *3 Drug Officials Transferred, 2 for Poor Northeast Results*, N.Y. TIMES, Feb. 25, 1981, at B3.

branch offices with missions related to drug enforcement, it did little more than to internalize all of those overlapping and interlocking conflicts within one unwieldy, hard-to-steer bureaucracy.[72]

Under the Reagan Administration, the DEA grappled with all of the inherited historical contradictions, as well as two new ones. One of these contradictions was between Reagan's general indifference to the drug issue and his keen interest in fighting Communism in Latin America.[73] Overlying this tension was a second conflict, between law-and-order advocates in Congress, an Executive Branch eager to spend money on the drug war, and budget hawks in the newly-created Office of Management and Budget, to which all other agencies had to answer.[74] At the same time, the stakes in the Latin American drug trade grew enormously: the so-called "Medellín Cartel" consolidated the processing and distribution of Colombian cocaine in the early 1980s, roughly at the same time Caro-Quintero and other Sinaloan smugglers converged on Guadalajara and from there organized the large-scale production of high-grade *sinsemilla* (seedless) marijuana.[75] By the fall of 1984, seizures of marijuana at the U.S.-Mexican border had increased significantly.[76] There was, moreover, evidence that the structure of the Mexican drug industry was changing, not only for marijuana but for heroin as well, with more potent goods, more organized distribution, and more violent internecine struggle.[77] Publicly, Mexican and U.S. officials stated their belief that they had the situation in hand.[78] The November 1984 raid on Caro-Quintero's plantations, however, indicated that this was probably not the case.[79] By that time, Guadalajara was well known among DEA agents as a small, underequipped, and dangerous post; agents reported having trouble communicating their situation to their superiors in Washington D.C., whose attention was focused on problems in Colombia and who, in any case, were reluctant to call the Mexican government to account

72. *See* SHANNON, *supra* note 24, at 34.

73. *See* SHANNON, *supra* note 24, at 37-39; *Thirty Years of America's Drug War: A Chronology*, *supra* note 26.

74. SHANNON, *supra* note 24, at 80-81.

75. *Thirty Years of America's Drug War: A Chronology*, *supra* note 26; SHANNON, *supra* note 24, at 2-4, 24, 117-21.

76. Lamar Jr., *supra* note 25, at 26.

77. *See id.*; Joel Brinkley, *In the Drug War, Battles Won and Lost*, N.Y. TIMES, Sept. 13, 1984, at A1.

78. Brinkley, *supra* note 77.

79. Lamar Jr., *supra* note 25, at 26.

for fear of disrupting other aspects of the complex relationship between the two countries.[80]

D. Conclusion: Drift, Default, and Sacrifice

The February 1985 murder of Agent Camarena was a pivotal event in the evolution of U.S. efforts to combat the international drug trade. "The decision to kill a U.S. federal agent changed everything," recalled James Kuykendall who, as the DEA's resident agent in Guadalajara, was Camarena's supervisor at the time of his abduction.[81] Kuykendall later said, "[t]he war on drugs . . . began on February 7, 1985. Nobody did anything until Kiki Camarena was gone, and a lot of people just wouldn't let him disappear into the mist."[82] The DEA's official history describes the murder as "a turning point in the war on drugs. His violent death brought the American public face-to-face with the vicious brutality of drug trafficking."[83] "In Bogota," reported *The Los Angeles Times* thirty years later, "federal agents say the Camarena case has established a steely template for how the U.S. pursues drug investigations in what remains one of the world's most perilous law enforcement terrains."[84] Camarena remains to this day a revered figure in federal law enforcement.[85] In the end, however, Operation Leyenda did little to resolve the "drift and default"[86] that characterized the War on Drugs as a whole, that impeded the investigation into Camarena's murder, and indeed that likely contributed to

80. SHANNON, *supra* note 24, at 7-9, 37-40; KUYKENDALL, *supra* note 24, at 203-12. *See also* Christopher Lehmann-Haupt, *Books of the Times: Behind the Torture-Death of a U.S. Drug Agent*, N.Y. TIMES, Oct. 13, 1988, at C25; Jason McGahan, *How a Dogged L.A. DEA Agent Unraveled the CIA's Alleged Role in the Murder of Kiki Camarena*, L.A. WEEKLY (July 1, 2015, 6:30 AM), http://www.laweekly.com/news/how-a-dogged-la-dea-agent-unraveled-the-cias-alleged-role-in-the-murder-of-kiki-camarena-5750278.

81. Wilkinson, *supra* note 38.

82. SHANNON, *supra* note 24, at 453.

83. U.S. DRUG ENF'T ADMIN., *supra* note 6, at 64.

84. Kraul, *supra* note 5.

85. The accounts of other contributors to this Symposium, who knew Camarena and fought to bring his killers to justice, testify eloquently to this. *See* Gary Feess et al., *The Enrique "Kiki" Camarena Murder and Its Aftermath*, 23 Sw. J. INT'L L. 17 (2017). *See also Kiki and the History of Red Ribbon Week*, *supra* note 18.

86. The phrase "drift and default" is the work of J. Willard Hurst. JAMES WILLARD HURST, LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES 78, 80 (1956). The phrase, according to one scholar, describes "a lack of applied intelligence in public policy." Carl Landauer, *Social Science on a Lawyer's Bookshelf: Willard Hurst's Law and the Conditions of Freedom in the Nineteenth-Century United States*, 18 LAW & HIST. REV. 59, 87 (2000).

his sacrifice in the first place.[87] The Camarena investigation did, however, lead to significant changes in the American law of international criminal procedure.

II. The Leyenda Cases and International Criminal Procedure

The campaign to bring Agent Camarena's killers to justice generated a number of complicated legal issues that made their way into the federal appellate system. Three cases ultimately led to appeals to the United States Supreme Court; two of these originated in the District Court for the Central District of California while a third began in San Diego, in the Southern District. *United States v. Verdugo-Urquidez*[88] asked whether or not a Mexican national, whose Mexican residence U.S. agents searched without a warrant, could have the resulting evidence suppressed under the Fourth Amendment of the U.S. Constitution.[89] The most famous of the three, *United States v. Alvarez-Machain*,[90] challenged the District Court's jurisdiction over a defendant whom Mexican nationals had abducted in Mexico and delivered to the custody of U.S. agents at the border.[91] The last was a civil case, *Sosa v. Alvarez-Machain*,[92] which raised the issue of whether the abducted defendant could recover in tort from the parties who captured him and/or the U.S. officials at whose behest they did so.[93] In all three cases, the Supreme Court reversed rulings of the California courts in favor of the government and, in the process, established precedents that became significant in the wake of the attacks of September 11, 2001.[94]

A. *United States v. Verdugo-Urquidez*

First of the Operation Leyenda prosecutions to reach the U.S. Supreme Court was that of René Martín Verdugo-Urquídez. Verdugo,

87. Then-DEA Administrator John C. Lawn "suggested that Camarena was killed because 'the level of cooperation' between U.S. and Mexican police had broken down." *9 Indicted in Torture, Slaying of DEA Agent*, L.A. Times, Jan. 6, 1988, pt. 1, at 1. *See also* Will Grant, *Mexico Drugs: How One DEA Killing Began a Brutal War*, BBC News (Feb. 7, 2012), http://www.bbc.com/news /world-us-canada-16920870.

88. 494 U.S. 259 (1990).

89. *Id.* at 263, 264; U.S. Const. amend. IV.

90. 504 U.S. 655 (1992).

91. *Id.* at 658.

92. 542 U.S. 692 (2004).

93. *Id.* at 697.

94. *See id.* at 699, 738; *Verdugo-Urquidez*, 494 U.S. at 263, 275; *Alvarez-Machain*, 504 U.S. at 658-59, 670.

like Enrique Camarena, was a native of Mexicali. They were about the same age, as well: Verdugo, who was thirty-four at the time of his arrest in 1986, came from a "respectable" family, owned a variety of legitimate businesses, and had a green card that permitted him frequent travel to San Diego.[95] On his own, he built a highly sophisticated network for smuggling marijuana into the United States by air.[96] Eventually, he became what *The Los Angeles Times* called "a top lieutenant for Mexican drug lord Rafael Caro- Quintero;"[97] the journalist Elaine Shannon described him as "a senior vice-president in charge of transportation and wholesaling for California" in the Caro-Quintero organization.[98]

The DEA believed that Verdugo had taken part in Camarena's murder. Unable to catch him north of the border, the agency paid a half-dozen Baja California state police officers $32,000 to abduct Verdugo from his car one night in January, 1986.[99] The officers drove him, bound and blindfolded, to the border near Mexicali, where they pushed him through a hole in the fence and into the hands of U.S. Border Patrol officers, who then delivered him to DEA officers in Calexico.[100] Thereafter, the Mexican officers requested (and received) asylum in the United States for themselves and their families.[101] With the help of the Mexican Federal Judicial Police, DEA officers then searched Verdugo's Mexicali residence, where they found evidence of smuggling activities for which he was indicted in San Diego.[102] In January 1988, a federal grand jury in Los Angeles indicted Verdugo and eight others in the Camarena murder; Verdugo was convicted and sentenced later that year.[103]

95. SHANNON, *supra* note 24, at 308.

96. *Id.* at 308-09.

97. Kim Murphy, *Mexican Drug Figure Found Guilty in Death of U.S. Agent*, L.A. TIMES, Sept. 27, 1988, pt. 1, at 3.

98. SHANNON, *supra* note 24 at 309.

99. SHANNON, *supra* note 24, 309-10.

100. United States v. Verdugo-Urquidez, 856 F.2d 1214, 1216 (9th Cir. 1988), *rev'd*, 494 U.S. 259 (1990); KUYKENDALL, *supra* note 24, at 214; SHANNON, *supra* note 24, at 310.

101. KUYKENDALL, *supra* note 24, at 216.

102. *Verdugo-Urquidez*, 856 F.2d at 1215-17.

103. *9 Indicted in Torture, Slaying of DEA Agent*, *supra* note 87; Murphy, *supra* note 97; Feldman, *supra* note 50; United States v. Verdugo-Urquidez, 939 F.2d 1341, 1343 (9th Cir. 1991).

The charges against Verdugo, on all of which the jury found him guilty, were (1) conspiracy to kidnap a federal agent, (2) kidnapping a federal agent, (3) felony-murder of a federal agent, and two counts of committing violent crimes in aid of racketeering activity. United States v. Verdugo-Urquidez, No. 88-5462, 1994 U.S. App. LEXIS 16083, at *5-6 (9th Cir. 1994).

Verdugo made the same claim that Álvarez-Machaín did later, that his abduction into custody voided the court's jurisdiction in his case, although the District Court denied his motion to dismiss. *See Verdugo-Urquidez*, 939 F.2d at 1343 n.1. The Court of Appeals reversed the order,

In San Diego, Verdugo's lawyers in the smuggling case challenged both the manner of his arrest and the seizure of evidence from his home in Mexicali.[104] District Judge Lawrence Irving rejected Verdugo's challenge to the arrest, but suppressed the disputed evidence on the ground that the DEA agents had conducted the search without a warrant.[105] A three-judge panel of the Ninth Circuit Court of Appeals affirmed the exclusion in August 1988, noting first that there were no reported cases at the time on the question of whether a foreign national could challenge a search of a foreign residence under the Fourth Amendment.[106] The Ninth Circuit panel concluded that the Constitution "imposes substantive constraints on the federal government, even when it operates abroad."[107] The Constitution immunized Verdugo's residence from unreasonable search and seizure, even though he was an alien, because he was in a U.S. court being tried for violations of U.S. law. It made no sense, the court concluded, to regulate the search-and-seizure authority of U.S. agents differently just because the residence to be searched was in a foreign country rather than in the United States.[108]

In 1990, however, the U.S. Supreme Court reversed.[109] In an opinion by Chief Justice Rehnquist, joined by Justices White, O'Connor, Scalia, and Kennedy, the Court withheld the exclusionary rule from Verdugo for several reasons.[110] Since the DEA's action was against Verdugo's property in Mexico (as opposed, say, to his person now in U.S. custody), any Constitutional violation that may have occurred took place in Mexico.[111] Going deeper, the Court held that the phrase "the people," as used in the Fourth Amendment, referred only

however, and remanded the case for an evidentiary hearing on whether Verdugo's rendition violated the extradition treaty with Mexico. *Id.* at 1362. The Court of Appeals later used that decision as authority in Álvarez-Machaín's case. United States v. Alvarez-Machain, 946 F.2d 1466, 1466 (9th Cir. 1991). Following the U.S. Supreme Court's approval of Álvarez-Machaín's rendition, United States v. Alvarez-Machain, 504 U.S. 655, 670 (1992), the Court of Appeals reversed its disapproval of Verdugo's rendition accordingly, *Verdugo-Urquidez*, 1994 U.S. App. LEXIS 16083, at *1-5. Judge Reinhardt, who wrote the Court's original opinion on the Verdugo rendition, dissented from the 1994 decision, addressing both Verdugo's and Álvarez-Machaín's cases. *Id*. at *20-23 (Reinhardt., J., dissenting). In the same dissent, Reinhardt strenuously expressed his opinion that the evidence against Verdugo was insufficient to support his conviction. *Id.* at *23.

104. *See Verdugo-Urquidez*, 856 F.2d at 1215.
105. *Id.* at 1214-15, 1217.
106. *Id.* at 1217, 1230.
107. *Id.* at 1218.
108. *Id.* at 1230.
109. United States v. Verdugo-Urquidez, 494 U.S. 259, 275 (1990).
110. *See id.* at 261, 274-75.
111. *See id.* at 274-75.

to "persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community."[112] The purpose of the Amendment was "to protect the people of the United States against arbitrary action by their own Government," not to restrain Federal action against aliens outside of U.S. territory.[113] A contrary ruling, moreover, would have "significant and deleterious consequences for the United States in conducting activities beyond its boundaries."[114] In dissent, Justices Brennan and Marshall agreed with the Court of Appeals that the Amendment was a substantive limitation on federal power, not a privilege afforded to U.S. citizens: Verdugo became "one of the governed" at the moment the DEA took him into custody.[115] As a case of first impression, the *Verdugo* case contributed significantly to what the dissenters decried as "[t]he enormous expansion of federal criminal jurisdiction outside our Nation's boundaries."[116]

B. United States v. Alvarez-Machain

The second Operation Leyenda case to make its way to the U.S. Supreme Court did so on facts nearly identical with those in *U.S. v. Verdugo-Urquidez*. The defendant this time was Humberto Álvarez-Machaín, the Guadalajara obstetrician/gynecologist whom the DEA believed had kept Agent Camarena alive and conscious during his interrogation. This time, when informal negotiations to secure Álvarez's arrest failed, the Leyenda agents got permission from Washington D.C. to pay $50,000 to have Mexican nationals deliver him to the border, which they did in April 1990.[117] Within the same month, Álvarez was arraigned—with the same charges as those of which Verdugo had been convicted two years before—and moved to Los Angeles for trial in Central District Court.[118] Although the DEA denied it, a Justice Department spokesman said that an informal reward had apparently

112. *Id.* at 265 (citing United States ex rel. Turner v. Williams, 194 U.S. 279, 292 (1904)). On this issue, *see* Note, *The Meaning(s) of "The People" in the Constitution*, 126 HARV. L. REV. 1078, 1079-82 (2013).

113. *Verdugo-Urquidez*, 494 U.S. at 266.

114. *Id.* at 273.

115. *Id.* at 283-84 (Brennan, J., dissenting).

116. *Id.* at 281-82.

117. Jim Newton, *2 Suspects in Camarena Case Ordered to Stand Trial*, L.A. TIMES, June 23, 1992, at A3; United States v. Caro-Quintero, 745 F. Supp. 599, 602-04 (C.D. Cal. 1990). *See also* KUYKENDALL, *supra* note 24, at 217-19.

118. Alvarez-Machain v. United States, 504 U.S. 655, 657 n.1 (1992); *see supra* text accompanying note 103.

motivated the abduction.[119] The Justice Department insisted, however, that Dr. Álvarez would not be returned even if the capture violated Mexican sovereignty.[120]

As in the *Verdugo* case, the abduction generated outrage in Mexico.[121] Then-President Carlos Salinas de Gortari declared that future perpetrators of such abductions would be tried for treason; he also threatened to withdraw from the North American Free Trade Agreement.[122] In Los Angeles, Judge Edward Rafeedie ruled that Álvarez's rendition violated the U.S.-Mexico Extradition Treaty[123] and ordered him repatriated.[124] Noting that Álvarez was the third defendant in the case to have been kidnapped into custody, Judge Rafeedie concluded that "maintaining civilized standards of procedure and evidence" required him to bar jurisdiction "in the interest of the greater good in preserving respect for the law."[125] The Ninth Circuit Court of Appeals affirmed in October 1991, in a perfunctory opinion that pointed to its decision in the *Verdugo* case two months earlier.[126] The fact of the abduction, its authorization by the United States, and Mexico's formal objection to it were enough to allow Álvarez to invoke the treaty and defeat the Central District Court's jurisdiction to try him.[127]

Paul L. Hoffman, Legal Director of the American Civil Liberties Union (ACLU) Foundation of Southern California, argued Álvarez-Machaín's appeal before the U.S. Supreme Court on April 1 of the following year.[128] In June, the Court issued its opinion: writing for himself and five others, Chief Justice Rehnquist held that the fact of

119. Philip Shenon, *U.S. Says It Won't Return Mexican Doctor Linked to Drug Killing,* N.Y. TIMES, Apr. 21, 1990, at A3.

120. *Id.*

121. *E.g.*, *Yes, Prosecute the Torture Doctor*, N.Y. TIMES, June 13, 1990, at A30; Editorial, *Imperial Arrogance*, MILITANT, Jan. 8, 1993, https://www.themilitant.com/1993/5701/MIL5701.pdf.

122. KUYKENDALL, *supra* note 24, at 219; North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993).

123. Extradition Treaty, May 4, 1978, U.S.-Mex., T.I.A.S. No. 9656.

124. United States v. Caro-Quintero, 745 F. Supp. 599, 614 (C.D. Cal. 1990).

125. *Id*. at 615 (quoting Judge Oakes' warning in United States v. Lira, 515 F.2d 68, 73 (2d Cir. 1975) (Oakes, J., concurring)). On Judge Rafeedie, *see generally* Jocelyn Y. Stewart, *Judge Exhibited Pragmatism, Independence,* L.A. TIMES, Mar. 30, 2008, at B12, (expounding Judge Rafeedie's reputation in the courts).

126. United States v. Alvarez-Machain, 946 F.2d 1466, 1466 (9th Cir. 1991), *rev'd*, 504 U.S. 655 (1992).

127. *Id.* at 1466-67. *See also* United States v. Verdugo-Urquidez, 939 F.2d 1341, 1350-51 (9th Cir. 1991), *rev'd sub nom*. United States v. Alvarez-Machain, 504 U.S. 655 (1992).

128. United States v. Alvararez-Machain, 504 U.S. 655, 656 (1992); *Attorneys: Paul L. Hoffman*, SCHONBRUN DE SIMONE SEPLOW HARRIS AND HOFFMAN, LLP, http://www.losangelesemploymentlawyer.com/Attorneys/Paul-L-Hoffman.shtml (last visited Oct. 29, 2016).

Álvarez's forcible rendition did not prohibit his trial in a U.S. court for violations of U.S. criminal law.[129] The court relied chiefly on a case from the 1880s, *Ker v. Illinois*,[130] in which a private detective who had a warrant to secure the extradition of a fugitive from Peru, but who "disdained reliance on the treaty processes," forcibly kidnapped the suspect and returned him to Illinois to stand trial for larceny.[131] The extradition treaty with Peru did not apply because the agent had not, in fact, invoked it in returning Ker for trial.[132] *Ker* applied in Álvarez's case, the Court decided, because the extradition treaty with Mexico did not explicitly prohibit forcible rendition.[133] Chief Justice Rehnquist found nothing in general principles of international law to prohibit international abductions, no matter how "shocking" or contrary to general principle the particular abduction might be: whether to return Dr. Álvarez to Mexico or not was solely within the discretion of the Executive Branch.[134]

Justice Stevens dissented, joined by Justices Blackmun and O'Connor. The dissenters argued that *Ker* did not apply for several reasons: first, because the alleged crime took place in Mexico, not the United States; second, because the alleged crime violated both Mexican and U.S. law; third, because the abduction took place at the behest of U.S. government agents; and finally because Mexico had formally demanded the suspect's return for trial in its own courts.[135] The Ninth Circuit, the dissenters thought, had correctly interpreted both the extradition treaty and international law in upholding Verdugo's challenges to his abduction.[136] The "critical flaw" in the majority's opinion, they thought, was to ignore the key fact that Álvarez's abduction, unlike Ker's, was "expressly authorized by the Executive Branch of the Government, which unquestionably constitutes a flagrant violation of international law."[137] Quoting Holmes to underscore the emotional charge of the Camarena case, Justice Stevens acknowledged that "the desire for revenge" could exert "a kind of hydraulic pressure . . . before which even well settled principles of law

129. *Id*. at 670.

130. 119 U.S. 436 (1886).

131. *Alvarez-Machain*, 504 U.S. at 660.

132. *Id.* at 660-61.

133. *Id.* at 663-66, 670.

134. *Id.* at 669.

135. *Id.* at 670-71.

136. *Id.* at 671.

137. *Id.* at 682.

will bend."[138] In this "monstrous" case, however, Justice Stevens reached all the way to Thomas Paine: "an avidity to punish is always dangerous to liberty. . . . He that would make his own liberty secure[ ] must guard even his enemy from oppression; for if he violates this duty, he establishes a precedent that will reach to himself."[139]

C. Sosa v. Alvarez-Machain

The third and final *Leyenda* case to reach the Supreme Court was a civil, rather than a criminal one. In the wake of the Supreme Court decision in June 1992, Judge Rafeedie scheduled Álvarez-Machaín and co-defendant Rubén Zuno-Arce for trial at the end of August.[140] This was the second trial for Zuno-Arce, who had been arrested legally in the United States and convicted in 1990, although Judge Rafeedie had overturned that conviction on procedural grounds.[141] The 1992 jury convicted Zuno again and Judge Rafeedie sentenced him to two life terms.[142] At the close of the government's case against Álvarez, however, Judge Rafeedie entered a judgment of acquittal because, in addition to procedural faults, the government's case consisted of "suspicion," "hunch," and "wild speculation" and was legally insufficient to support a guilty verdict.[143]

Álvarez soon returned to Mexico as recrimination flew between the defense, the U.S. Attorney's office, and President Salinas de Gortari of Mexico.[144] Although the Supreme Court had dismissed Álvarez's objection to his arrest, it had also noted that he might have

138. *Id.* at 687 (quoting N. Sec. Co. v. United States, 193 U.S. 197, 401 (1904) (Holmes, J., dissenting)). *See also* Edmund S. McAlister, *The Hydraulic Pressure of Vengeance: United States v. Alvarez-Machain and the Case for a Justifiable Abduction*, 43 DEPAUL L. REV. 449, 449 n.1, 508 (1994) (offering a balanced assessment of the decision in the years before the attacks of September 11, 2001, which brought the issue of abduction to its current prominence).

139. *Alvarez-Machain*, 504 U.S. at 687-88 (quoting THOMAS PAINE, DISSERTATION ON FIRST PRINCIPLES OF GOVERNMENT 39 (1795)).

140. Newton, *supra* note 117.

141. Henry Weinstein, *Camarena Indictment Names Business Figure*, L.A. Times, Dec. 12, 1989, at A3; Henry Weinstein, *Zuno Arce Gets Life in Camarena Kidnapping*, L.A. TIMES, Mar. 25, 1993, at B1.

142. Jim Newton, *Businessman Convicted in Camarena Case*, L.A. TIMES, Dec. 22, 1992, at A1; Weinstein, *supra* note 141. The charges against Zuno were the same as those against Verdugo and Álvarez, except for the kidnapping of a federal agent. *See* Sixth Superseding Indictment at 11-26, United States v. Caro-Quintero, No. CR 87-422(F)-ER (C.D. Cal. 1989).

143. Alvarez-Machain v. United States, 107 F.3d 696, 699 (9th Cir. 1997); Seth Mydans, *Judge Clears Mexican in Agent's Killing*, N.Y. TIMES, Dec. 15, 1992, at A20; Jim Newton, *Judge Orders Camarena Case Defendant Freed*, L.A. TIMES, Dec. 15, 1992, at A1.

144. Marjorie Miller & Jim Newton, *Defendant Freed in Camarena Case Returns to Mexico*, L.A. TIMES, Dec. 16, 1992, at A3.

private-law remedies against his abductors in tort or trespass.[145] Accordingly, after he returned to Mexico, Álvarez sued José Francisco Sosa, the former Mexican police officer who organized the abduction, the Mexican DEA employee who recruited him, five unnamed Mexican civilians, the United States, and four North American DEA agents.[146] The core of the suit was a claim against the DEA for false imprisonment under the Federal Tort Claims Act (FTCA),[147] and one against "collaborator" Sosa under the 1948 Alien Tort Statute[148] (ATS), which lawyers had revived in the 1980s as a tool for creating subject matter jurisdiction in U.S. courts over human rights violations in other countries.[149] This case was also heard in Central District Court, with Judge Stephen V. Wilson presiding, and Paul Hoffman of the ACLU once again represented Álvarez.[150]

As in many of the cases that emerged out of the Camarena investigation, the courts disagreed wildly on the law in the new and rapidly developing area of trans-border criminal procedure. By the time *Sosa v. Alvarez-Machain* reached the U.S. Supreme Court in 2004, the Central District and the Ninth Circuit courts had agreed that Álvarez's Fourth, Fifth, and Eighth Amendment claims would be dismissed;[151] that the United States could be liable under the FTCA for the acts of its agents in organizing a false arrest by foreign nationals in a foreign country;[152] and that the ATS gave Álvarez an action against collaborator Sosa for an alleged violation of the law of nations.[153] The Central District court had gone so far as to grant summary judgment against collaborator Sosa and $25,000 in damages to Álvarez, both of which the Court of Appeals affirmed in a decision that it filed on September 11, 2001.[154] Sosa and the United States argued their appeals before the Supreme Court in 2004.[155]

145. United States v. Alvarez-Machain, 504 U.S. 655, 670 (1992).

146. Alvarez-Machain v. United States, 331 F.3d 604, 610 (9th Cir. 2003) (en banc), *rev'd sub nom.* Sosa v. Alvarez-Machain, 542 U.S. 692 (2004).

147. 28 U.S.C. § 1346(b) (2012).

148. 28 U.S.C. § 1350.

149. *See Alvarez-Machain*, 331 F.3d at 610-611; *see also* Penny M. Venetis, *The Broad Jurisprudential Significance of Sosa v. Álvarez-Machain*, 21 TEMP. POL. & CIV. RTS. L. REV. 41, 43-49 (2011); Igor Fuks, *Sosa v. Alvarez-Machain and the Future of ATCA Litigation: Examining Bonded Labor Claims and Corporate Liability*, 106 COLUM. L. REV. 112, 113 (2006).

150. *Id.* at 607.

151. Alvarez-Machain v. United States, 107 F.3d 696, 699, 703 (9th Cir. 1997).

152. *Alvarez-Machain*, 331 F.3d at 641.

153. *Id.* at 614.

154. Alvarez-Machain v. United States, 266 F.3d 1045, 1049, 1064 (9th Cir. 2001), *rev'd sub nom.* Sosa v. Alvarez-Machain, 542 U.S. 692 (2004).

155. Sosa v. Alvarez-Machain, 542 U.S. 692 (2004).

In *Sosa v. Alvarez-Machain* the Supreme Court, through Justice Souter, affirmed the government's prerogative to pursue criminal law enforcement abroad, as it had previously done in Verdugo's Fourth Amendment case and in Álvarez's rendition appeal. The FTCA contains an explicit exception to its waiver of sovereign immunity for actions "arising in a foreign country."[156] The Ninth Circuit, under what it called the "headquarters doctrine," held that the exception did not apply in Álvarez's case because the DEA had planned and directed his abduction from its offices in California.[157] The Supreme Court, on the other hand, pointed out that a tort in which the physical harm to the plaintiff takes place in a foreign country "arises in" that country within the plain meaning of the statute.[158] The actions of Sosa and his henchmen, moreover, and not those of the DEA, were the proximate cause of Álvarez-Machaín's abduction.[159] For both reasons, the "arising in a foreign country" exception applied and the government remained immune from suit.[160]

The *Sosa* case raised a significant issue of first impression with regard to the ATS, which was whether the First Congress had intended the statute to do any more than give the federal courts jurisdiction over the limited number of international law violations—offenses against ambassadors or piracy, for example—with which it was familiar.[161] Sosa claimed that it did no more than that; Álvarez claimed that the statute's authorization of jurisdiction "for a tort only, committed in violation of the law of nations or a treaty of the United States,"[162] gave him an action for his unlawful detention and rendition by the DEA.[163] Justice Souter's opinion offered the first in-depth analysis of the ATS in its history and concluded that the statute did grant jurisdiction over a limited number of serious violations of "definable, universal, and obligatory" customary international norms.[164] This was enough to sustain the significant body of case law that had recognized ATS jurisdiction over human rights violations since

156. 28 U.S.C. § 2680(k) (2012).
157. *Alvarez-Machain*, 331 F.3d at 638-39.
158. *Sosa*, 542 U.S. at 700-01.
159. *Id.* at 704.
160. *Id*. at 712.
161. *Id.* at 712, 715, 724-25.
162. 28 U.S.C. § 1350 (2012).
163. *See Sosa*, 542 U.S. at 712-13.
164. *Id*. at 732 (citing Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 781 (D.C. Cir. 1984)).

1980.[165] It did not, however, include the "relatively brief detention in excess of positive authority" of which Álvarez complained.[166]

D. Conclusion: New Rules in a New Context

The same year *Sosa v. Alvarez-Machain* came down, one writer criticized the decision for departing from the Supreme Court's "long-standing practice" of "willingly extend[ing] its jurisdiction to victims of human rights violations" under the FTCA and the ATS.[167] Five years later, another writer praised the decision for holding that federal common law *could* grant jurisdiction over law-of-nations abuses, although Álvarez's abduction did not count as one.[168] The more recent article paid little attention to the case itself, nor did it explain why other facts might trigger jurisdiction under the ATS where *Sosa* did not, other than to point to the *Sosa* court's assertion that extending jurisdiction to law-of-nations violations was necessarily a policy exercise and that Álvarez's hardship was a minor one.[169] Another key difference, although unstated, between *Sosa* and earlier ATS cases was that in Álvarez's case the author of the violation was the United States government, and in a very different context: Álvarez's fourteen-year career in federal court had begun as part of a campaign to avenge the murder of a much-admired DEA agent but ended in the midst of a "struggle against global terrorism."[170] *Sosa* thus joined the other two cases that made their way from the Camarena investigation to the Supreme Court—Verdugo's Fourth Amendment challenge to the search of his foreign residence and Álvarez-Machaín's challenge to his unauthorized abduction by the DEA—in presenting new questions whose resolution contributed significantly to the national secur-

165. *See id.* at 731-34.

166. *Id.* at 736-38.

167. Laura A. Cisneros, Note, *Sosa v. Alvarez-Machain – Restricting Access to US Courts Under the Federal Tort Claims Act and the Alien Tort Statute: Reversing the Trend,* 6 LOY. J. PUB. INT. L. 81, 81-82 (2004).

168. *See* Venetis, *supra* note 149, at 55-56. *See also* Carolyn A. D'Amore, Note, *Sosa v. Alvarez-Machain and the Alien Tort Statute: How Wide Has the Door to Human Rights Litigation Been Left Open?,* 39 AKRON L. REV. 593, 611-14 (2006).

169. *See* Venetis, *supra* note 149, at 49-50. *See also Sosa*, 542 U.S. at 732-33 (noting that "the determination whether a norm is sufficiently definite to support a cause of action . . . inevitably must[ ] involve an element of judgment about the practical consequences of making that cause available to litigants in the federal courts"); *id*. at 737 (stating that an application of a principle against arbitrary detention requires more than "relatively brief detention in excess of positive authority").

170. Alvarez-Machain v. United States, 331 F.3d 604, 608 (9th Cir. 2003) (en banc) (McKeown, J.), *rev'd sub nom*. Sosa v. Alvarez-Machain, 542 U.S. 692 (2004).

ity apparatus that developed in the wake of the attacks of September 11, 2001.[171]

III. Evolving Scholarship on the Camarena Case and the War on Drugs

In the same way that the significance of the *Leyenda* cases only became clear in the wake of the September 11 attacks, scholarship on the Camarena case and the War on Drugs generally took on a markedly different aspect as the Bush Administration pushed national security and criminal procedure in directions at which the earlier cases offered only hints.[172] The *Leyenda* cases' civil liberties aspects generated a good bit of law review writing in their immediate aftermath (much of which was in the form of student case notes),[173] but scholarship proliferated as federal prosecutors enlisted the precedents in what became known as the "War on Terror."[174] Law and Society scholars, likewise, took a new interest in the War on Drugs after 2001, although earlier writing had useful things to say about the subject as it stood before then. In 2010, the law professor Michelle Alexander published a significant study of the criminal justice system that reoriented scholarship in the field and led to new and creative reworking of some well-studied topics.[175]

A. Legal Scholarship

The two *Leyenda* cases that reached the Supreme Court before 2001 generated substantial commentary on their own, although writers seem to have paid more attention to the forcible abductions of Verdugo and Álvarez-Machaín than to the Fourth Amendment issue raised by the warrantless search of Verdugo's residence. Commentators recognized that the decisions represented a modification of the *Ker-Frisbie* doctrine, *viz*., that "forcible abduction, standing alone, will not defeat the personal jurisdiction of a court over a defendant" un-

171. *See* Kraul, *supra* note 5.

172. *See generally* Jane Mayer, The Dark Side: The Inside Story of How the War on Terror Turned into a War on American Ideals (2009); Benjamin Wittes, Law and the Long War: The Future of Justice in the Age of Terror (2008); Rosa Brooks, How Everything Became War and the Military Became Everything (2016).

173. *See, e.g.*, Cisneros, *supra* note 167; D'Amore, *supra* note 168.

174. *See* Kraul, *supra* note 5.

175. *See* Michelle Alexander, The New Jim Crow: Mass Incarceration in the Age of Colorblindness (2010).

less the abduction was so outrageous as to "shock the conscience."[176] One thought the extension appropriate to meet the exigencies of the War on Drugs.[177] Others thought that it might invite retaliation, one noting that in 1989 the Iranian Parliament had authorized that country's officers to arrest American citizens anywhere and to transport them to Iran for trial.[178] A 1994 article noted that the U.S. assertion of unilateral authority to enforce U.S. law extraterritorially represented "a 180-degree turn between 1980 and 1989" as a result of the frustration of U.S. law enforcement agencies with their inability to secure foreign cooperation.[179] "Nowhere," the writer claimed, was "that frustration, nor law enforcement's willingness to ride the edge of legality, more apparent than in the intensive investigation that resulted from the abduction, torture, and murder of United States DEA agent Enrique Camarena-Salazar."[180]

Both law and scholarship on the extraterritorial projection of U.S. criminal justice mushroomed after 2001. Looking back from the vantage of 2006, Owen Fiss identified the *Verdugo* case as "one of the defining decisions of the modern period:" a key move by Chief Justice Rehnquist—well-known as "a master of the long game"—"in freeing the Executive from the shackles of the Bill of Rights in foreign military operations."[181] In hindsight, Fiss could see clearly the germ of *Verdugo* in the three 2004 cases—*Rumsfeld v. Padilla*,[182] *Hamdi v. Rumsfeld*,[183] and *Rasul v. Bush*[184]—in which the Supreme Court made its ambivalent peace with the Bush Administration's "War Against Terrorism."[185] At New York University, Margaret Satterthwaite analyzed the process by which what she called "rendition to justice," the

176. Peter S. McCarthy, Comment, *United States v. Verdugo-Urquidez: Extending the Ker-Frisbie Doctrine to Meet the Modern Challenges Posed by the International Drug Trade,* 27 NEW ENG. L. REV. 1067, 1071-73 (1993).

177. *Id.* at 1093-98.

178. Linda C. Ward, Note, *Forcible Abduction Made Fashionable: United States v. Alvarez-Machain's Extension of the Ker-Frisbie Doctrine,* 47 ARK. L. REV. 477, 477 (1994); *see also* Molly McConville, Note, *A Global War on Drugs: Why the United States Should Support the Prosecution of Drug Traffickers in the International Criminal Court,* 37 AM. CRIM. L. REV. 75, 86-87 (2000).

179. McAlister, *supra* note 138, at 452.

180. *Id.*

181. Owen Fiss, *The War Against Terrorism and the Rule of Law,* 26 OXFORD J. LEGAL STUD. 235, 250 (2006). The "long game" sobriquet is that of Linda Greenhouse. Linda Greenhouse, *A Justice in Chief*, N.Y. TIMES (June 28, 2012, 5:19 PM), http://opinionator.blogs.Nytimes.com.

182. 542 U.S. 426 (2004).

183. 542 U.S. 507 (2004).

184. 542 U.S. 466 (2004).

185. Fiss, *supra* note 181, at 256.

extrajudicial transfer of suspects like Verdugo and Álvarez-Machaín from foreign countries into the United States for prosecution, evolved into "extraordinary rendition:" "the transfer of an individual, without benefit of a legal proceeding in which the individual can challenge the transfer, to a country where he or she is at risk of torture."[186] This "move to the dark side," as then-Vice President Cheney famously described it,[187] began with the War on Drugs in the 1980s but assumed a different character entirely after 2001.[188] Operation Leyenda was an important testing ground, although the DEA undertook the renditions of Verdugo, Álvarez-Machaín, and Ballesteros in the heat of passion and without much planning or analysis.[189] The Supreme Court's decision in *United States v. Alvarez-Machain*, however, was for Satterthwaite and Fisher a key point in the process because it "effectively removed the limits on the rendition policy by making practically irrelevant the existence of formal methods of approving transfer between countries."[190] *Alvarez-Machain* "opened up an alternative to extraditions when the U.S. for political reasons [didn't] want to go through that lengthy process," Satterthwaite told *The Los Angeles Times*.[191]

B. Law and Society Scholarship

Like the doctrinal scholarship, historical and social science writing on the War on Drugs, international law enforcement, and other areas changed significantly after 2001. Lawrence M. Friedman had relatively little to say about the War on Drugs in his comprehensive 1993 history of the American criminal justice system.[192] For Friedman, the

186. Margaret L. Satterthwaite, *Rendered Meaningless: Extraordinary Rendition and the Rule of Law,* 75 GEO. WASH. L. REV. 1333, 1335-37 (2007). *See also* Margaret Satterthwaite & Angelina Fisher, *Tortured Logic: Renditions to Justice, Extraordinary Rendition, and Human Rights Law*, 6 LONG TERM VIEW 52, 55-60 (2006); ASS'N OF THE BAR OF THE CITY OF N.Y. & CTR. FOR HUMAN RIGHTS AND GLOBAL JUSTICE, TORTURE BY PROXY: INTERNATIONAL AND DOMESTIC LAW APPLICABLE TO "EXTRAORDINARY RENDITIONS" 4 (2004), http://www.nycbar.org/pdf/report/Torture%20by%20Proxy%20-%20Final%20(PDF).pdf.

187. MAYER, *supra* note 172, at 9 (quoting Vice President Cheney's statement). *See generally* WITTES, *supra* note 172 (addressing legal issues surrounding the Bush Administration's responses to the 9/11 attacks).

188. *See* M. CHERIF BASSIOUNI, INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE 289-90 (6th ed. 2014). *See also* Satterthwaite, *supra* note 186, at 1134.

189. McAlister, *supra* note 138, at 490-91; *see generally* SHANNON, *supra* note 24.

190. Satterthwaite & Fisher, *supra* note 186, at 56; Kraul, *supra* note 5.

191. Kraul, *supra* note 5.

192. *See generally* LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY (1993). For other works of legal history that touch on drug enforcement, see DAVID F. MUSTO, THE AMERICAN DISEASE: ORIGINS OF NARCOTIC CONTROL (Oxford Univ. Press 3d ed. 1999) (1973); JOHN C. MCWILLIAMS, THE PROTECTORS: HARRY J. ANSLINGER AND THE FEDERAL BUREAU OF NARCOTICS, 1930-1962 (1990).

drug laws were "the great exception" to the general trend in which criminal statutes aimed at sexual behavior, gambling, alcohol use, and the like gradually withered away after the Second World War.[193] Since Congress created the Federal Bureau of Narcotics in 1930, the federal government has "never looked back," as Friedman put it, and never retreated from its equation of drug use with social disorder as well as of the drug trade with foreign threats to national security.[194] Since the formation of the DEA in 1973, the federal government has been "sucked further and further into the pit of drug-law enforcement. . . . The 'war on drugs' now consumes billions of dollars every year; it is fought in the streets, in the air, along the coasts, and even in foreign countries."[195] Friedman thought the drug war largely an "exercise[ ] in futility," although "[t]he public hysteria over drugs is not, of course, totally wrongheaded."[196] The important question for Friedman was "why, in an age that has relaxed so noticeably its attitudes on sex, vice, and gambling, does drug prohibition still stand so firm?"[197] Although the War on Drugs seems no less futile today than it did to Friedman, the violence of the drug trade and its costs to society are of a different order of magnitude now.[198]

Nonetheless, several of Friedman's ideas remain useful in explaining the complexity of the drug problem and its resistance to change. One is that criminal justice is a *social system*: a complex interaction between the way society is organized, people's ideas about it, and the changing social/political environment.[199] People's ideas about

193. *See* FRIEDMAN, *supra* note 192, at 354-56.

194. *See id*. at 356.

195. *Id*.

196. *Id*.

197. *Id.*

198. The Sentencing Project, a non-profit research-and-advocacy program in Washington, D.C., has published several worthwhile social-science studies of drug enforcement. *See generally* RYAN S. KING & MARC MAUER, SENTENCING PROJECT, THE WAR ON MARIJUANA: THE TRANSFORMATION OF THE WAR ON DRUGS IN THE 1990s (2005), http://www.sentencingproject.o rg/wp-content/uploads/2016/01/War-on-Marijuana-Transformation-of-War-on-Drugs-in-the-1990 s.pdf (assessing the role of drug enforcement in the criminal justice system during the period of 1990 to 2002); MARC MAUER & RYAN S. KING, SENTENCING PROJECT, A 25-YEAR QUAGMIRE: THE WAR ON DRUGS AND ITS IMPACT ON AMERICAN SOCIETY (2007), http://www.sentencingproject .org/wp-content/uploads/2016/01/A-25-Year-Quagmire-The-War-On-Drugs-and-Its-Impact-on-American-Society.pdf (analyzing twenty-five years of government data regarding drugs and the criminal justice system); MARK MAUER, SENTENCING PROJECT, THE CHANGING RACIAL DYNAMICS OF THE WAR ON DRUGS (2009), http://www.sentencingproject.org/wp-content/uploads/2016/01/The-Changing-Racial-Dynamics-of-the-War-on-Drugs.pdf (examining a dynamic shift in the racial composition of people incarcerated for a drug offense).

199. FRIEDMAN, *supra* note 192, at 6. *See, e.g.*, Lawrence M. Friedman, *Crimes of Mobility*, 43 STAN. L. REV. 637 (1991) (addressing bigamy, confidence fraud, and infanticide); Joseph R.

such things as race (especially), national security, or morality likely have more impact on drug policy than on many other social problems; such ideas are often more or less impervious to reason and resistant to change. The identification of drug use with race, immorality, or social decay is one such set of ideas that powerfully influences drug policy;[200] the idea that drugs are best interdicted at the source by state power is another.[201]

Another useful idea that Friedman developed is that law and law-making institutions may be especially resistant to calculated change when opposing social forces impinging on a particular issue work themselves into stalemate. Collusive divorce, for example, in which people had to allege (typically fraudulently) one or another statutory ground before judges (who were in on the fraud) would grant them the legal divorce they needed, persisted from the Reconstruction Era until 1970, when California passed the first no-fault divorce statute.[202] This corrupt, inefficient, and destructive system survived so long because the defenders of traditional marriage norms deadlocked with the multitudes of unhappy couples seeking easy divorce, so that reform legislation was impossible.[203] Once the political gridlock broke in 1970, legislatures tumbled over each other to enact overdue reforms.[204] The theory explains other areas in which legalized absurdity persists: immigration, same-sex marriage, or, indeed, drug use. For drug use in particular, normative gridlock explains the "drift and default" to which drug policy is subject: the aggregated political vectors impinging on the issue frustrate the development of rational policy while inexorably, by default, nudging it toward racism, militarization at home and abroad, and violence. For all the energy and bravery that went into it, the campaign to avenge Enrique Camarena's death thus

Gusfield, *Moral Passage: The Symbolic Process in Public Designations of Deviance*, 15 SOC. PROBS. 175 (1967) (discussing the cultural valence of "victimless" crimes); Leslie J. Reagan, *"About to Meet Her Maker": Women, Doctors, Dying Declarations, and the State's Investigation of Abortion*, *Chicago, 1867-1940*, 77 J. AM. HIST. 1240 (1991) (illustrating how state officials and medical professionals collaborated to enforce the anti-abortion law in Illinois). *See also* MICHAEL TONRY, THINKING ABOUT CRIME: SENSE AND SENSIBILITY IN AMERICAN PENAL CULTURE 3-9 (2004).

200. *See* TONRY, *supra* note 199, at 109-12.

201. *E.g.*, CATO INST., CATO HANDBOOK FOR CONGRESS: POLICY RECOMMENDATIONS FOR THE 106TH CONGRESS 169-73 (1999).

202. *See* Lawrence M. Friedman, *A Dead Language: Divorce Law and Practice Before No-Fault,* 86 VA. L. REV. 1497, 1504 (2000) (discussing collusive divorce); CAL. FAM. CODE § 2310 (West 2004 & Supp. 2016).

203. *See* Friedman, *supra* note 202, at 1533, 1536.

204. *See id*. at 1533-34.

contributed materially to the "hydraulic pressure" that bent U.S. law-enforcement agencies to "the dark side" in the years after 2001.[205]

C. New Scholarship after 2010

In 2010, the law professor Michelle Alexander published a book, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*,[206] that made a powerful impact not only on the scholarship but also the law of criminal justice. The book's thesis is that "rather than rely on race" to inscribe white supremacy on the law, as Americans did in the century between Emancipation and the 1970s, "we [now] use our criminal justice system to label people of color 'criminals' and then engage in all the practices [discrimination, exclusion, social contempt] we supposedly left behind."[207] Arrest records and criminal convictions deprive people—Black men, particularly—of civil liberties, economic opportunities, and political franchise more efficiently and on a larger scale than the Jim Crow system ever could.[208] "Mass incarceration," Alexander argued, "is, metaphorically, the new Jim Crow: the most damaging manifestation of the backlash against the Civil Rights Movement."[209] For Alexander, the leading edge of this campaign has been the War on Drugs that began during the Nixon Administration and has continued under every Administration since.[210]

Alexander's impact on the politics of criminal justice compares to that of Upton Sinclair on food safety, or Rachel Carson on environment.[211] If Alexander did not invent the term "mass incarceration"

205. *See supra* notes 138, 187.

206. MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010).

207. *Id.* at 2. *Cf.* Baum, *supra* note 69 (quoting the words of John Ehrlichman indicating that the Nixon Administration used the War on Drugs as a pretext to suppress the Black community).

208. *See id*. at 175-76.

209. *Id.* at 11.

210. *See id.* at 54-56.

211. *See* Jennifer Schuessler, *Drug Policy as Race Policy: Best Seller Galvanizes the Debate*, N.Y. TIMES, Mar. 7, 2012, at C1 (describing people's reactions to Alexander's theory of the new Jim Crow). *See generally* UPTON SINCLAIR, THE JUNGLE (Barnes & Noble 1995) (1906) (exposing the appalling working conditions in the meat-packing industry); RACHEL CARSON, SILENT SPRING (1962) (illustrating the harmful effects on the environment of the widespread use of pesticides). On the relationship between social change and political ideas, *see* Arthur F. McEvoy, *The Triangle Shirtwaist Factory Fire of 1911: Social Change, Industrial Accidents, and the Evolution of Common-Sense Causality*, 20 LAW & SOC. INQUIRY 621, 622-24 (1995); DEBORAH A. STONE, POLICY PARADOX AND POLITICAL REASON 162 (1988); JOHN W. KINGDON, AGENDAS, ALTERNATIVES, AND PUBLIC POLICIES 99-105 (1984).

(whose earliest use seems to have been by Marx in 1852),[212] she certainly energized it politically,[213] just as Catharine MacKinnon did with the term "sexual harassment" in the 1980s.[214] The idea took on new substance in people's comprehension of events in a political culture disrupted by international terrorism and the Great Recession of 2007-09. Its ability to explain events in the new environment lent it momentum in political debate that it lacked before.[215] Whether *The New Jim Crow* ultimately makes the kind of impact on the legal system that followed Carson's *Silent Spring*,[216] Sinclair's *The Jungle*,[217] or MacKinnon's *Sexual Harassment of Working Women*[218] remains to be seen. Initiatives at all levels of government toward decriminalizing marijuana, rolling back mass incarceration, even improving relations between police and communities of color may be evidence that the normative gridlock that has beset criminal justice for so long may be loosening.[219]

Two recent works by historians betray the influence of Alexander's masterwork, as well as of the social experiences that germinated it. Lisa McGirr's *The War on Alcohol* argues that Prohibition "was no mere distraction with few lasting consequences: [it] remade national party politics and imprinted the path of American state development

212. Karl Marx, *The Eighteenth Brumaire of Louis Bonaparte in* KARL MARX: SELECTED WRITINGS 347 (David McLellen ed., 2d ed. 2000). The term Marx used was "maβenhafte Einkerkerung."

213. Oliver Roeder, *A Million People Were in Prison Before We Called It Mass Incarceration*, FIVETHIRTYEIGHT (Sept. 18, 2015, 10:46 AM), http://fivethirtyeight.com/features/a-million-people-were-in-prison-before-we-called-it-mass-incarceration/.

214. *See generally* CATHARINE MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION (1979). *See also* Meritor Sav. Bank v. Vinson, 477 U.S. 57, 66-67 (1986) (citing Henson v. Dundee, 682 F.2d 897, 902 (11th Cir. 1982)) (recognizing sexual harassment that creates a "hostile working environment" as a violation of Title VII of the 1964 Civil Rights Act).

215. *See, e.g.*, ELIZABETH HINTON, FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMERICA 307-08 (2016). For the role of the Reagan Administration's War on Drugs in militarizing domestic policing, see *id*. at 309-14.

216. CARSON, *supra* note 211.

217. SINCLAIR, *supra* note 211.

218. MACKINNON, *supra* note 214.

219. *See, e.g.*, *Marijuana Overview*, NAT'L CONF. OF ST. LEGISLATURES (Sept. 2, 2016), http://www.ncsl.org/research/civil-and-criminal-justice/marijuana-overview.aspx; Erica Goode, *U.S. Prison Populations Decline, Reflecting New Approach to Crime*, N.Y. TIMES, July 26, 2013, at A11; PALLADIAN PARTNERS, STRENGTHENING THE RELATIONSHIPS BETWEEN LAW ENFORCEMENT AND COMMUNITIES OF COLOR: DEVELOPING AN AGENDA FOR ACTION (2014), https://nnscommunities.org/uploads/StrengtheningtheRelationshipBetweenLE_CommunitiesofColor-DevelopinganAgendaforAction.pdf.

into distinctive and permanent molds."[220] The book shows how Prohibition, which McGirr calls "one of America's greatest experiments in state building," had "highly differential impact[s] on distinct social groups, many of whom face parallel challenges to this day."[221] It also shows how Prohibition's legacy, more than the usual cautionary tale about "legislating morality," also included "the political awakening of the religious right, the electoral realignment that launched the New Deal, and the emergence of the twentieth-century federal penal state."[222]

Another new work, Katherine Unterman's *Uncle Sam's Policemen*, uses the term "rendition," which made few appearances either in legal or academic writing before it entered common parlance during the George W. Bush Administration.[223] Unterman's book shows how the practice of extra-legal rendition by Pinkerton detectives and other private agents became common in the last decades of the nineteenth century;[224] the germinal case, *Ker v. Illinois* in 1886, affirmed that private bounty hunters "still lacked authority to operate internationally, [but] that there would be no consequences within the United States if they crossed borders."[225] Informal rendition, the book argues, enabled "American law enforcers . . . to treat the Western Hemisphere—the space where the United States so often rehearsed imperial strategies—as part of their criminal jurisdiction;"[226] it "encouraged Americans to view the entire world as legitimately subject to U.S. laws and norms."[227] Domestically, the book makes the significant point that, like today, "pursuit of American fugitives abroad aimed not only to secure the nation's physical borders but also to stabilize the cultural boundaries of citizenship and national identity during an era of increasing mobility, demographic flux, and social upheaval."[228]

220. LISA MCGIRR, THE WAR ON ALCOHOL: PROHIBITION AND THE RISE OF THE AMERICAN STATE, at xvii (2016).

221. *Id.* at xvi.

222. *Id.* at xvi-xvii.

223. KATHERINE UNTERMAN, UNCLE SAM'S POLICEMEN: THE PURSUIT OF FUGITIVES ACROSS BORDERS (2015). The term "rendition" in legal and political senses means "the transfer of a criminal suspect from one jurisdiction to another. *Id*. at 5.

224. *Id.* at 66.

225. 119 U.S. 436, 444 (1886); UNTERMAN, *supra* note 223, at 66.

226. UNTERMAN, *supra* note 223, at 10.

227. *Id.* at 7.

228. *Id.* at 5.

D. Conclusion: Law Enforcement and Social Change

Like *The New Jim Crow,* both of these new books point to new ways of understanding relationships between law enforcement, social structure, and social change. They suggest, as well, different ways of understanding the legacy of the Camarena case. Satterthwaite developed a typology of abductions, from "rendition to justice" to "extraordinary rendition," as law enforcement agencies thought of new ways to subject international suspects to U.S. law. The abductions of Verdugo-Urquídez and Álvarez-Machaín were early examples of this process although, with the Supreme Court's approval, they underwrote less benign efforts later on. Law and Society scholars have long been interested in the social context of official behavior; the ideas of "drift and default" and "normative stalemate" shed light on the complex, interacting forces that exposed Agent Camarena to danger and guided the effort to bring his killers to justice into the particular channels that it took. New scholarship inspired by Lisa Alexander's remarkable book, finally, shows how law enforcement tactics both ratify existing power relations and limit opportunities to alter them in the future.

CONCLUSION

Friedman's lesson is still apt: criminal justice is a social system in which every action has sources in and consequences for its social environment, although the lesson manifests itself differently over time. Enrique Camarena brought bravery and considerable talent to the suppression of drug trafficking from Mexico, although competing priorities in both Mexican and U.S. governments—some of them legitimate, some not—hindered authorities from appreciating the dangerousness of the trade and from responding effectively once Camarena was taken. Camarena's fellow officers, likewise, mounted an unprecedented effort to bring his killers to justice. Without the cooperation of the host country and frustrated by the inadequacy of procedures available to them, they improvised as best they could and thereby ran afoul of established norms of criminal justice. The War on Drugs itself, driven as it was by contradictory strategic, political, and diplomatic considerations, impeded effective control of the drug trade and drifted gradually into lawlessness and violence.

California courts, especially the Central District Court, struggled to keep the *Leyenda* prosecutions within established norms of criminal procedure, often to the frustration of law enforcement officers in the DEA and the U.S. Attorney's office. Although there was no law

on the books to say whether René Verdugo-Urquídez could suppress evidence taken in a warrantless search by U.S. agents of his foreign residence, the Southern District Court and the Ninth Circuit Court of Appeals agreed that he could because the Fourth Amendment limited the federal government's authority to act, regardless of where or upon whom. Judge Rafeedie of the Central District and the Court of Appeals likewise agreed that the extrajudicial rendition of Humberto Álvarez-Machaín defeated U.S. jurisdiction over his case, and when the Supreme Court returned Álvarez for trial, the Judge directed his acquittal because the DEA's evidence was in his view insufficient to convict. Both the Central District Court and the Court of Appeals agreed that Álvarez-Machaín was entitled to a private-law remedy against his abductors and the government agents who directed them, whether under the Alien Tort Statute or the Federal Tort Claims Act. In every case, the Supreme Court supported the authority of U.S. law enforcement officers to act in foreign territory free from restrictions under which they would operate at home. In doing so, the Court played an essential role in constructing what would become the post-2001 national security apparatus.

Meanwhile, doctrinal and socio-legal scholars have tried to put order to the legal system's haphazard response to new challenges to U.S. law, first from international drug traffickers and later from terrorists. They explained the mysterious evolution of the "wars," first on drugs and then on terror, in terms of the contradictory social vectors that first produced them and then all but guaranteed that they would be counterproductive. They systematized all of the different ways in which the government tried to arrest and interrogate international suspects without regard to established norms of criminal procedure. They showed how the militarization of criminal justice abroad was of a piece with that at home, and how militarization at home and abroad tended mostly to exacerbate the problems it was supposed to resolve.[229] New work based on the combined experience of the War on Terror and the Great Recession of 2007-09, finally, has brought the whole into new perspective, suggested new ways of understanding the history and structure of our criminal justice system, and may point to more effective strategies for reform.

The abduction and murder of Enrique Camarena was a relatively small part of this story, although his own commitment to his work and the devotion of his comrades who sought to avenge him contributed in important ways to the evolution of the law of international criminal

229. *See* BROOKS, *supra* note 172.

procedure. The law enforcement community honors his memory with particular feeling because he devoted his considerable gifts and gave his life in the service of a policy that, while honorable in concept, was neither coherently motivated nor well strategized. His story provides students of our legal system with a powerful case study in the relationships between individual action and broader social changes, as well as in the subtle ways in which passion for a righteous cause can "make[ ] what previously was clear seem doubtful, and before which even settled principles of law will bend," as Justice Holmes put it.[230] His heirs can best honor his memory by taking the right lessons from his sacrifice.

230. Northern Securities v. United States, 193 U.S. 197, 401 (1904) (Holmes, J., dissenting).

PANEL DISCUSSION: JUDGES TEACHING RULE OF LAW ABROAD*

Bryant Garth, Hon. Lourdes Baird, Hon. Ronald Lew, Hon. Beverly Reid O' Connell, Hon. David Carter & Hon. Barbara Rothstein†

I. INTRODUCTION

BRYANT GARTH: Good morning. My name is Bryant Garth and I'm very happy to moderate this panel on judges teaching the rule of law abroad. I want to thank Jonathan Miller for inviting me and indeed for thinking up this panel, which I think is quite creative and unique. I also want to say, as former dean, I am very happy to be back at Southwestern and always feel comfortable in this wonderful place. The panel is about something unique, which is how you think about judges in relationship to judging. In particular, this panel is about the Central District's impact around the world, as missionaries of the rule of law.[1]

Our panelists have very distinct experiences and we're going to hear only a little bit about them, even though each of them could

* What follows is an edited and annotated transcript of the remarks made during the panel, "Judges Teaching the Rule of Law Abroad," at the Southwestern Journal of International Law's symposium on March 18, 2016. This panel, moderated by one of the leading scholars on the international movement of legal ideas, Professor Bryant Garth, allowed past and present judges of the Court to discuss their experiences teaching the rule of law overseas.

† Professor Bryant Garth, formerly Dean of Southwestern Law School and Professor of Law, UC Irvine; Judge Lourdes Baird, U.S. District Court for the Central District of California, retired; Judge David Carter, U.S. District Court for the Central District of California; Judge Ronald Lew, U.S. District Court for the Central District of California; Judge Beverly Reid O'Connell, U.S. District Court for the Central District of California; and Judge Barbara J. Rothstein, U.S. District Court for the Western District of Washington visiting with the U.S. District Court for the District of Columbia, formerly Director of the Federal Judicial Center.

1. *See Rule of Law Initiative: Our Origins & Principles*, AM. BAR ASS'N, http://www.americanbar.org/advocacy/rule_of_law/about/origin_principles.html (last visited Sept. 3, 2016); SHAWNA WILSON, FED. JUDICIAL CTR., U.S. RULE OF LAW ASSISTANCE: A GUIDE FOR JUDGES (2011), http://www.fjc.gov/public/pdf.nsf/lookup/rullaw11.pdf/$file/rullaw11.pdf.

probably speak all day on this topic. I want to hear their wisdom. I'm a researcher in this field and am very interested to hear their wisdom. We'll go ahead and start.

II. Panel Discussion

JUDGE BAIRD: Thank you. From roughly 1989 to 1999, there were only about two years that I wasn't involved in this sort of judging because that was the period that I was the U.S. Attorney. But for a full eight years I was able to partake in this experience.

Approximately two-thirds of all the programs that I dealt with were with groups of lawyers and at least one or more judges from the U.S.[2] We would provide numerous lectures and demonstrations. After getting into a particular country, we would put on these programs with the demonstration of an actual trial. It was all done in English since all of the participants spoke English. We would assign them in many cases as witnesses, which was a lot of fun for them and for us. We did that for approximately two-thirds of the programs that I was involved in. They culminated in what would be considered mock trials.

It was a mock trial wherein the participants would act as witnesses and judges. By the way, I should say, I am bilingual, so that helped me a lot in Latin American/Spanish-speaking countries. We were in Argentina, El Salvador, Egypt, India, Jordan, and East Jerusalem in Israel. Those were the areas in which we had set up these programs and mock trials. It was really interesting to see that the participants were very anxious to perform, if you will, but they would come in and really get into their parts. It was very exciting for everyone.

For approximately one-third of my experience, I was the only presenter. I would mainly lecture about the system, take questions, and lead discussions with the audience. The countries that I did that in were Bangladesh, Uruguay, and Argentina. The main question was, "what were we doing and why were we doing it?" The key problem that we were trying to assist these countries with was their delay in the resolution of cases.[3]

It was particularly serious in Bolivia, Bangladesh, and Egypt, which were the least-developed countries. Now you say, "well yes, that could be a problem," but the reality of this problem was that a

2. *See*, *e.g.*, Jennifer Rasmussen, *A Short History of the American Bar Association Rule of Law Initiative's Technical Assistance Approach*, 31 Wis. Int'l L.J. 776, 776-78 (2013).

3. *See* U.S. Dep't of State, Country Reports on Human Rights Practices for 1998, Vol. II, 1861-64 (1999).

participant may be arrested and there was no such thing as bail available for the criminal defendant.[4] This meant that the participant would stay in custody until his or her trial was heard and resolved, which was beyond the statute of limitations, and beyond the maximum sentence they could ever have gotten. It was a very serious problem and very difficult problem to resolve.

As I mentioned before, the least-developed countries, which were Egypt, Bangladesh, and Bolivia, were the hardest to deal with regarding bail, and even more difficult to determine whether they were capable of making any adjustments. The worst thing about it was that there were individuals just languishing in jail until courts got around to hearing their case. Eventually, upon concluding their hearings, the resulting sentences would be well beyond the maximum sentence he or she could have ever gotten. Although we were able to successfully convince a majority of international courts to adopt their own versions of a guilty plea,[5] some of the parties (Bolivia, Bangladesh, and Egypt) turned down that concept.

Though their own version of the guilty plea didn't necessarily shorten the time served, it instead allowed them the opportunity to plead guilty, by which the defendants would be sentenced immediately, and released on time served. This was the one success that we had from this particular exercise. One of the disappointments that I've encountered, which I'm sure all the rest of us share, was the inability of most countries to adopt a bail system. They just didn't have this concept. Perhaps this was due to the fact that they were so underdeveloped, but that is only one of the possible reasons that it happened that way. This was the biggest disappointment that we had. We were hoping that we could change their minds and adopt the kinds of systems of bail that we have, but were unable to do so. Thank you.

BRYANT GARTH: Now, Southwestern's very own, Judge Ronald Lew.

JUDGE LEW: I think Judge Baird has covered a lot of areas that will be covered in other questions yet to come. My experience in the

4. *See id*. (stating that in Bangladesh lengthily pretrial detention is a problem and in some cases pretrial detention lasts several years); *see also* USAID, BOLIVIA STRATEGIC PLAN FY 1998-2000, at 9 (2002) ("Many who qualify for release from detention still remain there beyond legally prescribed times.").

5. *See* Leonard Cavise, *The Transition From The Inquisitorial To The Accusatorial System of Trial Procedure: Why Some Latin American Lawyers Hesitate*, 53 WAYNE L. REV. 785, 808 (2007).

rule of law began when I was a young man in the military. I first traveled overseas during the Vietnam War. Fortunately they needed an officer immediately in Okinawa, Japan. Then I went to Taiwan for seven months of temporary duty. I had my first exposure from my military travel, which later motivated me to return to those countries and to work with their courts of law.

My other worldwide travels began in 1978. In 1979 I went to China and thereafter continued to travel to countries throughout all of Asia. While I was traveling in those early years to China and Taiwan, I always contacted their court systems during my personal trips, and made myself available to speak to their courts or law schools. Through my early travels throughout China, unbeknownst to me, judges from the United States were hearing about my work in China and other countries. And so, Judge Michael Mihm, part of the Committee on International Judicial Relations for the Judicial Conference of the United States,[6] a new committee at the time, contacted me and said, "You're doing such great work in China on your own, why don't you join our committee?" I had volunteered to join that committee when it was first created by the United States Courts, but they did not select me. But now that Judge Mihm had offered me this opportunity, I decided to accept. The Chief Justice called me and said, "Please come onto the committee, we have a vacancy," which was a wonderful opportunity.

Beginning in 2000, I worked on the Committee on International Judicial Relations for two consecutive three-year terms. The committee is basically the arm of the U.S. Courts that coordinates the rule of law work around the world. Judge Wallace and I chaired the Asia committee, and we orchestrated the work of the rule of law throughout Asia.

We broke it down so that we had committees for Russia, South America, and Africa. We divided the world up so that we could coordinate everyone's efforts. I think there were only thirteen judges on that committee at the time. We did the coordinating and some of the travels too. Throughout my years, I traveled to and worked with every country in the world, except for Australia. But I have worked with

6. James G. Apple, *Starting Down the Long Trail of Judicial Independence: The Experience in Russia, the Newly Independent States, and Central and Eastern Europe*, 8 CIJL YEARBOOK 173, 177-78 (2000); *see also International Judicial Relations*, FED. JUDICIAL CTR., http://www2.fjc.gov/content/materials-international-exchanges-0 (last visited Sept. 1, 2016) (the Committee on International Judicial Relations' mission is to coordinate the federal judiciary's relationship with foreign judiciaries and with other organizations that are involved in international judicial relations, the expansion of the rule of law, and the administration of justice).

Australian judges throughout various programs in other countries as well. The contacts have been tremendous. It's been great.

When I first became involved in rule of law, I familiarized myself with other countries' infrastructure, judicial system, and legal system. It was a very easy presentation. As we delved into the work, we began considering procedural fairness, substantive laws, and various programs in the best interest of the countries requesting our assistance. We organized these programs to assist our efforts. We would involve judges from the United States and coordinate our efforts with other judges from around the world. Despite not being bilingual, I've been to almost every country or continent around the world, including China, South America, Central America, and Canada. It's been very fascinating to do real law work. That's my exposure.

BRYANT GARTH: Thank you. Now Judge O'Connell.

JUDGE REID O'CONNELL: My rule of law experience is relatively recent compared to the previous panelists. I was a state court judge before I took the federal bench, and I taught a lot too. I was asked by the State Department because I too speak Spanish fluently, and they wanted Spanish speakers to go to Mexico City. Many countries were transitioning from the inquisitorial system to an adversarial system.[7] And what those countries wanted were judges to talk to their judges about the role that we serve in trial work. So I first went to Mexico City, and then I was asked to go to Macedonia to talk to the judges about their role as a judge and the concept of plea bargain and bail in criminal cases. I also have a background as a federal prosecutor so I knew a little bit about bail and trials.

Then, based upon that, a professor from my alma mater asked me to go to Uganda with him and a team of lawyers, and what we did there was very similar to Judge Baird's experience; we met with the judges, we had very frank discussions in private with their judges about power, the integrity of the system, about how we engender confidence in our system, and also their private fears as to change. I think they were more willing to talk to judges about these issues than lawyers. Then we did mock trials. Gosh it went from arraignment through

7. *See, e.g.*, Miguel A. Méndez, *Shifting From the Inquisitorial to the Adversarial Model in Criminal Cases: Is a Hearsay Rule Indispensable?*, 5 FIU L. REV. 13 (2009) (stating that by spring of 2009, the Mexican legislative branches had approved a constitutional amendment that incorporates many features of the adversarial system into Mexican criminal trial practice); William Burnham & Jeffrey Kahn, *Russia's Criminal Procedure Code Five Years Out*, 33 REV. OF CENT. & E. EUR. L. 1, 3 (2008).

bench trial and sentencing. We wore their garb, so that it looked familiar to them.

One component that is very different from Judge Baird's experience is the Mexican judges from Mexico City came to the United States. The Macedonian judges came to the United States and observed both federal and state proceedings to get a sense of our civil and criminal proceedings. The Ugandan judges have been here twice. We are now working with Guatemala as a result of it. Zambia has made a request to partner with its team of lawyers and judges to talk to us about case management. They're involving their court staff as to how that's going to change the way they do business. We have an interaction: they've actually asked us to, for a week, agree to embed their folks with our folks, shoulder-to-shoulder, as to how we manage cases from a technology standpoint—which I love talking to them about—to a judicial standpoint. That has been my experience and what I have found is that we keep getting these requests to assist, and frankly I'm proud because I think our system, although not perfect, is exemplary and I'm proud to share it with everybody.

BRYANT GARTH: Thank you. And now Judge Carter.

JUDGE CARTER: In 1999, I got a call from a Judge Manuel Real and Linda (my judicial assistant) said, "Judge Real's on the phone." Now of course I started to genuflect and he couldn't see that. As I started to reach for the phone I was in a prostrate position talking to him. On the phone he said, "Hey Dave, I need you to go to Arkhangelsk." You have to understand I can't spell Arkhangelsk and I don't know where it is. His other demand (or request) was, "You need to be there in three weeks." I searched in Riverside County and San Bernardino County, but couldn't find a place by that name, and off I went.

I want to talk to you briefly about why I've entitled this "the rule of law" with multiple question marks after it. The rule of law depends on who you are, where you sit, or what you want to impose, or how you want to not impose, but instead modify it. Presently, I'm taking about ten trips a year and I prefer conflict zones. I prefer these areas because I have a firm belief that when the American military goes into a region, that which occurs is an implementation of the rule of law. But that implementation cannot continue without civilian trainers, the judiciary, and others inserting themselves quickly. There's a huge deference to the State Department. In regards of Ambassador Stevens, there is a "huge gulf" that takes place. And I'm prepared to discuss

with you why the Taliban, in a sense, is able to implement the Jirga System.[8]

I think this transition of power today places people with a terrible responsibility. It can be orderly or it can be brutal. In our American system this transition is made easier because under the Constitution we transfer power swiftly and, usually, quite easily. We take for granted how fundamental this commitment is to governmental institutions. It's not so much that the American military has not attempted to take control, which in most countries it does occur. It's that no one in the military has ever questioned the assumption of military control because of their support of the Constitution. Epitomized by George Washington handing his sword back to the Continental Congress.

The rule of law concept that you've spoken about, with nodding acquiescence, is very elusive. I hope to point that out to you, and I'm prepared to take you to the following places . . . I've come today with some of the slides of Armenia and Georgia to show you how transition takes place and, often, how it doesn't. I'm prepared to take you up to the Syrian refugee camps if you want to discuss human rights, women's rights, the Jirga System, or the Hudûd statutes.[9] We can discuss what happens to you if you run from a husband who's beating you, and show you what is currently occurring in Syrian camps and to the refugees. I'm prepared to take you to Bosnia, if you'd like, to show you the ethnic cleansing that took place and what that really means to have a corrupt judiciary. I have graphic slides of Afghanistan, and going north into a Taliban prison to show you how the military is going through sorting out whether they take you to the right side or the left side. If you're a petty thief, or somebody who's committed a crime, you're going to the left side and you will have some kind of due process. Finally, I'm prepared to take you to Pakistan, prepared to take you up into the tribal areas if you want to ask questions about it, and show you slides about working with the tribal chiefs up there. Maybe a story about being there when Osama Bin Laden was killed that week, and demonstrate our pleasure, as judges, of hav-

8. *See* Francois Tanguay-Renaud, *Post-Colonial Pluralism, Human Rights & the Administration of Criminal Justice in the Federally Administered Tribal Areas of Pakistan*, 6 SING. J. OF INT'L & COMP. L. 541, 557 (2002) ("A jirga in its simplest form is merely an assembly. Practically all community business, both public and private, is subject to its jurisdiction . . . It exercises executive, judicial, and legislative functions, and yet frequently acts as an instrument for arbitration and conciliation.").

9. *See Hadd*, OXFORD ISLAMIC STUD. ONLINE, http://www.oxfordislamicstudies.com/ article/opr/t125/e757 (last visited Sept. 1, 2016) ('Hûdud' is plural for the word 'Hadd'); Michael Skjelderup, *Hudud Punishments in the Forefront: Application of Islamic Criminal Law by Harakat Al-Shabaab Al-Mujahideen*, 29 J. OF L. & RELIGION 317, 320 (2014).

ing to declare gifts. I want to show you a cobra that was given as a gift by my colleagues along the tribal area if you give me the opportunity, because that's a gift I didn't know how to declare. Thank you.

BRYANT GARTH: Thank you. Our first four panelists were all from the Central District, which should give you a sense of the outreach of our locals. Now we have Judge Rothstein, who has been the Director of the Federal Judicial Center to give you a Washington-centered perspective.

JUDGE ROTHSTEIN: The Federal Judicial Center has as part of its mandate—in addition to the education and training of federal judges—the spreading of the rule of law across the globe, and educating judges in other countries. For the eight years that I was with the Center, I had the opportunity to travel, I won't say to every country in the world, but certainly many of them. It's a very interesting experience.

We would always begin by asking, "What do you want us to talk about?" and we'd get the same requests over and over again. They wanted us to talk about judicial ethics, case management, and how to move cases and prevent delay. They also wanted us to talk about writing. Now it's one thing to give somebody instructions on how to write a good opinion, but we found that you had to start one tier lower than that. You had to explain the importance of writing an opinion and further explain that a reasoned opinion was an element to the judiciary that would explain their reasoning to the people. That it wasn't just an arbitrary outcome, "Yeah, he won, he lost," but that there was a reason behind it.

In addition to case management, they would also ask about the role of a judge. Most of us believe that a judge's ability to control a courtroom is an important way of moving a case along. However, this was a concept that was foreign to many judges because in most countries, judges are not chosen in the same way our judges are chosen. They haven't had enough experiences with lawyers, and they're not about middle age or getting there. Becoming a judge is instead a choice when they go to law school. They have the option of taking a prosecutorial, private practice, or a judicial track. This may mean that at the age of 22 or 23 they will come out a judge. You may have access to a low-level judge to help get you through, but nobody is teaching you the things that judges learn in the U.S. By being a lawyer for years before becoming a judge, you learn the fundamentals, such as how a courtroom works, and what makes a trial work and move along.

One of the issues when you're teaching ethics in a foreign country is that at least half of the judges you are talking to are taking bribes. It's a given, it's a given in many judicial systems. Of course you don't know which judges are taking you seriously and which ones are just sort of sitting there nodding very carefully at everything you're saying. But I will tell you a powerful instance that I think will illustrate this point.

So the way we would teach ethics very often is with clickers, those electronic polling devices that show you the percentages and distribution of the group's chosen answers. Many foreign judges were absolutely fascinated by this. They absolutely loved it. The idea that first of all, they had adopted a judicial code of conduct similar to the one that we have,[10] but of course, that they were not aware of that. They were responding on an instinctive basis, and of course, their answers were all over the map, which incidentally happens in our judicial exercises too. Before breaking for lunch, they asked, when we come back, instead of beginning with your prepared questions, can we start with our questions? I thought, "Yes! We've made it, they really love this, and they're going to give us really good questions because we'll be geared to their system." We said, "of course."

When we came back from lunch, we started with the first question that somebody had written out, which asked, "After you've made a decision, you have decided that the plaintiff's going to win. You ask the parties to come back in an hour while you prepare your decision for them. Your secretary comes in with an envelope and it's full of cash from the plaintiff's attorney. Question, since you were going to rule for the plaintiff anyway, the money is not influencing your decision, can you take the money?"

My assistant and I looked at each other; we thought we did something this morning, but now we're talking about something totally different. Don't ask me how we answered the question, we obviously didn't answer it, but went on with something else a little more basic.

That should give you an idea as to how you should be very careful when you go into a different system. You have to be very careful about superimposing. What we're bringing with us from our system is extremely basic. We once went to a clerk's office in Uganda. First of all, these clerks had, I would say, not even the equivalent of a junior high education. They were paid a mere pittance. How do you expect somebody to perform in a job like that? This is the staff of somebody

10. *See* ABA MODEL CODE OF JUDICIAL CONDUCT (2011).

who's going to be bringing the files to the judges. The files were on the floor and went up to the ceiling. They were not alphabetized in any way. I figured the best advice I could give to the State Department was to buy these people some filing cabinets and that would help a lot.

Okay, so here are these files, how did the judges know which cases to hear? There's a very simple answer. The guy who came in with money and subtly handed it to the clerk with the file in hand. Well there's the file to the case that the judge got to hear that day. Here I am talking about case management and about how you need to set a date for the motion to be filed and for the reply briefs as well, and that you need to tell them the number of pages in the brief. They just look at you like you're joking.

I just wanted to make a point that, when we as judges go to other countries, we can't just walk in and say, you've got to do it our way, you know, it works our way. It doesn't transplant unless you have a very good understanding of the system and people that you're talking to.

III. Questions and Answers

BRYANT GARTH: Thank you all, and thanks for providing me with a difficult hypothetical for my legal profession class. I want to pick up on your point with a question, and I want to get the audience involved as well. All of you have long experience doing this and it's not easy to learn how to bring the rule of law to places that don't have a strong tradition. How did you learn how to do this and what have you learned in the time that you've been doing this?

JUDGE ROTHSTEIN: I think one of the most important things is to learn about the country before you go. Lean as much as you possibly can. The State Department is very helpful. They usually have a lot of information, at least, sometimes, official information. The other thing is to spend a few days there before you do your talk. My trip to that clerk's office changed everything that I had prepared because I realized what I was going to talk about no longer made sense. When I went to Ghana, and saw exactly what Judge Baird said—that people were sitting in jail way beyond their maximum sentence—it changes everything you wanted to say.

JUDGE LEW: I have a few points to make about the successes and the failures of the program I've been involved in. You go over to a country for a particular program. They have asked directly, specifi-

cally, what they want to hear from you, whether it's a subject matter or a procedure. You prepare the programs by bringing speakers over and implementing your program.

Over the years I've noticed that once the program is over, I would give them my opinion and say, "This program has been pretty good, but you don't have all the proper people here to listen to our presentation. You need the prosecutors. You need the lawyers. You need the administration. If you were to have such a program again, ask for some other input, because your problems are created by these other agencies. Everybody should be on the same page and hear our presentation."

What are some of the successes? There are too many to mention, but I have one in particular. One day I received a call from Justice O'Connor. China invited her to attend a two-week program with the People's Court as part of a Supreme Court exchange. They had a host of problems that they wanted to discuss privately with other international Supreme Court members. Even though I'm not on the Supreme Court, Justice O'Conner invited me to join her because I have a reputation for knowing how to work with China. I was one of five judges selected for the program.

We had a tremendous program in China. We identified their problems. Because there were so many, we prioritized them. We informed China that we would focus on ten. The highest priority, which as Judge Rothstein just mentioned, was the corruption overseas. Corruption was the underpinning of many of China's problems, so we attacked that by recommending that China raise its judge's salaries.

The President of the Supreme Court of China accepted all ten of our recommendations. Before we left, we had a meeting with the President of China about our list of recommendations and they implemented every one of those programs. That was the year that China was entering the World Trade Organization (WTO). I also made a personal recommendation: Prepare for your anticipated business litigation with regard to intellectual property rights and the patent litigation that's going on. Your judges are not trained for this program, so you better start training your judges. The President said that *all* the judges would be trained. I said, "I'm sorry, but you have a problem. You need to tailor it down to a specific court." Two days later he said, "We will, we'll give it to the intermediate [court]."

That's an example of a success, but I also want to isolate the failures. We go to a country and we try to do work. In Indonesia we

wanted to import the rules of the Code of Conduct[11] to the countries around the world. Indonesia asked for help, but we knew we could not go there and say, "Look at our codes of conduct." It will not work. They would never accept it. So another judge from the Netherlands and myself went to Indonesia to try to get them to implement the rule of law and the judicial rule of conduct.

We said, "Don't look at Netherlands, and don't look at our system. Adopt the international accord on the rule of conduct based on your country's principles." We spent three days discussing why their Supreme Court should implement the rule of conduct. On the third day discussions stalled. "We will never accept it," they said. "What can't you accept? The rules of conduct are very simple," I asked . . . "Let me just pick a simple rule: You have to have the appearance of impartiality." I said, "If a judge in court had a litigant come in, and they're all Muslims, who wanted to give some fruits to the judge, would the judge accept it?"

He said, "Of course, all the time." I said, "How about if the judge was in court before the proceeding, and they handed the fruit to the judge?" The judge says, "I will accept it." I said, "Even if the other party didn't give you anything?" He said, "Of course." I said, "Why is that? Don't you think there's an appearance of impartiality?" He says, "Of course not, we're Muslims, you just don't understand us. These are our rules. We will not offend another Muslim; we will always accept a gift." I said, "Despite the fact that the judge is going to make a ruling on the case?" He said, "Yes, therefore we will never accept the rules of conduct. End of story." That is an example of a failure.

BRYANT GARTH: Thank you. Does anyone have a question?

AUDIENCE MEMBER: Yes, actually. It's directed to Judge Carter. It's one thing to go into a relatively calm region, for lack of better terms, but I'm curious about how it's like to go into the areas of conflict. How do you use and apply U.S. law in places such as in the Syrian camps?

JUDGE CARTER: Okay, that's a great question. First of all, I don't work for the State Department, I'm a judge. Oftentimes, in overseas training, there's a very fine line. Picture a situation where a judge that you trained in America is accused of taking a bribe, but

11. CODE OF CONDUCT FOR UNITED STATES JUDGES, INTRODUCTION (2014), http://www.uscourts.gov/judges-judgeships/code-conduct-united-states-judges.

he's being held in the Taliban prison. The Ambassador of the State Department cannot go into that facility without being asked for something. In terms of human rights, I can enter these regions. Bush can talk to Putin, or maybe I can talk to the general, but my country wouldn't have their fingerprints on it. I call that partial rule of law.

BRYANT GARTH: I've got one more question. Do you find this type of work to be complementary or does it compete with work as a judge, that is, do you bring anything from abroad back into your judging at home?

JUDGE REID O'CONNELL: Absolutely. You bring back everything. Patience, expectations, and great ideas you can have a conversation with someone about. It has enriched my life significantly to learn how to be a better judge by just talking with people all over the world.

JUDGE LEW: Many civil law countries already have great programs for mediation and ADR. Many of the countries immediately want to start transitioning their system to be like ours when they hear what we present to them. On one occasion, I stood up and said, "We always learn from each other. You like what we present, and I like what you have here already." So in one country, I said, "You have such a great mediation program already and you're going to do away with it so you can have a so-called rule of law adversarial system. Please don't get rid of that system. We learn from you. In our country we are now implementing mediation and ADR to supplement our system." It works as a two-way street.

AUDIENCE MEMBER: The profundity of the cultural and historical challenges is really staggering. One of the panelists used the phrase of being "missionaries for the rule of law." I'm curious about the partnerships that may be established with all the work you're doing with groups like NGO's or other groups that have experience on the ground, as opposed to or in addition to the State Department, U.S. military, or USAID. Are there connections to other groups that may have deep cultural appreciation with the challenges?

JUDGE ROTHSTEIN: There are resident people from organizations like the ABA in these countries for months and years at a time. They are invaluable because they know the country very well. To disregard them would be foolish, because you need to know as much as

possible before you go. We note the differences they have with some of our ideas. For instance, there are many countries that cannot understand our love of the jury system. There's practically no other country that I know of where the jury system works. They're really amused by it. You know immediately a lot of the things are not going to go over very well, so you have to be very careful.

For instance, I already mentioned this in talking about writing opinions and coming out with opinions, but one thing we realized very quickly, is that if you don't have a reporter system, no one can ever find those opinions, and they have no precedential value. Now of course we're talking case law where precedential values support you. But even under a non-common law system, whatever system you're judging in, precedence still makes a difference. You don't want the judge down the hall coming up with a totally different decision than what you're coming up with. How do you define it? How difficult would it be and how would you go about establishing a recorder system? Every time you attack one portion of it, it gets more and more complicated, but that doesn't mean you can't do it.

JUDGE LEW: It's very interesting that you pick up on a phrase, "missionary for the rule of law." That implies that we're carrying a message over there for someone else and that someone else is the funding agency. We are all judges. Somebody else funds the programs, and it's never us. The courts have no money for this. Either we do it on our own account, with our own money, or we're funded by a source. The sources have a message to promote. If the source is the ABA for instance, they have their own agenda. It could be the USPTO's office; they have their own message that they want to carry across. It could be the World Bank. In sum, the funding agency is going to want to be involved. The State Department is always involved as well.

When you go to any country, there will always be an economic officer waiting for you in our U.S. Consulate. He has his mission that he wants too. There's a representative from the USPTO's office in many of the major U.S. Consulates around the world, and they too have their message. You have to remember that we are all judges; we carry our own message. We will deal with the rule of law, but we stand apart from what their mission is.

We only carry the court's message, pure and simple. These representatives have other goals. For instance, when I went to Dubai, the economic officer was basically funding my trip under auspices of some

work in the U.S. on the IPR. When I found out what the real mission was, I said, "I can't do it." We went undercover and had our meetings and I said, "Listen, that's your mission. You deal with it, but you can't tie the court to that. You have to recognize that you're talking to the judges only with respect to the rule of law, with regard to the legal systems, and the infrastructure within the courts."

JUDGE CARTER: Just to follow up, most of these programs are funded through the State Department. Though there are some peculiar situations worth mentioning. For instance, we just got done with a session between the North Koreans and the South Koreans. If you just happened to be in Bangkok conducting a counter terrorism seminar for three days and you happen to wander down the hallway on a Wednesday afternoon, and you find the judges from Mongolia, Japan, North Korea, and South Korea sitting in a room. Do you drop in to participate even though the State Department might disown this? But where did that money come from? It came from the South Korean government. Let me repeat that. We are faced with, on occasion, some very potentially peculiar decisions that we have to make, and one of the individual decisions you have to make is whether you want to participate. Do you believe that your humble efforts can somehow modify or change a system for the better?

From my perspective, I think that all of my colleagues here are missionaries. They are missionaries for peace, humanity . . . whether we move to change a system (which is arrogant), or gently push and modify a system, and get in there at dinnertime or breakfast, talk and live with these folks—that's the change you make over a period of time and it's relational.

BRYANT GARTH: Thank you. I have a question about the history of the Central District. We have a sense of when this started, but are rule of law activities by federal judges increasing in more recent years? Do you have any idea as to the number of judges that undertake these activities?

JUDGE LEW: I believe it to be very popular from the Administration Office and the Committee on International Judicial Relations. Judges are always interested in submitting their name for this kind of work.

BRYANT GARTH: Do you think most of them do it?

JUDGE LEW: Most of them do indeed do it, but the other problem is the workload in the federal courts. The workload is so heavy, that it becomes very difficult for us to find the time to get away to do the work. Judge Carter and myself think alike and we squeeze our time out and people do not know when we're gone. Lawyers do their work, settle their case, and do whatever they have to do. But we're on a very tight schedule. I think a lot of judges are interested in this work, and I think there's a lot of great interest in the work. But you have to remember that it's a lot of effort for us to travel to other countries. We've also encouraged many of the countries now to bring people over. We have, through the Federal Judicial Center and the USPTO's office, grand arenas and facilities to educate these people.[12] I remember judges from the Supreme Court had sent young judges over from Korea and Japan to be trained here in my court for two to three months at a time on specific missions. One such mission was how to create a jury system and the other was to report back recommendations on how to create a magistrate judges system to augment the judicial work. They spend money to bring people over here as well.

JUDGE REID O'CONNELL: As a newer judge to the federal bench, I would like to make one last point. Judge Carter seeks you out if you have any interest at all to continue this rule of law effort. I think that's very important because at some point it's going to be on the newer judges to later carry this on. I would just like to give kudos to Judge Carter for constantly identifying people and offering to get them involved.

BRYANT GARTH: Kudos to you all for sharing your time in this very crowded room. Thank you.

12. *See* Hon. Barbara Rothstein, *The Federal Judicial Center Offers Training and Research*, The Federal Lawyer, Oct. 2009, at 36, 38-39; *Global Intellectual Property Academy*, USPTO, http://www.uspto.gov/learning-and-resources/global-intellectual-property-academy (last modified Apr. 19, 2016).

FEDERAL JUDGES AND RULE OF LAW INITIATIVES: AN EPILOGUE WITH NOTES FOR SCHOLARLY INQUIRY

*Bryant Garth**

The preceding remarks by the panel of federal judges, four of whom are from the Central District of California and the other, with long experience in the Federal Judicial Center, provide a rich picture of the work abroad by federal judges in the name of the rule of law. This epilogue will seek to put their individual stories into a larger context. I will not repeat the remarks of the federal judges, but I will offer a few preliminary observations about how they may fit into the general process of exchange and promotion of the rule of law. My intent is not to explain the remarks or the commitment of the federal judges to this enterprise. Their enthusiasm and commitment are evident in their own statements. I think this exchange is worthy of more scholarly attention and therefore write this brief epilogue mainly to encourage more research.

There is vast literature on the rule of law industry, criticizing the various approaches that have been taken toward building the rule of law. Among the most thoughtful commentators on rule of law assistance—termed more generally "democracy aid"—from the inside is Thomas Carothers of the Carnegie Endowment for International Peace. Carothers in a recent retrospective notes the increase in annual expenditures from $1 billion in the late 1980s to about $10 billion today.[1] Taking stock of the 25 years of democracy aid, Carothers notes some progress, but also many systemic problems. He argues in fact that the first generation of aid relied too much on "the strengthening and reform of key state institutions, especially those checking the

* Professor of Law, UC Irvine; Dean Emeritus, Southwestern Law School.

1. Thomas Carothers, *Democracy Aid at 25: Time to Choose*, 26 J. OF DEMOCRACY 59, 60 (2015).

power of centralized executives, such as . . . judiciaries."[2] He also believes that a problem remains today with a failure to "move beyond stale judicial-strengthening efforts that rely on rote best practices training while ignoring the broader array of entrenched obstacles that prevent ordinary citizens from achieving justice."[3] The problems of these approaches and democracy aid more generally, he contends, relate also to "a feebler policy commitment" today to democracy and the rule of law in relation to the priorities of national security and wars on terror.[4] USAID, he notes, has cut spending.[5]

The personal testimonies of the federal judges at Southwestern may reflect the persistence of old and largely unsuccessful models, as Carothers would maintain. The judges at Southwestern certainly recognize the difficulties and the challenges of facilitating enduring changes. Carothers might criticize the tendency reflected in the individual stories to use United States models in promoting reforms, such as bail, relatively long reasoned opinions, codes of judicial ethics, and oral trials—even though they also suggested an openness to other approaches. Of course, it is not an accident that United States models appear. It is not imperialism. United States judges are best able to advise on United States approaches and indeed are invited because of their expertise in those approaches. The general theme of Carothers and many other critics, however, is difficult to counter either with personal narratives or comprehensive evaluations. The enduring successes of these missions—and rule of law assistance more generally—are subject to question and difficult to show.

Yet the overwhelming message that comes from the remarks, by the federal judges, is how much they enjoy their missions abroad and how much they are appreciated when they travel or work at home with judges from abroad. The story is certainly more complex than what Carothers and other critics suggest.

My own work on globalization suggests that these programs do not occur unless they fit the interests of the importers and the exporters. The interests do not have to be the specific agenda of reform that ostensibly motivates the activity—even if the activity itself directly focuses on the reform agenda. It is instructive to look at the histories of prominent programs of exchange. Giles Scott-Smith, a historian based in the Netherlands, has studied the impressive Ford Foundation

2. *Id*. at 61.
3. *Id*. at 64.
4. *Id*. at 70.
5. *Id*. at 71.

funded programs for the teaching of international law at The Hague after World War II.[6] The programs taught international law to individual students from developing countries in particular. Whether the participants came away as international lawyers or not, Scott-Smith shows that the Ford Foundation commitment to funding the program during the Cold War depended on the belief that the networks of individuals who passed through the program, united perhaps by some orientation toward a noble vision of law, would turn out to be enduring friends of the United States in the Cold War.[7]

Similarly, the Institute of International Education Exchange, which administers the Fulbright program among other programs of exchange, had as one very clear mission the creation of cosmopolitan Americans who would support a US foreign policy that strongly engages with the world—versus isolationism and retreat from that engagement.[8] The idea was that Americans who went to Europe and elsewhere would make friends and develop interests that would continue throughout their lives.

Other programs of international exchange more explicitly teach norms of governance—for example in law or in economics—consistent with a market economy that is open to trade and investment. Jorge Dominguez, for example, documents the important role of Latin American economists educated in the United States in both liberalizing Latin American economies and in promoting transitions to democracy in the 1980s and 1990s.[9] The cohort of economists from different programs met and befriended each other in the United States.

I could imagine enthusiasm for judicial exchange with respect to all these interests; in creating friends abroad, in developing more cosmopolitan judges at home, and in promoting openness to United States friendly norms. Steps toward judicial reform are indeed consistent with promoting norms of governance that allow a stronger role for markets and private power, in part by providing strong judicial means to question governmental policies. They promote a stronger role for the judiciary, which goes against the relatively strong role of

6. Giles Scott-Smith, *Attempting to Secure an 'Orderly Evolution': American Foundations, the Hague Academy of International Law and the Third World*, 41 J. OF AM. STUD. 509, 509-510 (2007).

7. *Id.*

8. *See About Us*, INST. OF EDUC., http://www.iie.org/Who-We-Are/Mission-and-Values#.V84eKTt4048 (last visited Sept. 5, 2016).

9. Jorge Dominguez, *Technopols: Ideas and Leaders in Freeing Politics and Markets in Latin America in the 1990s, in* TECHNOPOLS FREEING POLITICS AND MARKETS IN LATIN AMERICA IN THE 1990s, at 12, 15 (Jorge Dominguez ed., 1996).

the state and weak role for the judiciary that has characterized France and countries influenced or colonized by France, including those in Latin America.

One can be more specific in speculating about the dynamics of federal judicial exchange. Perhaps there is something particularly special about federal judges. I was intrigued especially by the statement by the Honorable Ronald Lew in which he declared some independence from funding authorities and specific agendas behind judicial exchange: "You have to remember that we are all judges; we carry our own message. We will deal with the rule of law, but we stand apart from what their mission is. We only carry the courts' message, pure and simple."[10]

The question is, what it means to showcase United States federal judges abroad. Sociology teaches us that individuals are selected for and learn the behaviors associated with positions in particular fields.[11] Those who become federal judges share many features. Federal judges are talented, confident, act with a certain amount of gravitas, and both expect and receive respect. As the quotation shows, they do not necessarily follow the orders of those who try to control them. If we think of the position of most judges in the world outside the United States, they do not command that kind of respect. They may be seen as bureaucrats or mere functionaries of the legal system. In short, whether federal judges have particular expertise to make major strides toward the rule of law or judicial administration in the complicated political and social contexts outside the United States, as Carothers might remind us, they model a certain kind of behavior that evinces a formidable position for judges and law.[12]

Scholars and legal reformers frequently argue that various initiatives in law and development do not make fundamental changes in bringing the rule of law, but perhaps, they have suggested from time to time, programs such as legal aid may serve as Trojan Horses making subtle changes that, over time, will bring more fundamental change.[13] While there is reason for skepticism about the power of Trojan Horses

10. *See* Bryant Garth et al., *Judges Teaching the Rule of Law Abroad*, 23 Sw. J. Int'l L. 73, 86 (2017).

11. *See* Pierre Bourdieu & Loic J. D. Wacquant, Invitation to Reflexive Sociology 12 (1992).

12. *See* Annelise Riles, *Legal Amateurism, in* The Search for Contemporary Legal Thought (Chris Tomlins & Justin Desaultes-Klein, eds., forthcoming 2016) (Annelise Riles writes of the importance of what she calls "amateurs" in legal reform.).

13. *See, e.g.,* Matthew C. Stephenson, *A Trojan Horse Behind Chinese Walls? Problems and Prospects of U.S.-Sponsored 'Rule of Law' Projects in the People's Republic of China*, 18 UCLA Pac. Basin L. J. 64 (2000) (noting a skeptical discussion of this theory).

in these contexts, there are some precedents in legal reforms. In particular, there are numerous accounts of individuals from developing countries studying law in the United States, admiring the stature and position of corporate lawyers, and creating a similar and quite successful version of the corporate law firm in their own countries.[14]

Only qualitative research on the particular influences of encounters with federal judges on the careers of individuals abroad would begin to provide material to understand the actual influence of these programs. We would have to do more research. I have other research questions also that I think would be interesting to pursue. One is simply who goes on these missions. One intriguing aspect of the panel's remarks at Southwestern is the role of ethnicity and language in building rapport abroad. How important are these aspects of the program, which provide one more argument for diversity among the judiciary? I wonder also what role these kinds of activities play in building judges' reputations and careers within the judiciary. Are the participating judges outliers or the most respected individuals? Does everyone want to participate or only a few? And, very simply, are the programs and the numbers of judges expanding or contracting?

Finally, going back to the role of exchange in building support for more engagement with the world outside the United States, I wonder if the more cosmopolitan judges are attracted to these programs and the more "American first" individuals skeptical of foreign engagements are resistant. Or does the travel actually build the cosmopolitanism that the Fulbright and similar programs seek? Does it translate to different perspectives—more deference perhaps—for example, in cases involving international comity?

It may be excessive to build too much scholarly concern around these activities of federal judges of the central district and elsewhere, but the activities continue and after all employ substantial human resources. They also reflect interests and ambitions that merit more scholarly visibility.

14. *See, e.g.*, YVES DEZALAY & BRYANT G. GARTH, ASIAN LEGAL REVIVALS: LAWYERS IN THE SHADOW OF AN EMPIRE 242-43 (2010) (discussing the thriving Korean corporate bar).

THE CENTRAL DISTRICT OF CALIFORNIA'S COURT PROGRAMS*

Amanda Goodman,† Hon. George H. King,†† & Hon. Otis D. Wright†††

I. INTRODUCTION

AMANDA GOODMAN: Good afternoon. My name is Amanda Goodman. I am the Editor-in-Chief of the Southwestern Journal of International Law. I served as a judicial extern for the Honorable Andrew J. Wistrich at the Central District of California, as well as the Honorable Kim McLane Wardlaw at the Ninth Circuit Court of Appeals.

My time at this Federal District Court and Court of Appeals allowed me to appreciate the essential work done by these courts, which we are honoring today. With more than 16,500 cases filed each year, the Central District handles the highest caseload of any federal court within the United States, and serves about 18.6 million people, nearly half of the population of California.

On behalf of the Southwestern Journal of International Law and Southwestern Law School, I would like to thank the past and present judges of the U.S. District Court for the Central District of California, and the Ninth Circuit Court of Appeals, as well as our esteemed panelists for their presentations today. I am particularly grateful that many of our academic panelists will be submitting their presentations as articles to be published in the Southwestern Journal of International Law.

* The following is an annotated and edited transcript of the live remarks made during the lunchtime reception at Southwestern Journal of International Law's symposium, "The U.S. District Court for the Central District of California, 1966-2016: International Context," on March 18, 2016. An article adaptation of Judge M. Margaret McKeown's remarks appears immediately following this transcript.

† Editor-in-Chief, Southwestern Journal of International Law (2015-2016).

†† Chief Judge, U.S. District Court for the Central District of California.

††† Judge, U.S. District Court for the Central District of California.

It is both a great pleasure and a great privilege to re-introduce to you, the Honorable George H. King, Chief Judge of the U.S. District Court for the Central District of California. A native of Shanghai, China, Judge King received his undergraduate degree from University of California, Los Angeles, graduating *magna cum laude*, and received his J.D. from the University of Southern California Gould School of Law. Judge King was an Assistant U.S. Attorney in the Criminal Division of the U.S. Attorney's Office for the Central District of California from 1974 to 1979 before entering private practice, where he specialized in civil business litigation.

In the early 1980s, he taught Trial Advocacy at Southwestern Law School. He then served as a Federal Magistrate Judge for the Central District beginning in 1987, until he was appointed as a District Judge by President Bill Clinton in 1995. In September 2012, Judge King was elected by his peers to become the Chief Judge of the U.S. District Court for the Central District of California.

Today's symposium would not have been possible without the support of Judge King and our academic co-sponsors, the Ninth Judicial Circuit Historical Society, and the Huntington-USC Institute on California and the West. Thank you for giving us the opportunity to honor your court, Your Honor.

II. The Dynamics of the Central District of California's Court Programs

CHIEF JUDGE KING: Amanda, thank you very much. Good afternoon, everyone. I hope you're all enjoying the presentations. I can tell you I certainly enjoyed them. I thought they were just fantastic this morning. Thanks also to all the panelists.

I wanted to say a few words about the magistrate judges and the bankruptcy judges. I don't want to repeat what Judge Real already said in his statements, that in 1966, we had no magistrate judges and we had no bankruptcy judges, as such. But today, we have twenty-four full-time and one part-time magistrate judge, and we have twenty-four bankruptcy judges, assisted by four recall judges.

These are some of the most impressive judicial officers we have in our district today. Together, they're responsible and account for an enormous amount of civil matters and all of the bankruptcy cases. Their impact upon the administration of justice in our district simply cannot be overstated.

As for the magistrate judges, all you need to do is to look east, and see how one of the most important and cutting-edge technological

issues is unfolding before one of our magistrate judges in Riverside.[1] As for the bankruptcy judges, we all know that throughout the years they have handled some of the most important insolvency matters in the country. They are responsible for providing for the financial welfare of not just the individual debtors, or even the corporations, but even the municipalities that have gone through bankruptcy. Because of what they do on an ongoing basis, they have had a much larger impact upon the overall economy in our country.

Frankly, the work of the Central District simply could not be done, and the cause of justice would seriously suffer, if we didn't have our magistrate judges and our bankruptcy judges working with us in this district. I know some of the magistrate judges and bankruptcy judges are here. If you are here, would you please stand to be acknowledged?

Thank you. Professor Miller also wanted me to just say a few words about some of the programs that our district sponsors. These are important programs, both in civil and criminal law. In civil law, we continue to partner with bar associations, community groups, and public interest organizations to operate pro se clinics in all three divisions of our court.

These clinics are particularly vital and important because they help otherwise unrepresented civil litigants, both plaintiff and defendant, with what to do about navigating the difficult process of going through court and trying to put together a case. That brings meaningful access to the court to a segment that otherwise would not have that.

We also have a very vibrant Patent Pilot Program[2] in our district. We're only one of fourteen districts in the country with such a program. The purpose of this project is to concentrate as many patent cases before as few designated judges as possible so as to increase substantive knowledge of patent law and to develop innovative ways of case management. I am happy to report that our Patent Pilot Program is very successful because our six patent judges now handle up to 70 percent of all the patent cases in our district. That is very significant because, historically, the Central District of California is within the top three in the country in terms of patent filings.

1. *In re* Search of an Apple iPhone Seized During Execution of a Search Warrant on a Black Lexus IS300, Cal. License Plate 35KGD203, No. ED 15-451, 2016 WL 618401 (C.D. Cal. Feb. 16, 2016).

2. *See* Patent Pilot Program, Pub. L. No. 111-349, 124 Stat. 3674 (2011) (codified at 28 U.S.C. § 137 note (2012)); U.S. Dist. Ct. E.D. Cal., General Order No. 11-11 (Sept. 23, 2011), http://www.cacd.uscourts.gov/sites/default/files/general-orders/GO-11-11.pdf.

On the criminal side, of course, we have the Conviction and Sentence Alternatives ("CASA")[3] and the Substance Abuse Treatment and Reentry ("STAR")[4] programs. I'm going to leave STAR for a little bit later because Judge Wright is going to tell us all about STAR. CASA stands for Conviction and Sentence Alternatives. It is a diversion program. We have that program operating most robustly in all three divisions of our court. In fact, they're so successful that former Attorney General Eric Holder, who came out for one of our graduations, has often cited it as a prime example of the new and smarter approach to ensuring public safety and yet preserving human potential.

Now let me go to Judge Wright. He does not need much of an introduction particularly here because this is a homecoming of sorts for Judge Wright. He is an illustrious graduate of this wonderful law school. After law school, he served the public as a Deputy Attorney General and then he was in private practice as a partner at a major New York law firm. He also served as a Los Angeles County Superior Court Judge before his appointment by President George W. Bush to our court. Ladies and gentlemen, please welcome Judge Wright.

III. Presentation on the Central District's STAR Program

JUDGE WRIGHT: All right. I'm almost four minutes behind schedule already, so there will be no jokes, there will be no preamble. We are going to talk about some of the things that we are trying to do smarter.

Under the leadership of our former Chief Judge Audrey B. Collins, who is now Associate Justice of the Court of Appeal, we launched STAR,[5] an acronym for Substance Abuse Treatment and Reentry, to change the way we treat criminal defendants. Our focus is on persons who are essentially career criminals who have spent more than half of their adult lives in and out of prison. Because what we do in this enlightened society is, arrest people for their drug related offense, prosecute and incarcerate them for X number of years, release them; and then we repeat. Nothing changes other than they have added a new felony conviction to their resume, perhaps making them

3. U.S. Attorney's Office, Cent. Dist. of Cal., *Conviction and Sentence Alternatives Program (CASA)*, https://www.justice.gov/usao-cdca/conviction-and-sentence-alternatives-program-casa (last updated Nov. 9, 2015).

4. U.S. Attorney's Office, Cent. Dist. of Cal., *Substance Abuse Treatment and Reentry Program (STAR)*, https://www.justice.gov/usao-cdca/substance-abuse-treatment-and-reentry-program-star (last updated Nov. 9, 2015).

5. *Id.*

even less employable than before. So, why should we be surprised when they re-offend?

What we are trying to do with STAR is to simply interrupt and hopefully end the reoccurring vicious cycle of drug related incarceration. Our clientele have a few things in common. Around the tenth grade, they discovered marijuana. What the adults have been telling them about, "Leave drugs alone," turned out to be wrong. They found marijuana to be good. Then, someone offers them crystal meth, or crack cocaine, or powder cocaine, or heroin. They figure, if the adults were wrong about marijuana, they're probably wrong about this stuff too, so they try it. They find that it is good. And they keep using it.

Now, life becomes just a constant quest for that next high. School is no longer important to them. They also discover that that friend that was getting them that stuff is no longer giving it to them for free. Now they have to pay for it. And of course, they have no money for drugs. After they've depleted mom's purse and granny's loose change, they go out and actually start committing crimes to get the money to buy drugs. Naturally they get caught. They get caught because they suck at being a criminal. As a first offender, the criminal justice system essentially gives them a pass. Just a period of time on probation. I guess that is the way we want it. So begins a trend. Because they suffered no real consequences, they go back to crime as a means of paying for their dope. And, of course since they still suck at it, they get caught again. Within a very short period of time, what we have now is someone with a tenth grade or lower education who has amassed a number of felony convictions, with no marketable skills, and a serious drug addiction. The future is not bright for them. So is it completely unexpected that they return to crime?

One of the first things that we try to do is get a grip on the addiction. Unless they are clean and sober, none of the other programs have a chance of succeeding. Most of the programs in this country use evidence based methodology consisting of immersion in a 12-step program, weekly meetings with the court team comprised of prosecutors, defense attorneys, probation officers, drug counselors, and the supervising bench officer. This is coupled with life skills training, Moral Reconation Therapy (MRT), and cognitive behavior therapy—all of which are designed to correct their criminal thinking.

At the end of the day, making them employable is an important goal. The common sense approach employed in the state drug courts has proven to be successful in that regard. Following an arrest on a new drug charge, the offender is offered a deal that requires them to

plead guilty to the new offense. Imposition of sentence is put off for at least a year to permit them time to participate in drug court. If they successfully complete the program, they are permitted to withdraw their guilty plea and the charges against them are dismissed. If they are terminated from drug court, sentence is imposed. That prospect provides some incentive to making a concerted effort to successfully complete the program.

What we do, because we are not quite as enlightened, is that we go ahead and prosecute and incarcerate them. After they're finished with their term of imprisonment, they go on what we call, supervised release, for a number of years. Thus, after all the money, time, and effort has already been spent, we now begin to do something about the root cause of their criminal behavior.

Our participants soon understand we are there to support their efforts and have no interest in seeing them fail, which we would view as our failure. They understand that we recognize that relapse is a part of recovery. And while we are not pleased about relapse, we understand it and will take steps to intensify their treatment. What we will not condone, however, is the commission of a new crime. That will result in termination from the program and return to prison. In any event, what we've done is taken people out of the criminal justice system, especially for those who have been in this endless cycle. We've actually turned some lives around by focusing on the causes of criminality and interrupting that cycle. Thank you.

HOW INTERNATIONAL LAW BECAME A FOUR-LETTER WORD

*Judge M. Margaret McKeown**

It is an honor to be included in the Central District's 50th anniversary celebration, it is of special interest to me that the focus is international law. "Globalization," "international judicial conversation," and "judicial diplomacy" are constant buzz-words in judicial and rule of law circles. Long ago, Justice O'Connor counseled, "international law is no longer a [legal] specialty. . . . [It is] vital if . . . judges are to faithfully discharge their duties."[1] The program today underscores that advice.

We have come to terms with the fact that globalization is here to stay, and the judiciary has no immunity in this regard. For years, globalization was often synonymous with "Americanization."[2] As one British barrister observed, there has been a "vigorous overseas trade in the Bills of Rights."[3] The question now remains whether the American judiciary will move to correct the trade imbalance.

Which brings me to my topic today—how international law became a four-letter word. Admittedly, I chose the title somewhat in jest when I was pressed for a speech title long before I had a speech topic, but it captures the essence of the current debate—namely the role that international norms, foreign precedent, and the experiences of other countries—play in shaping American law.

* Judge McKeown is a judge on the United States Court of Appeals for the Ninth Circuit. She serves as Chair of the American Bar Association Rule of Law Initiative. This article is adapted from her remarks at the 50th Anniversary of the Central District of California on March 18, 2016 at Southwestern Law School. She thanks her law clerks, Tatiana Sainati (Duke, J.D. 2013) and Clare Ryan (Yale, J.D. 2013) for their research assistance.

1. Sandra Day O'Connor, *Dedication of the Eric E. Hotung International Law Center Building: Keynote Address,* 36 GEO. J. INT'L L. 651, 654 (2005).

2. *See, e.g.*, Robert A. Kagan, *Globalization and Legal Change: The 'Americanization' of European Law?*, 1 REG. & GOVERNANCE 99, 100 (2007).

3. Anthony Lester, *The Overseas Trade in the American Bill of Rights*, 88 COLUM. L. REV. 537, 541 (1988).

The alluring prospect of internationalization came to my house early. Armed with a degree in international relations, a law degree, and a love of languages and travel, I always imagined I would be an international lawyer, although I had no clear picture of what that entailed—other than exotic travel, good food, and interesting legal issues. I had yet to distinguish between public and private international law. But as luck would have it, when I began private practice, my first federal appeal involved the extraterritorial application of the federal securities laws. Over time, my practice began to take on an international patina, particularly in the international intellectual property arena. When I joined the bench, I was surprised at how many of our cases invoke considerations of international law. Unlike the California Supreme Court justice who quit because there wasn't enough international law on his dockets,[4] the courts in the Ninth Circuit are home to thousands of cases involving both international and foreign law.

I. International Law as a Four-letter Word

Turning then to the debate at hand—how did the lofty principle of international law join the parade of George Carlin's "Seven Dirty Words"?[5] I suggest three reasons: (1) conflating international and foreign law has led to a misunderstanding of what law binds United States courts; (2) a growing fear of foreignness coupled with American Exceptionalism fuels the debate; and (3) conflicting views on the role of judges in a democracy have spawned pointed rhetoric.

In today's remarks, I will expand on these reasons, take you back in time to illustrate why it wasn't always so, illustrate the many important uses of U.S. and foreign law in domestic courts, and then comment briefly on a way forward through legal diplomacy and promoting the rule of law.

International law, in its purest form, means "the law of nations," which since our founding, has been part of U.S. law.[6] The debate over the authority to apply international law to domestic decisions has been extended to include many things: (1) references to the laws of other countries and the decisions of foreign courts, sometimes called comparative law; (2) extraterritoriality, or the extension of U.S. law to

4. Interview by Carole Hicke with Frank C. Newman, Professor of Law, Univ. of Cal. Berkeley, in Berkeley, Cal. (June 18, 1991).

5. George Carlin, *Seven Words You Can Never Say on Television, on* Class Clown (Atlantic Records 1972).

6. U.S. Const. art. I, § 8, cl. 10.

activities occurring overseas; (3) choice-of-law rules and rules that govern cross-border activities; and (4) "transjudicialism,"[7] which I take to mean a more general reference to the laws of other nations and the internalization of international legal norms into the domestic process.

The upshot is that all of these facets become lumped together as "international law," and the next thing you know legislators are claiming that U.S. courts are being infected by foreign law.[8] Collapsing all of these aspects of foreign and international law into a single packet and failing to distinguish between what law is binding and what principles are instructive is both disingenuous and intellectually dishonest.

Illustrative of this confusion was a 2004 congressional resolution, titled the "Reaffirmation of American Independence Resolution," known as the Feeney/Goodlatte Resolution.[9] The proposed resolution—albeit nonbinding —declared that judicial determinations regarding the laws of the United States should not be based on foreign law unless such law is: (1) "incorporated into the legislative history" of the statute, or (2) "otherwise informs an understanding of the original meaning" of the U.S. law.[10] This resolution is troublesome for many reasons—it not only contradicts the legal tradition and history of the law of nations in our courts, but also invades the judicial process and separation of powers in directing the courts on how to interpret the law.

This reaction to foreignness, coupled with American exceptionalism, has led to a big scare about the practical implications of international law. The most recent hoopla and fearmongering came in the form of several state legislative efforts to ban the use of Sharia law–at least thirteen states have gone down this path.[11] For example, in Oklahoma, the legislature proposed a ballot initiative—passed by the voters—that prevented Oklahoma courts from considering or using

7. American Justice for American Citizens Act, H.R. 4118, 108th Cong. § 2(5) (2004).

8. *See* Sarah H. Cleveland, *Our International Constitution*, 31 YALE J. INT'L L. 1, 4 (2006) (describing Congressional backlash to judicial references to international and foreign sources in constitutional interpretation).

9. H.R. Res. 568, 108th Cong. (2004).

10. *Id.*

11. *See* ALA. CONST. of 1901, amend. 884 (2014); H.B. 88, 27th Leg., 2d Sess. (Alaska 2011); S.B. 97, 88th Gen. Assemb., Reg. Sess., (Ark. 2011); H.B. 2582, 50th Leg., Reg. Sess. (Ariz. 2011); H.B. 171, 2015-2016 Reg. Sess. (Ga. 2015); S.J. Res. 16, 117th Gen. Assemb., Reg. Sess. (Ind. 2011); H.B. 525, 2011 Reg. Sess. (Miss. 2011); TENN. CODE ANN. § 39-13-802 (2016); LA. REV. STAT. ANN. § 9:6001 (2010); H.B. 2087, 2011 Sess. (Kan. 2011); Legis. B. 647, 102d Leg., 1st Sess. (Neb. 2011); S.B. 444, 119th Gen. Assemb., 1st Reg. Sess. (S.C. 2011); H.B. 911, 2011 Leg., 82d Sess. (Tex. 2011); S.D. CODIFIED LAWS § 19-8-7 (2012).

either Sharia law or international law and banned the courts from "look[ing] to the precepts of other nations or cultures."[12] The Tenth Circuit upheld a preliminary injunction against the legal grounds of religious discrimination.[13] The district court ultimately entered a permanent injunction against the measure.[14]

This case points to the larger tension between looking out and looking in–the failure by our own system to recognize that even domestic courts must deal with foreign law when required, and that deciding cases in a cultural vacuum is no longer realistic.

In the immediate aftermath of World War II the United States was an integral, if not driving force, behind the development of international law.[15] Together with its allies, the United States established the Nuremberg and Tokyo War Crimes Tribunals to prosecute and punish those responsible for war crimes and atrocities.[16] The effort was widely viewed as a profoundly hopeful moment in the history of U.S. engagement with international law.[17]

This optimism quickly gave way to Cold War disillusionment. In the early 1950s, Senator Bricker pushed for the passage of the Bricker Amendment, which would provide: "No treaty or executive agreement shall be made respecting the rights of citizens of the United States protected by this Constitution, or abridging or prohibiting the free exercise thereof."[18] Proponents of the amendment evinced a fear of foreignness that resonates today: "This amendment is urgently needed for at the present time some *200 treaties* are being drawn up by agencies of the U.N. most of which *are dominated by majorities from countries which do not understand or* are not concerned with the American concepts of human freedom and constitutional government."[19] We hear the same rhetoric today with respect to global engagement, the refugee crisis, and attacks on international institutions.

Finally, turning to the third reason, even if doubters accept that U.S. courts are bound by international law in a pristine sense, the debate continues on whether U.S. courts should look to other courts and

12. H.R.J. Res. 1056, 52d Leg., 2d Sess. (Okla. 2010).

13. Awad v. Ziriax, 670 F.3d 1111 (10th Cir. 2012).

14. Awad v. Ziriax, 966 F. Supp. 2d 1198 (W.D. Okla. 2013).

15. William A. Schabas, *United States Hostility to the International Criminal Court: It's All About the Security Council*, 15 EUR. J. INT'L L. 701, 702 (2004).

16. Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis Powers, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279; Charter of the International Military Tribunal for the Far East, Jan. 19, 1946, T.I.A.S. No. 1589.

17. Schabas, *supra* note 15, at 705.

18. S.J. Res. 130, 82d Cong., 98 Cong. Rec. 908 (1952).

19. 99 Cong. Rec. A4024 (1953) (statement of Rep. Pat Sutton).

cultures for persuasive or informational value.[20] To be sure, this query makes for good rhetoric that keeps the debate afloat, especially at the highest levels, such as the many debates between Justice Scalia and Justice Breyer on this subject. This controversy challenges the role of judges in a democracy.

On one side, Justice Breyer embraces looking abroad for guidance, pointing out: "[T]he United States is not the only nation that seeks to reconcile the practical need for a central authority with the democratic virtues of more local control."[21] He recognizes that "[o]f course, we are interpreting our own Constitution, not those of other nations, . . . [b]ut their experience may nonetheless cast an empirical light on the consequences of different solutions to a common legal problem . . . ."[22] As evident in his new book, *The Court and the World*, Justice Breyer emphasizes the "interdependence" of the American system.[23]

In contrast, and often in heated language, Justice Scalia said that the debate is interesting but not meaningful. In Justice Scalia, we lost a jurist with strong views in this arena. He wrote: "[W]e *don't* have the same moral and legal framework as the rest of the world, and never have."[24] He went further to say that "foreign materials can *never* be relevant to an interpretation of—to the meaning of—the U.S. Constitution,"[25] and that the "Framers would . . . be *appalled*" that a proposition democratically adopted by the American people "could be judicially nullified because of the disapproving views of foreigners."[26] Also, pulling no punches, Justice Scalia delivered this zinger in his dissent in *Atkins v. Virginia*:[27]

> [T]he Prize for the Court's Most Feeble Effort to fabricate "national consensus" must go to its appeal (deservedly relegated to a footnote) to the views of assorted professional and religious organizations, members of the so-called "world community," and

20. *See, e.g.,* David J. Seipp, *Our Law, Their Law, History, and the Citation of Foreign Law*, 86 BOSTON U. L. REV. 1417, 1417—1424 (2006) (describing debate regarding use and misuse of foreign and international law among judges, legislators and legal scholars).

21. Printz v. United States, 521 U.S. 898, 976 (1997) (Breyer, J., dissenting).

22. *Id.* at 977 (referencing THE FEDERALIST No. 20, at 134–38 (James Madison & Alexander Hamilton) (Clinton Rossiter ed., 1961)).

23. STEPHEN BREYER, THE COURT AND THE WORLD 4 (2015).

24. *The Relevance of Foreign Legal Materials in U.S. Constitutional Cases: A Conversation Between Justice Antonin Scalia and Justice Stephen Breyer*, 3 INT'L J. CONST. L. 519, 521 (2005).

25. Justice Antonin Scalia, Keynote Address before the American Society of International Law: Foreign Legal Authority in the Federal Courts (Apr. 2, 2004), *in* 98 AM. SOC'Y INT'L L. PROC. 305, 307 (2004).

26. Sosa v. Alvarez-Machain, 542 U.S. 692, 750 (2004) (Scalia, J., concurring).

27. 536 U.S. 304 (2002).

> respondents to opinion polls. . . . "We must never forget that it is a Constitution for the United States of America that we are expounding."[28]

Justice Scalia was consistently joined by Justice Thomas, who also has the ability to deliver a judicial jab, like this one: "In any event, Justice Breyer has only added another foreign court to his list while still failing to ground support for this theory in any decision by an American court."[29]

The range of views among the Justices are perhaps best expressed in the Court's debate over international norms and references to foreign experiences in the juvenile death penalty case of *Roper v. Simmons*.[30] Justice Kennedy—joined by Justices Stevens, Souter, Ginsburg and Breyer—staked out the majority's view:

> It is proper that we acknowledge the *overwhelming weight of international opinion against* the juvenile death penalty, resting in large part on the understanding that the instability and emotional imbalance of young people may often be a factor in the crime. . . . The opinion of the world community, while not controlling our outcome, does provide *respected* and *significant confirmation* for our own conclusions.[31]

Though dissenting because she said there was no evidence of consensus, Justice O'Connor affirmed her view about the role of foreign and international law, one that, over time, would lead her to became one of the Court's most prominent internationalists:

> I disagree with Justice Scalia's contention . . . that foreign and international law have no place in our Eighth Amendment jurisprudence. Over the course of nearly half a century, the Court has consistently referred to foreign and international law as relevant to its assessment of evolving standards of decency. . . . [T]his Nation's evolving understanding of human dignity certainly is neither wholly isolated from, nor inherently at odds with, the values prevailing in other countries. . . . At least, the existence of an international consensus of this nature *can serve to confirm the reasonableness of a consonant and genuine American consensus*.[32]

28. *Id*. at 347–48 (Scalia, J., dissenting) (quoting Thompson v. Oklahoma, 487 U.S. 815, 868–69 n.4 (1987) (Scalia, J., dissenting)).

29. Foster v. Florida, 537 U.S. 990, 990 n.* (2002) (Thomas, J., concurring in denial of certiorari) (citing Knight v. Florida, 528 U.S. 990, 990 (1999) (Thomas, J., concurring in denial of certiorari).

30. 543 U.S. 551 (2005).

31. *Id.* at 578 (emphasis added).

32. *Id.* at 604–05 (O'Connor, J., dissenting) (emphasis added) (citations omitted).

Thus, Justice O'Connor agreed with the majority's approach, just not the ultimate conclusion.[33]

Justice Scalia came back in dissent with a crystal clear indictment rejecting the majority's approach:

> Though the views of our own citizens are essentially irrelevant to the Court's decision today, the views of other countries and the so-called international community take center stage. . . . The Court should either profess its willingness to reconsider all these matters in light of the views of foreigners, or else it should cease putting forth foreigners' views as part of the *reasoned basis* of its decisions. To invoke *alien law* when it agrees with *one's own* thinking, and *ignore it otherwise, is not reasoned decision making, but sophistry*.[34]

This statement reflects the oft-repeated criticism of the pick-and-choose approach.

With this backdrop of why international law has been pilloried, it is instructive to turn to history to see that it wasn't always so. While the debate may be contemporary, the long-standing use of international and foreign law is not. In the spirit of Justice Holmes, who said "a page of history is worth a volume of logic,"[35] let's look back.

II. History of the Supreme Court Invoking International Law

From the time of our founding, the Supreme Court has looked to both international law and foreign law. The former as binding authority, and the latter as a useful analytical tool in interpreting the Constitution and deciding contentious cases on issues of tremendous social importance.

From law school, we all remember *Charming Betsey*,[36] and the canon that statutes should be construed so as not to conflict with international law.[37] Indeed, throughout the early years of our republic, the Court turned to international law repeatedly to establish the scope of the federal government's sovereign powers. In the early 1800s, Justice Johnson looked to international law to interpret the phrase "*the power to regulate commerce*" and noted that "[t]he definition and limits of that power are to be sought among the features of international

33. *See id*. at 605-07 (O'Connor, J., dissenting).

34. *Id.* at 622, 627 (Scalia, J., dissenting) (first emphasis in original, second and third added).

35. N.Y. Trust & Co. v. Eisner, 256 U.S. 345, 349 (1921).

36. Murray v. Schooner Charming Betsey, 6 U.S. (2 Cranch) 64 (1804).

37. *Id*. at 118.

law[.] . . . The *law of nations*, regarding man as a social animal[ ] pronounces all commerce legitimate in a state of peace . . . ."[38]

The Court similarly invoked international law in determining that the federal government could exercise eminent domain as a recognized "attribute of sovereignty,"[39] and that, in the immigration context, the "accepted maxim of international law [is] that every sovereign nation has the power, as inherent in sovereignty. . . to forbid the entrance of foreigners within its dominions."[40] Again in *The Prize Cases*[41], in refusing to hold that the Civil War was not a war, the Court explained that "[t]he law of nations . . . contains no such anomalous doctrine as that . . . insurgents . . . are not *enemies* because they are *traitors*."[42]

The Court historically has turned to foreign law and practices — as Justice Breyer did in *Printz* —to "cast an empirical light on the consequences of different solutions to a common legal problem."[43] This was precisely the way Justice Wilson used foreign laws in 1793 in considering whether the State of Georgia was "amenable to the jurisdiction of the Supreme Court."[44] In *Chisholm v. Georgia*, Justice Wilson emphasized that "[a] cause so conspicuous and interesting, should be carefully and accurately viewed from every possible point of sight," including "[b]y the laws and practice of particular States and Kingdoms."[45] In other words, Justice Wilson found foreign law and practice relevant because the issue before the court was "conspicuous and interesting," thus merited consideration through multiple analytical lenses.

This use of foreign law as a source of "empirical light"[46] continued throughout the twentieth century. In 1908, the Court in *Muller v. Oregon*[47] emphasized the relevance of foreign and international law in "examining the constitutional question," of whether maximum hour laws designed to protect female employees violated the constitutional right to freedom of contract.[48] The Court cited statutes and commit-

38. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 227 (1824) (Johnson, J. concurring) (emphasis added).

39. Miss. & Rum River Boom Co. v. Patterson, 98 U.S. 403, 406 (1878).

40. Nishimura Ekiu v. United States, 142 U.S. 651, 659 (1892).

41. 67 U.S. (2 Black) 635 (1863).

42. *Id*. at 670.

43. Printz v. United States, 521 U.S. 898, 977 (1997) (Breyer, J. dissenting).

44. Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 453 (1793) (opinion of Wilson, J.).

45. *Id*. (emphasis omitted).

46. *Printz*, 521 U.S. at 977 (Breyer, J. dissenting).

47. 208 U.S. 412 (1908).

48. *Id.* at 419.

tee reports from Great Britain, France, Switzerland, Austria, Holland, Italy, and Germany noting they were not "*technically speaking authorities*" and did not discuss "the constitutional question presented."[49] Nevertheless, the Court stressed that "when a question of fact is debated and debatable, . . . a widespread and long continued belief concerning it is worthy of consideration. We take judicial cognizance of all matters of general knowledge."[50]

Almost 100 years later, Justice Ginsburg echoed this approach of citing foreign norms and reports in *Grutter v. Bollinger*,[51] a university affirmative action case. Referencing the International Convention on the Elimination of All Forms of Racial Discrimination,[52] she wrote that "[t]he Court's observation that race-conscious programs 'must have a logical end point' . . . accords with the international understanding of the office of affirmative action."[53] The more recent controversy on international and foreign law seems iconoclastic and at odds with 200 years of jurisprudential history.

III. Real Life—International Law in U.S. Courts

Even if a strong historical base is not enough to quell the chorus of international law as a four-letter word, two things have changed the calculus: increased globalization and the Internet. Their impact means that international and foreign law will be increasingly important in our courts, and no amount of name calling will blunt their consequences.

When the concept of globalization first entered the lexicon, it typically described the export of American culture, market capitalism, and corporations around the world.[54] Today, globalization entails a far more reciprocal enterprise. In 2015, the U.S. census reported $2.3 trillion in foreign exports and $2.8 trillion in imports.[55] The U.S. also participates in the global economy through treaties on everything

49. *Id.* at 419-20, 419 n.1 (emphasis added).

50. *Id.* at 420-21.

51. 539 U.S. 306 (2003).

52. International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Dec. 21, 1965, 660 U.N.T.S. 195.

53. *Grutter*, 539 U.S. at 343 (Ginsburg, J. concurring) (citation omitted).

54. Thomas L. Friedman, The Lexus and the Olive Tree 40-41 (2000).

55. U.S. Census Bureau, U.S. Trade in Goods and Services - Balance of Payments (BOP) Basis (2016), https://www.census.gov/foreign-trade/statistics/historical/gands.pdf.

from trade,[56] to child protection,[57] tax,[58] terrorism,[59] and intellectual property.[60]

As people, goods, ideas, art, pollution, violence, and investments flow across borders (either physically or electronically), courts around the world are key players in what Anne-Marie Slaughter, a former State Department official, called "judicial globalization."[61] She described this as a "diverse and messy process of judicial interaction across, above and below borders, exchanging ideas and cooperating in cases involving national as much as international law."[62] American judges today confront judicial globalization on a daily basis, as it has become an inevitable element of resolving cases, which—like many other aspects of our society—do not always fit tidily within national borders.

Perhaps even more than globalization, the Internet is a game changer. The interconnectedness spawned by the Internet exponentially multiplies the impact of globalization. The Internet is a platform for political and civic speech, commercial transactions, debates about human rights and state power, cultural sharing, and ubiquitous friends and frenemies. To say the Internet is ubiquitous understates its reach. With more than 3 billion users worldwide, the Internet knows no borders.[63] So, in many respects, the lid comes off the traditional principles of territorial jurisdiction, national privacy laws, and legal autonomy based on geographical boundaries in the physical world. Every day federal courts are dealing with international law issues, and most of these cases are resolved without controversy. Where there is controversy, it is often dissatisfaction with the outcome, rather than the method.

At the end of the Second World War, Justice Jackson, who served as the prosecutor at Nuremberg, presciently observed that:

56. *E.g.*, United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, 1489 U.N.T.S. 3.

57. *E.g.*, Convention on the Rights of the Child, May 25, 2000, T.I.A.S. No. 13,095, 2171 U.N.T.S. 227.

58. *E.g.*, Agreement on State and Local Taxation of Foreign Employees of Public International Organizations, Apr. 21, 1992, T.I.A.S. No. 12,135.

59. *E.g.*, International Convention for the Suppression of the Financing of Terrorism, Dec. 9, 1999, T.I.A.S. No. 13,075, 2178 U.N.T.S. 197.

60. *E.g.*, Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, 1869 U.N.T.S. 299, 33 I.L.M. 81 (1994).

61. Anne-Marie Slaughter, *Judicial Globalization*, 40 VA. J. INT'L L. 1103, 1104 (2000).

62. *Id.*

63. INT'L TELECOMM. UNION, FACTS & FIGURES 2015 1 (2015), http://www.itu.int/en/ITU-D/Statistics/Documents/facts/ICTFactsFigures2015.pdf.

> It [would be] futile to think, as extreme nationalists do, that we can have an international law that is always working on our side. . . . We cannot successfully cooperate with the rest of the world in establishing a reign of law unless we are prepared to have that law sometimes operate against what would be our national advantage.[64]

Federal courts routinely and without controversy adjudicate both individual rights arising under treaties, such as immigration cases concerning requests for asylum and relief under the Convention Against Torture[65] or, in entirely different areas, disputes over child custody or intellectual property claims. We also hear transnational commercial disputes requiring the application of international and foreign laws, including forum non-conveniens, enforcement of foreign arbitral awards, the extraterritorial applicability of antitrust and intellectual property statutes, questions of foreign sovereign immunity, and issues of comity. In the criminal arena, extradition and international terrorism and drug conspiracies are a routine part of the docket. The Central District of California is exhibit A in international law, as you heard from Judge King this morning.[66] What I describe is not an atypical docket.

Similarly, the federal courts continue to employ comparative analysis of foreign and international law as a lens through which to view complicated and novel questions under our law. For example, in *Garcia v. Google, Inc.*,[67] the Ninth Circuit en banc considered whether an actress could force YouTube to remove her five-second performance in a video deriding the Prophet Mohammed.[68] We observed that the actress ultimately wanted to vindicate through copyright law a right to be forgotten that does not (yet) exist in the United States.[69] In contrast, the Court of Justice of the European Union recently affirmed the right to be forgotten, and determined that this right required Google to consider individual requests to remove personal information from its search engine.[70]

64. AMERICAN SOCIETY OF INTERNATIONAL LAW, "A DECENT RESPECT TO THE OPINIONS OF MANKIND. . .": SELECTED SPEECHES BY JUSTICES OF THE U.S. SUPREME COURT ON FOREIGN INTERNATIONAL LAW 40 (Christopher Borgen ed., 2007).

65. Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85.

66. *See* Susan Westerberg Prager & Hon. George H. King, *Opening Remarks*, 23 Sw. J. INT'L L. 1 (2017).

67. 786 F.3d 733 (9th Cir. 2015) (en banc).

68. *Id.* at 736–37.

69. *Id.* at 745.

70. Case C-131/12, Google Spain SL v. Agencia Española de Protección de Datos, ¶¶ 92–99 (May13, 2014), http://curia.europa.eu/juris/document/document.jsf?text=&docid=152065&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=261015.

The rhetoric surrounding the use of foreign and international law in some more politicized cases speaks to the fear that, by invoking foreign and international law, judges can impose their personal ideologies on the public. The Supreme Court's debates over the death penalty, the criminalization of homosexuality, and gay marriage are prime examples.[71] Examples from the United States District Court for the Central District of California include cases brought by survivors of the Armenian genocide to recover lost assets.[72]

The Ninth Circuit is no stranger to this controversy, as you heard earlier with respect to *Sosa v. Alvarez-Machain*.[73] Although the Supreme Court ultimately reversed the Ninth Circuit in that case, the Court confirmed that foreign nationals could sue for human rights violations in United States courts under the Alien Tort Statute[74] if such acts violate customary international law.[75] Unfortunately, the Court determined that kidnapping, arbitrarily detaining, and transporting Alvarez-Machain from Mexico to the United States was not such a violation.[76] But the case was important in affirming that, although the Alien Tort Statute is jurisdictional in nature, it "is best read as having been enacted on the understanding that the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time."[77] Importantly, the Court underscored the "discretionary judgment" of the lower federal courts and the evolutionary nature of norms of customary international law, stating that, in recognizing "actionable international norms, . . . the door is still ajar subject to vigilant doorkeeping, and thus open to a narrow class of international norms today."[78]

Another example of the importance of transnationalism came in the Nazi memorabilia case, *Yahoo! Inc. v. La Ligue Contre Le Racisme Et l'Antisemitisme*,[79] which illustrates the cultural and jurisdic-

71. *See*, *e.g.*, Kennedy v. Louisiana, 554 U.S. 407 (2008) (holding that the Eighth Amendment to the U.S. Constitution did not permit a state to punish the crime of rape of a child with the death penalty); Lawrence v. Texas, 539 U.S. 558 (2003) (overturning the sodomy law in Texas and legalizing same-sex sexual activity); Obergefell v. Hodges, 135 S. Ct. 2584 (2015) (holding that both the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution guarantees the same-sex couples' right to marry).

72. *E.g.*, Deirmenjian v. Deutsche Bank, A. G., 526 F. Supp. 2d 1068 (C.D. Cal. 2007).

73. 542 U.S. 692 (2004).

74. 28 U.S.C. § 1350 (2012).

75. *Sosa*, 542 U.S. at 724-25.

76. *Id.* at 735–38.

77. *Id.* at 724.

78. *Id.* at 726, 729.

79. 433 F.3d 1199 (9th Cir. 2006) (en banc).

tional complexities of law in the internet age. La Ligue, a French organization, sued in Paris claiming that Yahoo!'s sale of Nazi memorabilia on its auction site violated French prohibitions on the sale of items that incite racism.[80] The French court entered an injunction, spawning litigation on both sides of the pond.[81] Both French and U.S. courts were forced to grapple with novel issues of Internet jurisdiction and competing values of free speech versus responding to anti-Semitism.[82] The case is a perfect example of how the Internet transcends national boundaries and how human rights norms intersect with commercial activity.

So like it or not—and I think we love it—judges and lawyers in this district are at the forefront of international law in domestic courts.

IV. Looking Forward

In closing, let me offer a few comments moving forward; the root of much of the brouhaha about international law stems, in my view, from misunderstanding and a lack of familiarity. The case of *Republic of Bolivia v. Philip Morris Cos.*[83] is illustrative. There, the court for the Southern District of Texas lampooned its own capacity "to address the complex and sophisticated issues of international law and foreign relations presented by this case," noting that, there isn't even a Bolivian restaurant anywhere near here! . . . While the Court does not . . . profess to understand all of the political subtleties of the geographical transmogrifications ongoing in Eastern Europe, the Court is virtually certain that Bolivia is not within the four counties over which this Court presides, even though the words Bolivia and Brazoria are a lot alike and caused some real, initial confusion until the Court conferred with its law clerks.[84]

Education and discourse can go a long way in dispelling the many myths and raising awareness. This conference is a wonderful example of a major contribution to education in the international arena. I want to give a shout out to the American Society of International Law's Judicial Advisory Board. In 2000, the Society asked Justice O'Connor to put together a judicial board to think about ways in which the bench could become more knowledgeable in this arena. Justice Ginsburg now chairs the board. I have been fortunate to be a part of the

80. *See id.* at 1202-03.
81. *Id.* at 1203–05.
82. *See id*. at 1205-11, 1220-24.
83. 39 F. Supp. 2d 1008 (S.D. Tex. 1999).
84. *Id.* at 1009–10.

group since its founding, along with representatives from each federal circuit court and key state supreme courts.

This project led to the *Benchbook on International Law*,[85] which is a fabulous primer on international law and the issues judges deal with day-to-day. It is available online and will soon be reprinted in hard copy.

But judicial scholarship goes beyond the bench to judicial diplomacy. The panel this morning highlighted the range of judicial involvement overseas. I have the privilege of serving as Chair of the Board of American Bar Association's Rule of Law Initiative,[86] or ROLI, as we say. ROLI began after the fall of the former Soviet Union when a small group of U.S. lawyers and judges were asked to help the new republics draft constitutions and set up court systems.[87] From that initiative in Central Europe, ROLI has grown tremendously. We now work in over 50 countries and have more than 500 staff and volunteers.[88]

The role of American judges and lawyers as legal diplomats has had an important impact in many ways. Key to the ABA programs is our partnership with local players, developing sustainable programs that will live long beyond ROLI's program assistance.[89] And, though we use many American volunteers, we reach out to both local and international volunteers, who are assisted by rule of law professionals. Our perspective is global, not U.S.-centric. ROLI's work is wide-ranging and includes: establishing a program training Turkish lawyers to assist Syrian refugees in Turkey;[90] ongoing trial training with lawyers and judges in Mexico to support the transition of Mexico's criminal

85. AM. SOC'Y OF INT'L LAW, BENCHBOOK ON INTERNATIONAL LAW (Diane Marie Amann ed., 2014), https://www.asil.org/benchbook/complete.

86. *ABA Rule of Law Initiative*, AMERICAN BAR ASSOCIATION, http://www.americanbar.org/advocacy/rule_of_law.html (last visited Sept. 3, 2016).

87. *Rule of Law Initiative: Our Origins & Principles*, AMERICAN BAR ASSOCIATION, http://www.americanbar.org/advocacy/rule_of_law/about/origin_principles.html (last visited Sept. 3, 2016); *American Bar Association Central European and Eurasian Law Initiative (CEELI)*, MILLER & CHEVALIER, http://www.millerchevalier.com/Quotes/AmericanBarAssociationCentral European and Eurasian Law Initiative CEELI (last visited Sept. 3, 2016).

88. *Rule of Law Initiative: Our Origins & Principles*, *supra* note 87.

89. *Id.*

90. *Rule of Law Initiative: Turkish Lawyers Trained to Provide Legal Aid and Counseling to Syrian Refugees*, AMERICAN BAR ASSOCIATION (Apr. 2015), http://www.americanbar.org/advocacy/rule_of_law/where_we_work/middle_east/syria/news/news-syria-legal-aid-counseling-for-refugees-0415.html.

justice system from an inquisitorial to an accusatorial model;[91] working with the judiciary in Bahrain on comparative sentencing practices;[92] mentoring lawyers in Kosovo;[93] working with lawyers in Southeast Asia on strategies to challenge Internet restrictions;[94] training judges in Egypt on judicial ethics;[95] empowering women lawyers in the fight against impunity in the Democratic Republic of Congo;[96] and conducting trainings in Southeast Asia to emphasize the intersection of human rights and corruption, with a focus on human trafficking and arbitrary detention.[97] The list goes on as ROLI endeavors to promote justice, economic opportunity and human dignity through the rule of law.

We live in a delicate international balance where isolationism and fear of foreignness are not practical choices. Globalization underscores the importance of international law and need for strengthening international cooperation, not abdication. Sticking our head in the sand is no way forward. I don't want to sound like Pollyanna, but engagement with international law and international organizations in a positive sense is the better course. To be sure, dealing with states that do not share our values and goals and recognizing the shortcomings in international law is a challenge. But it is a challenge perfectly suited to us in the legal community.

International law provides a foundation for the rule of law, a platform for resolving disputes, and hope for a better, even if imperfect, world. Learning about foreign courts and their approaches to resolving the challenges facing our modern global society can only make us better decision-makers and advocates at home.

This is March Madness week with hoards descending on Las Vegas to view the festivities. Unlike that city's slogan, "what happens in Vegas, stays in Vegas," it is not so with international law. What happens abroad matters at home. Join me in a campaign to turn international and foreign law into something positive and constructive—a different four-letter word—HOPE.

91. ABA RULE OF LAW INITIATIVE, PROGRAM HANDBOOK 95-96 (2016), http://www.americanbar.org/content/dam/aba/directories/roli/misc/aba-roli-2016-program-book.authcheckdam.pdf.

92. *Id.* at 100.

93. *Id.* at 64–65.

94. *E.g.*, *Rule of Law Initiative: Philippine Lawyers Attend Training on Internet Freedom*, AMERICAN BAR ASSOCIATION (June 2015), http://www.americanbar.org/advocacy/rule_of_law/where_we_work/asia/philippines/news/news-philippines-training-on-internet-freedom-0615.html.

95. ABA RULE OF LAW INITIATIVE, *s*upra note 91, at 102.

96. *Id.* at 26-27, 30, 32.

97. *Id.* at 46.

PANEL DISCUSSION: LOG CABIN REPUBLICANS V. UNITED STATES: LITIGATING "DON'T ASK, DON'T TELL"*

Danielle Hart, Hon. Terry J. Hatter, Jr., Dan Woods, Col. Christopher Miner, Hon. Virginia Phillips & Erwin Chemerinsky†

I. INTRODUCTION

DANIELLE HART: Thank you all very much for coming to this panel called "Log Cabin Republicans v. United States: Litigating Don't Ask, Don't Tell." I want to take a minute to thank all of the panelists for taking time out of their schedules to talk to us about the military's Don't Ask, Don't Tell policy (DADT).[1] I also wanted to take a brief moment to acknowledge and thank Professor Jonathan Miller and all of the Law Journal students who have been working for months to pull this symposium together. I think it's pulled together really, really well. I want to acknowledge all of them, their hard work, and all of the various Southwestern offices that have participated in making this day come together. Thank you very much.

As I said, this panel is about *Log Cabin Republicans v. United States*,[2] and our panelists will be discussing the litigation of the U.S. military's DADT policy.[3] We are very lucky to have the judges who

* What follows is an edited and annotated transcript of the live remarks made by selected panelists on March 18, 2016 during the Southwestern Journal of International Law's symposium, "The U.S. District Court for the Central District of California, 1966-2016: International Context."

† Danielle Hart, Professor of Law, Southwestern Law School introduced the panelists and moderated the panel. Introductions and short biographies for the included panelists appear in Professor Danielle Hart's introductory remarks. Professor Nathaniel Frank's individual remarks have been omitted from the following annotated transcript. His article, *The Role of Research, Litigation and Comparative International Policy in Ending the U.S. Military's "Don't Ask, Don't Tell" Policy*, appears later in this issue.

1. *See* 10 U.S.C. §654 (1993).
2. Log Cabin Republicans v. United States, 716 F. Supp. 2d 884 (C.D. Cal. 2010).
3. *See* 10 U.S.C. § 654 (1993).

heard the decisions, the lawyers, and the witnesses who were instrumental in the case. We will also hear from Colonel Miner, who will to talk to us about the implications of the policy post-decision, and Dean Chemerinsky, who will put the entire decision into a larger context for us. I'm going to take a couple of minutes to briefly introduce each of our panelists.

Let me start with the Honorable Terry Hatter, Jr., who is a judge in the United States District Court, Central District of California. He was nominated on September 28, 1979 and was confirmed in December of 1979. In 1998, he became the Chief Judge of the Central District and served in that position until 2001. Prior to joining the federal bench, Judge Hatter served in the Los Angeles Superior Court. He was also Professor of Law at Loyola Law School and the University of Southern California. He has served in a special category of the Army with the Air Force during the Korean conflict.

Next, Dan Woods, who is a partner with Music Peeler & Garret here in Los Angeles, is going to talk. He was the lead plaintiff's attorney in the DADT litigation. He took on the case when he was a partner at White & Case. Prior to going into private practice, where he again was a partner with many different law firms, he was a clerk for the Honorable Andrew A. Hawk at the U.S. District Court for Central District of California. He was also a fellow of the American Bar Association, a board member and the board President of the Inner City Law Center, and a board member of Uncommon Good.

Following Mr. Woods, we're going to have the Honorable Virginia A. Phillips, who is a U.S. District Court Judge for the Central District of California. She was nominated on January 26, 1999 and confirmed on November 15, 1999. Prior to serving on the bench, Judge Phillips was a partner at Best & Krieger with a litigation practice. She also served as a Magistrate Judge in the Central District of California and sat on the California Superior Court. She's a founding member of the Inland Empire Chapter of the Federal Bar Association and serves in leadership roles with various community organizations, including the Riverside Youth Service Center.

Following Judge Phillips, Colonel Chris Miner of the United States Marine Corp will talk to us. He is the officer in charge of Legal Services Support, section West, where he supervises over 100 attorneys, providing legal services in criminal justice and legal assistance in civil administration law at five different installations. He has served all over the world, including Japan, Okinawa, and Afghanistan prior to returning home, where he is now working in his current capacity. He,

again, will be talking to us about the implications of the policy post-decision.

Finally, Dean Erwin Chemerinsky, who is the Founding Dean of the University of California Irvine School of Law, a Distinguished Professor of Law, and Chair of the Raymond Pryke First Amendment Law at UC Irvine School of Law with a joint appointment in political science. He has taught at several different schools. He is the author of eight books, including *The Case Against the Supreme Court*.[4] He frequently argues cases before the United States Supreme Court and is also a commentator for legal issues on national media. He will talk to us and put the issues into larger context for us. With that, I want to turn the discussion over to Judge Hatter.

II. Panel Discussion

JUDGE HATTER: Thank you. Let me tell you why I think we're here on this topic, because you wonder: well, what does it really have to do with international law? Clearly, international fact-finding if nothing else. Mr. Meinhold was an outstanding Navy enlisted man. He was an instructor. He was highly esteemed by all of his superiors, including those whom he actually taught in classes. Many of the people that he served with knew that he was gay. He didn't keep it a secret. In no way did it interfere with his work or with the evaluations that he was receiving. But when Mr. Meinhold decided to go on a national news show and he, as they say, came out on national television, he suddenly received orders from the Navy that he was to be discharged.

Mr. Meinhold merely did not want to be discharged. He asked for an injunction and we granted that after there were cross Motions for Summary Judgment.[5] Clearly, the Navy had a very sparse record.[6] There was not much to go on, but the Navy was basically claiming that Mr. Meinhold had not gone through all of the hoops he needed to go through.[7] I determined that it made no difference that he had not gone through them because the response would have been exactly the same. I made the determination that:

> [G]ays and lesbians have served and continue to serve the United States military with honor, pride, dignity, and loyalty. The Department of Defense's justifications for its policy banning gays and lesbi-

4. Erwin Chemerinsky, The Case Against the Supreme Court (2014).

5. Meinhold v. United States Dep't of Defense, 808 F. Supp. 1455, 1456-58 (C.D. Cal. 1993).

6. *Id.* at 1457.

7. *Id.* at 1456-57.

> ans from military service are based on cultural myths and false stereotypes. These justifications are baseless and very similar to the reasons offered to keep the military racially segregated in the 1940s.[8]

I found that to be true. As I say, while we're talking about international law, I also talked about international fact-finding. I wrote that in addition to all the countries in North Atlantic Treaty Organizations (NATO), only the United States and Great Britain banned gays and lesbians from their armed forces.[9]

On October 27th (the Meinhold case was filed with us on October 5th of 1992), Canada's military leaders rescinded Canada's policy of banning gays and lesbians from its Canadian forces, albeit as a result of a court order.[10] In explaining why the ban was rescinded, the Chief of their Defense staff reported that the military leadership was satisfied that the policy no longer served the best interests of Canada and its military.[11] On November 23rd of the same year, Australia lifted its ban against gays and lesbians in the Australian Defense Force.[12] The Prime Minister, in support of lifting the ban, stated that the decision "will not have the adverse effect on morale and cohesion predicted by some."[13]

Interestingly, and I'm glad that it was mentioned that I did serve in the military, I got all kinds of hate mail when I issued my order. They would write, and you always feel like, "Boy, I'd like to respond to that," but you can't in this position. In my case, I particularly wanted to, because I would say, "If you'd ever served in the military you'd know that it would work." I felt like writing back, "Not only was I in one branch of the military, but in two." During the Korean conflict, I was in a thing called SCARWAF (Special Category Army with the Air Force), which nobody has ever heard of. I served with the Army first, right after President Truman issued orders integrating the service.

Interestingly to me, when I issued this order, President Clinton was, as you know, early in his Presidency. I received a call from the White House counsel asking if they could have a copy of the Order. I said, "Of course." Unfortunately, the President and his White House

8. *Id.* at 1458.
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.* (quoting *Statements by Prime Minister, The Hon. P.J. Keating, Australian Defence Force Policy on Homosexuality*, Nat'l. Archives of Austl. (Nov. 23, 1992)).

team decided that they would not just leave it with the courts. Instead, the President went up on the Hill and met with Sam Nunn, who at that time was a Senator from Alabama and Chair of the Armed Forces Committee in the Senate.

I assumed, and probably rightfully so, that President Clinton, being one of the first Presidents in modern time who had not been in the military, was talked down by the Senator. This case, *Meinhold*,[14] became the precursor for DADT because right after that meeting with the President and Senator Nunn, DADT was offered to us.[15] Shortly after that, the Navy added another defense: that by following my order, they (the Navy) couldn't implement DADT. It was very clear, at least to me, that being gay and not engaging in any activities that would be adverse to the mission of the military was unconstitutional and I so ordered.[16] I also ordered the entire military, the Defense Department, the Navy, and the other parts of the Defense Department to not engage in this unconstitutional activity.[17]

The Supreme Court stayed that injunctive relief and sent it back to the Ninth Circuit.[18] The Ninth Circuit determined that while they would affirm me on *Meinhold*,[19] they would not do the same regarding the sweeping injunction for the entire military.[20] The basis, of course would be that Mr. Meinhold did not bring a class action.[21] With that, I'll turn it over.

DAN WOODS: Let me start by saying a couple words about some of the other panelists here. Judge Hatter, I spoke with you once about *Meinhold* before I was ever involved in DADT. You would never remember this, but we were seated at the same table at some Bar event. I was curious about what caused you to rule in favor of Mr. Meinhold. You said to me that you were struck by the evidence presented to you that the military enforced this ban more often in times of peace than they did in times of war, and if there was a purpose to this policy, it wasn't being served by discharging people more often in times of peace. It seemed more as if there was time to do it. When they needed cannon fodder in times of combat, gays were as

14. *Meinhold,* 808 F. Supp. 1455.

15. *Meinhold* was decided prior to the passage of DADT. *See* 10 U.S.C. §654 (1993); *see also Meinhold,* 808 F. Supp. 1455.

16. *Meinhold,* 808 F. Supp. 1455 at 1458.

17. *Id.* at 1480.

18. United States Dep't of Defense v. Meinhold, 510 U.S. 939 (1993).

19. Meinhold v. United States Dep't of Defense, 34 F.3d 1469, 1472 (9th Cir. 1994).

20. *Id.*

21. *Id.*

good as anybody else. That stayed with me and we used that during the case. Professor Nathaniel Frank's book, *Unfriendly Fire*,[22] became required reading for the people on our team. I really did read it over one weekend. It inspired me and provided us with many, many leads about the evidence we could put on in this case.

This many years later, I think many people take open service for granted. It's not even an issue in the Presidential campaign anymore. When Judge Phillips made her decision,[23] it was extremely controversial. I heard that a number of angry phone calls flooded not just her chambers, but the voice mail of the entire court. Judge Phillips received lots and lots of hate mail and even death threats. She had to be guarded by the United States Marshals for some period of time after she made her decision. I don't think she appreciated the commotion it would cause, but it certainly did. We recognize her courage that way.

I want to talk, though, about the trial of the DADT case. Trying and winning the DADT case was a tremendous experience for me and the entire team of lawyers who worked on the case. It was a wonderful opportunity as a trial lawyer to try the case. It had lots and lots of interesting moments. You have signature moments in any case, but this trial included moments where I could argue successfully about important constitutional law principles. I could argue the admissibility of a tweet by the Chairman of the Joint Chiefs of Staff. I could say in a closing argument, "Your Honor, the evidence showed that the government would rather give a convicted felon a gun than to give a gay guy a typewriter."

The case and the trial were memorable, not just because of the skills and the craftsmanship involved, but also because of the subject matter of the case. The gay men and women we were representing, and on whose behalf we brought the case only wanted to serve our country.[24] They wanted to conform to military standards and values.[25] These were people who wanted to shave their heads; who wanted to go to boot camp; who wanted to risk their lives to fight for our country while it was depriving them of their constitutional rights.[26] They were the real heroes in the whole DADT story from our perspective.

Once we decided to try the case, we had to win the case. It was important not just for the thousands of people who were involved in

22. *See* NATHANIEL FRANK, UNFRIENDLY FIRE: HOW THE GAY BAN UNDERMINES THE MILITARY AND WEAKENS AMERICA (2009).

23. Log Cabin Republicans v. United States, 716 F. Supp. 2d 884 (C.D. Cal. 2010).

24. *Id.* at 900-08.

25. *Id.*

26. *Id.*

the military, but also for the whole LGBT community. We thought it was important for the whole country and the world to show that we could win this case. Ending DADT was and is one of the major civil rights victories of our generation. We collectively made history in causing DADT to be ruled unconstitutional and then legislatively repealed.[27]

We started this case in 2004 after the Supreme Court decided *Lawrence*.[28] Before *Lawrence,* every case that challenged the constitutionality of DADT had failed. After *Lawrence*, we thought that there might be an argument that could be made that DADT was indeed unconstitutional. We decided, "Okay, how do we go about doing that?" We first decided that it would be preferable to have a "facial challenge" to the constitutionality of the statute as opposed to an "as applied" challenge brought by one or a small number of service members. We thought that would have more impact. Along with that, we decided to have associational standing. This gay Republican advocacy group, the Log Cabin Republicans, would be the plaintiff, not an individual service member. We also decided to bring the case in the Central District, partly because of the *Meinhold* case and the 9th Circuit's view of it, but also because it was convenient to us. Finally, we decided to bring claims based on violations of Due Process, Equal Protection and the First Amendment.[29] We met very stiff resistance from the government in this case throughout it's long history. After various Motions to Dismiss and Summary Judgment Motions by the government, we came to a point where we were prepared to try the case on the Due Process and First Amendment claims, the claims that survived all these motions.[30] We had to put on a great deal of evidence in order to persuade our friend Judge Phillips that this was an unconstitutional statute.

Now, while we recognize the potential historical significance of the case, like any other trial, we had to focus on the elements of our claims. We had to prove the elements of our claims for relief. On the Due Process claim, as a result of *Lawrence*, and another 9th Circuit case called *Witt*,[31] we knew what we had to prove. Since DADT intruded on protected constitutional rights, we had to prove that DADT

27. *See* Don't Ask, Don't Tell Repeal Act of 2010, Pub. L. No. 111-321, § 2, 124 Stat. 3515 (repealing 10 U.S.C. §654); *see also Log Cabin Republicans*, 716 F. Supp. 2d at 929 (holding the Don't Ask, Don't Tell policy unconstitutional).

28. Lawrence v. Texas, 539 U.S. 558 (2003).

29. *Log Cabin Republicans*, 716 F. Supp. 2d at 888.

30. *Id.*

31. Witt v. Dep't of the Air Force, 527 F.3d 806, 818-819 (9th Cir. 2008).

did not further the government's interest in a strong military and was not the easiest or narrowest way to do that.[32] That was our real burden as we went forward.

At any trial, you have themes that you want to keep repeating during the trial. The themes that we tried to present were that we were not talking about this as a gay rights issue. We were addressing this as a *civil rights* issue, a pro-military issue, and we tried to emphasize the patriotism and bravery of the people who were being discharged under DADT.

Now, we did introduce a lot of evidence in a variety of different forums during the trial. One piece of evidence we introduced was a 1993 General Accounting Office report done before DADT was even passed.[33] This report studied the militaries of twenty-nine different countries and reported that permitting open service did not impair the functioning of those countries' militaries.[34] It had a special focus on Israel, Canada, Germany, and Sweden, and concluded as follows: "Military officials in all four countries said the presence of homosexuals in the military is not an issue and has not created problems in the functioning of military units."[35] We had expert testimony from Professor Frank and his colleague Professor Belkin who explained all of the reports they had done and why they were significant.

To me, the more interesting evidence was the testimony from soldiers. It wasn't just that these other countries had changed their rules. Our soldiers were working with other soldiers and fighting with soldiers from those countries. They were in these combat areas in the Middle East, working with soldiers from Canada, England, and so forth, without any problem. They were even in some situations being trained or taught by those people and in other situations being commanded by openly gay people from these countries.[36] It didn't seem to have any impact on military readiness for our countries and forces.

We also did something very interesting. It's called, for those civil procedure fans, a Rule 30(b)(6) deposition.[37] I did a Rule 30(b)(6) deposition of the United States of America. We asked the government to produce witnesses to testify on certain subjects. One of them was a study of foreign militaries. The government produced Dr. Paul Gade,

32. *Id.*

33. U.S. GEN. ACCOUNTING OFFICE, GAO/NSIAD-93-215, HOMOSEXUALS IN THE MILITARY POLICIES AND PRACTICES OF FOREIGN COUNTRIES (1993).

34. *Id*. at 3.

35. *Id*. at 8.

36. *Id*. at 9.

37. FED. R. CIV. P. 30(b)(6).

who was the chief of a research program for the U.S. Army Research Institute for the Behavioral and Social Sciences. We introduced his deposition testimony at the trial. He testified that the experience of foreign militaries was the best method of evaluating openly homosexual service in our military.[38] He identified a number of studies showing that open service did not create any issues,[39] and he had to admit that there was no study showing that it would create an issue.[40] That testimony was very helpful.

We also used a lot of other evidence. We had documents we obtained from the government in discovery. We showed that this evidence proved that DADT did not further its purposes. It was used more often in times of peace than in war.[41] Discharges occurred more often after lengthy periods of service.[42] DADT disproportionately impacted women in the military.[43] Those discharged included people in a variety of professions, not just combat troops.[44] We even had a regulation in evidence, which showed that those under investigation nevertheless went with their comrades on deployment, but that their investigation would resume when they returned (if they returned).[45]

We also had a variety of other party admissions that we used. At the same time the case was gearing up, we had Senate hearings on DADT. The Chairman of the Joint Chiefs of Staff, Admiral Mullen, made admissions that we used;[46] we also used admissions made by the Secretary of Defense;[47] and even the President's admissions were used.[48] The President said in speeches, "Don't Ask, Don't Tell doesn't contribute to our national security. . . . [R]eversing this policy . . . . is essential for our national security."[49] Over a lot of objections, we got

38. Deposition of Paul Gade at 112, Log Cabin Republicans v. United States, 716 F. Supp. 2d 884 (C.D. Cal. 2010) (No. 2:04-cv-08425).

39. *Id.* at 71-72.

40. *Id.* at 77-78.

41. *Log Cabin Republicans*, 716 F. Supp. 2d at 916.

42. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-05-299, MILITARY PERSONNEL: FINANCIAL COSTS AND LOSS OF CRITICAL SKILLS DUE TO DOD'S HOMOSEXUAL CONDUCT POLICY CANNOT BE COMPLETELY ESTIMATED 18-19 (2005).

43. *Id.* at 10; *see also* Expert Witness Report of Melissa Sheridan Embser-Herbert at 2-4, Ph.D, Log Cabin Republicans v. United States, 716 F. Supp. 2d 884 (2010) (No. CV 04-08425); Declaration of Elizabeth Hillman at 4, Log Cabin Republicans v. United States, 716 F. Supp. 2d 884 (2010) (No. CV 04-08425).

44. *Log Cabin Republicans*, 716 F. Supp. 2d at 916.

45. *Id.* at 918.

46. *Id.* at 919.

47. *Id.* at 922.

48. *Id.* at 919.

49. *Id.*

that into evidence. I argued in the closing that those were the greatest party admissions in the history of party admissions.

This doesn't have as much to do with the international context, but the key to the case, I thought, in really persuading the court to rule in our favor was the emotional testimony of the seven service members that we brought. They all came from a cross-section of backgrounds: different ages, male and female, different branches, officers and enlisted personnel. They told in heartbreaking terms how DADT impacted them. Ultimately, we were successful in having Judge Phillips rule in our favor and issue an injunction that we argued for, which had worldwide scope.[50] For some reason I could never figure out, the government argued that the injunction should be limited to the Central District of California.[51] Judge Phillips was good enough to issue a worldwide, permanent injunction.

There have been a lot of books written about DADT since all this happened. In all of the books I've read, while the authors of each book took primary credit for DADT's repeal, they at least credited Judge Phillips in all of them.

I will tell you that after the case was decided, I did happen to encounter Secretary of Defense, Robert Gates, and talked with him about the case. I said, "I'd like to introduce myself. I'm Dan Woods. I sued you. We won and you lost." We talked about the case briefly. He acknowledged that the decision was the key factor in causing the military to change its view about DADT, and to cause its repeal. As he put it, and I'm trying very hard to quote, "I wasn't going to let some judge in California tell me how to run my military."

JUDGE PHILLIPS: Thank you very much for the invitation to be on this panel of really distinguished speakers. It's an honor for me. It really is an interesting opportunity because what really struck me so far is that the focus of the other speakers is very similar to what I had planned to say. We didn't try to coordinate our remarks at all and I hadn't spoken with any of the others about our respective roles in speaking today. I don't know if any of the others had meetings about what we were all going to say and they just didn't include me.

Let me start by answering a question I got asked a lot: "How did this case end up in Riverside?" We have this sleepy, country courthouse. You've probably never heard of it and nothing big ever hap-

50. *Id.* at 929.

51. Brief For Appellee Log Cabin Republicans at 14, Log Cabin Republicans v. United States, 658 F.3d 1162 (9th Cir. 2011) (No. 10-56634).

pens in our courthouse. The short one is, it's a very simple, but important answer. My colleague, Judge Schiavelli, had some physical ailments and he decided rather suddenly to retire. When a judge on our court leaves the bench for whatever reason, their cases are randomly assigned throughout the district. Although Judge Schiavelli is here in Los Angeles, I got this case as part of the random distribution along with some other cases. I remember clearly, my secretary was out that day and I was standing at her desk going through the group of cases that I was getting from Judge Schiavelli, which included this one. I thought, "I've heard of this case."

That's how it came here. I would also like to state that when change happens because of a lawsuit, the credit really has to go to the litigants and the lawyers who bring the case, because as judges we just take what cases are sent to us. We don't have a choice. It was random. It wasn't random, however, for Mr. Woods and his law firm to bring this case on a pro bono basis and it wasn't random for the Log Cabin Republicans to decide to litigate this case. My role in it is really much smaller.

As Mr. Woods pointed out, one of the things I enjoyed the most or one of the things I thought was unique and wonderful about this case was the variety of legal issues that were presented. As you might expect given my job, I'm a real civil procedure junkie. I loved the fact that there was such a difficult, from my perspective, and meaty standing issue.[52] All right, so maybe not everybody would feel that way, but I really loved the standing issue. At one point, I asked for additional briefing on it. To me, the court has a *sua sponte* duty to address its standing. To me, that was a very critical and perhaps close call.

Some of the testimony that I found most compelling, from an international standpoint, was the testimony about the experience of other militaries, partly because there was a great deal of such evidence and it was intensely factual and, frankly, very persuasive. On a side note, there was also some testimony about the experience that women had had in the military and that they were affected more in terms of this policy than others. At one point, one of the expert witnesses who testified explained to me, the trier of fact, the history of women serving in the military.

The very first women to serve as officers in the military were nurses in World War I. My grandmother was one of those women. Her picture has always been on my desk, because to me she is a really

52. *Log Cabin Republicans*, 716 F. Supp. 2d at 889.

inspiring example of public service. It's easy for us now when we travel to Europe, we just need to get on a plane. My grandmother got on an Army ship, crossed the Atlantic Ocean in a very difficult journey when those ships were being torpedoed, and served right in the trenches with the horrible casualties of World War I in France and Belgium. It was a private moment for me to listen to someone else telling me that these were the very first female officers. My grandmother died before I even graduated from college, but I'd like to think that she was proud of that moment when I was hearing that testimony and thinking, "Yeah, I knew that."

I should mention that the government decided not to put on any of the other testimony. Their position was that this was a facial attack and I should only look at the legislative history.[53] I discussed, I hope thoroughly in my decision, why I found that was not the appropriate thing to do.[54] The testimony of the witnesses who were actually serving or had served in the military was particularly effective because the prosecution team was excellent about deciding the order of their witnesses. At one point, near the end of the case, the government complained that, "They just cherry picked a bunch of really effective witnesses." I don't know, I thought that was what most lawyers would try to do in a case. In any event, they were right.

The first witness, I believe, was a man who had served in the military. He was heterosexual. He said, "Look, I was from Nebraska. I didn't know any gays. I held a lot of prejudices against gays. I was serving with and then rooming with someone who I thought was a terrific soldier and I found out there were rumors he was gay, so I warned him. He said, 'No, it's true.'" The testimony of this witness was at the outset of the trial, but his testimony—that he decided not to re-up because he eventually found it so uncomfortable to serve in the military with this rule—was very effective and persuasive. All of the soldiers, airmen, and sailors who testified were very persuasive about the effect.

I don't know if this is true, but I was later told that I was the first judge in a published opinion to rule that a tweet was admissible.[55] It was fascinating to have to have the foundation laid for a tweet. It was a great tweet from the plaintiff's perspective in terms of the international impact.

53. *Id.* at 895.

54. *Id.* at 895-97.

55. *See* Transcript of Record at 469-71, *Log Cabin Republicans*, 716 F. Supp. 2d 884 (No. CV 04-08425).

I don't know if my colleagues have the same experience, but when I sit down to write my decision, my experience is that I usually haven't decided a case—especially a court trial—before I start to write. It is the discipline of writing that helps me decide. As I went through and I was writing this, I really valued the importance of judicial independence. I struggled a lot and spent a lot of hours in chambers working on this case as we do with every case, but I only had to worry about the correctness and the validity of my decision. "Was I making the right decision? Have I addressed all the facts? Have I addressed all the arguments on both sides? Am I reaching a sound, reasoned, and the right decision?" I didn't have to worry about whether I was going to be re-elected. That, I'm afraid is a luxury, but it made me value even more the importance of judicial independence.

I always say to juries during *voir dire* and at the end of a trial when I'm thanking them for their service: "This may not be the longest case or whatever, but this is the most important case in the world to the parties involved." That's true in this case and it's true in every case. I feel like I really try to treat all cases by that standard. This certainly affected more people than some other cases between private litigants, but all cases are really important.

I'll end with one small anecdote that impressed on me. I was very very focused on my decision of course and a bit naïve about how much attention it would get. Very naïve as it turned out. My case was tried shortly after Judge Walker (of the Northern District) tried the Prop 8 case, which got a lot more media attention at the time. Due to the relative lack of media attention to our trial, I thought, "Maybe the Los Angeles Times might cover the outcome." I was a little bit wrong about that. One of my volunteer externs at the time was checking the news casts all night and did a little mini PowerPoint that he sent around to everyone in my chambers of all the international news organizations that covered the outcome within about 12 hours. It was really astonishing to me. I also wasn't prepared for the amount of interest and the effect, not only eventually of the injunction, but also of the decision itself.

About a month after the decision, I had a law clerk who happened to be working outside of chambers that day and I needed to get in touch with him. He was home. I sent him an email to his personal Gmail account. Luckily it had no confidential information. His email address was his first name, middle initial, and last name at Gmail. I sent an email saying, "Hi, I need to talk to you about the Monday calendar and you have a file that I need. Could you give me a call?" I

didn't get an answer for an hour or two and I thought that was a little peculiar. Then I got an answer that said, "Dear Virginia," and I thought, "Boy, I guess he's very comfortable after a month or two in my chambers. That's great." "I received your email. I think you may have sent it to the wrong person. I am a computer analyst in Germany. Wrong middle initial. P.S.: If you are the Judge Phillips from Don't Ask, Don't Tell, great work."

COL. MINER: I'd like to thank Southwestern Law School for inviting me to this symposium. It is an honor to be up here with such an esteemed and accomplished group. I'm going to talk a little bit about the repeal of DADT and its impact on the military. Now many of you have heard this before, but since I am a Marine here appearing in uniform, I must do the disclaimer: this is solely my own opinion and not that of the military. I don't speak for the President, ma'am, and you can't hold that against me.

Now I'm sure most of you know that the opponents of DADT objected to the repeal based upon mission readiness and the military readiness. The Comprehensive Review Panel issued a report in November of 2010, which found that 30% of the military members surveyed believed the repeal would have a negative impact on the military mission.[56] The Marine Corp was higher, with 58% of our combat arms personnel believing it would have a negative impact, which is a significant number.[57]

What impact did the repeal really have? I'm going to give you an anecdote that I think summarizes it pretty well and I'll discuss it a little bit further. As I was explaining to another Senior Judge Advocate the other day about why I was coming to this panel and what I was going to be addressing, he said, "Repeal of DADT? Isn't that a little dated? It's almost like my daughter telling me my dance moves were so 1980." He wasn't making light of the repeal, but his question brought home the point of how far we have advanced in the U.S. military from the debate that we had just a few years ago regarding the perceived negative impact that the repeal would have on issues of readiness to engage in combat and related missions. By the end of the year after the repeal, all of the military services reported that there was no negative impact on the basis of mission readiness, and one year after that, they all reported no negative impact altogether.

56. U.S. DEP'T OF DEF., REP. OF THE COMPREHENSIVE REV. OF THE ISSUES ASSOCIATED WITH A REPEAL OF "DON'T ASK, DON'T TELL" 64. (2010).

57. *Id.* at 75.

Part of the reason the implementation of the repeal was so successful is that the military is a microcosm of society in many ways. Our societal views evolved on sexual orientation since 1993. The other reason for the repeal's success was military leadership. I also believe that the effective leadership of the military was significant to the implementation of the repeal. I believe all the service leadership remain faithful to their obligation and oath to protect and defend the Constitution. For example, General Jim Amos, Commander of the Marine Corps, who was an opponent of the repeal, made it clear that the debate was over and it was now time to move forward. That's exactly what we did.

In the Marine Corps, we undertook a tiered approach to training. The training was focused at experts, such as myself, judge advocates, and chaplains, and also geared toward our senior leadership - our commanding officers, our senior enlisted advisors, and all the Marines in general. The emphasis of the training was on having effective leadership, professionalism, discipline, and respect. Even the units that were deployed in combat at the time in Iraq or Afghanistan received this training. That's how serious the Department of Defense was to make sure this happened and was implemented effectively. The number one message of the training was that everyone who serves, regardless of who they are, is entitled to dignity and respect.

Having provided you with a little bit of an overall assessment of the impact of the repeal, I'm going to go over a few of the policies. I'm going to try not to belabor any of them. These are some of the policies that were either implemented prior to the repeal or after the repeal. I'll try to make note of those as I can.

Number one is accessions and separations: No longer was being a homosexual a bar to enlistment and no longer could it be used to separate one solely on that characterization. That was huge. What happened with that? In the year following the repeal, all of the services reported that they had achieved 100% of their recruiting mission in the active duty services.

Standards of conduct: Our standards of conduct really did not change after the repeal. Everybody was supposed to be treated, like I said, with dignity and respect regardless of sexual orientation. In the Marine Corps, we remain dedicated to our core values of honor, courage, and commitment. That didn't change.

One thing that was a little peculiar that this panel mentioned before was consensual sodomy. It took until 2014 with the passage of

the National Defense Authorization Act[58] where we actually repealed consensual sodomy under Article 125 of the UCMJ.[59] I look at that as they look at laws about spitting on sidewalks: it was archaic and I think people put it out of mind. I don't believe that we actually used a charge of consensual sodomy in a court-martial after the repeal. Again, the deference to the military just wouldn't have been there in light of *Lawrence v. Texas*.[60] It would not have been present.

Moral and religious concerns: The repeal didn't affect any individual's moral or religious beliefs. People can continue to have their own personal beliefs. Our chaplains are still afforded the opportunity to practice the free exercise of religion according to their faith. They can refrain from any practice contrary to their religious beliefs. While it was probably not necessary, the protection to chaplains was codified in the National Defense Authorization Act of 2013.[61] The evidence indicates that chaplain retention and recruiting had not been affected as some had argued earlier on.

Equal opportunity was huge obviously. All service members, regardless of sexual orientation, are entitled to be in an environment free from personal, social or institutional barriers that prevent them from advancing free from discrimination and harassment or abuse. While initially after the repeal we did not roll sexual orientation up into our military equal opportunity programs, in June of 2015, the Department of Defense changed our directives on that. Now sexual orientation is included in military equal opportunities.[62] Before, if somebody had a complaint of discrimination, they were supposed to address it either through their commander channels or through the inspector general channels. Now, it is part of the MEO (Military Equal Opportunity Program).[63] Other avenues of redress are now available. People can come in for things like mediation and alternate dispute resolution that may not have been available to them in the past. My research also suggested that there were only six complaints of discrimination in the whole Department of Defense based on sexual orientation made through IG channels through June of 2015, when the policy was instituted.

58. National Defense Authorization Act For Fiscal Year 2014, Pub. L. No.113-66, § 1707, 127 Stat. 961 (2013).

59. *Id.*

60. 539 U.S. 558, 578 (2003).

61. National Defense Authorization Act For Fiscal Year 2013, Pub. L. No. 112-239, § 533, 126 Stat. 1632 (2013).

62. Department of Defense Directive 1020.02 (2015).

63. *Id.*; *see also* Department of Defense Directive 1350.2 (1995).

Many of the benefits that were available to homosexual service members continue to be in place, such as being able to designate somebody as a beneficiary for your life insurance or your retirement savings account. You probably should know, and you probably all know, that the one benefit you were not entitled to had to do with being married or one's dependent status. That was because of the Defense of Marriage Act (DOMA).[64] Of course in 2013, the Supreme Court ruled Section 3 of DOMA to be unconstitutional and that opened the door for same-sex couples to receive the same benefits as heterosexual couples, with medical care and housing being the biggest ones.[65] They could even avail themselves now of legal assistance in my offices. Again, that was change that, I know, was slow to come, but it came and I think it adds a lot to the repeal to be able to have same-sex partners receive those same benefits.

Even though there was some concern that the implementation of the repeal of DADT was going to have a roar on military readiness, it was really a whimper when it comes down to it. I think the generational and societal changes and the effective leadership that our commanders provided made a big difference in the outcome.

In February of 2012, I deployed to Afghanistan. We were still in that period of one year where we were supposed to be reporting any issues. In a combat environment where we started with about 18,000 Marines in the Helmand province, to the time we had somewhere between 7 and 8,000 Marines, I can't recall one incident that was unusual. Did we have some misconduct? Yeah. Do you know what the misconduct was? General order number one, which prohibited sexual relations between anyone. As my general used to say, "If I ain't getting any, nobody's getting any." We did have some homosexual service members who were administratively punished for engaging in sexual relationships, but we also had heterosexuals who were punished for the same thing. With that I thank you for your time and I'll pass it along.

DEAN ERWIN CHEMERINSKY: I am so honored to been asked to be a part of this distinguished panel. I was asked to put Judge Hatter's decision in *Meinhold v. United States Department of Defense,*[66] and Judge Phillips' decision in *Log Cabin Republicans v.*

64. Defense of Marriage Act, Pub. L. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 and 28 U.S.C. § 1738C (1996)).

65. United States v. Windsor, 133 S. Ct. 2675, 2696 (2013).

66. 808 F. Supp. 1455 (C.D. Cal. 1993).

United States[67] in a larger constitutional context. I think this context not only shows how far constitutional law has advanced with regard to protecting gays and lesbians from discrimination, but also how much is left to be done. It also shows that we would not be at this point if it wasn't for wise and courageous judges like Terry Hatter and Virginia Phillips, so I think this is also an opportunity to recognize and thank them for how they are responsible for where we are today.

I want to address two points: First, what is the history in the Supreme Court and the Ninth Circuit with regards to sexual orientation discrimination, especially in the military. I think this history is important. Relatively soon, people will think that the protection of gays and lesbians in the military, and with regard to marriage, was inevitable and preordained. It is easy to forget in the context of the military that it wasn't just conservative Republican administrations who defended the exclusion of gays and lesbians in the military in DADT. It was the Carter, Clinton and Obama administrations as well. I also think that looking at the historical context is important in seeing how much it really was wise and courageous judges who made a difference. So I will take a few minutes to sketch the history.

My guess is that some is familiar to all of you, but some may have been forgotten. Let's start in 1986 with the Supreme Court's decision in *Bowers v. Hardwick*.[68] There the Supreme Court, in a 5-to-4 decision, upheld a Georgia law that prohibited oral-genital or anal-genital contacts.[69] The Supreme Court in a 5-to-4 decision ruled that homosexual sodomy is not protected by the Constitution.[70] Justice Byron White wrote the opinion for the court. It turns out that Lewis Powell was the fifth vote in the majority. Initially, he had voted with the dissenters to strike down the Georgia statute, but then he changed his mind. Not long after leaving the bench, in a speech at New York University Law School, he said the one decision he regretted being a part of was the majority in *Bowers v. Hardwick*.[71]

Two years later, in 1988, the Ninth Circuit decided *Watkins v. Department of Defense*.[72] *Watkins* is a case that I fear has been forgotten, but is enormously important in this history. It involved the military

67. 716 F. Supp. 2d 884 (C.D. Cal. 2010).

68. 478 U.S. 186 (1986).

69. *Id.* at 196.

70. *Id.* at 191.

71. Ruth Marcus, *Powell Regrets Backing Sodomy Laws*, WASH. POST (Oct. 26, 1990), https://www.washingtonpost.com/archive/politics/1990/10/26/powell-regrets-backing-sodomy-law/a1ae2efc-bec6-47ec-bfb6-1c098e610c5b/.

72. 847 F.2d 1329 (9th Cir. 1988).

seeking to discharge and prevent reenlistment of Perry Watkins for being gay.[73] The Ninth Circuit, in a 2-to-1 decision, held that the exclusion of gays and lesbians from the military denied equal protection.[74] The Ninth Circuit said that discrimination on the basis of sexual orientation is discrimination on the basis of a suspect classification and that there was no evidence that excluding gays and lesbians from the military enhanced military preparedness and readiness.[75] Judge William Norris wrote the opinion, joined by Judge William Canby. If you're not familiar with the decision, you will be stunned when I tell you who the dissenter was—Judge Stephen Reinhardt. Judge Reinhardt ruled that on the basis of *Bowers v. Hardwick,* though he disagreed with the Army's position, he could not find that it was unconstitutional.[76]

The next year, the Ninth Circuit *en banc* held that the exclusion of Watkins was impermissible based on an estoppel theory, but did not reach the constitutional question.[77]

In 1990, the Ninth Circuit decided *High Tech Gays v. Defense Industry Security Clearance Office*,[78] and the question was whether it was constitutional to deny an individual a security clearance on account of being gay or lesbian.[79] There, the Ninth Circuit said that *only* rational basis review should be used for sexual orientation discrimination,[80] and that it *was* permissible to deny somebody security clearance on the basis of their sexual orientation.[81] Judge Melvin Brunetti wrote the opinion for the court.

So in that context, when *Meinhold v. United States Department of Defense* came to Judge Hatter in 1993, you can see why it was such a courageous ruling. Judge Hatter ruled that the exclusion of Meinhold was a denial of equal protection and that the Army's policy was unconstitutional.[82] This, as Judge Hatter said, led to Congress passing DADT.[83] The next year, the Ninth Circuit said that Meinhold could not be excluded from the military, but that the military policy was

73. *Id.* at 1331.
74. *Id.* at 1352.
75. *Id.* at 1349-51.
76. *Id.* at 1353 (Reinhardt, J., dissenting).
77. *See* Watkins v. United States Army, 875 F.2d 699, 711 (9th Cir. 1989).
78. 895 F.2d 563 (9th Cir. 1990).
79. *Id.* at 565.
80. *Id.* at 571.
81. *Id.* at 580.
82. Meinhold v. United States Dep't of Defense, 808 F. Supp. 1455, 1458 (C.D. Cal. 1993).
83. *See supra* note 15 and accompanying text.

constitutional.[84] Here, I think it is worth looking at the words of Judge Pamela Rymer. She wrote: "[O]n the merits, we defer to the Navy's judgment, that the presence of persons who engage in homosexual conduct or who demonstrate a propensity to engage in homosexual conduct by their statements, impairs the accomplishment of the military mission."[85]

In 1996, in *Watson v. Perry,*[86] the federal district court judge in the District of Washington upheld the constitutionality of DADT.[87] It is also worth noting that 1996 was the year that the Supreme Court, for the first time, declared a law unconstitutional on grounds of sexual orientation discrimination. In *Romer v. Evans*,[88] the Supreme Court, 6-to-3, declared unconstitutional Colorado's amendment that repealed all laws in the state protecting gays and lesbians from discrimination and that prevented the enactment of any new laws protecting gays and lesbians from discrimination.[89]

In 2003, the Supreme Court decided *Lawrence v. Texas*.[90] There, the court expressly overruled *Bowers v. Hardwick*, holding that if the right to privacy means anything, it safeguards what consenting adults do in the privacy of their own bedroom.[91] In 2008, in *Witt v. Dep't of Air Force*,[92] the Ninth Circuit said that a military policy excluding gays, including DADT, has to serve an important interest, substantially further that interest, and has to be necessary.[93] That, of course is the test Judge Phillips had to apply. We should also remember that 2008 is the year that California voters passed Proposition 8,[94] which amended the California Constitution to say that marriage had to be between a man and a woman.[95]

It was two years after, in 2010, that Judge Phillips handed down a decision in *Log Cabin Republicans*. If you haven't read it, or have not read it recently, I commend you to do so. It is an incredibly thorough

84. Meinhold v. United States Dep't of Defense, 34 F.3d 1469, 1479 (9th Cir. 1994).

85. *Id.* at 1472.

86. 918 F. Supp. 1403 (W.D. Wash. 1996).

87. *Id.* at 1417-18.

88. 517 U.S. 620 (1996).

89. *Id.* at 635-36.

90. 539 U.S. 558 (2003).

91. *Id.* at 578.

92. 548 F. 3d 1264 (9th Cir. 2008).

93. *Id.* at 819.

94. CAL. SEC'Y OF STATE, CALIFORNIA GENERAL ELECTION TUESDAY, NOV. 4, 2008: OFFICIAL VOTER INFORMATION GUIDE 128 (2008), http://vig.cdn.sos.ca.gov/2008/general/pdf-guide/vig-nov-2008-principal.pdf.

95. CAL. CONST. art. I, § 7.5.

and detailed opinion. Judge Phillips presents statistics: from 1994 to 2001, 7,856 soldiers had been excluded because of DADT.[96] From 2002 to 2009, 5,167 individuals had been removed from the military for being gay or lesbian.[97] She talked about how this was in light of a serious troop shortage; how it meant that the military didn't have critical skills; and how it undermined morale.[98]

Based on all of the testimony before her, there was no evidence that this policy significantly furthered military readiness.[99] She found that DADT was a content-based restriction on speech that violated the First Amendment and violated Due Process.[100] And, of course, it was her decision that led Congress to repeal DADT.

In 2013, in *Windsor v. United States*,[101] the Supreme Court declared Section 3 of the Defense of Marriage Act unconstitutional.[102] It found that the law was an impermissible denial of equal protection to gays and lesbians.[103] And on June 26, 2015, in *Obergefell v. Hodges*,[104] the Supreme Court found that laws in Kentucky, Michigan, Ohio and Tennessee that prohibited same-sex marriage violated the Constitution.[105] Now, gays and lesbians have the right to marry in all fifty states and all territories in the United States.[106]

So, what lessons can be drawn from this quick recitation of history? I think it shows that judicial action is necessary for social change, but it is not sufficient. The reality is that we would not be where we are today without the courageous judges in the Massachusetts Supreme Judicial Court in *Goodrich v. Massachusetts Dep't of Public Health*[107] in 2003, or the decisions in *Meinhold* and *Log Cabin Republicans* by Judge Hatter and Judge Phillips, respectively. At the same time, I don't mean to imply that their decisions were sufficient for bringing about social change—it's a much more complicated story than that. I think T.V. shows like *Will and Grace* and movies like the *Kids Are Alright* were key in changing social attitudes. I think legislative actions, such as the New York Legislature passing a statute al-

96. Log Cabin Republicans v. United States, 716 F. Supp. 2d 884 (C.D. Cal. 2010).
97. *Id.* at 915.
98. *Id.* at 915-16.
99. *Id.* at 911.
100. *Id.* at 926.
101. 133 S. Ct. 2675 (2013).
102. *Id.* at 2695.
103. *Id.* at 2693.
104. 135 S. Ct. 2584 (2015).
105. *Id.* at 2599.
106. *Id.* at 2607.
107. 798 N.E.2d 941 (Mass. 2003).

lowing marriage equality,[108] were key. I think voter passed initiatives in the 2012 election to allow marriage equality in Maine, Maryland, and Washington were important. But all of this is a model for how law in a social movement can bring about change.

But the second point I want to make is that there is still a long way to go. It's a mistake to take the successes I have described, that we are celebrating today, as implying that it's the end of the story. For example, the Supreme Court never has said that heightened scrutiny is to be used for sexual orientation discrimination. In cases like *Lawrence v. Texas*, *Windsor, Obergefell v. Hodges*, the Supreme Court simply did not say the level of scrutiny it was applying.[109] That is quite important—if a federal, state or local law is challenged for discrimination based on sexual orientation, the outcome will likely depend on the level of scrutiny used. In fact, in a trial court, can peremptory challenges be used on the basis of sexual orientation? If sexual orientation gets heightened scrutiny (through intermediate or strict scrutiny), then it cannot be the basis of peremptory challenges. Then it is treated the same as race and sex. But if sexual orientation discrimination is given rational basis review, then it can be the basis of peremptory challenges. The Ninth Circuit in *Smith Klein v. Abbott Laboratories*[110] said that sexual orientation discrimination gets heightened scrutiny and therefore peremptory challenges cannot be used on that basis in federal courts in the Ninth Circuit.[111] But the other circuits haven't ruled and the Supreme Court hasn't ruled.

Also, though we are celebrating the repeal of DADT and the lack of sexual orientation discrimination against gays and lesbians in the military, we should not forget that the military still discriminates against transgender individuals; that the protection that has been accomplished for gays and lesbians hasn't yet come for others who deserve this. And if I can step aside for a second beyond the Constitution, there is still no federal statute that prohibits employment discrimination on the basis of sexual orientation. Though the so-called ENDA statute has been proposed many times, it has never been passed by Congress. So, while federal law prohibits employment discrimination based on race, sex or religion, it does not prohibit on the basis of sexual orientation.

108. NY DOM. REL. art. 3, §10-a. (2011).

109. *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2623 (2015) (Roberts, C.J., dissenting); *see also* United States v. Windsor, 133 S. Ct. 2675, 2706 (2013) (Scalia, J., dissenting); Lawrence v. Texas, 539 U.S. 558, 586 (2003) (Scalia, J., dissenting).

110. SmithKline Beecham Corp. v. Abbott Labs., 740 F.3d 471 (9th Cir. 2014).

111. *Id.* at 474.

Over 40 years ago, I decided to apply to law school because I was inspired by the civil rights lawyers of the 1950s and the 1960s. I wanted to use law for social change. Their efforts convinced me that law was the most powerful tool for social change. My hope is that the litigation that has been brought by those on this panel and the decisions of the judges on this panel inspire the next generation of people to go to law school and be lawyers and to believe that law is the most powerful tool for social change.

THE ROLE OF RESEARCH, LITIGATION AND COMPARATIVE INTERNATIONAL POLICY IN ENDING THE U.S. MILITARY'S "DON'T ASK, DON'T TELL" POLICY

*Nathaniel Frank**

INTRODUCTION

On September 9, 2010, Judge Virginia Phillips of the United States District Court for the Central District of California handed down a historic ruling in the case of *Log Cabin Republicans v. United States*.[1] At issue was the constitutionality of the U.S. military's practice of barring service by openly gay or lesbian personnel under its notorious "Don't Ask, Don't Tell" (DADT) policy,[2] which President Bill Clinton signed into law in 1993 after a bruising battle with the Pentagon and the Congress.[3]

The ruling by Judge Phillips, a Clinton appointee, struck down DADT as an unconstitutional infringement on the "fundamental rights" of American service members.[4] When Judge Phillips issued an injunction the following month banning enforcement of the policy, the Pentagon spent a frenzied week feverishly trying to maintain control of a policy that was quickly unraveling without regard for how military leaders hoped to see the policy end (to the extent that this was their hope at all).[5] The result of Judge Phillips' injunction was an immedi-

* Nathaniel Frank, director of the What We Know Project at Columbia Law School, is author of the 2017 book, *Awakening: How Gays and Lesbians Brought Marriage Equality to America*.

1. Log Cabin Republicans v. United States, 716 F. Supp. 2d 884 (C.D. Cal. 2010).

2. *See id.* at 888.

3. *See* 10 U.S.C. § 654 (repealed by Don't Ask Don't Tell Repeal Act of 2010, Pub. L. No. 111-321, § 2, 124 Stat. 3515).

4. *Log Cabin Republicans*, 716 F. Supp. 2d at 923.

5. *See* Elisabeth Bumiller, *Varied Forces Pushing Obama to Drop 'Don't Ask, Don't Tell'*, N.Y. TIMES, Feb. 1, 2010, at A1.

ate, albeit temporary, lifting of the ban.[6] The world quickly saw that allowing openly gay service did not break the armed forces, lending crucial weight to an effort that was underway in Congress to repeal the ban—and by exerting pressure on the Pentagon to endorse that effort so as to salvage some control over the process by which the policy change might unfold. So when Congress passed a repeal bill that President Barack Obama signed on December 22, 2010,[7] Judge Phillips' ruling took its place in history as a critical contributor to ending more than two centuries of discrimination against lesbians, gays and bisexuals in the U.S. military.

As a scholar who spent a decade researching sexual minorities in the military prior to the Log Cabin Republicans (LCR) trial,[8] I was asked by White & Case, the law firm representing LCR in their suit against the government, to serve as an expert witness. What follows is a chronicle of the strategies that I and other research-centered advocates deployed in our efforts to build a factual record by publicizing relevant data on the topic of sexual minorities in the military in the U.S. and abroad. At the Palm Center,[9] an academic think tank where I was a research fellow, scholars and advocates placed a special emphasis on researching and publicizing the international experiences of military service by gays and lesbians in order to distill relevant lessons that could be applied in the American context. Our aim was to reach opinion leaders, policymakers, military officials, judges and the American public so that public opinion could evolve to reflect an understanding that restrictions on gay and lesbian service were rooted in bias and discomfort around sexual minorities rather than empirical evidence that they posed a genuine threat to military effectiveness.

The deployment of empirical research on sexual minorities in the military, particularly research on foreign militaries, helped end the military's anti-gay discrimination by influencing public opinion and, subsequently, decisions in litigation and legislative efforts that came to a head in 2010.[10] While the case at hand shows that data and evidence are crucial ingredients in changing public opinion and ultimately pol-

6. *See Log Cabin Republicans*, 716 F. Supp. 2d at 929 (issuing the worldwide injunction); Log Cabin Republicans v. United States, 658 F.3d 1162, 1168 (9th Cir. 2011) (vacating the injunction).

7. Don't Ask Don't Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515 (2010).

8. Nathaniel Frank, *About Nathaniel*, http://www.nathanielfrank.com/about.php (last visited Oct. 13, 2016).

9. PALM CENTER, *About Us – Staff*, http://www.palmcenter.org/about/staff/ (last visited Oct. 13, 2016).

10. *See Log Cabin Republicans*, 716 F. Supp. 2d at 913, 915-16.

icy, it also shows us that facts are necessary, but not sufficient, for such a task. These efforts must be strategically deployed in order to infuse public dialogue in specific ways and to exert pressure on the right levers of policy. The aim is to hold advocates, opinion leaders and policymakers accountable and to undercut biases and rationalizations that help prop up failed or unjust policies. It is hoped that this account of how LGBT advocates deployed empirical research in this effort, especially on the experiences of international militaries that fully integrate sexual minorities into service, can provide valuable lessons in what I call "research advocacy," or the strategic use of scholarly data to advance effective and humane public policy goals.

I. Building a Record of Facts

In order to defend the constitutionality of DADT's encroachment of the rights of gays and lesbians, Judge Phillips wrote, the U.S. government had to show that DADT "was necessary to significantly further the government's important interests in military readiness and unit cohesion."[11] The defendants, she concluded, "failed to meet that burden."[12] The extensive evidence collected at trial, wrote Judge Phillips, "directly undermine[d] any contention that the Act further[ed] the Government's purpose of military readiness."[13] The policy not only failed to protect national security, Judge Phillips found, but it actively undermined it by making it more difficult for the military to build and maintain a first-rate fighting force.[14] The policy diverted energy and attention from the armed forces by requiring commanders to spend time rooting out fully capable troops (and thus wrenching apart cohesive units) for reasons having nothing to do with military prowess.[15] Judge Phillips found that the testimony of the plaintiffs' "lay and expert witnesses" convincingly demonstrated that the law "not only is unnecessary to further unit cohesion, but also harms the Government's interest" by "impeding the efforts to recruit and retain an all-volunteer military force" and "by causing the discharge of otherwise qualified servicemembers with critical skills."[16]

Judge Phillips' ruling was historic for several reasons. First, it was one of the only cases in which a federal district court held that DADT

11. *Id.* at 923.
12. *Id*.
13. *Id.* at 918.
14. *Id.* at 919.
15. *Id.* at 918-19.
16. *Id.* at 921, 923.

was unconstitutional on its face.[17] Second, the case was one of the most thorough efforts to put government-sanctioned prejudice on trial, and to find and share with the world that decades—centuries, in fact—of invidious distinctions made against sexual minorities by the federal government constituted nothing more than animus being masqueraded as a rational concern for national security. Third, although the court's injunction was eventually stayed by the Ninth Circuit, the timing and outcome of the case nevertheless played a critical role in ending DADT, one of the last remaining instances of federal anti-gay discrimination in the U.S.[18] It was a step that helped demolish the legal rationale for anti-gay discrimination in marriage over the subsequent five years.[19]

In the decade leading up to Judge Phillips' decision and the ultimate demise of DADT, I was one of a small number of researchers focused on gathering evidence about gay and lesbian military service, and sharing that data with the public. The idea was to build a factual record that would allow—in fact compel—those with the power to make sound and just policy to determine just what such a policy ought to look like when it came to the military service of sexual minorities; and further, to create policy that was rooted in evidence rather than emotion, bias or traditions whose rationale (if there ever was one) had long since passed.

Working with a team of colleagues and partners in the think tank, scholarly, military, LGBT advocacy and legal communities, I conducted and publicized research in a broad range of venues with an emphasis on evidence-based research so as to build credibility among opinion leaders and policymakers whose trust in the process was needed in order to make lasting policy change. It was equally necessary to attract media attention so that the record of facts would be disseminated and noticed by those in a position to act on them. Research on sexual minorities in the military was not exactly new in the 2000s. In fact, since the 1950s, the military itself, along with academic, independent and think tank researchers, had thoroughly studied the question of whether service by gays and lesbians had any appreciable

17. *See, e.g.,* Cook v. Gates 528 F.3d 42 (1st Cir. 2008) (affirming facial validity of DADT); Thomasson v. Perry, 80 F.3d 915, 919 (4th Cir. 1996) (affirming facial constitutionality of DADT); Richenberg v. Perry, 97 F.3d 256, 258 (8th Cir. 1996) (affirming that DADT passes rational basis scrutiny).

18. *See* Log Cabin Republicans v. United States, 658 F.3d 1162, 1168 (9th Cir. 2011); Jackie Gardina, '*Don't Ask, Don't Tell' Repeal: A Look Back*, HUFFINGTON POST (Feb. 2, 2016), http://www.huffingtonpost.com/jackie-gardina/dont-ask-dont-tell-repeal-a-look-back_b_1888988.html.

19. Obergefell v. Hodges, 135 S. Ct. 2584, 2596, 2605 (2015).

impact on the effectiveness of the U.S. military.[20] But the results (which were overwhelmingly favorable to inclusive policy) were repeatedly concealed, downplayed or ignored, and sometimes only saw the light of day as the result of a court order.[21]

Indeed, U.S. courts have a distinguished history of bringing to light facts that have made many people too uncomfortable, outraged or threatened to confront, particularly in the realm of sexuality, but also those involving race and gender equality. For gays and lesbians in pursuit of full equality, the courts have offered leverage for a hearing—the dignity of being taken seriously—at times when government officials, cultural leaders, institutions and popular culture frequently laughed gay people and their claims out of the proverbial room.

Of course, courts have also been guilty of doing the same. In 1972, the Supreme Court dismissed a marriage equality claim "for want of a substantial federal question,"[22] and in 1986, it infamously referred to a gay man's claim of a right to personal intimacy as "facetious."[23] In the case of the military, in particular, courts have a longstanding tradition of "judicial deference" to the military's claims of national security, a doctrine that allowed the Pentagon's anti-gay discrimination to persist without adequate judicial review for far too long.[24] In *Thomasson v. Perry*,[25] one of the first cases to test the constitutionality of DADT, the Fourth Circuit upheld the policy, concluding that protecting unit cohesion and military readiness by restricting service by open gays served a "legitimate purpose" and that the military is owed extra "deference" when matters of national security are at issue.[26] Over the course of the 1990s, four U.S. Circuit courts upheld the constitutionality of DADT,[27] often citing the special "deference" that the courts owed to the judgment of the military, which the courts described as a "specialized community" with its own set of rules.[28]

20. NATHANIEL FRANK, UNFRIENDLY FIRE: HOW THE GAY BAN UNDERMINES THE MILITARY AND WEAKENS AMERICA 118 (2009) [hereinafter FRANK, UNFRIENDLY FIRE].

21. *Id.*

22. Baker v. Nelson, 409 U.S. 810 (1972).

23. Bowers v. Hardwick, 478 U.S. 193, 194 (1986).

24. *See* DIANE MAZUR, A MORE PERFECT MILITARY: HOW THE CONSTITUTION CAN MAKE OUR MILITARY STRONGER 191-95 (2010).

25. Thomasson v. Perry, 80 F.3d 915 (4th Cir. 1996).

26. *See id.* at 925, 928-29.

27. *See* Holmes v. California National Guard, 124 F.3d 1126 (9th Cir. 1997); Thomasson v. Perry, 80 F.3d 915 (4th Cir. 1996); Richenberg v. Perry, 97 F.3d 256 (8th Cir. 1996); Able v. United States, 88 F.3d 1280 (2d Cir. 1996).

28. *Thomasson*, 80 F.3d at 925; JODY FEDER, CONG. RESEARCH SERV., R40795, "DON'T ASK, DON'T TELL": A LEGAL ANALYSIS 6 (2013).

Across the 1990s, gay rights advocates felt increasingly frustrated with the terms of public debate over the place of gays and lesbians in American society. The refusal of the federal court system to provide an avenue to critically evaluate the rationale for barring openly gay military service added to this frustration. In 1999, Professor Aaron Belkin, a political scientist, founded the Palm Center, a think tank based at the University of California, Santa Barbara.[29] Belkin had been discouraged by the public dialogue about gay and lesbian military service in 1992 and 1993—which resulted in the DADT compromise. He found the political debate to be largely fact-free, informed more by heat than by light.

While President Bill Clinton fought the battle for openly gay service with good intentions, it resulted in an expenditure of considerable political capital,[30] ultimately setting back both his presidency and the cause of gay rights. Not only was the far-right wing opposed to Clinton's effort to achieve equal treatment in the military, but leaders of the president's own Democratic Party were in opposition as well. Sen. Sam Nunn, the powerful chairman of the Senate Armed Services Committee, was a particularly vociferous opponent of gay service.[31] During the political debate over whether to end the existing ban in 1993, Sen. Nunn led hearings on the subject that included a highly choreographed media field trip to the bowels of Navy ships and nuclear attack submarines.[32] The message, conveyed by stark photos of anxious young sailors crammed into their bunks, was clear: quarters were close and feelings were pitched; there could be no place for open gays in military service.[33]

Belkin wanted facts and data to drive public dialogue, not fear and emotions being whipped up by politicians. He believed that regardless of whether the attainment of equal rights was more likely through legislative action or litigation, it was cultural understandings of sexuality that must lay the groundwork for change. And he thought that research, particularly empirical findings from the international context of gay military service, was a key piece of that work. The aim of the Palm Center was to conduct research that would have the credibility of a major research university and would showcase the facts on

29. PALM CENTER, *About Us – Staff*, http://www.palmcenter.org/about/staff/ (last visited Oct. 13, 2016).

30. Robert Pear, *President Admits 'Don't Ask' Policy Has Been Failure*, N.Y. TIMES, Dec. 12, 1999, at A1.

31. *See* FRANK, UNFRIENDLY FIRE, *supra* note 20, at 74-75.

32. *Id.* at 99-100.

33. *Id.*

the ground to the public. The next part of the strategy was to get these data points covered by the media to help repudiate the demagoguery that had taken over the dialogue in the lead-up to DADT.[34]

II. Applying Lessons from the International Context

The Palm Center's first task was to conduct research on foreign militaries that allowed openly gay service so that empirical findings could be used to inform the debate. Through its commissioning of scholars with expertise in military personnel policies and gender politics, Palm sponsored four major studies on the experiences of Britain, Canada, Australia and Israel, all of which had policies of open service.[35] In 2000, Palm released four studies, investigating the experiences of each of those allied military forces with open gay service. The studies showed that when those countries lifted their gay bans their militaries suffered no harm.[36] The study on the British military declared the shift to open service "an unqualified success," and cited the British military's own classified, internal assessment in which the new policy was "hailed as a solid achievement."[37] The Palm study did not find any evidence of decline in recruitment, mass resignations, increase in reports of harassment or effect on morale, unit cohesion or operational effectiveness.[38]

34. *See generally* Aaron Belkin, How We Won: Progressive Lessons from the Repeal of 'Don't Ask, Don't Tell' §2 Strategy (The Huffington Post Media Group, 2011) (outlining the strategic deployment of empirical research and data through the media to spark a public debate about the "merits" of DADT).

35. Aaron Belkin & R. L. Evans, Center for the Study of Sexual Minorities in the Military, The Effects of Including Gay and Lesbian Soldiers in the British Armed Forces: Appraising the Evidence 2 (2000), http://archive.palmcenter.org/files/active/0/Britain1.pdf [hereinafter British Military Report]; Aaron Belkin & Jason McNichol, Center for the Study of Sexual Minorities in the Military, Effects of the 1992 Lifting of Restrictions on Gay and Lesbian Service in the Canadian Forces: Appraising the Evidence 2 (2010), http://archive.palmcenter.org/files/active/0/Canada5.pdf [hereinafter Canadian Military Report]; Aaron Belkin & Jason McNichol, Center for the Study of Sexual Minorities in the Military, The Effects of Including Gay and Lesbian Soldiers in the Australian Defence Forces: Appraising the Evidence 2 (2000), http://archive.palmcenter.org/files/active/0/Australia_Final_Report.pdf [hereinafter Australian Military Report]; Aaron Belkin & Melissa Levitt, *Homosexuality and the Israeli Defense Forces: Did Lifting the Gay Ban Undermine Military Performance?*, 27 Armed Forces & Soc'y 541, 541 (2001), http://archive.palmcenter.org/files/Homsexuality%20and%20Israel%20Defense%20Forces_0.pdf [hereinafter *Israeli Military Report*].

36. British Military Report, *supra* note 35, at 2; Canadian Military Report, *supra* note 35, at 2; Australian Military Report, *supra* note 35, at 2-3; *Israeli Military Report*, *supra* note 35, at 542.

37. British Military Report, *supra* note 35, at 2.

38. *Id.*

The results elsewhere were the same. A study of the Australian military found that the "lifting of the ban on gay service ha[d] not led to any identifiable negative effects on troop morale, combat effectiveness, recruitment and retention, or other measures of military performance."[39] It also identified some evidence that the inclusive policy "may have contributed to improvements in productivity and working environments for service members."[40] A study of the Canadian military found that "lifting of restrictions on gay and lesbian service in the Canadian Forces ha[d] not led to any change in military performance" and also noted that sexual harassment actually dropped significantly after the policy change.[41]

The study's authors noted the relevance of the international context to the debate over openly gay service in the U.S. A 2001 study of the Israel Defense Forces published in *Armed Forces and Society* concluded:

> Despite the facts that the majority of gay combat soldiers do not disclose their sexual orientation to peers, that some gay soldiers receive special treatment, and that important organizational and cultural differences distinguish the Israeli and American cases, we believe that the Israeli experience supports the claim that American military effectiveness would not decline if known homosexuals were allowed to serve.[42]

Indeed, it was not sufficient to simply study and report the experiences of allied nations. Making an explicit case for the relevance of lessons learned from foreign militaries was a critical part of the Palm Center's informational strategy because the belief in "American exceptionalism" often led military officials and their political champions to claim that the experiences of other countries would not apply in the U.S. The American military was the most powerful in the world and had unique obligations around the globe, as some of the ban's defenders noted. Besides, American culture was also unique, with a heavily conservative military population. No matter what European or Canadian forces might allow, they concluded, there was no telling what might happen in the U.S. if gays were permitted to serve openly.

This conservative principle, of course, has a counterpart in constitutional philosophy. It is well crystalized in a dissent by the late Justice Antonin Scalia in the 2003 case, *Lawrence v. Texas*.[43] The holding in

39. AUSTRALIAN MILITARY REPORT, *supra* note 35, at 2.

40. *Id*.

41. CANADIAN MILITARY REPORT, *supra* note 35, at 2.

42. *Israeli Military Report*, *supra* note 35, at 558.

43. Lawrence v. Texas, 539 U.S. 558, 586 (2003) (Scalia, J., dissenting).

Lawrence, which struck down state sodomy bans, overruled that of *Bowers v. Hardwick*,[44] just seventeen years earlier.[45] The *Lawrence* court's decision, written by Justice Anthony Kennedy, noted that the European Court of Human Rights departed from the *Bowers* holding in decriminalizing homosexuality: "To the extent *Bowers* relied on values we share with a wider civilization, it should be noted that the reasoning and holding in *Bowers* have been rejected elsewhere."[46] As noted by Justice Kennedy, the right to consensual intimate relations "has been accepted as an integral part of human freedom in many other countries."[47] Justice Kennedy added a line specifically addressing—and rejecting—the prospect that the international context did not apply to the U.S., stating that "[t]here has been no showing that in this country the governmental interest in circumscribing personal choice is somehow more legitimate or urgent."[48]

The notion that U.S. law should, in any way, reference the laws of other nations infuriated Scalia. "Constitutional entitlements," he wrote in dissent, "do not spring into existence . . . as the Court seems to believe, because *foreign nations* decriminalize conduct."[49] The *Bowers* holding, he insisted "*never* relied" on values the U.S. shared with a wider civilization, but rather relied on the ground that the claimed right was not "deeply rooted in *this Nation's* history and tradition."[50] Indeed, Scalia declared, even discussing "these foreign views" is nothing more than "meaningless dicta."[51] For good measure, he added that it was "dangerous dicta" since "this Court . . . should not impose foreign moods, fads, or fashions on Americans."[52]

Like Justice Kennedy, who not only made comparisons to foreign contexts but also made the case for why such comparisons were appropriate and relevant, the Palm Center made a point of conducting and publicizing research that would respond to the charge that the international context was irrelevant to the U.S. To take one example, Palm research showed that even the nations that allowed for openly gay service had cultures that were not completely tolerant of homo-

44. Bowers v. Hardwick, 478 U.S. 193, 196 (1986) *overruled by Lawrence*, 539 U.S. at 578.

45. *Id.*

46. *Lawrence*, 539 U.S. at 576.

47. *Id.* at 577.

48. *Id.*

49. *Id.* at 598 (emphasis added).

50. *Id* (emphasis added).

51. *Id.*

52. *Id.*

sexuality.[53] As concluded by one Palm study, "tolerant national climates are not necessary for maintaining cohesion, readiness, morale, and performance after the integration of a minority group into the military."[54] Palm also studied American police and fire departments, which do not ban openly gay service.[55] Researchers noted that those institutions functioned effectively despite the persistence in many pockets of cultural norms that opposed homosexuality, stating that "[i]t would not be possible for the numerous American police and fire departments that include known homosexuals to continue to function smoothly if a fully tolerant national climate were necessary for the maintenance of organizational effectiveness."[56]

It was important that the data collected and shared be as specific as possible so that it could be used to hold officials and politicians accountable when they made broad generalizations about foreign militaries being irrelevant in the American context. So Palm shared data showing that the very same concerns that American officials aired as a reason not to let gays serve openly had been also been raised in foreign contexts, but were found to be groundless. Defenders of the U.S. ban claimed that because such large numbers of service members opposed openly gay service, allowing it could create a mass exodus of needed troops and could harm efforts to recruit service members.[57] In the context of dismissing the relevance of foreign military experiences, the message was that American culture was unique—uniquely anti-gay—and thus inclusive policy in other nations had no bearing on the ability to implement a similar policy in the U.S. Yet this claim would only hold water if those other countries proved to be more tolerant than the U.S. In fact, while debates over gay rights were more fierce and politicized in the U.S. than elsewhere (largely due to a mobilized and vocal contingent of religious conservatives), data showed that military tolerance of homosexuality was not significantly greater in the countries that allowed openly gay service.[58] Palm's study of Canada, for example, noted that before the country lifted its ban, a large survey of its troops found that 62 percent claimed that they would refuse

53. Jeanne Scheper et al., "*The Importance of Objective Analysis" on Gays in the Military: A Response to Elaine Donnelly's Constructing the Co-Ed Military*, 15 DUKE J. GENDER L. & POL'Y 419, 429 (2008).

54. *Id.*

55. *Id.* at 429-30.

56. *Id.*

57. *Id.* at 425.

58. *Id.* at 429.

to share housing or bathing facilities with gay peers.[59] Yet after the ban was lifted, follow-up studies found no follow-through on threats to leave the force. There was "no increase in disciplinary, performance, recruitment, sexual misconduct, or resignation problems."[60]

Palm also conducted a study on the status of openly gay troops in multinational military units.[61] NATO, North American Aerospace Defense Command (NORAD),[62] Supreme Headquarters Allied Powers Europe (SHAPE),[63] and several other multinational forces, all of which expanded operations with the increase in global terrorism after 2001, routinely included U.S. service members along with allied troops who were openly gay.[64] Evaluating these units, researchers found that no problems were reported as a result of the presence of openly gay troops, even in close proximity to U.S. service members.[65] These facts on the ground, described in academic research, undercut assertions that American troops could not serve effectively with open gays since empirical contexts showed that they already were. No evidence or expert suggested that any problems had occurred as a result.

To show just how disingenuous and contradictory it was for military leaders to dismiss the lessons of foreign militaries when it came to openly gay service, Palm included a section in a major study on foreign militaries that detailed the routine reliance of the U.S. military on the learned experiences from foreign forces—at least when it pertained to issues besides openly gay service. "The U.S. military has a long tradition of considering the experiences of other militaries to be relevant to its own lessons learned," said a 2010 report.[66] "While there is no doubt that the U.S. military is different from other militaries, such distinctions have not prevented the U.S. military from comparing itself to and learning from foreign armed forces."[67] Palm pointed out that the Pentagon even created a Foreign Military Studies Office in 1986 to research lessons from foreign militaries on technological, stra-

59. CANADIAN MILITARY REPORT, *supra* note 35, at 6.

60. *Id.* at 2.

61. GEOFFREY BATEMAN & SAMEERA DALVI, CENTER FOR THE STUDY OF SEXUAL MINORITIES IN THE MILITARY, MULTINATIONAL MILITARY UNITS AND HOMOSEXUAL PERSONNEL (2004), http://archive.palmcenter.org/files/active/0/2004_02_BatemanSameera.pdf.

62. *Id.* at 7.

63. *Id.* at 7-8.

64. *Id.* at 11-13.

65. *Id.* at 24.

66. *See* NATHANIEL FRANK ET AL., PALM CENTER, GAYS IN FOREIGN MILITARIES 2010: A GLOBAL PRIMER 4 (2010), http://archive.palmcenter.org/files/FOREIGNMILITARIESPRIMER2010FINAL.pdf [hereinafter FRANK, GLOBAL PRIMER].

67. *Id.*

tegic and tactical operations, as well as cultural aspects of service including housing, healthcare and personnel policy.[68]

III. Deploying the Media

In line with Palm's strategy of publicizing its research and message about openly gay service, we successfully pitched a major story on the 2010 study to the *New York Times,* which ran just three weeks after Adm. Mike Mullen, then Chairman of the Joint Chiefs of Staff, expressed his support for ending the gay ban in the first congressional hearings on the issue in seventeen years.[69] "A comprehensive new study on foreign militaries that have made transitions to allowing openly gay service members," read the story, "concludes that a speedy implementation of the change is not disruptive. The finding is in direct opposition to the stated views of Pentagon leaders, who say repealing a ban on openly gay men and women in the United States armed forces should take a year or more."[70] The article succinctly described the 151-page study's conclusion that, "in foreign militaries, openly gay service members did not undermine morale, cause large resignations," increase harassment or otherwise harm military effectiveness.[71]

This moment in 2010 was a critical step towards creating the momentum for ending DADT. It was the product of years of researching gays in the military, publicizing its findings, reaching out to national media, working with service members and allied groups like Servicemembers Legal Defense Network (SLDN), and building relationships with political leaders and foreign and U.S. military officials. As the dialogue about whether to end the ban heated up that year, the messages that Palm and others had worked so hard to publicize were finally heard: that, as shown by the experiences of over two dozen foreign militaries, many with similar cultures to our own, service by open gays and lesbians does not conflict with the necessities of military effectiveness, and that discrimination and forced dishonesty, not equal treatment, are the actual threat to military cohesion and performance.

The *New York Times* piece[72] was just one of hundreds of press hits over a decade that helped keep anti-gay military discrimination—

68. *Id.* at 108.

69. Elisabeth Bumiller, *Study Backs Fast Repeal of Gay Ban in Military*, N.Y. Times, Feb. 22, 2010, at A7.

70. *Id.*

71. *Id.*

72. Bumiller, *supra* note 69.

and the research on the effectiveness of equal treatment—in the public discourse. The terrorist attacks of 2001 came two years after Palm began its work, and suddenly, the U.S. was at war, making the international context of our issue paramount. Service members with mission-critical skills (i.e. language proficiency in Arabic) and other expertise, suddenly became essential. So did the need to retain and replenish competent and skilled troops of all stripes as sustained military operations began to weigh on the armed forces. Yet advocacy groups quickly noticed that highly skilled linguists and other mission-critical specialists who happened to be gay or lesbian were being caught in the clenches of DADT.[73] No longer was the policy just an issue—if it ever was—of gay rights or a matter of social justice or fairness. It was now also a matter of military readiness and national security. The military was reeling under the weight of multiple wars and endless deployments, and yet it was kicking out exactly the people we needed to fight these wars for reasons that had nothing to do with their ability, but instead, for reasons that had everything to do with bias. In fact, the military was removing capable gay and lesbian service members and replacing them with individuals with lower educational and physical fitness capabilities, and even granting so-called "moral waivers" to applicants with criminal and substance abuse histories who would not have otherwise qualified for service.[74]

Each of these facts casts in stark relief the irrationality of DADT. The Palm Center worked to publicize every instance of prejudice masqueraded as military necessity. Using research, data and studies we produced; articles and reports written by independent scholars and major research groups like the RAND Corporation,[75] and the military's own research arms; statistics obtained through the Freedom of Information Act[76] and Government Accountability Office;[77] discharge figures and personal stories collected by allied advocacy groups such as SLDN[78]—we pitched story after story to anyone who would

73. NATHANIEL FRANK, PALM CENTER, DON'T ASK, DON'T TELL: DETAILING THE DAMAGE, 2-4 (2010), http://archive.palmcenter.org/files/DetailingCostofDADT.pdf [hereinafter FRANK, DETAILING THE DAMAGE].

74. *Id.* at 3.

75. *See* FRANK, GLOBAL PRIMER, *supra* note 66, at 25-28.

76. *See, e.g.,* PALM CENTER, MISSION-CRITICAL SPECIALISTS DISCHARGED FOR HOMOSEXUALITY (June 21, 2004), http://archive.palmcenter.org/files/active/0/MissionCriticalSpecsDischargedForHomosexuality6-21-04.pdf.

77. *See* FRANK, GLOBAL PRIMER, *supra* note 66, at 26-27.

78. *See generally* FRANK, DETAILING THE DAMAGE, *supra* note 73 (providing an extensive collection of discharge statistics and personal stories collected by the SLDN and other advocacy groups).

listen, creating a steady drumbeat of embarrassing stories for the Pentagon and, over time, drew the public's attention to those political leaders who defended this irrational policy. This was not always easy. What seems in retrospect like an obvious instance of newsworthy egregiousness—groundless prejudice forcing the military to waste its best talent in the name of a misconceived notion of national security—was for many people and for many years a dull, predictable piece of common sense, not a news story. We therefore used research and data, which themselves can be dull, combined with the stories, faces, and voices of actual service members affected by the policy, in order to find dozens of different ways to keep telling the same maddening story and get it into the news.

IV. FROM THE COURT OF OPINION TO A COURT OF LAW

By 2008, the years of building a factual record were beginning to pay off. Key to the pay-off was making the compelling case that the effect of the law was to unnecessarily and unconstitutionally punish gay and lesbian service members for reasons that not only failed to serve a government interest, but which actually undercut its interests in protecting the nation through its armed forces. Making this case in the public discourse was critical in helping win support for repeal from military leaders and helping to double public support for open service from roughly 40 percent to nearly 80 percent of the American public between 1993 and 2010.[79] Stories about fired gay linguists, the hiring of ex-convicts to replace them, the high financial costs of firing badly needed troops, and more, were also critical to getting political candidates, and eventually the President, to a point where they forcefully argued, with factual points at the ready, that this policy was not only unfair, but that it was also harming rather than helping the important government interest of protecting national security.

It was also critical to making the case against the gay ban in federal court. Although there was much evidence from the legislative proceedings leading to the enactment of DADT that the law was based on anti-gay animus, courts are understandably reluctant to infer a "unified legislative 'motive' underlying any given enactment."[80] Yet there is another way to demonstrate that a statute, on its face, is unconstitutional, which requires showing that the law's effect is both discriminatory and unnecessary.

79. *See* FRANK, UNFRIENDLY FIRE, *supra* note 20, at 270-71.

80. Log Cabin Republicans v. United States, 716 F. Supp. 2d 884, 896 (C.D. Cal. 2010) (quoting United States v. O'Brien, 391 U.S. 367, 384 (1968)).

As Judge Phillips wrote in her decision, "a court deciding a facial challenge can and should consider evidence beyond the legislative history, including evidence regarding the effect of the challenged statute."[81] That effect, as Judge Phillips found, was clear. The testimony introduced at trial "demonstrates that the Act adversely affects the Government's interests in military readiness and unit cohesion."[82] The decline in discharges when the U.S. is at war, and documentation of sending known gays to war despite the dictates of the ban, showed that even the military did not believe that open gays undermined effectiveness. As Judge Phillips put it, "Far from furthering the military's readiness, the discharge of these service men and women had a direct and deleterious effect on this governmental interest."[83] Indeed, she continued, "It defies logic that the purposes of the Act could be served by suspending the investigation during overseas deployments, only to discharge a servicemember upon his or her return to a non-combat station."[84] Judge Phillips concluded, "Taken as a whole, the evidence introduced at trial shows that the effect of the Act has been, not to advance the Government's interests of military readiness and unit cohesion, much less to do so significantly, but to harm that interest."[85]

Starting even before Judge Phillips handed down her decision, the case was critical to spurring repeal. As soon as President Obama took office, he began high-level meetings in the Oval Office to discuss how to respond both politically and legally to the build-up of court pressure against the policy.[86] The President did not want to place himself in the vulnerable position of having to publicly defend a policy that he had strongly condemned in his campaign. In fact, he had not only called the policy unfair, but had specifically called it harmful to national security, which undercut any legal claim his administration might make in stating that the policy was necessary for national security.[87]

By 2010, the pending trial and looming decision of the *LCR* case was alarming not only to the President, but to the Pentagon as well, whose leaders had initially been more hesitant to endorse a lifting of

81. *Id.* at 897.

82. *Id.* at 915.

83. *Id.* at 916.

84. *Id.* at 919.

85. *Id.*

86. *See* Elisabeth Bumiller, *Varied Forces Pushing Obama to Drop 'Don't Ask, Don't Tell'*, N.Y. TIMES, Feb. 1, 2010, at A1.

87. *Id*. at A3.

the ban.[88] Now, the threat of a federal court taking over the process by ordering an immediate halt to enforcement worried top brass who preferred to control the timing themselves. Their fears came true with Judge Phillips' decision and her subsequent injunction that prevented the Pentagon from enforcing the policy. The Defense Department's general counsel, Jeh Johnson, told the Senate in fall of 2010 of the Pentagon's wariness of losing control of the process. "This legal uncertainty is not going away anytime soon,"[89] he said referring to the continued threat of litigation. Johnson later said the court case had thrown military leaders into "panic" and that the case "had a real impact on Secretary Gates," who only explicitly backed legislative repeal of DADT just weeks after Judge Phillips issued her injunction.[90] The next month, the Senate followed the House in passing repeal legislation, providing for the ban's end the following year.[91]

V. Conclusion: Court Matters and Social Change

This chronicle of the efforts to inform the gay military service debate with empirical evidence has sought to make clear the important role of both the *LCR* case,[92] and the international legal context in ending anti-gay discrimination in the U.S. military. Both sources—that of the court case and that of international policy comparisons—were indirect factors in ending DADT. The Phillips decision was not ultimately the cause of ending DADT. The ruling did not rely heavily on the research on foreign military law or policy for its legal grounding, but its indirect role made it easier to miss it and, in that sense, all the more important for advocates of evidence-based policy to understand. The looming threat of court interference with Pentagon policy put pressure on political and military leaders to get behind the DADT repeal. Furthermore, more than a decade of empirical research into, among other things, the international experiences of military forces with service by gays and lesbians contributed to a much greater understanding by military, political and other opinion leaders about the effi-

88. *Id.* at A1.

89. Due to the continued threat of legal action, the Pentagon faced much uncertainty regarding enforcement of DADT. In the course of eight days, the Pentagon had to shift course on its enforcement twice. In the span of a month, it potentially had to shift course four different times. *See* Elisabeth Bumiller, *For Pentagon Lawyer Who Co-Wrote Report on Gays, Military Bias Hits Home*, N.Y. Times, Dec. 5, 2010, at N32.

90. *See id.*

91. *See* Don't Ask Don't Tell Repeal Act of 2010, Pub. L. No. 111-321, § 2, 124 Stat. 3515 (repealing 10 U.S.C. § 654).

92. Log Cabin Republicans v. United States, 716 F. Supp. 2d 884 (C.D. Cal. 2010).

cacy of inclusive service and about the tendency to exaggerate the risks of expanding inclusivity.

These indirect contributors to the advancement of the debate over gay military service are sometimes underappreciated, but taking note of them can help put the role of the courts in matters of social change into perspective. On the one hand, courts have proven to be a critical element in expanding inclusion, often before public opinion and representative political bodies embrace it. On the other hand, however, even courts, which can be so forward-thinking, are subject to biases and blinders that can often only be overcome by the grinding groundwork of pushing public opinion. "Times can blind us to certain truths," wrote Justice Kennedy in his *Lawrence* opinion, "and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom."[93] As the story of DADT repeal shows, research advocacy, litigation and strategic deployment of the media to share messages about disenfranchised populations were all critical ingredients in advancing the cause of freedom and equality for LGBT people.

93. Lawrence v. Texas, 539 U.S. 558, 579 (2003).

LOG CABIN REPUBLICANS: INTERNATIONAL EXPERIENCE WITH MILITARY INCLUSIVENESS AND THE END OF DON'T ASK, DON'T TELL

*David B. Cruz**

ABSTRACT:

The federal statute mandating the exclusion of lesbigay persons from the armed forces was known as "Don't Ask, Don't Tell" ("DADT"). Before it was repealed by Congress in 2010, it was subject to challenge politically and legally, including in the U.S. District Court for the Central District of California. Litigating against the ban on behalf of the Log Cabin Republicans, Dan Woods and his legal team established before Judge Virginia A. Phillips that DADT violated the substantive due process and First Amendment rights of lesbigay persons. The bench trial before Judge Phillips in Log Cabin Republicans v. United States of America presented considerable evidence about the experience of other nations' militaries with open service by lesbigay persons. That trial, and Judge Phillips's consequent world-wide injunction against enforcement of the exclusion, played a key role in the legislative repeal of DADT. That repeal and comparable evidence of foreign military treatment of transgender servicemembers in turn helped secure the administrative repudiation of the U.S. armed forces' categorical ban on service by openly transgender persons of all sexual orientations.

* Copyright © David B. Cruz 2016. Professor of Law, University of Southern California Gould School of Law. B.S., B.A., University of California, Irvine; M.S., Stanford University; J.D., New York University School of Law. I am grateful to USC Gould of Law students Emily Cronin, Nicholas Duncan, and Christina Roberto and to Gould law librarians including Cindy Guyer for excellent research assistance; to Dan Woods for conversations about and source material concerning Log Cabin Republicans, and to the editors of the Southwestern Journal of International Law for their fine work. None is responsible for any shortcomings herein.

INTRODUCTION

The early years of the twenty-first century have seen remarkable changes in the treatment of lesbian, gay, bisexual, and transgender (LGBT) persons in the United States, particularly in the legal arena. The country started the century with more than one in four states criminalizing certain forms of sexual intimacy between consenting adults, four of them *only* when it was a same-sex couple involved; with the federal government statutorily precluded by federal statute from accepting lawfully married same-sex couples as married and states statutorily authorized to disregard lawful marriages of same-sex couples from jurisdictions that allowed such; with lesbigay persons, whether transgender or cisgender, barred from military service by a federal statute commonly known as "Don't Ask, Don't Tell" (DADT); and with transgender persons of any sexual orientation barred by military regulations from serving in the armed forces.

On the personal relationship front, in 2003 the Supreme Court's decision in *Lawrence v. Texas* invalidated so-called "sodomy laws," thus protecting people's rights of intimate association.[1] In 2013 the Court held that the federal government could not ignore same-sex couples' marriages in *United States v. Windsor*.[2] In 2015 the Court held that all states must allow same-sex couples to marry civilly and must recognize those marriages and treat them equally with marriages of different-sex couples.[3]

On the military front, litigation against the lesbigay exclusion continued into the twenty-first century. Although some powerful political forces supported repeal of DADT, a bill to effectuate repeal only made it through Congress after Judge (now Chief Judge[4]) Virginia A. Phillips of the U.S. District Court for the Central District of California in late 2010 held DADT unconstitutional in a suit brought by Dan Woods and colleagues, *Log Cabin Republicans v. United States of America*.[5] Six years later, the Department of Defense (DOD)

1. Lawrence v. Texas, 539 U.S. 558, 578 (2003).

2. United States v. Windsor, 133 S. Ct. 2675, 2682 (2013).

3. Obergefell v. Hodges, 135 S. Ct. 2584, 2607-08 (2015).

4. Press Release, Kiry K. Gray, U.S. Dist. Court for the Cent. Dist. of Cal., Judge Virginia A. Phillips Succeeds Judge George H. King as Chief Judge (2016), http://www.cacd.uscourts.gov/news/judge-virginia-phillips-succeeds-judge-george-h-king-chief-judge.

5. Log Cabin Republicans v. United States, 716 F. Supp. 2d 884, 923 (C.D. Cal. 2010).

repealed the categorical regulatory exclusion of transgender persons from military service.[6]

This Essay, part of the Southwestern Law School Journal of International Law's symposium on the fiftieth anniversary of the Central District of California, looks primarily at Judge Phillips's landmark decision in *Log Cabin Republicans*, one of the most important cases to come out of this court. Part I briefly introduces DADT and the history of challenges to that statute (and predecessor regulations) mandating lesbigay exclusion. Part II focuses upon the *Log Cabin Republicans* litigation, the role in the trial and in Judge Phillips's opinion of comparative evidence of other nations' experiences with open military service by lesbigay individuals, and the role of *Log Cabin Republicans* in the statutory repeal process that culminated in enactment of the Don't Ask, Don't Tell Repeal Act of 2010 and repeal of the policy the following year. Part III then takes up the military's transgender exclusion, again emphasizing the role that comparative evidence (here, of other nations' experience with open service by transgender individuals) played in the recent repeal of the U.S. military's categorical exclusion of transgender servicemembers.

I. A Brief History of Don't Ask, Don't Tell

Throughout much of the twentieth century, the United States military officially excluded LGBT persons from service.[7] Courts repeat-

6. Ash Carter, *Remarks on Ending the Ban on Transgender Service in the U.S. Military*, U.S. Dep't of Def. (June 30, 2016), *available at* http://www.defense.gov/News/Speeches/Speech-View/Article/821833/remarks-on-ending-the-ban-on-transgender-service-in-the-us-military.

7. *See, e.g.,* Steffan v. Perry, 41 F.3d 677, 707 (D.C. Cir. 1994) ("The basis for separation may include previous, prior service or current service conduct or statements. Homosexuality includes the member engaging in, attempting to engage in or soliciting another to engage in a homosexual act or acts. It also includes statements by the member that he or she is homosexual or bisexual, or the member marrying or attempting to marry a person known to be of the same biological sex."). That noted, I have not seen evidence to support judge Michael Luttig's pronouncement—without citation—that "[f]or as long as it has had a military, the United States has excluded homosexuals from military service." Thomasson v. Perry, 80 F.3d 915, 935 (4th Cir. 1996) (en banc) (Luttig, J., concurring).

Given the context, the slippery word "homosexuality" here makes most sense as an abstract noun about a person's sexual orientation, since the "Don't Ask, Don't Tell" statute challenged in *Thomasson* excluded people just for saying they were lesbigay, *see infra* text accompanying note 16, and there was no evidence that Thomasson himself had engaged in or even had a "propensity" to engage in homosexual conduct. *Id.* at 921. Thus, the court martial of Lieutenant Gotthold Frederick Enslin in 1778 for sodomy with another man, *see* Randy Shilts, Conduct Unbecoming: Lesbians and Gays in the US Military 11 (St. Martin's Press, 1st ed. 1993), does not offer adequate support for Luttig's bare assertion.

According to Shilts, "[i]t was during World War I that the punishment of homosexual soldiers was first codified in American military law[,]" and "[t]he idea of excluding people for

edly rebuffed challenges gay and lesbian service members brought against their exclusion.[8] After the issue's profile was heightened by activism including through such litigation,[9] change seemed within reach in 1992 when Democratic presidential candidate Bill Clinton pledged to repeal the policy,[10] which he could effectively do because it

having a homosexual orientation, as opposed to punishing only those who committed homosexual acts, was born during World War I False" *Id.* at 15. The transgender exclusion, by contrast, appears of more recent vintage. *See* Editorial*, Let Transgender Troops Serve Openly*, N.Y. TIMES, June 4, 2015, at A24 ("The rules that prohibit transgender people from entering military service were introduced in the early 1980s, an era during which few people lived openly and those who did were widely stigmatized.").

8. *E.g.,* Steffan v. Perry, 41 F.3d 677 (D.C. Cir. 1994) (en banc); Ben-Shalom v. Marsh, 881 F.2d 454 (7th Cir. 1989); Beller v. Middendorf, 632 F.2d 788 (9th Cir. 1980). *But cf.* Meinhold v. United States Dep't of Defense, 34 F.3d 1469, 1479-1480 (9th Cir. 1994) (enjoining Navy from discharging one specific gay soldier based solely on his statement that he was gay because "in the circumstances under which he made it [,] [it] manifests no concrete, expressed desire to commit homosexual acts[,]" taking it outside court's construction of the regulation at issue); Pruitt v. Cheney, 963 F.2d 1160 (9th Cir. 1992) (rejecting First Amendment challenge on merits but holding that plaintiff's complaint stated an equal protection claim); Watkins v. United States Army, 875 F.2d 699 (9th Cir. 1989) (en banc) (estopping Army from barring reenlistment of one specific gay soldier without reaching constitutionality of exclusion policy). *Cf.* Jill Elaine Hasday, *Fighting Women: The Military, Sex, and Extrajudicial Constitutional Change*, 93 MINN. L. REV. 96, 158 n.260 (2008) ("The policy change [from the predecessor of Don't Ask, Don't Tell to DADT] was not made under judicial pressure; courts had consistently upheld military policies discriminating against gay servicemembers.").

9. Janie M. Dascenzo & Neal A. May, *Cleaning Out the Pentagon's Closet: An Overview of the Defense Department's Anti-Gay Policy*, 23 U. TOL. L. REV. 433, 465 (1992) ("Perhaps no group has struggled more diligently to end the discrimination faced by homosexuals in the military than gay-activist groups. The Military Freedom Institute at the National Gay and Lesbian Task Force, a lobbying group, is optimistic that the abandonment of the policy is close."); Judith Hicks Stiehm, *Managing the Military's Homosexual Exclusion Policy: Text and Subtext*, 46 U. MIAMI L. REV. 685, 688 n.21 (1992) ("Ironically, at the same time the DOD adopted its strict rule, homosexual civilians were experiencing some success in easing legal restrictions, and advocacy groups were increasingly engaged in public education and political action."); Scott Harris, *Gay Activists Hail Ruling on Military Policy*, L.A. TIMES, Aug. 21, 1991, at A3 (discussing ACLU's involvement in the advocacy movement against the lesbigay military exclusion).

10. R.L. Evans, *U.S. Military Policies Concerning Homosexuals: Development, Implementation, and Outcomes*, 11 LAW & SEX. 113, 124 (2002) ("During the 1992 presidential campaign, then-candidate Clinton vowed to 'lift the ban' on sexual minorities serving in the military."); Susan Baer, *Clinton Reaffirms his Promise to End Military's Ban on Gays*, BALTIMORE SUN, Nov. 12, 1992, http://articles.baltimoresun.com/1992-11-12/news/1992317161_1_ban-on-gays-clinton-military-leaders ("Asked after the ceremony about his campaign pledge to lift the ban on gays in the military, he referred to an October 1991 Defense Department study reporting that homosexuality did not affect job performance or pose a security risk. 'We've got a study that says a lot of gays have performed with great distinction in the military,' Mr. Clinton said. 'I don't think status alone, in the absence of some destructive behavior, should disqualify people'. . . Mr. Clinton said he would meet with military leaders to work out procedures for lifting the ban and allowing homosexuals to enter the military. 'How to do it, the mechanics of doing it, I want to consult with military leaders about that,' he said. 'My position is we need everybody in America that's got a contribution to make, that's willing to obey the law and work hard and play by the rules.' Clinton spokesman George Stephanopoulos said the timing of such an executive order

was contained within military regulations,[11] not congressional statutes. Clinton met resistance, however, from within his own party.[12] Democrat Sam Nunn, chair of the Senate Armed Forces Committee, spearheaded the efforts that led Congress to codify exclusion of lesbigay servicemembers in a federal statute.[13]

The result, the National Defense Authorization Act for Fiscal Year 1994,[14] contained the policy that came to be known, somewhat misleadingly, as "Don't Ask, Don't Tell."[15] The statute requires separation from the armed forces of anyone who "engaged in, attempted to engage in, or solicited another to engage in a homosexual act;" "stated that he or she is a homosexual or bisexual . . . unless . . . the member has demonstrated that he or she is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts;" or has "married or attempted to marry a person known to be of the same biological sex."[16] The breadth of the statute is underscored by its definition of "homosexual act" as including: "(A) any bodily contact, actively undertaken or passively permitted, between members of the same sex for the purpose of satisfying sexual desires; and (B) any bodily contact which a reasonable person would understand to demonstrate a propensity or intent to engage in an act described in subparagraph (A)."[17] Despite rather glaring First

was still uncertain but that Mr. Clinton is 'committed' to lifting the ban. 'It is something he wants to do,' he said.").

11. *See supra* note 7.

12. *See* William A. Woodruff, *Homosexuality and Military Service: Legislation, Implementation, and Litigation*, 64 UMKC L. Rev. 121, 122-123 (1995) ("The President's decision to lift the ban placed the senior military leadership in the awkward position of publicly opposing the Commander-in-Chief. The split in Congress was equally dramatic with influential members of the President's own party objecting to the President's unilateral approach to lift the ban."); *see also* Evans, *supra* note 10, at 124 ("Clinton's vow created a firestorm of opposition among the Joint Chiefs of Staff. Senate Armed Services Committee Chair Sam Nunn, other members of Congress, and other opponents mobilized immediately to block the president's efforts.").

13. Rhonda Evans, The Ctr. for the Study of Sexual Minorities in the Military, U.S. Military Policies Concerning Homosexuals: Development, Implementation and Outcomes, http://archive.palmcenter.org/files/active/1/evans1.pdf (last visited Nov. 7, 2016) ("Clinton's vow created a firestorm of opposition among the Joint Chiefs of Staff. Senate Armed Services Committee Chair Sam Nunn, other members of Congress, and other opponents mobilized immediately to block the president's efforts."); *supra* note 12.

14. *See* 10 U.S.C. § 654 *repealed by* Don't Ask Don't Tell Repeal Act of 2010, Pub. L. No. 111-321, § 2, 124 Stat. 3515.

15. *See generally* Sharon E. Debbage Alexander, *A Ban by Any Other Name: Ten Years of "Don't Ask, Don't Tell,"* 21 Hofstra Lab. & Emp. L.J. 403 (2004) (showing the effect of DADT over ten years of application).

16. 10 U.S.C. §§ 654(b)(1)-(3) (1994) (repealed 2010).

17. 10 U.S.C. § 654(f)(3) (1994) (repealed 2010).

Amendment concerns,[18] courts rejected constitutional challenges to DADT as they had challenges to the predecessor exclusion policy.[19]

Until *Log Cabin Republicans v. United States of America*.[20]

II. The Demise of Don't Ask, Don't Tell: Log Cabin Republicans, International Military Experience, and the Don't Ask, Don't Tell Repeal Act

Log Cabin Republicans arguably ranks as one of the most important decisions of the U.S. District Court for the Central District of California. It resulted in the enjoining of DADT, nationwide, if only for a period measured in days. But U.S. District Judge Virginia Phillips's ruling in this suit, which was brought by attorney Dan Woods of White & Case and his legal team, provided crucial impetus for the ultimately successful effort to get a statutory repeal of DADT enacted by Congress.

The Log Cabin Republicans ("LCR") is, as described today, a group of "LGBT Republicans and allies who support equality under the law for all, free markets, individual liberty, limited government, and a strong national defense."[21] As provided in the Plaintiffs Memorandum of Points and Authorities, LCR

> initiated this action in 2004. The government moved to dismiss and, after a lengthy delay, Judge [George P.] Schiavelli granted the motion with leave to amend as to standing and did not reach the constitutional law issues. Log Cabin amended its complaint in compliance

18. *See, e.g.,* David D. Cole & William N. Eskridge, Jr., *From Hand-Holding to Sodomy: First Amendment Protection of Homosexual (Expressive) Conduct*, 29 Harv. C.R.-C.L. L. Rev. 319, 320 (1994) ("This shift to conduct is misleading, however, for the military defines conduct in expansive, Orwellian terms.").

19. *See, e.g.,* Cook v. Gates, 528 F.3d 42 (1st Cir. 2008) (rejecting equal protection, due process, and First Amendment challenges to DADT); Able v. United States, 155 F.3d 628 (2d Cir. 1998) (rejecting equal protection challenge); Holmes v. Cal. Army Nat'l Guard, 124 F.3d 1126, 1132-36 (9th Cir. 1997) (using rational basis review to reject plaintiff's equal protection challenge); Philips v. Perry, 106 F.3d 1420 (9th Cir. 1997) (rejecting equal protection and First Amendment challenges); Thomasson v. Perry, 80 F.3d 915 (4th Cir. 1996) (en banc) (rejecting equal protection, substantive due process, and First Amendment challenges); Richenberg v. Perry, 97 F.3d 256 (8th Cir. 1996) (rejecting First Amendment and equal protection challenges).

20. Log Cabin Republicans v. United States, 716 F. Supp. 2d 884 (C.D. Cal. 2010) *vac'd as moot*, Log Cabin Republicans v. United States, 658 F.3d 1162 (9th Cir. 2011). Witt v. Dep't. of the Air Force, 527 F.3d 806 (9th Cir. 2008) earlier held that DADT as applied in individual cases had to survive a form of heightened scrutiny. On remand, the district court held that Witt's separation pursuant to DADT violated her substantive due process rights, a decision the government chose not to appeal. *See* Witt v. Dep't. of the Air Force, 739 F. Supp. 2d 1308 (W.D. Wash. 2010).

21. *About Us*, Log Cabin Republicans, http://www.logcabin.org/about-us/ (last visited Oct. 21, 2016).

with Judge Schiavelli's order, the government again moved to dismiss, another lengthy delay ensued, and Judge Schiavelli retired without deciding the motion.

The case was eventually reassigned to Judge Virginia A. Phillips,[22] and she ultimately rejected the motion to dismiss the amended complaint and set a trial to be held over two weeks in July 2010.[23]

After trial, Judge Phillips handed down a memorandum opinion on September 9, 2010,[24] and, following post-trial skirmishes,[25] an amended and final memorandum and opinion along with findings of fact and conclusions of law on October 12, 2010.[26] She had previously rejected LCR's equal protection challenge to DADT based on binding Ninth Circuit precedent.[27] But in her final opinion, Judge Phillips concluded that DADT violated LCR's members' substantive due process rights under *Lawrence v. Texas*[28] as well as their First Amendment rights.[29]

The common thread of Judge Phillips's reasoning on these two claims was that DADT did not, and was not necessary to, achieve its aims. On the substantive due process claim, she concluded that "the evidence introduced at trial shows that the effect of the Act has been, not to advance the Government's interests of military readiness and unit cohesion, much less to do so significantly, but to harm that interest [sic]."[30] Likewise, on the First Amendment claim, she concluded that "the sweeping reach of the restrictions on speech in the Don't

22. Memorandum of Points and Authorities in Opposition to Defendants' Motion for Summary Judgment at 2, *Log Cabin Republicans*, 716 F. Supp. 2d 884 (No. CV04-8425 VAP(Ex)). Judge Schiavelli had entered a minute order "that the case file was destroyed because it was inadvertently marked 'Closed' by courthouse staff. The Court, however, was able to recover what appears to be copies of the filings. Accordingly, this Court will review the copies to make sure it has all of the materials that were taken under submission on 7/14/2006, and set a hearing at a future date." Civil Minutes, *Log Cabin Republicans*, 716 F. Supp. 2d 884 (No. CV04-8425 VAP(Ex)), Dkt. Entry 34. Another piece of the delay was due to Judge Schiavelli's order staying further proceedings until final disposition of the *Witt* litigation following the decision by the Court of Appeals to remand that case for trial, Order Staying Action, *Log Cabin Republicans*, 716 F. Supp. 2d 884 (No. CV04-8425 VAP(Ex)), Dkt. Entry 52. The case was subsequently transferred to Judge Phillips on Oct. 8, 2008. Order of the Chief Judge, *Log Cabin Republicans*, 716 F. Supp. 2d 884 (No. CV04-8425 VAP(Ex)), Dkt. Entry 65.

23. *Log Cabin Republicans*, 716 F. Supp. 2d at 888 (noting trial held July 13-16 and 20-23).

24. Memorandum Opinion, *Log Cabin Republicans*, 716 F. Supp. 2d 884 (No. CV04-8425 VAP(Ex)), Dkt. Entry 232 (filed concurrently with Findings of Fact & Conclusions of Law).

25. *See id.* at Dkt. Entries 233-239.

26. *Log Cabin Republicans*, 716 F. Supp. 2d. 884.

27. *Id.* at 888 n.2.

28. Lawrence v. Texas, 539 U.S. 558 (2003); *Log Cabin*, 716 F. Supp. 2d. at 909, 929.

29. *Log Cabin Republicans*, 716 F. Supp. 2d. at 929.

30. *Id*. at 919.

Ask, Don't Tell Act is far broader than is reasonably necessary to protect the substantial government interest at stake here."[31] One way of showing that DADT's restrictions are not necessary is to show other comparable nations' experience with military service by lesbigay persons. In preparation for and during the trial, LCR, its experts, and its amici extensively addressed such evidence.

For example, Log Cabin Republicans submitted an expert report by Lawrence Korb, who noted that

> [t]wenty-four countries allow gay men and lesbians to serve openly in the military. None of these have reported 'any detriment to cohesion, readiness, recruiting, morale, retention or any other measure of effectiveness or quality,' according to the Palm Center, and 'in the more than three decades since an overseas force first allowed gay men and lesbians to serve openly, no study has ever documented any detriment to cohesion, readiness, recruiting, morale, retention' or any other measure of effectiveness or quality in foreign armed services.[32]

"Even the British," Dr. Korb reported, "whose military structure and deployment patterns are most similar to ours—and who fiercely resisted allowing gays to serve in the military—were forced to do so by the European Court of Human Rights, and have now seamlessly integrated them."[33] Likewise, LCR's expert Robert J. MacCoun addressed foreign experience with open service. Dr. MacCoun's report concluded that "new evidence from the U.S. military, from foreign militaries, and from multinational forces fails to show any significant deleterious impact of open gays or lesbians on unit cohesion or performance."[34]

Log Cabin Republicans' Memorandum of Contentions of Fact and Law[35] made extensive use of foreign experience. It explained:

> At least 23 countries allow homosexual individuals to serve openly in their respective armed forces; these countries include Australia, Austria, Belgium, Canada, the Czech Republic, Denmark, Estonia, Finland, France, Ireland, Israel, Italy, Lithuania, Luxembourg, the

31. *Id*. at 927.

32. Expert Report of Lawrence Korb at 4 n.10, *Log Cabin Republicans*, 716 F. Supp. 2d 884 (No. CV04-8425 VAP(Ex)) (quoting AARON BELKIN ET AL., PALM CENTER, HOW TO END "DON'T ASK DON'T TELL" 8 (2009), http://archive.palmcenter.org/files/active/0/Executive%20Order%20on%20Gay%20Troops%20-%20final.pdf).

33. *Id.*

34. Report of Robert J. MacCoun, Ph.D. at 6, *Log Cabin Republicans*, 716 F. Supp. 2d 884 (No. CV04-8425 VAP(Ex)).

35. Plaintiffs' Memorandum of Contentions of Fact and Law, *Log Cabin Republicans*, 716 F. Supp. 2d 884 (No. CV04-8425 VAP(Ex)).

> Netherlands, New Zealand, Norway, Slovenia, South Africa, Spain, Sweden, Switzerland, and the United Kingdom. American forces are stationed in many of those countries, often alongside members of those nations' armed forces, and they study and train together with those nations' forces, frequently as seamlessly integrated units. None of these nations—including several which have specifically studied the issue—has reported any detriment to any metric of military effectiveness, including unit cohesion, readiness, morale, retention, good order, or discipline. Indeed, in our most closely allied nations such as Britain, Canada, and Israel, homosexuals serve openly in the highest positions. In both Afghanistan and Iraq, members of the United States Armed Forces have fought and continue to fight side by side with coalition forces from nations whose forces include openly homosexual servicemembers and commanding officers, with no adverse effects.[36]

LCR's memorandum found confirmation of its conclusions about the lack of necessity of DADT in "[i]ndependent studies and research," specifically studies by the Palm Center at the University of California, Santa Barbara in 2000 and 2010.[37] "[E]xhaustive studies to assess the effects of openly homosexual service [sic] in Britain, Israel, Canada, and Australia" by the Palm Center "found . . . that not one person had observed any impact or any effect at all that undermined military performance, readiness, or cohesion, led to increased difficulties in recruiting or retention, or increased the rate of HIV infection among the troops."[38]

These factual contentions about other militaries' experiences had significance for LCR's legal claims. For example, in supplemental briefing regarding substantive due process, LCR argued: "Log Cabin Republicans also plead that the military has successfully coordinated with U.S. and foreign military and government entities that do proudly accept the participation of gays and lesbians, thereby belying any claim that DADT is 'necessary' to the successful 'management of the military.'"[39] In resisting the government's motion for summary judgment, LCR maintained that it had presented Judge Phillips with "voluminous evidence in the form both of expert opinion from seven distinguished academics, researchers, and scholars, and of reports and documents from the government's own records. That evidence shows

36. *Id.* at 15-16.

37. *Id.* at 16.

38. *Id.* (citations and internal quotations omitted).

39. Plaintiff's Supplemental Brief Re: Substantive Due Process Pursuant to January 29, 2009 Minute Order at 3, *Log Cabin Republicans*, 716 F. Supp. 2d 884 (No. CV04-8425 VAP(Ex)).

that DADT had no rational basis when enacted and continues to have no rational basis today . . .”[40] As “[s]pecific[ ]” support for this claim, LCR argued:

- When DADT was enacted, some comparable foreign militaries, e.g., Canada, had already changed their policies to allow open service by homosexuals without any negative impact on unit cohesion, a factor ignored by Congress;
- Many comparable foreign countries’ militaries have, both before and since the enactment of DADT, changed their policies to permit open service by homosexuals without any negative impact on unit cohesion;
- U.S. troops fight side-by-side with openly homosexual members of the armed forces of foreign militaries without any impact on unit cohesion and, in some instances, are commanded by openly homosexual officers from other countries[.][41]

Despite the extent of LCR’s reliance on them, other nations’ experiences with military service by lesbigay persons did not feature prominently in Judge Phillips’s opinion. When Congress was considering DADT in 1993, General Colin Powell was among those who testified. As summarized by Judge Phillips in her opinion, “General Powell testified that despite the official position of nondiscrimination towards homosexuals in the militaries of countries such as Canada, Germany, Israel, and Sweden, practice does not always match policy, and homosexuals are often subjected to discrimination in those militaries.”[42] The judge did not expressly state whether or not she accepted Powell’s testimony as factually accurate.

She did, however, note trial evidence favorable to LCR in her Findings of Fact and Conclusions of Law. Dr. Lawrence Korb “testified before the Senate Armed Services Committee on March 31, 1993 concerning the likely impact on unit cohesion if homosexuals were permitted to serve openly.”[43] He testified, she observed, “concerning the experiences of foreign militaries and domestic law enforcement agencies that had integrated homosexual servicemembers, and stated that their integration had not adversely affected unit cohesion or performance in those entities.”[44]

40. Memorandum of Points and Authorities in Opposition to Defendants’ Motion for Summary Judgment at 1-2, *Log Cabin Republicans*, 716 F. Supp. 2d 884 (No. CV04-8425 VAP(Ex)).

41. *Id.* at 17-18.

42. *Log Cabin Republicans*, 716 F. Supp. 2d at 914.

43. *Id.* at 913.

44. *Id.* at 947.

Although these statements too could be read as mere repetitions of the fact that someone took a certain position, that does not seem the best interpretation. For later in her findings and conclusion, Judge Phillips recounted:

> According to Professor MacCoun, the RAND working group concluded that task cohesion [i.e., one particular type of unit cohesion[45]] was paramount; it was a more important predictor of military performance than social cohesion, and service in the Armed Forces by openly homosexual members was not seen as a serious threat to task cohesion. Therefore, the recommendation to Secretary of Defense Les Aspin from the RAND Corporation in the 1993 Report [which relied upon the experiences of other countries with service by openly gay and lesbian people] was that sexual orientation should not be viewed as germane to service in the military; the 1993 Report made various recommendations regarding the implementation of this change.[46]

"Thus," Judge Phillips next concluded, "the evidence at trial demonstrated that the Act does not further significantly the Government's important interests in military readiness or unit cohesion, nor is it necessary to further those interests."[47] At least in part for such reasons, Judge Phillips held that DADT failed heightened scrutiny.

The evidence from foreign military experience showing successful functioning with open service by lesbigay persons also helps provide a better explanation of Judge Phillips's additional holding that DADT violated lesbigay servicemembers' First Amendment rights. As mentioned above,[48] Judge Phillips concluded that "the sweeping reach of the restrictions on speech in the Don't Ask, Don't Tell Act is far broader than is reasonably necessary to protect the substantial government interest at stake here."[49] Most of her analysis stressed the breadth of the speech that was suppressed or deterred by DADT.[50] She did make the point that in some respects, such as by inhibiting personal speech that can facilitate trust between servicemembers, DADT's limitations "actually serve to impede military readiness and unit cohesion rather than further these goals."[51]

45. *See id.* at 912-13 (articulating distinction between social cohesion and task cohesion).

46. *Id.* at 956. Earlier in her opinion, Judge Phillips characterized Dr. MacCoun's testimony as "cogent and persuasive." *Id.* at 922.

47. *Id.* at 956.

48. *Supra* text accompanying note 31.

49. *Log Cabin Republicans*, 716 F. Supp. 2d at 927.

50. *See id.* at 927-28.

51. *Id.* at 928.

By and large, though, she simply repeats the conclusion that the ways that DADT chills servicemember speech are not necessary for military readiness and unit cohesion.[52] Referring readers back to an earlier portion of her opinion, Judge Phillips's double-negative asserts that a range of evidence—including Colin Powell's views noted earlier in this Essay[53]—"does not suffice to show the Act's restrictions on speech are 'no more than is reasonably necessary' to achieve the goals of military readiness and unit cohesion."[54] Perhaps implicit in her cross-reference to her summary of testimony by LCR's expert Dr. Lawrence Korb[55] is the inference that if nations such as Great Britain with military experience roughly comparable to that of the U.S. have not suffered impairment of their military functioning from letting lesbigay persons serve openly, then it is not necessary for the U.S. to restrict such open service in order to protect military functioning.

Having concluded that DADT was doubly unconstitutional, Judge Phillips ordered a permanent injunction against enforcement of it.[56] As then General Counsel of the U.S. Department of Defense, Jeh Johnson, later put it, Judge Phillips "issued a worldwide injunction to stop the enforcement of the 'Don't Ask, Don't Tell' law and policy in every respect . . . in a force of more than two million people worldwide . . . ."[57] Although the U.S. Court of Appeals for the Ninth Circuit shortly stayed the injunction, this was, to put it mildly, still a big deal.[58] As a consequence, the military did briefly suspend enforcement of DADT and enlisted openly gay servicemembers.[59]

52. *See id.* at 927 ("far broader than is reasonably necessary to protect the substantial government interest at stake"); *id.* ("a vast range of speech, far greater than necessary to protect the Government's substantial interests"); *id.* at 928 ("broader than reasonably necessary to protect the Government's substantial interests"); *id* ("restricts speech more than reasonably necessary to protect the Government's interests").

53. *Id.* at 914; *supra* text accompanying note 42.

54. *Log Cabin Republicans*, 716 F. Supp. 2d at 928 (citing section IV(C)(1) of Judge Phillips opinion).

55. *Id.* at 913.

56. *Id.* at 888, 929.

57. Jeh C. Johnson, *Implementation of "Don't Ask, Don't Tell" Repeal*, 5 ALB. GOV'T L. REV. 407, 419 (2012).

58. *See, e.g.*, *A look at some of the top national and international news events of 2010*, CAN. PRESS (Dec. 30, 2010) *available* on Westlaw at 12/30/10 Can. Press 00:00:00 (reporting that "Federal judge in California issues worldwide injunction ordering U.S. military to immediately suspend its 17-year 'don't ask, don't tell' policy after ruling in September it was unconstitutional; another court grants a stay 8 days later pending U.S. government appeal.").

59. *See, e.g.*, Warren Richey, *No Delay For 'Don't Ask, Don't Tell' Ruling, So Pentagon Takes Gays For Now,* CHRISTIAN SCI. MONITOR (Oct. 19, 2010), http://www.csmonitor.com/USA/Justice/2010/1019/No-delay-for-don-t-ask-don-t-tell-ruling-so-Pentagon-takes-gays-for-now ("The Pentagon's undersecretary for personnel and readiness, Clifford Stanley, said in a memo

Ultimately, the Court of Appeals directed that *Log Cabin Republicans* be vacated as moot once DADT was repealed by Congress.[60] Indeed, in a somewhat unusual display of intent that Judge Phillips's actions in the case be a legal nullity, the Court of Appeals emphatically declared that it was vacating "the district court's judgment, injunction, opinions, orders, and factual findings—indeed, all of its past rulings—to clear the path completely for any future litigation. Those now-void legal rulings and factual findings have no precedential, preclusive, or binding effect."[61]

This most recent chapter in the saga of how the congressional repeal of the military exclusion of LGBT persons came about,[62] as Jeh Johnson has recounted, started with Barack Obama's 2008 presidential campaign pledge to work with the military to craft a repeal of DADT.[63] In his January 2010 State of the Union address, President Obama announced that "[t]his year, I will work with Congress and our military to finally repeal [Don't Ask, Don't Tell] . . . ."[64] Secretary of Defense Robert Gates "announced the appointment of a high-level DOD internal working group to assess essentially two things: one, the risk to overall military effectiveness of the repeal of 'Don't Ask, Don't Tell,' if the law were repealed, and, two, what recommendations for new policies we would make in the event that the law was repealed."[65] The working group produced a report released publicly in November 2010, titled *Report of the Comprehensive Review of the Issues Associated with a Repeal of "Don't Ask, Don't Tell."*[66] Congress passed the

that openly gay recruits are now free [sic] begin the process of joining the military."); Symposium, *Don't Ask, Don't Tell: Beyond the Log Cabin Republicans Injunction and the Defense Authorization Act*, 1 AM. U. LAB. & EMP. L.F. 127, 132-33 (2011) (remarks by David Rittgers) (noting that "on October 20, Lieutenant Daniel Choi, an openly gay man who had previously been discharged under DADT, re-enlisted").

60. Log Cabin Republicans v. United States, 658 F.3d 1162, 1168 (9th Cir. 2011).

61. *Id.*

62. For discussion of earlier phases of the repeal effort, *see generally* Michelle Benecke, *Turning Points: Challenges and Successes in Ending Don't Ask, Don't Tell*, 18 WM. & MARY J. WOMEN & L. 35 (2011).

63. Johnson, *supra* note 57, at 408.

64. *Id.* at 410 (quoting President Barack H. Obama, Address Before a Joint Session of Congress on the State of the Union Address (Jan. 27, 2010)).

65. *Id.* at 411.

66. JEH C. JOHNSON & CARTER F. HAM, DEPT. OF DEF., COMPREHENSIVE REVIEW OF THE ISSUES ASSOCIATED WITH A REPEAL OF "DON'T ASK, DON'T TELL" (2010), https://archive.org/details/ComprehensiveReviewOfTheIssuesAssociatedWithARepealOfdontAsk.

Don't Ask, Don't Tell Repeal Act of 2010 on December 18,[67] and President Obama signed it December 22.[68]

The Act did not repeal DADT when the President signed it. Rather, it required that the President, the Secretary of Defense, and the Chairman of the Joint Chiefs certify to Congress, first, that they had "considered the recommendations contained in the report and the report's proposed plan of action;"[69] second, that the DOD "ha[d] prepared the necessary policies and regulations to exercise the discretion provided by" the repeal act;[70] and, third, that "the implementation of necessary policies and regulations . . . is consistent with the standards of military readiness, military effectiveness, unit cohesion, and recruiting and retention of the Armed Forces."[71] Then, following the passage of sixty days, the DADT statute would be repealed.[72] The President delivered the required certification to Congress on July 22, 2011, and DADT was accordingly repealed effective September 20.[73] Following the repeal, the U.S. Court of Appeals for the Ninth Circuit, as mentioned above, vacated Judge Phillips's work in *Log Cabin Republicans* on September 29, 2011.[74]

Nevertheless, the impact of *Log Cabin Republicans* and Judge Phillips's (briefly enforced) injunction far exceeds the enabling of some servicemembers to enlist during those few days of October 2010 while the injunction was in force. Congress's repeal of DADT was unlike its adoption of DADT in a key respect. As Jill Elaine Hasday has noted, the statutory enactment of DADT in 1993 "was not made under judicial pressure;" at the time, "courts had consistently upheld military policies discriminating against gay servicemembers."[75]

67. Don't Ask, Don't Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515 (2010) (repealing 10 U.S.C. § 654).

68. Johnson, *supra* note 57, at 420 (citing H.R. 2965, 111th Cong. (2010)) (House amendment passed in the Senate on Dec. 18, 2010).

69. 124 Stat. 3515 § 2(b)(2)(A).

70. 124 Stat. 3515 § 2(b)(2)(B).

71. 124 Stat. 3515 § 2(b)(2)(C).

72. 124 Stat. 3515 § 2(b).

73. Press release, Leon E. Panetta & Mike Mullen, DOD News Briefing with Secretary Panetta and Adm. Mullen from the Pentagon (Sept. 20, 2011), http://archive.defense.gov/transcripts/transcript.aspx? transcriptid=4886 ("As of 12:01 a.m. this morning, we have the repeal of "Don't Ask, Don't Tell," pursuant to the law that was passed by the Congress last December."); Johnson, *supra* note 57, at 420 ("That certification was delivered to the Congress on July 22, 2011, and the law took effect, repealing "Don't Ask, Don't Tell" sixty days after that, which is how you get to September 20, 2011.").

74. Log Cabin Republicans v. United States, 658 F.3d 1162, 1166-68 (9th Cir. 2011).

75. Jill Elaine Hasday, *Fighting Women: The Military, Sex, and Extrajudicial Constitutional Change*, 93 MINN. L. REV. 96, 158 n.260 (2016).

In marked contrast, the congressional repeal of DADT was effectuated against the backdrop of the ongoing *Log Cabin Republicans* litigation. The lawsuit was filed by Dan Woods on October 12, 2004, and an amended complaint filed April 28, 2006.[76] President Obama's election was more than two years after that. So, although the review process that Obama initiated started early in 2010, before Judge Phillips's worldwide injunction against DADT, the case pre-dated that development. Furthermore, Judge Phillips presided over the trial in July of 2010,[77] more than four months before the working group completed and released its report. Even before trial, Judge Phillips had rejected the defendants' efforts to have DADT assessed under rational basis review, instead measuring the policy's consistency with substantive due process under the form of heightened scrutiny that the Ninth Circuit Court of Appeals had adopted in 2008 in *Witt v. Department of the Air Force*.[78]

Accordingly, the prospects of losing should have been clear to the government long before Judge Phillips's injunction. Indeed, I think the defense's legal strategy in the case reflected such awareness. In addressing the merits of the constitutional challenge, Judge Phillips noted that:

> Defendants did not specifically identify any item of legislative history upon which they are relying in their Memorandum of Contentions of Law and Fact; Defendants only identified specific items of the legislative history during their closing argument at trial . . . . Defendants did not include precise citations to any portion of the above-referenced materials to support the constitutionality of the Policy.[79]

This choice might be interpreted in line with conspiracy theories that President Obama was trying to have the Justice Department lose the case.[80] It is, however, more plausible that the DOJ attorneys were

76. Order Granting Defendants' Motion To Dismiss Without Prejudice at 14-15, Log Cabin Republicans v. United States, 716 F. Supp. 2d 884 (C.D. 2010) (No. CV04-8425 VAP(Ex)) (granting the defendants' motion to dismiss the original complaint for lack of associational standing).

77. *See* Log Cabin Republicans v. United States, 716 F. Supp. 2d 884, 888 (C.D. Cal. 2010).

78. *See, e.g.*, *id* at 911 (citing Witt v. Dep't of Air Force, 527 F.3d 806 (9th Cir. 2008); Order Denying Defendants' Motion for Summary Judgment at 6-9, *Log Cabin Republicans*, 716 F. Supp. 2d 884 (C.D. 2010) (No. CV04-8425 VAP(Ex))). *Witt*, however, had held "that this heightened scrutiny analysis is as-applied rather than facial." *Witt*, 527 F.3d at 819. Judge Phillips's order extended that standard of review.

79. *Log Cabin Republicans*, F. Supp. 2d at 911.

80. *See*, *e.g.,* Devin Dwyer, *"Don't Ask, Don't Tell": Is Obama Administration Bound to Defend Law it Opposes?*, ABC NEWS (Oct. 21, 2010), http://abcnews.go.com/Politics/don't-debate-obama-administrations-legal-defense-gay-ban/story?id=11928405 (noting that "the legal de-

trying to create an illusion of legality in the face of a statute that clearly could not survive any heightened scrutiny (as many legal scholars have long maintained of both DADT and its predecessor policy[81]). That is, one could see the government lawyers as having made the choice to try to limit the evidence the court could consider in light of a realization that if the court were not constrained in some artificial way, the policy would almost certainly fail. Hence, the government's desperate and not very plausible contention that because LCR challenged DADT on its face, the court could only consider its legislative history and no other evidence.[82] Judge Phillips was right to side with LCR and reject this attempt to cabin her analysis so as to blink reality.[83]

In sum, then, the writing was on the wall that DADT would fail constitutional scrutiny in Judge Phillips's court. Since she was applying the level of scrutiny set by the Ninth Circuit Court of Appeals in the *Witt* case, a decision of which the government declined to seek review in the Supreme Court, DADT also appeared destined to doom on appeal. Furthermore, with the Commander-in-Chief of the armed forces already on record as viewing DADT as harming the military and the nation[84] and median Justice Anthony Kennedy having authored the Court's major "gay rights" opinions in *Romer v. Evans*[85] and *Lawrence v. Texas*,[86] DADT's prospects in the Supreme Court also were

fense the administration has mounted has drawn sharp criticism from supporters of 'don't ask, don't tell,' some of whom have suggested the administration has been complicit in the situation that led to Phillips' injunction ending the ban on openly gay troops" and quoting Ed Whelan, president of the conservative Ethics and Public Policy Center, as saying "The fact that DOJ has filed a formal notice of appeal shouldn't distract from the deeper scandal that the political appointees at DOJ have been only pretending to mount a vigorous defense of DADT while in fact operating to undermine it").

81. *See, e.g.*, Arthur S. Leonard, *Exorcising the Ghosts of* Bowers v. Hardwick*: Uprooting Invalid Precedents*, 84 CHI.-KENT L. REV. 519, 556-57 (2009) (fails heightened scrutiny); Robert I. Correales, *Don't Ask, Don't Tell: A Dying Policy on the Precipice*, 44 CAL. W. L. REV. 413, 454 (2008) (fails "searching rational basis review"); Shannon Gilreath, *Sexually Speaking: "Don't Ask, Don't Tell" and the First Amendment after* Lawrence v. Texas, 14 DUKE J. GENDER L. & POL'Y 953, 967-68 (2007) (fails strict scrutiny).

82. *Log Cabin Republicans*, F. Supp. 2d at 895 ("According to Defendants, because Plaintiff challenges the constitutionality of the statute on its face, rather than challenging its application, the only evidence the Court should—indeed may—consider, is the statute itself and the bare legislative history; thus, according to Defendants, all other evidence is irrelevant.").

83. *Id.* at 895-97.

84. *See id.* at 919 (quoting President Barack Obama, Remarks at the White House (June 29, 2009)) ("'Don't Ask, Don't Tell' doesn't contribute to our national security . . . preventing patriotic Americans from serving their country weakens our national security. [R]eversing this policy [is] the right thing to do [and] is essential for our national security.").

85. Romer v. Evans, 517 U.S. 620 (1996).

86. Lawrence v. Texas, 539 U.S. 558 (2003).

not great. Thus, the potential for judicial invalidation of DADT was real and quite significant.

Judicial repeal of DADT was also *not* something that the DOD wished to see. In an interview on CNN, Defense Secretary Robert Gates described an exchange he had with President Obama right after Judge Phillips issued her injunction: "I said 'You, you really can't let this be done by an act of a single judge, or by your executive order. This needs to be done with the consent and the support of the Congress.'"[87] As Jeh Johnson recounted:

> [O]ur leadership . . . believed that if the law was going to be repealed, it should not be by judicial fiat. Rather, repeal should occur in an orderly manner through the political branches of government, through the democratic process, Congress, the executive branch, with training, and with education. A large part of the Secretary of Defense's appeal to Congress for immediate repeal in the lame duck session was to spare us from judicial fiat. I know that also had a huge impact on a number of members of Congress that I spoke to, both Republicans and Democrats.[88]

I would not use the word "fiat" myself, with its frequent connotation of unreasoned will or excessively concentrated power—not characteristics I would ascribe to courts exercising reasoned judgment to apply constitutional law to DADT. Nonetheless, the articulated concern shows the importance of Judge Phillips's ruling in *Log Cabin Republicans* to the statutory repeal of DADT.

III. A Brief Note on the Repeal of the Categorical Anti-Transgender Ban

As alluded to in Part I of this Essay,[89] until very recently, the armed forces of the United States categorically barred transgender persons from military service. As Allison Ross has described, medical fitness standards requiring physical and psychological examinations screened out transgender persons at the time of enlistment.[90] Should transgender persons manage to enlist (whether or not they realized they were transgender at that time), any activity to present themselves

87. *Q&A with Robert Gates* (C-SPAN television broadcast Jan. 22, 2016), *available at* http://www.c-span.org/video/?402922-1/qa-robert-gates.

88. Johnson, *supra* note 57, at 419.

89. *See supra* text accompanying note 7.

90. Allison Ross, *The Invisible Army: Why the Military Needs to Rescind Its Ban on Transgender Service Members*, 23 S. Cal. Interdisc. L.J. 185, 189-90 (2014) (recounting a variety of physical and mental conditions that Army standards, for illustrative purposes, use to exclude transgender persons, whether or not they have undergone any bodily transition procedures).

consistently with their gender, including such things as taking hormones, subjected them to separation on grounds such as enlistment violations, "cross-dressing," and failure to report outside (non-service provided) medical care.[91] And the applicability of these various military regulations to recalled members of the inactive reserves pressured servicemembers to delay their transitions or face separation.[92]

This web of regulatory exclusions was unnecessary and unjust. Transgender persons – Mick Andoso, Allyson Robinson, Paula Neira,[93] Shane Ortega,[94] Landon Wilson,[95] Kristin Beck,[96] and literally untold countless others[97]— have served honorably and effectively. As the American Psychiatric Association has recognized with its replacement of the diagnosis of "gender identity disorder" with "gender dysphoria" in the *Diagnostic and Statistical Manual of Mental Disorders* in 2013,[98] persons' simply being transgender does not necessarily entail that they have psychopathologies that might interfere with their functioning. Furthermore, as Allison Ross has detailed,[99] "[d]isqualifying transgender service members because of medical concerns is inconsistent with how the military generally addresses other medical conditions and diagnoses."[100]

Ross's note is only one of a number of works of legal scholarship that have criticized the exclusion of transgender servicemembers.[101]

91. *Id.* at 190-91.

92. *Id.* at 191-92.

93. *See id.* at 194-95 (describing their circumstances).

94. Sunnivie Brydum, *Meet the First Out Trans Soldier in the U.S. Military*, THE ADVOCATE (Apr. 10, 2015, 4:19 PM), http://www.advocate.com/politics/transgender/2015/04/10/meet-first-out-trans-soldier-us-military.

95. Jonathan Lapook, *Transgender People Push for Acceptance in Military – and Beyond*, CBS NEWS (Mar. 17, 2015, 7:05 PM), http://www.cbsnews.com/news/transgender-people-hope-for-acceptance-in-military-society/.

96. Devin Friedman, *Kristin Beck: A Navy SEAL in Transition*, GQ MAG., (Nov. 25, 2015, 6:00 AM), http://www.gq.com/story/kristin-beck-transgender-navy-seal.

97. Leora F. Eisenstadt, *Fluid Identity Discrimination*, 52 AM. BUS. L.J. 789, 801 (2015) ("Recent estimates suggest that despite the military's current policy 'more than 15,000 transgender individuals [serve] in the military[,] the National Guard and the Reserve.'") (quoting Helene Cooper, *Hagel 'Open' to Reviewing Military's Ban on Transgender People*, N.Y. TIMES, May 12, 2014, at A12).

98. AM. PSYCHIATRIC ASS'N., DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 451-59 (5th ed. 2013).

99. Ross, *supra* note 90, at 196-99 (comparing situation of transgender servicemembers to those of servicemembers who take hormones, are diabetic, or are pregnant).

100. *Id.* at 196.

101. *See also* Kevin M. Barry, et al., *A Bare Desire to Harm: Transgender People and the Equal Protection Clause*, 57 B.C. L. REV. 507, 512 (2016) (arguing that "[a] successful equal protection challenge [to the ADA's exclusion of discrimination based on gender identity disorder] will also reach far beyond disability rights to any laws that single out transgender people for

Much activism challenged it as well.[102] Transgender Marine Corp vet Dee Fulcher, Transgender Army vet Giuliano Silva, and the Transgender American Veterans Association petitioned the Secretary of Veterans Affairs to change VA rules that impose a blanket ban on providing transition-related surgeries to transgender veterans.[103] The ACLU and the Palm Center (a think tank at UC Santa Barbara that received over $1 million for a Transgender Military Service Initiative[104]) convened a day-long conference in 2014 to "continue building a strategic roadmap to help the United States join the rank[s] of the other 18 countries that allow transgender military service."[105] Organizations such as SPARTA[106] campaigned for the end of transgender military exclusion.[107]

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disparate treatment. This includes current DOD policies that prohibit military service on the basis of 'transsexualism' and 'transvestism,'") (footnote omitted); Mark R. Milhiser, *Transgender Service: The Next Social Domino for the Army*, 220 MIL. L. REV. 191 (2014); Matthew F. Kerrigan, *Transgender Discrimination in the Military: The New Don't Ask, Don't Tell*, 18 PSYCHOL. PUB. POL'Y. & L. 500 (2012).

This is not to imply that all legal scholars or all trans persons support removing barriers to transgender persons serving in the military. *Cf.* Gabriel Arkles, *No One Is Disposable: Going Beyond the Trans Military Exclusion Debate*, 13 SEATTLE J. FOR SOC. JUST. 459, 468-69, 512-14 (2014) (quite carefully not expressly answering whether or not the current exclusion should be ended, while being very critical of the U.S. military); Chris Geidner, *Meet The Trans Scholar Fighting Against The Campaign For Out Trans Military Service*, BUZZFEED (Sept. 9, 2013, 2:03 PM), https://www.buzzfeed.com/chrisgeidner/meet-the-trans-scholar-fighting-against-the-campaign-for-out?utm_term=.RepBky2Q8r#.fm1R6EGbWY (quoting transgender legal scholar Dean Spade, without claiming that Spade thinks the exclusion should in fact remain in place, as saying "This [the campaign for transgender military service] is shoddy window dressing for the realities of U.S. militarism, which is bad for the world and certainly bad for populations, like women and LGBT people, who are targets of sexual and gender violence."). For a respectful yet pointed response to Spade, *see* Brynne Tannehill, *We're Not Astroturf: Why Open Trans Military Service Is a Worthy Fight*, HUFFINGTON POST (Sept. 16, 2013, 7:46 PM), http://www.huffingtonpost.com/brynn-tannehill/were-not-astroturf_b_3903502.html.

102. *See, e.g.*, Tannehill, *supra* note 101 ("I am out in front and pushing this because the people I represent still have to serve in silence. Over the past 18 months we have worked together with LGB and straight allies, many of whom are veterans of the DADT fight, to raise awareness of this issue.").

103. Katy Steinmetz, *Exclusive: Transgender Veterans Petition the V.A. to Lift Blanket Ban on Surgery*, TIME (May 10, 2016), http://time.com/4324586/transgender-veterans-affairs-surgery-petition/; *Petition for Rulemaking to Promulgate Regulations Governing Provision of Sex Reassignment Surgery to Transgender Veterans* (May 9, 2016), http://www.lambdalegal.org/sites/default/files/petition_va_20160509_surgery-for-transgender-veterans.pdf.

104. Margaret Eby, *How Colonel Jennifer Pritzker Pushes for Transgender Rights in Military*, FORWARD (Nov. 11, 2014), http://forward.com/culture/208832/how-colonel-jennifer-pritzker-pushes-for-transgend/.

105. Remington Gregg, *Working Toward LGBT Inclusion in the Armed Forces*, HUM. RTS. CAMPAIGN (Oct. 21, 2014), http://www.hrc.org/blog/pushing-for-transgender-military-service.

106. *Homepage*, SPARTA, www.spartapride.org (last visited Oct. 23, 2016).

107. *See, e.g.*, Sandhya Somashekhar, *Gay rights groups urge military to lift ban on transgender service members*, WASH. POST (Feb. 23, 2015), https://www.washingtonpost.com/politics/

One upshot of activism on the issue, combined with receptiveness from the Obama administration, was an examination by the armed forces of the issue of transgender military service. "[I]n July 2015, Secretary of Defense Ashton Carter announced that DoD would create a working group to study the policy and readiness implications of welcoming transgender persons to serve openly."[108] As part of the review, the RAND National Defense Research Institute—the same one that found no need for the lesbigay exclusion in 1993—was not only asked to study the implications of allowing open military service by transgender individuals, but in particular, as one of three specified tasks, to "review the experiences of foreign militaries that permit transgender service members to serve openly."[109]

Out of the eighteen countries that allow transgender individuals to serve openly in their armed forces, the RAND study concentrated on Australia, Canada, Israel, and the UK because they had "the most well-developed and publicly available policies on transgender military personnel."[110] This review helped RAND identify a variety of "best practices" for dealing with such military service.[111] Perhaps most importantly, the study found that "[i]n no case was there any evidence of an effect on the operational effectiveness, operational readiness, or cohesion of the force" of a foreign country from open service by transgender persons.[112]

Finally, after some delay,[113] the military announced regulatory changes that repealed the categorical ban. Directive-type Memorandum 16-005, "Military Service of Transgender Servicemembers,"

gay-rights-groups-urge-military-to-lift-ban-on-transgender-service-members/2015/02/23/c056e5b6-bb73-11e4-8668-4e7ba8439ca6_story.html.

108. AGNES GEREBEN SCHAEFER ET AL., RAND, ASSESSING THE IMPLICATIONS OF ALLOWING TRANSGENDER PERSONNEL TO SERVE OPENLY, at iii (2016), *available at* http://www.rand.org/pubs/research_reports/RR1530.html.

109. *Id.*

110. *Id.* at xii.

111. *See id.* at xiii, 45, 49-62.

112. *Id.* at xiii.

113. *See, e.g.*, Michael S. Schmidt, *Study Finds Few Obstacles to Lifting Military's Transgender Ban*, N.Y. TIMES, May 16, 2016, at A10 ("The RAND study was completed in March, and Brad Carson, the senior Pentagon official in charge of the working group, gave a memo to defense officials in April on how to carry out the policy change. [¶] But since then, Mr. Carson has resigned, the process has stalled, and Mr. Carter has declined to release the report. Mr. Carter's aides said they had a policy of not releasing reports until after a decision directly tied to them was made, but transgender advocates have accused Mr. Carter of sitting on the report because it shows that there would be few hurdles to allowing transgender people to serve openly."); Dan Lamothe, *Plan to allow open transgender military service tripped up by internal resistance*, WASH. POST, Checkpoint, May 15, 2016, https://www.washingtonpost.com/news/checkpoint/wp/2016/05/15/disagreements-slow-pentagons-plan-to-allow-transgender-service-members/.

"[e]stablishes policy, assigns responsibilities, and prescribes procedures for the standards for retention, accession, separation, in-service transition, and medical coverage for transgender personnel serving in the Military Services."[114] This DTM provides that "[e]ffective immediately, no otherwise qualified Service member may be involuntarily separated, discharged or denied reenlistment or continuation of service, solely on the basis of their gender identity."[115] Notably, in explaining the process the military used to study the potential policy change, Defense Secretary Carter made a point of noting that "[w]e looked carefully at what lessons could be learned from the outside, including from allied militaries that already allow transgender servicemembers to serve openly . . . ."[116]

Despite some predictable criticism from the political right,[117] the policy shift is an important, although flawed[118] and incomplete,[119]

114. Directive-Type Memorandum (DTM) 16-005, Military Service of Transgender Service Members, at 1 (June 30, 2016), http://www.defense.gov/Portals/1/features/2016/0616_policy/DTM-16-005.pdf.

115. *Id.* at attachment p.1.

116. Ash Carter, *DoD Transgender Policy Changes: New Policy will End Ban on Transgender Americans in the United States Military*, MEDIUM (June 30, 2016), https://medium.com/@SecDef/dod-transgender-policy-changes-4f473b21b416.

117. *See, e.g.*, Press Release, U.S. House Representative Brian Babin, Military Should Not Be Used as Vehicle for Obama's Social Engineering, (June 30, 2016), *available at* http://babin.house.gov/news/documentsingle.aspx?DocumentID=849 (decrying "another needless distraction by this President that puts his personal liberal social agenda ahead of military preparedness and training" and "the Obama Administration's social experiments"); FAM. RES. COUNCIL, *Family Research Council Criticizes Pentagon for Transgender Policy Change* (June 30, 2016), http://www.frc.org/newsroom/family-research-council-criticizes-pentagon-for-transgender-policy-change (lamenting "another example of President Obama using America's military to fight culture wars instead of to fight real wars against the enemies of our nation"); David French, *The Pentagon's New Policy on Transgender Soldiers Is Pure Social Engineering*, NAT'L REV. (June 30, 2016), http://www.nationalreview.com/corner/437360/pentagon-new-policy-transgender-soldiers-pure-social-engineering (purportedly fearing use of this policy change "to retrain the ranks about the very concepts of sex and gender, introducing radical LGBT theology as the government-approved, Army-mandated world view"); Greg Corombos, *Obama's Transgender Policy 'Devastating' Military,* WORLD NEWS DAILY (July 3, 2016, 7:12 PM), http://www.wnd.com/2016/07/obamas-transgender-policy-devastating-military/ (quoting Elaine Donnelly, President of the Center for Military Readiness – which worked unsuccessfully to retain the exclusion of lesbigay persons from the military – as lambasting the policy because it "will encourage indiscipline and sexual tension and a range of problems that have nothing to do with strengthening the Armed Forces").

118. Perhaps the most glaring flaw of the new policy is its specification that "transgender people wishing to sign up after the lifting of the ban must prove that they have been stable in their gender identity for 18 months before being medically cleared to serve." Michael Lambert, *Transgender Americans Can Have Rights, Leaders Say—As Long As They Stick to the Binary*, OUT MAG. (July 7, 2016, 12:51 PM), http://www.out.com/news-opinion/2016/7/07/transgender-americans-can-have-rights-leaders-say-long-they-stick-binary. The National Center for Transgender Equality has criticized this period on the ground that "Eighteen months is much longer

achievement. It puts an end to the categorical exclusion of individuals from military service simply because they are transgender or undertake transition procedures. It saves resources by forestalling the separation of (expensively) trained and competent military personnel for reasons that do not compromise their ability to do their job. It makes the forces that defend the United States more representative of the people of the country. We should be grateful for all that, and to all those who helped pave the way by contributing to the repeal of DADT, not least Judge Virginia Phillips for her decision and injunction in *Log Cabin Republicans*.

CONCLUSION

Although the situation of LGBT persons in the U.S. remains far from ideal, particularly for those of us who may be persons of color or poor or living with disabilities, I count it an important victory that we are seeing the elimination of our exclusion from the U.S. armed forces, which has been a potent marker of us as legally inferior. Dan Woods's litigation and Judge Virginia A. Phillips's rulings in *Log Cabin Republicans v. U.S.* in the Central District of California have played critical roles in this advance. For this, I am, and the country should be, deeply in their debt.

than delays associated with other comparable medical treatments." Harper Jean Tobin, *Pentagon Lifts Transgender Military Service Ban*, NCTE BLOG, (June 30, 2016), http://www.transequality.org/blog/pentagon-lifts-transgender-military-service-ban. *See also* Editorial, *Transgender Troops Protected at Last*, N.Y. TIMES, July 1, 2016, at A22 (calling the 18-month waiting period "an extraordinarily high bar" that should be replaced, as Secretary Carter has suggested it might, within two years); Lambert, *supra* (reporting "Sue Fulton, president of SPARTA, an organization for transgender soldiers" as saying "'It's not supported by the facts; it doesn't take that long to be 'stable' on hormones or in your gender expression.'").

119. *See, e.g.*, Lamothe, *supra* note 113 (suggesting that military still will have to address rules for things including restroom and shower facilities, details on gender-specific physical fitness standards, and seeing to it that laws change to allow Tricare, "a health-care program for active-duty troops, their families, military retirees and Defense Department employees," to cover gender transition surgery).

PANEL DISCUSSION: MAROOTIAN V. NEW YORK LIFE INSURANCE COMPANY: LITIGATING ARMENIAN GENOCIDE INSURANCE CLAIMS*

Hon. Zaven V. Sinanian, Hon. Dickran M. Tevrizian, Richard G. Hovannisian & Michael J. Bazyler†

I. INTRODUCTION

JUDGE SINANIAN: Good afternoon. We are here for the panel entitled: "Marootian v. New York Life Insurance Company: Litigating Armenian Genocide Insurance Claims." *Marootian v. New York Life Insurance Company*[1] is the case at issue today, which was brought by the attorneys on behalf of the Armenian-American community concerning the recovery of insurance claims stemming from the loss of life and property during the Armenian Genocide. Today's discussion will proceed first with Professor Richard Hovannisian[2] who will give an introduction and historical perspective of the Armenian Genocide. He was going to be followed by Judge Snyder who, due to unforeseen circumstances, could not be here with us this afternoon. Judge Dickran Tevrizian will be filling in for her, ably I'm sure, as he was formerly a U.S. District Court judge. The final speaker will be Profes-

* What follows is an edited and annotated transcript of the live remarks made by selected panelists on March 18, 2016 during Southwestern Journal of International Law's symposium, "The U.S. District Court for the Central District of California, 1966-2016: International Context."

† Judge Sinanian has been a judge on the Superior Court of California for Los Angeles County since June of 2002. Prior to his appointment, Judge Sinanian prepared the amicus curiae brief on behalf of the California Attorney General's office in support of the Armenian Genocide Victims Act of 2000. Judge Tevrizian's brief biography appears in Judge Sinanian's introduction.

1. Marootian v. N.Y. Life Ins. Co., No. CV-99-12073 CAS (MCx), 2001 U.S. Dist. LEXIS 22274 (C.D. Cal. Nov. 28, 2001).

2. Professor Richard Hovannisian's individual remarks have been omitted. His Q&A remarks appear later in this section, and his article, *The Armenian Genocide and the Ruse of Protective Dispossession*, appears later in this issue.

sor Michael Bazyler,[3] who will speak on the comparative perspectives of Holocaust cases and will comment on *Marootian* and the *Movsesian* case,[4] which is probably of greater precedential value in the context of the Armenian Genocide claims that we are discussing this afternoon.

Judge Snyder handled both the *Marootian* and *Movsesian* cases as a U.S. district court judge, and Judge Tevrizian was the settlement judge in the *Marootian* case. I will open today's discussion with this thought: There was no international apparatus for streamlining restitution and reparation of claims arising out of the Armenian Genocide, nor is there one today. The *Marootian* case attempted to change that in spite of the fact that the current Turkish government was not a party to the action. I think this is the premise that we'll start with.

Judge Tevrizian was nominated on November 7, 1985 and received his commission on December 17, 1985 to sit as the U.S. District Court Judge for the Central District of California. He retired from the bench in 2007. He's now currently with JAMS where he serves as a mediator and arbitrator on various matters. Prior to his service on the bench, Judge Tevrizian was an associate and later became a partner in the law firm, Kirtland and Packard, from 1966 until he was appointed to the California State Court bench in 1972. He was also a partner in the law firm Manatt Phelps Rothenberg & Tunney and Of-Counsel to Lewis Brisbois Bisgaard & Smith before his appointment to the federal bench.

He served in the California state courts first on the Los Angeles Municipal Court and then on the Superior Court before returning to private practice. In 1985, he became the first Armenian-American ever named to the federal bench. In 1987, he was named Trial Judge of the year by the California Trial Lawyers Association. Judge Tevrizian was also named the 1994-1995 Trial Jurist of the year by the Los Angeles County Bar Association. In 1999, he was awarded the Ellis Island Medal of Honor, an award that celebrates American citizens who have distinguished themselves within their ethnic group.

In 2005, Judge Tevrizian received the Emil Gumpert Award for his efforts in promoting alternative dispute resolution and received the 2005 Justice Armand Arabian Leaders in Public Service Award. Judge Tevrizian, as I indicated earlier, handled the mediation in the

3. Professor Michael Bazyler's individual remarks have been omitted. His Q&A remarks appears later in this section, and his co-authored article with Rajika Shah, *The Unfinished Business of the Armenian Genocide: Armenian Property Restitution in American Courts*, appears later in this issue.

4. Movsesian v. Victoria Versicherung AG, 670 F.3d 1067 (9th Cir. 2012).

Marootian case while serving on the federal bench. He will also address the case and the matters therein. Judge Tevrizian.

II. Panel Discussion

JUDGE TEVRIZIAN: Thank you. Genocides are not just limited to the Armenians and to the Jewish Holocaust. There are, at the present time, genocides going on in the Middle East, in Africa and in Asia. This matter is of paramount importance and not to be treated as a historical event.

With regard to the *Marootian* case the following is true. On September 18, 2000, California Senate Bill No. 1915 was signed into law by Governor Gray Davis.[5] This bill was entitled, *Armenian Genocide Victims Insurance Act*,[6] and it added section 354.4 to the California Code of Civil Procedure.[7] That section provided in relevant part, which I will paraphrase, that notwithstanding any other provision of law, any "Armenian Genocide victim," or heir or beneficiary of an Armenian Genocide victim, seeking benefits under the insurance policies issued or in effect between 1875 and 1923 may bring a legal action to recover on that claim in any court of competent jurisdiction in the State, which shall be deemed the proper forum for that action.[8]

The statute also provided that no action seeking to recover benefits under an insurance policy covered by section 354 would be dismissed for failing to comply with the applicable statute of limitations.[9] In enacting the section, the California legislature stated that California has an overwhelming public policy interest in ensuring that its residents and citizens, who are claiming entitlement to benefits under the policies issued to the Armenian Genocide victims, are treated reasonably and fairly, and that those legal obligations are honored.[10]

To that end, the California legislature declared its specific attempt to provide Armenian Genocide-era life insurance policy holders expeditious, inexpensive, and fair forum by allowing claims to be brought in California, irrespective of any contrary forum selection clauses or limitations period.[11] In the early to mid 2000s, two cases came before Judge Snyder raising questions as to whether section

5. S.B. 1915, 1999 Leg., Reg. Sess. (Cal. 2000).
6. *Id.*
7. Cal. Civ. Proc. Code § 354.4 (West 2016).
8. *Id.*
9. *Id.*
10. S.B. 1915, 1999 Leg., Reg. Sess. (Cal. 2000).
11. *Id.*

354.4 violated the Foreign Affairs Clause of the Constitution. The first of these cases was *Marootian v. New York Life Ins. Co*.[12]

By the way, one of the attorneys on the *Marootian* legal team, Vartkes Yeghiayan, is in the audience today. Vartkes was the one who put together the legal team for *Marootian*. He is an expert on international law and conversant in many languages. He did the "grunt work" of obtaining and translating voluminous documents in preparation for the case. He also had on that team an insurance specialist with an international reputation for successfully litigating cases against insurance companies, specifically involving the Holocaust. Vartkes entered into a joint effort with William Shernoff's firm. He also brought class action attorney Brian Kabateck who knew the "ins and outs" of how to get class certification, and later brought in trial attorney, Mark Geragos.

In *Marootian*, the beneficiaries of Armenian Genocide-era life insurance policies brought claims against New York Life Insurance Company.[13] The beneficiaries claimed that their predecessors in interest living in the Ottoman Empire purchased life insurance policies from New York Life and died during the period referred to as the Armenian Genocide.[14] The beneficiaries claim that for over 85 years, they sought, albeit without success, to obtain the right in these insurance benefits.[15]

Following the enactment of section 354.4, the beneficiaries brought claims in California seeking to recover the insurance benefits from New York Life Insurance. New York Life moved to dismiss the action for improper venue arguing that the life insurance policies contained forum selection clauses requiring that the claims be brought in the courts of either England or France.[16] The California federal court ultimately determined that the forum selection clauses were invalid under the precedent set forth in the Supreme Court case of *M/S Bremen v. Zapata Offshore Company*,[17] and another case called *Carnival Cruise Lines v. Shute*.[18]

However, in reaching this decision, the trial court also had the opportunity to consider the constitutionality of section 354.4.[19] In its

12. No. CV-99-12073 CAS (MCx), 2001 U.S. Dist. LEXIS 22274 (C.D. Cal. Dec. 3, 2001).
13. *Id.* at *2.
14. *Id.*
15. *Id.* at *4.
16. *Id.* at *8-9.
17. *Id.* at *10 (citing The Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972)).
18. *Id.* at *11 (citing Carnival Cruise Lines v. Shute, 499 U.S. 585 (1991)).
19. *Marootian*, 2001 U.S. Dist. LEXIS 22274, at *29-53.

motion to dismiss, New York Life argued that section 354.4 was an unconstitutional invasion of the federal government's foreign affairs power because it adopts an official position on extremely sensitive foreign affairs issue, namely the recognition of the Armenian Genocide.[20]

Judge Snyder disagreed, reasoning that the purpose of section 354.4 was merely to provide a forum for beneficiaries of the Armenian Genocide-era life insurance policies to bring claims to recover.[21] To that end, she found that section 354.4 was not intended to offer any comment or condemnation of a foreign government, nor was it intended to interfere with the United States' relationship with a foreign government.[22] Judge Snyder also noted that none of the parties in *Marootian* was a foreign government, nor were any of the parties owned by a foreign government; rather, that the parties involved were simply comprised of an insurance carrier, the beneficiaries, and the heirs of the beneficiaries.[23]

Finally, and significantly, Judge Snyder found that New York Life failed to show how section 354.4 conflicted with any federal law or foreign policy.[24] Accordingly, she concluded that section 354.4 would likely have little to no impact on the foreign affairs of the United States government and therefore did not violate the Foreign Affairs Clause.[25]

After she made those rulings, the case was assigned to me for mediation. I was still a sitting judge at that time, and we mediated the case in July of 2004. I'm going to talk about the mediation later on, but before I do, I want to also give you the history and significance of another case pertinent to these matters.

The issue of section 354.4's constitutionality came before the court a second time in *Movsesian v. Victoria Versicherung, A.G.*[26] In that case, the plaintiffs were persons of Armenian descent, who claimed to be the rightful beneficiaries of life insurance policies issued during the Armenian Genocide.[27] The plaintiffs' claims would otherwise have been barred by the applicable statute limitations, so they

20. *Id.* at *32-33.
21. *Id.* at *49.
22. *Id.* at *39-40.
23. *Id.* at *36.
24. *Id.* at *39.
25. *Id.* at *40.
26. Movsesian v. Victoria Versicherung AG, 670 F.3d 1067 (9th Cir. 2012).
27. *Id.* at 1070.

relied on section 354.4 to bring their claims.[28] The insurers moved to dismiss the action arguing, among other things, that section 354.4 violated the Foreign Affairs Clause of the United States Constitution.[29] Once again Judge Snyder upheld section 354.4, finding that it did not violate the Foreign Affairs Clause.[30]

The insurers further argued that the executive branch of the federal government consistently expressed a policy against referring to the killing of Armenians in the Ottoman Empire between 1915 and 1923 as a "genocide."[31] For example, the insurers noted that under the administrations of both Bill Clinton and George W. Bush, the U.S. State Department repeatedly pressured Congress not to pass legislation officially recognizing the "Armenian Genocide."[32]

Thus, the insurers argued that section 354.4, which refers to the "Armenian Genocide" at least 12 times, threatened to undermine the United States foreign policy, and could antagonize the United States' relationships with Turkey and Armenia.[33] What was not argued in this case, and what the Ninth Circuit failed to take into account, was that Ronald Reagan, when he was President of the United States, acknowledged that there was indeed an Armenian Genocide.[34] This was conveniently or simply forgotten by the Ninth Circuit when they came down with their ultimate opinion in the *Movsesian* case.

Judge Snyder rejected the insurers' foreign policy arguments. She noted that 39 states, including California, issued statements formally recognizing the Armenian Genocide with no apparent response from the federal government.[35] Moreover, she found that there was no indication that the recognition of an Armenian Genocide by a majority of states had any actual impact on the United States' foreign policy.[36] In fact, neither the United States federal government nor Turkey expressed any opposition to section 354.4 when it was going through the California State Legislature.

Accordingly, Judge Snyder concluded that while the executive branch may prefer that Congress express no official national position

28. *See id.* at 1069.

29. *See* Order Granting in Part and Denying in Part Defendant Munich Re's Motion to Dismiss the Second Amended Complaint at 19, *Movsesian*, No. CV-03-09407 CAS (MCx) (C.D. Cal. June 7, 2007) [hereinafter Order Denying in Part Defendant's Motion to Dismiss].

30. *See id.* at 35.

31. *Id.* at 32.

32. *Id.* at 30.

33. *Id.* at 31.

34. Proclamation No. 4838, 3 C.F.R. 25 (1982).

35. Order Denying in Part Defendant's Motion to Dismiss, *supra* note 29, at 32.

36. *Id.* at 33.

on the recognition of an Armenian Genocide, the apparent lack of concern about state recognition of the Armenian Genocide suggested that no executive policy existed which would prevent California from doing so. Again, everyone forgot about President Reagan. He recognized the Armenian Genocide when he was a governor and again as President.[37]

Judge Snyder also found that section 354 was distinguishable from other statutes that the United States Supreme Court previously found to violate the Foreign Affairs Clause.[38] Now, Judge Snyder found that all three of the cases that were cited by the insurers were readily distinguishable.[39] The insurers appealed Judge Snyder's opinion to the Ninth Circuit, where the case had a complex, and I think convoluted, procedural history. The case was first heard by a panel consisting of Judges David Thompson, a Reagan appointee, Dorothy Nelson, and Harry Pregerson. In an opinion written by Judge Thompson and joined by Judge Nelson, the Ninth Circuit reversed Judge Snyder's finding that section 354 did not conflict with the foreign policy of the United States against providing official legislative recognition on the Armenian Genocide.[40]

Judge Thompson wrote in his majority opinion, "the conflict is clear on the face of the statute, by using the phrase "Armenian Genocide," California has defied the President's foreign policy preferences,"[41] again forgetting about what President Reagan said.

The plaintiffs then brought a petition for rehearing, which the Ninth Circuit granted. Upon rehearing the Ninth Circuit reversed course in an opinion. This time, the opinion was written by Judge Pregerson and was joined in by Judge Nelson.[42] Judge Nelson switched her vote and the Ninth Circuit affirmed the trial court, in which Judge Snyder was involved. Judge Pregerson concluded that there was no express federal policy forbidding states from using the term "Armenian Genocide."[43]

The insurers then brought petition for rehearing en banc with the Ninth Circuit, which was granted. On rehearing en banc, the Ninth Circuit again reversed and concluded that section 354.4 intruded on

37. Proclamation No. 4838, 3 C.F.R. 25 (1982).

38. Order Denying in Part Defendant's Motion to Dismiss, *supra* note 29, at 19-21, 27.

39. *See id.* at 32-33.

40. Movsesian v. Victoria Versicherung A.G, 578 F.3d 1052 at 1053, 1060 (9th Cir. 2009).

41. *Id.* at 1060.

42. *See* Movsesian v. Victoria Versicherung A.G., 629 F.3d 901, 903 (9th Cir. 2010).

43. *Id.* at 903.

the federal government's power to conduct foreign affairs.[44] Judge Graber, writing for the Ninth Circuit stated, "[s]ection 354.4 has more than some incidental or indirect effect on foreign affairs."[45] Further, the court stated:

> The statute expresses a distinct political point of view on a specific matter of foreign policy. It imposes the politically charged label of "genocide" on the actions of the Ottoman Empire (and, consequently, present-day Turkey) and expresses sympathy for "Armenian Genocide victim[s]." The law establishes a particular foreign policy for California—one that decries the actions of the Ottoman Empire and seeks to provide redress for "Armenian Genocide victim[s]" by subjecting foreign insurance companies to lawsuits in California.[46]

In June of 2013, the Supreme Court denied plaintiff's petition for certiorari and the case unfortunately came to an end.[47]

In its en banc opinion, the Ninth Circuit appeared to conclude that even if the insurance provisions of section 354 conflicted with the federal foreign policy, as the court noted, it does not appear that the federal government has any policy regarding the resolution of claims for insurance benefits arising from the era of the Armenian Genocide. Thus, unlike a case called *Garamendi,*[48] it does not appear that this is a case where California sought to use an "iron fist" where the federal government had "chosen to use kid gloves."[49]

Basically, the question really is, had the California legislature chosen a term other than Armenian Genocide, would the Ninth Circuit have found anything objectionable with the application of section 354 to the *Movsesian* case? That is the unanswered question that I think remains out there.

III. QUESTIONS & ANSWERS

JUDGE SINANIAN: Thank you very much. We will take a few questions. We are going to try to make this quick. I have a question here that is directed at Judge Tevrizian. I think it was with regard to the settlement negotiations in the *Marootian* case.[50] Is there anything

44. Movsesian v. Victoria Versicherung A.G., 670 F.3d 1067, 1076 (9th Cir. 2012).

45. *Id.* (citing Zschernig v. Miller, 389 U.S. 429, 434 (1968)).

46. *Id.* at 1076 (citing Zschernig v. Miller, 389 U.S. at 441 (1968)) (citations omitted).

47. Arzoumanian v. Munchener Ruckversicherungs-Gesellschaft Aktiengesellschaft A.G., 133 S. Ct. 2795*, cert. denied*, 670 F.3d 1067.

48. Am. Ins. Ass'n v. Garamendi, 539 U.S. 396 (2003).

49. *Id.* at 400.

50. Marootian v. N.Y. Life Ins. Co., No. CV-99-12073 CAS (MCx), 2001 U.S. Dist. LEXIS 22274, (C.D. Cal. Nov. 28, 2001).

you can address that is not part of the mediation privilege at this point?

JUDGE TEVRIZIAN: That is one of the things I was going to say. I am bound by this mediation privilege. I will talk about the process here. When I was selected as the settlement judge or mediator in that case, I was surprised because New York Life knew that I was the son of a survivor of the Genocide. My father came to this country in 1919, when he was 19 years of age. I was allowed to participate in the mediation that took a couple of sessions and where the case was finally settled. The problems that developed along the way were that most of the victims and policy holders were deceased. Their heirs are still out there. A lot of people's addresses and identities were lost. What was going to happen to the settlement proceeds or money? A common fund was set up and a procedure for claims to be made. Announcements were made to the Armenian diaspora all over the world.

It was a very hard case to administer. There was a cy pres set up for the funds that were not exhausted by the claims. Judge Snyder approved of the cy pres concept and money was spent on humanitarian and charitable efforts within the Armenian community. Eventually, the case was concluded. It was a very difficult case in the beginning because the insurance company did not want to recognize the Armenian Genocide or acknowledge that it was responsible in any way.

Another factor that was very difficult in the case is the fact that the life insurance policies at hand were not large policies. These were not million dollar policies. They were very small policies, one thousand, five thousand, ten thousand, and those were the limits. There were real serious questions as to whether or not the policies should be adjusted for the cost of living. There were questions about interest on the policies, but all of that was mediated and resolved.

I remember my grandmother and she was a survivor too. When she was living in Los Angeles, I remember that once a month, the representative from New York Life would come to her house and collect twenty dollars or fifty dollars and that custom from the old country carried over to this country with regard to New York Life, because the policy holders had trust and confidence in the New York Life Insurance Company. I believe it was a remarkable settlement and re-

markable result that took place in the *Marootian* case.[51] Unfortunately, it was not so remarkable in the *Movsesian* case.[52]

JUDGE SINANIAN: Thank you. This question is directed to Professor Hovannisian. These cases were brought by policy holders to try and collect insurance policies held by victims, what implications did they have or do they have on the Armenian-American?

RICHARD HOVANNISIAN: I think that the compensation involved in these cases gives the community significant satisfaction as an expression of validation of the immeasurable suffering and losses as a result of the Armenian Genocide. There is a feeling in the Armenian community that it does not possess the necessary political influence to achieve worldwide recognition and restitution in the face of state denial and perceived state interests of various governments. Therefore, the life insurance cases afford a symbolic affirmation of the suffering and irreparable losses of the Armenian people. I believe that for almost all parties to the class action lawsuits, this aspect is far more important than achieving any personal enrichment or personal aggrandizement. While the amount of restitution remains minimal, it represents for the community an important statement relating to the still-outstanding crime against the Armenian people.

There remains among Armenians a strong sense of great disadvantage against the powerful forces relentlessly attempting to suppress memory. The situation is different from Holocaust restitution, in which not only is there a large corpus of properly-funded legal scholars and experts who achieve impressive results through legal and extralegal means, but there are also governments and legislatures involved. These bodies are able to influence parties to reach settlements. If, for example, the State of California, makes it known that it will suspend trade or investment transactions with a foreign government or particular institution, the potential losses for those bodies are likely to make them far more amenable to reaching settlements involving compensation and restitution to the injured parties. This critical impetus is generally absent in the Armenian case, and because the United States government withholds official reaffirmation of its recognition of the Armenian Genocide, the opposing side is even able to argue that such potential legislation is contrary to the policies and positions of the federal government. The case of the life insurance poli-

51. *See id.*

52. *See* Movsesian v. Victoria Versicherung A.G., 670 F.3d 1067 (9th Cir. 2012).

cies nonetheless may be regarded as an important precedent and opening.

There will come a time, I believe, when Armenians who still possess property deeds or other entitlement documents will be able to seek restitution or compensation for their losses, even though the Turkish government has enacted multiple laws and regulations nullifying their validity and declaring the lands and goods seized without compensation to be "abandoned properties." Again, those still in possession of property deeds would represent a very small fraction of those who were dispossessed, but the symbolic value of the related affirmation and validation would be great. I think that this may be a viable avenue for future legal recourse.

JUDGE SINANIAN: Thank you. This question is for Professor Bazyler. What risk is there in having California legislate another statute to make it foreign policy neutral? To elaborate, would a statute, not using the language of Armenian Genocide but, for example, including those who died in the Ottoman Empire in this time of year (in neutral language), be in any way successful at this point in time with the Ninth Circuit?

MICHAEL BAZYLER: I thought, as Judge Tevrizian, that the en banc panel had just incorrectly decided that case. Now, they may just look at this and say, well, even that somehow surreptitiously impacted our foreign policy. As the judges on this panel know, you can always find a reason to rule a certain way. This was a commercial case and to somehow say that if you say this "G-word," all of a sudden everything somehow impacts foreign policy.[53] I just cannot understand that. How the en banc panel came up with that decision to me is strange. Procedurally, I want to bring in another hero of mine and his name is Benjamin Ferencz. He is ninety-five years old and the only living prosecutor from the Nuremberg trials.[54] This is what he taught me: "Never give up," these are his three wise words. That is what he taught me.

JUDGE SINANIAN: Okay. Thank you. I will conclude by quoting Stuart Eizenstat, the former US Ambassador to the European Union and a crucial member of the Holocaust restitution movement in the United States. He said, "US courts are not the best places to

53. *See* Movsesian v. Victoria Versicherung A.G., 629 F.3d 901, 903 (9th Cir. 2010).

54. Emma Green, *The Last Man at Nuremberg*, THE ATLANTIC (May 9, 2014), http://www.theatlantic.com/international/archive/2014/05/the-last-man-at-nuremberg/361968/

resolve profound historical and political questions."[55] I think that is basically the understanding that the Armenians have with regard to the *Movsesian* case. As much as we like to feel encouraged about this litigation, ultimately the *Movsesian* case, was dramatically disappointing.

Thank you very much to the panelists.

55. STUART E. EIZENSTAT, IMPERFECT JUSTICE LOOTED ASSETS, SLAVE LABOR, AND THE UNFINISHED BUSINESS OF WORLD WAR II, at 341 (2003).

THE ARMENIAN GENOCIDE AND THE RUSE OF PROTECTIVE DISPOSSESSION

*Richard G. Hovannisian**

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INTRODUCTION

The Armenian Genocide, beginning in 1915, was the supremely violent historical moment that removed a people from its homeland and wiped away most of the tangible evidence of its several thousand years of material and spiritual culture.[1] The calamity, which was unprecedented in scope and effect, may be viewed as a part of the incessant Armenian struggle for survival and the culmination of the intensified persecution and massacres starting in the 1890s; or it may be placed in the context of the great upheavals that brought about the disintegration of the multi-ethnic and multi-confessional Ottoman Empire and the emergence of a largely monolithic Turkish nation-state. The Ottoman government, dominated by the Committee of Union and Progress (Young Turk; Ittihadist) party, came to regard the

* Professor Emeritus of History, UCLA; Adjunct Professor of History, University of Southern California; President's Fellow, Chapman University. Portions of the non-legal and historical aspects of this article have appeared in other works on the subject by the author. For a partial list of the author's previous publications: http://www.history.ucla.edu/faculty/richard-hovannisian.

1. RICHARD G. HOVANNISIAN, REMEMBRANCE AND DENIAL: THE CASE OF THE ARMENIAN GENOCIDE 13 (1998).

Armenians as alien—the enemy within—and a major obstacle to the fulfillment of its political, ideological, and social goals.[2] The Young Turk repudiation of a plural society eventually resulted in a single society, as the destruction of the Armenians was accompanied and followed by the decimation of the Christian Assyrian and Greek populations and the suppression of even non-Turkish Muslim elements to compel their "Turkification" and complete assimilation.[3] The method adopted to transform Ottoman plural society to Turkish monolithic society was genocide. And, as in all other genocides, a major factor and consequence of this process was the dispossession of the victims through the forcible transfer of goods, properties, and all other forms of wealth to the side of the perpetrator.[4] And, just as in the case of the later Holocaust, great attention was paid to disguise and legalize the plunder through official acts and decrees, even if they were ex post facto.[5]

The practice of carrying out mass killings and forging surreptitious internal wars under the cover of major international conflicts did not begin with the Armenian Genocide. Civilian populations have frequently fallen victim to the brutality of invading armies, aerial bombings, missiles, poisonous substances, and other forms of indiscriminate killing. In the Armenian case, however, the Turkish government not only openly violated the fundamental obligation to defend its own citizenry, but also turned its might against a particular segment of its population. International law and convention at the time provided certain rules and customs of war intended to protect—at least in some measure—noncombatant, civilian populations and prisoners of war, but these regulations did not extend to domestic situations or a government's mistreatment of its own people. It was only after the Holocaust during World War II that domestic situations became actionable as part of the 1948 United Nations Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention).[6]

2. *Id.* at 14.

3. *See* G. S. Garber, *Introduction* to VARTKES YEGHIAYAN, THE ARMENIAN GENOCIDE AND THE TRIALS OF THE YOUNG TURKS, at vii-xiii (1990).

4. 1 SAMUEL TOTTEN & PAUL R. BARTROP, DICTIONARY OF GENOCIDE: A-L 125-26 (2007).

5. *See, e.g.,* ALAN WHITEHORN, THE ARMENIAN GENOCIDE: THE ESSENTIAL REFERENCE GUIDE (2015); EDDIE YEGHIAYAN, THE ARMENIAN GENOCIDE: A BIBLIOGRAPHY (2015); *Selected Bibliography on Armenian Genocide*, ARM. GENOCIDE MUSEUM-INST. (Oct. 9, 2016), http://www.genocide-museum.am/eng/bibliography.php.

6. *See* Hague Convention (IV) Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277; U.N. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 [hereinafter Genocide Convention].

Nonetheless, at the time of the Armenian deportations and massacres, many governments condemned the atrocities and termed them as brutal "crimes against humanity."[7]

There has been much political and scholarly debate on the precise definition of the term "genocide" and the compromise wording as incorporated in the Genocide Convention.[8] Some scholars find the United Nations (UN) definition ambiguous and open to such broad interpretation so as to allow for the inclusion of nearly all cases of collective persecution.[9] There is a tendency on the part of victimized groups, such as the Armenians and Jews, however, to insist on a narrow definition in order to prevent what they perceive as a dilution or trivialization of their own special suffering.[10] Many human rights activists, on the other hand, find the UN's definition too restrictive, especially as it excludes political and social groups from the questionable protection afforded by the Genocide Convention.[11] According to the 1948 Genocide Convention, genocide means the "intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such"[12] in any one of the following ways:

(a) Killing members of the group;
(b) Causing serious bodily or mental harm to members of the group;
(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
(d) Imposing measures intended to prevent births within the group;
(e) Forcibly transferring children of the group to another group.[13]

What makes the Armenian case especially compelling is that the victim group was subjected to each and every one of the five catego-

7. David Luban, *A Theory of Crimes Against Humanity*, 29 YALE J. INT'L L. 85, 86 (2004); Richard G. Hovannisian, *The Allies and Armenia*, 1915-18, 3 J. OF CONTEMP. HIST. 145, 147-55 (1968).

8. FRANK CHALK & KURT JONASSOHN, THE HISTORY AND SOCIOLOGY OF GENOCIDE: ANALYSES AND CASE STUDIES 8-12 (1990); LEO KUPER, GENOCIDE: ITS POLITICAL USE IN THE TWENTIETH CENTURY 19-23 (1982) ROBERT MELSON, REVOLUTION AND GENOCIDE: ON THE ORIGINS OF THE ARMENIAN GENOCIDE AND THE HOLOCAUST 22-26 (1996).

9. Alexander K.A. Greenwalt, *Rethinking Genocidal Intent: The Case for a Knowledge Based Interpretation,* 99 COLUM. L. REV. 2259, 2263-69 (1999).

10. Yehuda Bauer, *Is the Holocaust Explicable?*, 5 HOLOCAUST & GENOCIDE STUD. 145, 145-55 (1990); Vahakn N. Dadrian, *The Convergent Aspects of the Armenian and Jewish Cases of Genocide. A Reinterpretation of the Concept of Holocaust*, 3 HOLOCAUST & GENOCIDE STUD. 151, 160-69 (1988); Pierre Papazian, *A "Unique Uniqueness"?*, 30 MIDSTREAM 14, 18 (1984). *See also* LUCY S. DAWIDOWICZ, THE HOLOCAUST AND THE HISTORIANS (1997) (discussing various historians' views on the Holocaust's "uniqueness").

11. *See* CHALK & JONASSOHN, *supra* note 8, at 11; KUPER, *supra* note 8, at 22-39.

12. Genocide Convention, *supra* note 6, at art. II.

13. *Id.*

ries.[14] Such drastic and absolute methods underscore not only the calculated intent of the violence, but also the single-minded determination of the perpetrators to expunge the Armenians from the projected newly mono-ethnic, mono-linguistic, mono-cultural, and mono-religious Turkish society.

I. THE ARMENIAN QUESTION

The Armenians are an ancient people that inhabited the highland region between the Black, Caspian, and Mediterranean seas from deep antiquity until the twentieth century.[15] After a long period of proto-history, Armenia emerged as an organized state in the first millennium BC, or perhaps earlier.[16] Situated on the most strategic crossroad between Eastern and Western worlds,[17] Armenia was at times independent and formidable under national dynasties,[18] or autonomous under native princes who paid tribute to foreign powers,[19] or even subjected to direct foreign rule.[20]

At the turn of the fourth century AD, after more than a thousand years of polytheism, Armenia adopted Christianity, becoming the first nation to proclaim that faith as the religion of state.[21] Christianity cost the Armenian people dearly, for the tenacity with which they held to the faith exacted from them virtually millions of lives through the centuries before the genocide itself. Their existence was made difficult both by invasion and by nature, draining and devastating the land and

14. MARIA VAN HAPEREN ET AL., THE HOLOCAUST AND OTHER GENOCIDES: AN INTRODUCTION 55 (2012); Stuart D. Stein, Professor, Univ. of the W. of Eng., Bristol, A Lecture on the Armenian Genocide (transcript *available at* https://anca.org/assets/pdf/armenian_genocide_reference/A%20Lecture%20on%20The%20Armenian%20Genocide.pdf).

15. Lilia A. Arakelyan, *Quo Vadis, Armenia? The South Caucasus and Great Power Politics, in* RUSSIA, EURASIA AND THE NEW GEOPOLITICS OF ENERGY: CONFRONTATION AND CONSOLIDATION 64 (Matthew Sussex & Roger E. Kant, eds., 2015).

16. *See* 1 HISTORY OF HUMANITY: PREHISTORY AND THE BEGINNINGS OF CIVILIZATION 1-2 (S.J. De Laet et al. eds., 1994) ("proto-history" refers to the history of people or inhabitants of a region who had an oral literary tradition but did not take to literary writing); *see also* Arakelyan, *supra* note 15, at 64.

17. Arakelyan, *supra* note 15, at 64.

18. *See* JAMES BRYCE & ARNOLD TOYNBEE, THE TREATMENT OF ARMENIANS IN THE OTTOMAN EMPIRE, 1915-1916: DOCUMENTS PRESENTED TO VISCOUNT GREY OF FALLODON BY VISCOUNT BRYCE 602 (His Majesty's Stationery Office, 1916) *available at* http://libcdm1.uncg.edu/cdm/ref/collection/WWIPamp/id/3842.

19. *Id.* at 603.

20. *Id.* at 600.

21. MALACHIA ORMANIAN, THE CHURCH OF ARMENIA: HER HISTORY, DOCTRINE, RULE, DISCIPLINE, LITURGY, LITERATURE, AND EXISTING CONDITION 10 (G. Marcar Gregory, V.D. trans., 1912) (2015); *see also* LEON ARPEE, A HISTORY OF ARMENIAN CHRISTIANITY FROM THE BEGINNING TO OUR OWN TIME (1946).

compelling many Armenians to seek safety in distant realms. Most Armenians, however, stayed firmly planted on the Armenian highland, maintaining their separate ethno-religious identity and culture.[22]

The Turkic incursions into Armenia began in the eleventh century AD, and the last Armenian kingdom in the region of Cilicia fell three centuries later. Most of the territories that had once formed the ancient and medieval Armenian kingdoms were incorporated into the Ottoman Empire in the sixteenth century.[23] That empire was a theocratic state based on Islamic precepts.[24] The Turkish ruling classes controlled a multi-national, multi-confessional realm in which—and this may be a clue to potential genocide—there was a plural, not pluralistic, society where various groups lived side-by-side yet separate and distinct.[25] Ottoman citizens belonged to a common state, but the theocracy was founded on the institutionalized separation of the population into true believers and non-believers.[26] The non-believers were *gâvurs*, a pejorative term meaning "infidel."[27]

According to the precepts of Islam, tolerance of Christians and Jews was to be accorded on condition that these groups submit to an inferior second-class status with various financial, political, and social restrictions.[28] The testimony of a nonbeliever, for example, could not be admitted as evidence against a true believer.[29] In lieu of military service, because religious minorities were not allowed to bear arms, a poll tax was imposed on every male child.[30] This was one of the rea-

22. Dickran Kouymjian, *Armenia from the Fall of the Fall of the Cilician Kingdom (1375) to the Forced Emigration under Shah Abbas (1604), in* 2 THE ARMENIAN PEOPLE FROM ANCIENT TO MODERN TIMES 2-8 (Richard G. Hovannisian ed., 1997). For a concise historical survey of Armenian communities in Armenia and those in expatriate communities, *see* A.G. ABRAHAMYAN, HAMAROT URVAGITS HAY GAGHTAVAYRERI PATMUTYAN [A BRIEF OUTLINE OF THE HISTORY OF THE ARMENIAN EMIGRANT COMMUNITIES] (1964) (Arm.).

23. Kouymjian, *supra* note 22, at 9-19.

24. *Id.* at 26.

25. DERYA BAYIR, MINORITIES AND NATIONALISM IN TURKISH LAW 26-28 (2012); *see also* Brian Z. Tamanaha, *Understanding Legal Pluralism: Past to Present, Local to Global*, 30 SYDNEY L. REV. 379, 381 (2008).

26. Benjamin Braude, *Introduction* to CHRISTIANS AND JEWS IN THE OTTOMAN EMPIRE: THE ABRIDGED EDITION 1, 15-16 (Benjamin Braude ed., 1982) (2013).

27. Raymond Detrez, *Pre-National Identities in the Balkans*, *in* 1 ENTANGLED HISTORIES OF THE BALKANS: NATIONAL IDEOLOGIES AND LANGUAGE POLICIES 13, 44 (Roumen Daskalov & Tchavdar Marinov eds., 2013).

28. Braude, *supra* note 26, at 3-4; Nesim Seker, *Identity Formation and the Political Power in the Late Ottoman Empire and Early Turkish Republic*, 8 HISTORIA ACTUAL ONLINE 59, 60 (2005).

29. CHRISTOPHER J. WALKER, ARMENIA: THE SURVIVAL OF A NATION 87 (1980).

30. Braude, *supra* note 26; WALKER *supra* note 29, at 88; *see also* LINDA T. DARLING, REVENUE-RAISING AND LEGITIMACY: TAX COLLECTION AND FINANCE ADMINISTRATION IN THE OTTOMAN EMPIRE, 1560-1660 (1996).

sons that heads of household often concealed the true number of family members. There were numerous other disadvantages, such as special extraordinary taxes, uncompensated labor, and sometimes the requirement to wear a special garb, all in exchange for permission to practice what was perceived to be a pre-Islamic imperfect, albeit monotheistic, religion.[31]

Despite these burdens, most Armenians lived in relative peace while the Ottoman Empire was strong and expanding. But as the empire's administrative, fiscal, and military structure crumbled under the weight of internal corruption and external challenges in the eighteenth and nineteenth centuries, oppression and intolerance increased.[32] The breakdown of order was accelerated by the Ottoman inability to modernize and compete with the West.[33]

By the beginning of the nineteenth century, the Ottoman Empire was in rapid decline, losing much of its territory in Europe.[34] The concepts of liberation, emanating from the Enlightenment and the French Revolution, permeated into the empire and began an influential course on subject nationalities: the Greek, Serbian, Montenegrin, Romanian, Bulgarian and, very belatedly, Armenian people. Perhaps this, too, was one of the contributors to the Armenian tragedy; that the Armenians may have stirred too late. Those other groups who sought emancipation relatively early were able to find European support and ultimately achieve autonomy, then independence,[35] whereas the Armenians throughout the nineteenth century aspired, not to independence, but rather to civil rights, equality under the law, security of life and property, and local self-government.[36]

As Turkish control waned and the European powers, for their own selfish reasons, interfered increasingly in the affairs of the Ottoman Empire,[37] tensions intensified between the various ethno-religious communities, majority and minority groups, and among the minorities themselves—Greeks and Armenians, Armenians and Jews,

31. Kevork B. Bardakjian, *The Rise of the Armenian Patriarchate of Constantinople*, *in* 1 CHRISTIANS AND JEWS IN THE OTTOMAN EMPIRE: THE CENTRAL LANDS 89, 93-100 (Benjamin Braude & Bernard Lewis eds., 1982); WALKER, *supra* note 29, at 85-89.

32. HAPEREN, *supra* note 14, at 47-48.

33. *Id.* at 47.

34. *Id.* at 46-47.

35. FACING HISTORY AND OURSELVES NATIONAL FOUNDATION, CRIMES AGAINST HUMANITY AND CIVILIZATION: THE GENOCIDE OF THE ARMENIANS 23, 42-43 (2004).

36. PETER BALAKIAN, THE BURNING TIGRIS: THE ARMENIAN GENOCIDE AND AMERICA'S RESPONSE 57-58 (2003).

37. FACING HISTORY & OURSELVES NATIONAL FOUNDATION, *supra* note 35, at 23-24.

and so forth.[38] More than one sultan gave in to external pressures and domestic reformers in the nineteenth century to proclaim, against custom and tradition, that all his subjects were equal in his eyes and henceforth would be treated as such.[39] This was done in an effort to hold the empire together. Unfortunately, most sultans were not fully committed when they issued such decrees under duress. Moreover, one of the effects of the reform edicts was to anger and arouse traditional society.[40] For example, if previously a *gâvur* came into contact with a true believer, a first-class citizen, even if poor, humble, and less educated, a certain demeanor was expected and required.[41] Now, to try to change that mentality and suddenly announce that all were to be equal, during a time with no strong, sincere governmental support of the declaration, provocations as such could only lead to trouble.

Armenians came to be portrayed and perceived as an arrogant, avaricious element, a people who were conspiring to achieve dominance through the ploy of equality.[42] And it was not difficult for traditionalist leaders to bring the masses to regard the specter of equality as being tantamount to social and economic exploitation by the *gâvur*.[43] It was unfair; it was wrong; it was an attempt ultimately to usurp the rights and privileges of the true believers. That the European powers involved themselves in these matters only made things worse. European pressure for reform was repeatedly exerted on the Ottoman government, but this action was not sustained by effective measures of enforcement.[44] The result was an even greater suspicion of the subject people.[45]

The Armenians' attempt to achieve equality through reforms in the Ottoman Empire in the nineteenth century was ultimately an utter and dismal failure. Equality through edicts about all inhabitants being children of a common homeland and of a paternalistic ruler proved to

38. *Id.* at 51.

39. RONALD GRIGOR SUNY, THEY CAN LIVE IN THE DESERT BUT NOWHERE ELSE: A HISTORY OF THE ARMENIAN GENOCIDE 26 (2015); Letters from Mr. Terrell to Mr. Olney, Legation of the United States, (Oct. 24, 1895) *in* 2 U.S. DEP'T OF STATE, PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES 1328 (1895).

40. Letters from Mr. Terrell to Mr. Olney, *supra* note 39, at 1325-30.

41. *See* Roderic H. Davison, *Turkish Attitudes Concerning Christian-Muslim Equality in the Nineteenth Century,* 59 AM. HIST. REV. 844, 855 (1954).

42. RAYMOND KÉVORKIAN, THE ARMENIAN GENOCIDE: A COMPLETE HISTORY 172 (2013).

43. STEFAN IHRIG, JUSTIFYING GENOCIDE: GERMANY AND THE ARMENIANS FROM BISMARK TO HITLER 114 (2016).

44. LOUISE NALBANDIAN, THE ARMENIAN REVOLUTIONARY MOVEMENT 128 (1963).

45. *See Unfinished "Nuremberg": On the Occasion of the 90th Anniversary of the Trial of Young Turks*, ARM. GENOCIDE MUSEUM-INST., http://www.genocide-museum.am/eng/online_exhibition_9.php (last visited Nov. 5, 2016).

be stillborn. Some Armenian youth gave up hope that reforms could be achieved peaceably. They began to organize underground political parties and encouraged the population to learn to defend itself, but their strength and means were very limited.[46]

When in 1895 the last important sultan of the Ottoman Empire, Abdul Hamid II (1876-1909), was coerced by the European powers into signing another reform edict, his real answer to the Westerners—and to the Armenians who were seeking assistance and relief from the anarchic conditions caused by the breakdown of law and order in the interior provinces—was to unleash a rampage of death and destruction.[47] In October 1895, starting in the port city of Trebizond on the Black Sea and spreading in the winter months throughout the Armenian highland and into Cilicia along the Mediterranean Sea, the mayhem everywhere lasted for up to a week,[48] during which hapless Armenians were cut down wherever they were found. Armenian shops were looted, homes burned, and villages plundered.[49] Thousands of terrified people fled to the mountains or abroad, and other thousands were forcibly converted to Islam.[50] The total number of deaths was placed conservatively at about 100,000, although many sources give figures double that number.[51]

The question often posed is whether the Armenian Genocide should be regarded as starting in 1915, or rather, as part of a continuous process extending from the 1890s to the period of World War I and through its aftermath, 1914-1923? In whatever way one may wish to view this issue, the fact remains that there were very important qualitative and quantitative differences between 1895 and 1915. Sultan Abdul Hamid, however oppressive, sinister, or paranoid, probably did not conceive realistically of an empire without Armenians. The Armenians had a place and a function in his realm. Members of the Armenian elite in Constantinople/Istanbul, the Ottoman capital, served in his household administration and served useful functions in

46. NALBANDIAN, *supra* note 44, at 103.

47. Geoffrey Robertson, *Was There an Armenian Genocide?*, 4 UNIV. ST. THOMAS J.L. & PUB. POL'Y 83, 97 (2009-2010).

48. *Id.* at 100; *see also Hundreds Killed at Trebizond*, N.Y. TIMES, Oct. 18, 1895, http://query.nytimes.com/mem/archive-free/pdf?res=9B06E2D8113DE433A2575BC1A9669D94649ED7CF.

49. Robertson, *supra* note 47, at 99.

50. *Id.* at 97.

51. Robert Melson, *A Theoretical Inquiry into the Armenian Massacres of 1894-1896*, 24 COMP. STUD. IN SOC'Y & HIST. 489 (1982).

positions such as architects, physicians, and translators.[52] But their people, especially in the interior provinces, simply had to be taught a lesson. They needed to be intimidated back into complete submission. The Armenians should be impoverished somewhat, and their concentrations in their historic provinces should be diluted.[53] Certain demographic changes were in order. What better response to Western meddling?

While Abdul Hamid's actions in 1895 may today be classified as genocide according to the U.N. Genocide Convention,[54] when construed in the narrower sense in which many Holocaust and Armenian Genocide scholars interpret the term as implying the attempted massive or total annihilation of a people, it may be more proper to define the massacres of 1895-1896 as prolonged, extensive pogroms. Even though there was much bloodshed and certainly the intent was to kill an ethnic or religious group, at least "in part,"[55] there was a beginning and an end to the violence. Several days after the mobs had done their work, regular army units appeared to establish a degree of order.[56] The sultan could not allow the entire country to get out of hand. The intended message had been given, and it was time for the government to bring a halt to the pillage and plunder. For the Armenians, it seemed that they had sustained, but survived yet another in a long series of calamities. Thus, once more the challenge was to reconstruct and go forward. One may conclude that Abdul Hamid was not trying to bring about drastic changes in society. Rather, he was desperately attempting to preserve a system that was unsalvageable, a foundering ship of state that was being sunk by external volleys and internal disintegration. Massacres were his regime's vain and ineffective response to the critical problems besetting the empire. If this interpretation is accepted, then it is obvious that there was a fundamental difference between 1895 and 1915.

In 1908, Abdul Hamid, the crusty old sultan, was overthrown and sent into exile the next year by the Committee of Union and Pro-

52. For an in-depth account of Armenian professional and administrative services in the Ottoman Empire, *see* MESROB KRIKORIAN, ARMENIANS IN THE SERVICE OF THE OTTOMAN EMPIRE (1978).

53. Margaret J. Wyszomirski, *Communal Violence: The Armenians and the Copts as Case Studies*, 27 WORLD POL. 452 (1975).

54. Genocide Convention, *supra* note 6.

55. *See id.* at art. II ("In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or *in part*, a national, ethnical, racial or religious group. . .") (emphasis added); Robertson, *supra* note 47, at 90, 92; Wyszomirski, *supra* note 53.

56. Melson, *supra* note 51, at 491.

gress,[57] or, as they were commonly referred to, the Young Turks, a political movement that held forth the vision of a new Ottoman Empire based on constitutional government and the principles of equality, fraternity, and justice.[58] It is beyond the scope of this survey to explain in detail how that experiment went wrong. In his comparative study of the Armenian Genocide and the Holocaust, Robert Melson maintains that the Turkish internal war against the Armenians stemmed from a revolution that went sour, one that failed to achieve its anticipated high-principled objectives.[59]

In the Ottoman Empire, the hopes placed on constitutional government in 1908 soon dimmed, partly because of European exploitation and self-interest, which led to the loss of additional territories; and partly because of internal discord within the ruling Young Turk party.[60] By 1913, that which had started as a democratic revolution culminated in a dictatorship of the ultra-right wing faction of the party.[61] It was that extremist element that took Turkey—the Ottoman Empire—into World War I as an ally of the German Empire.[62] A fundamental calculation was that the anticipated triumph of the German-led Central Powers—against the Entente Powers of Great Britain, France, and the old nemesis, Russia—would allow for Turkish recovery of territories that had been lost to the Russian tsars in one war after another for more than a century.[63] Moreover, there was the vision of creating a new Turkish realm, no longer drawing its strength from its now-lost European possessions, but rather extending eastward over the Armenian highlands and Caucasus region toward the original Turkic homelands in central Asia.[64] Various pan-Islamic and pan-Turkic concepts were at work, but an overriding theme of Young Turk ideologues was the unification of the Turkic-speaking peoples within a common framework.[65] Ideology in the case of the Armenian Genocide was a very important, albeit not sole, explanation and justi-

57. Ruth Kark and Seth J. Frantzman, *Bedouin, Abdul Hamid II, British Land Settlement and Zionism: The Baysan Valley and Sub-district 1831-1948*, 15 ISR. STUD. 49, 54 (2010).

58. M. SUKRU HANIOGLU, A BRIEF HISTORY OF THE LATE OTTOMAN EMPIRE 150-51 (1995).

59. *See generally* Melson, *supra* note 51, at 506-07; Wyszomirski, *supra* note 53.

60. HAPEREN, *supra* note 14, at 46-47, 54.

61. Vahakn N. Dadrian, *The Armenian Genocide: Review of Its Historical, Political, and Legal Aspects*, 5 UNIV. ST. THOMAS J.L. & PUB. POL'Y 135, 152 (2010-2011).

62. HAPEREN, *supra* note 14, at 46-47, 54.

63. Dadrian, *supra* note 61, at 161.

64. *Id*. at 162-63.

65. *Id.* at 166.

fication of radical measures that were to be taken against the targeted group.[66]

Foreshadowing the genocidal plans of Adolf Hitler, whose ideology entailed the establishment of a new world order based on a racial formula in which there was no room for Jews, the Young Turk objective to create a new regional order without Armenians became an unmitigated obsession.[67] Armenians were regarded as being an alien element unwilling to assimilate.[68] The tenacious Armenians had existed as a subject people for centuries and had clung to their ethnoreligious identity. The Armenian Question[69] relating to the demand for measures to safeguard the lives and properties of the Armenians in the provinces had become an international issue since 1878 and had allowed for intermittent European intervention.[70] It was feared that sooner or later the Armenians would try to follow the example of the former subject European Christian nationalities to establish a separate state, thereby becoming a major barrier to any and all Young Turk objectives in the East.[71] Thus, the time had come, by embracing the German military model, to supplant the old, tired concept of Ottomanism—that is a society with Turks, Kurds, Yezidis, Greeks, Armenians, Assyrians, Arabs, Jews, and others all living side-by-side—with that of a modern state or empire anchored in a single ethnicity and a single religion.[72]

Scholars have begun to categorize the characteristics of genocide and the circumstances under which it is more likely to occur.[73] Applied to the Armenian experience, these include the existence of a plural society with clearly defined racial, religious, and cultural differences;[74] a sense of deprivation or danger felt by the dominant, perpetrator group, as the Ottoman Empire had steadily been losing extensive territories to the European powers and former subject Christian populations of the Balkan peninsula; the relative social and economic upward mobility of the victim group and related envy of the

66. *Id.*; TANER AKÇAM, FROM EMPIRE TO REPUBLIC: TURKISH NATIONALISM AND THE ARMENIAN GENOCIDE 106 (1998).

67. Dadrian, *supra* note 61, at 166.

68. *Id.*

69. *Id.* at 155.

70. *Id.* at 140.

71. *Id.* at 163, 165.

72. *See generally id.*

73. *See* Maureen S. Hiebert, *Theorizing Destruction: Reflections on the State of Comparative Genocide Theory*, 3 GENOCIDE STUD. & PREVENTION 309, 319-21 (2008).

74. *Id.* at 318-19; KUPER, *supra* note 8, at 57.

dominant group;[75] the espousal and propagation by the perpetrators of an ideology or belief system emphasizing the nobility and righteousness of its own group as opposed to the alien, exploitative nature of the group marked for elimination;[76] the determination to establish a new regional order (or in the Nazi case, a new world order) and in that process eliminate elements posing real, potential, or perceived threats to attaining this goal;[77] the mobilization of the state machinery and the military establishment for measures against the victim group;[78] and the seizure and retention of the material wealth and resources of the dispossessed population.[79] The time had come for Turkism to supplant Ottomanism and to give justifiable purpose to the unlimited violence necessary to create a homogeneous state and society.[80] In *Accounting for Genocide,* Helen Fein reaches the following conclusion:

> The victims of twentieth-century premeditated genocide—the Jews, the Gypsies, the Armenians—were murdered in order to fulfill the state's design for a new order. . . . War was used in both cases . . . to transform the nation to correspond to the ruling elite's formula by eliminating the groups conceived of as alien, enemies by definition.[81]

II. THE GENOCIDAL PROCESS

In the Ottoman Empire, the government and the Union and Progress party merged as the Young Turk dictatorship and moved toward the enactment of genocidal operations.[82] Starting before dawn on the 24th of April 1915, Armenian political, religious, educational, and intellectual leaders in Constantinople were arrested, exiled to Anatolia,

75. Hiebert, *supra* note 73, at 311-12.

76. *Id.* at 318-19, 328-30.

77. *Id.* at 325-28, 330.

78. *Id.* at 321.

79. *See* 1 TOTTEN & BARTROP, *supra* note 4, at 125-26 (evidencing the seizure and retention of material wealth, resources, and property from the dispossessed population).

80. *See* Garber, *supra* note 3, at vii-xiii. *See* Robert Melson, *Revolutionary Genocide: On the Causes of the Armenian Genocide of 1915 and the Holocaust*, 4 HOLOCAUST & GENOCIDE STUD. 161 (1989); Vahakn N. Dadrian, *Some Determinants of Genocidal Violence in Intergroup Conflicts-With Particular Reference to the Armenian and Jewish Cases*, 12 SOCIOLOGUS 129, 129-49 (1976); *see also* Donald Bloxham, *Introduction: Genocide and the Armenian Case, in* THE GREAT GAME OF GENOCIDE: IMPERIALISM, NATIONALISM, AND THE DESTRUCTION OF THE OTTOMAN ARMENIANS (2005).

81. HELEN FEIN, ACCOUNTING FOR GENOCIDE: NATIONAL RESPONSE AND JEWISH VICTIMIZATION DURING THE HOLOCAUST 29-30 (1979).

82. Ruben Paul Adalian, *Young Turks and the Armenian Genocide*, *in* 2 ENCYCLOPEDIA OF GENOCIDE 630 (Israel W. Charny ed., 1999).

and nearly all put to death.[83] Then in late May, after mass deportations had already begun in several eastern and southern provinces of the empire, Minister of Interior Talaat sought the official sanction of the Council of Ministers,[84] explaining that because some Armenians living near the war zones were aiding and abetting the enemy, obstructing the movement of troops and provisions, attacking, killing, and plundering the innocent Muslim population, among other reasons, the rebellious elements should be removed from the areas of military activity and places where the rebels could find shelter.[85] As a matter of national security, therefore, the Armenians living in the eastern provinces of Van, Bitlis, and Erzerum, and in the rural parts of Cilicia extending from Marash, Sis, and Adana to Alexandretta (Iskenderun) and Antioch were to be removed to the administrative districts of Deir ez-Zor, southern Urfa, southern Mosul, and southeastern Aleppo (the deserts of present-day Syria and Iraq).[86] The Council of Ministers confirmed Talaat's plan on May 27, even though the official decree is intentionally ambiguous and does not mention the Armenians by name:

> 1. If in time of war, the commanders of the armies, army corps, and divisions, or their replacements, as well as the commanders of independent military posts, who are subjected to an attack or to armed resistance from the populace, or who discover, under any form whatsoever, opposition to the orders of the Government or acts and measures for the defense of the state and the safeguarding of public order, are authorized and ordered to suppress them immediately and vigorously by armed force and to squelch ruthlessly the attack and resistance.
>
> A. The commanders of the army, army corps, and divisions, can if military needs demand, remove and settle in other localities, individually or together, the populations of cities and villages who are suspected of being guilty of treason and espionage.
>
> B. The law is in force from the moment of its publication.[87]

83. Press Reports, *The Cream of the Armenian Leadership Is Murdered*, *in* 1 ENCYCLOPEDIA OF GENOCIDE, *supra* note 82, at 66.

84. VAHAKN N. DADRIAN, THE HISTORY OF THE ARMENIAN GENOCIDE 219-20 (6th ed. 2003).

85. *Id.*

86. *Id.* at 219; RICHARD G. HOVANNISIAN, ARMENIA ON THE ROAD TO INDEPENDENCE 50 (1967).

87. 3 YUSUF HIKMET BAYUR, TÜRK İNKILÂBİ TARİHİ, pt. 3 (1983), *translated in* HOVANNISIAN, supra note 86, at 51.

Thus conveniently and ominously, *suspicion* alone was sufficient cause to deport "individually or together" the inhabitants of entire "cities and villages."[88]

The fact that massacres and other gross violations against the Armenian population were already well under way at the time when Talaat sought a legal cover for the evolving anti-Armenian operations is attested by a joint declaration issued by the Entente (Allied) Powers of Great Britain, France, and Russia (the wartime adversaries of the Central Powers) on May 24, 1915:

> Such massacres have taken place from mid-April at Erzerum, Terdjan, Egine, Bitlis, Moush, Sasun, Zeitun, and in all of Cilicia. The inhabitants of approximately a hundred villages in the vicinity of Van all have been killed and the Armenian quarter of Van besieged by Kurds. At the same time, the Ottoman Government has acted ruthlessly against the defenseless Armenian population of Constantinople. In view of this new crime of Turkey against humanity and civilization, the Allied Governments make known publicly to the Sublime Porte [Ottoman government] that they will hold all the members of the Turkish Government as well as those officials who have participated in these massacres, personally responsible.[89]

The proclamation became an early precedent for the current usage of "crimes against humanity."

Although Talaat's request to the Council of Ministers for confirmation of his plan had specified certain areas from which the Armenians should be removed, the actual decree adopted on May 27 did not define the exact geographic limits, and, as it happened, the Armenian population was driven out, not only from areas near war zones, but from the entire length and width of the empire. There were, of course, a few strategic exceptions to deportation in an effort to ensure concealment from the outside world, such as in Constantinople and Smyrna (Izmir), where numerous foreign diplomats, businessmen, and establishments were located.[90] Sometimes, Armenian Catholics and Protestants were exempted from the deportation decrees, only to have to follow once the majority belonging to the national Armenian Apostolic Church had been dispatched. Secrecy, surprise, deception and concealment were all a part of the process. As in the case of the *Einsatzgruppen* mobile killing units of World War II, the chief strategists

88. DADRIAN, *supra* note 84, at 221.

89. American Embassy, Constantinople, *Joint Declaration by France, Great Britain, and Russia*, *May 24, 1915*, *in* 1 ENCYCLOPEDIA OF GENOCIDE, *supra* note 82, at 82.

90. THOMAS DE WAAL, GREAT CATASTROPHE: ARMENIANS AND TURKS IN THE SHADOW OF GENOCIDE 35 (2015).

of the Young Turk party-government created the *Teshkilati Mahsusa* ("Special Organization") to supervise the extirpation of the Armenians.[91] Killer battalions were formed to ambush and slaughter the helpless caravans of Armenian deportees headed toward the Syrian Desert, and in every significant city, town and village, party functionaries were at work to ensure the timely execution of directives and to remove and punish weak-hearted and recalcitrant officials.[92] Young Turk army officers were assigned to critical command posts to assist in implementing the grand design. Moreover, even in a land as undeveloped as Ottoman Empire in 1915, the use of technological advances such as the telegraph and the single railway in Asia Minor allowed for unprecedented coordination in the genocidal process.[93] The intended victims didn't stand a chance and were doomed from the outset.[94]

By the summer of 1915, all of the empire's Asiatic provinces were in turmoil. Armenians serving in the Ottoman army had already been segregated into unarmed labor battalions and were either worked to death or taken out in batches and murdered.[95] Of the remaining population, the adult and teenage males were, in most instances, quickly separated from the rest of the population and killed outright under the direction of Young Turk agents, the gendarmerie, and bandit and tribal groups prepared for the operation.[96] The greatest torment, however, was reserved for the women and children, who were driven for weeks and months over mountains and valleys in the deportation caravans, often dehumanized by being stripped naked and repeatedly preyed upon and abused along the way.[97] Intentionally deprived of food and water, they fell by the thousands and the hundreds of thousands along the routes to the desert.[98] In this, an entire nation

91. Adalian, *supra* note 82, at 632.

92. De Waal, *supra* note 90, at 35-36; Dadrian, *supra* note 84, at 195-98.

93. 2 Samuel Totten & Paul R. Bartrop, Dictionary of Genocide 417 (2008).

94. Raymond Kévorkian, The Armenian Genocide 290 (2011); Viscount Bryce, The Treatment of Armenians in the Ottoman Empire: Documents Presented to Viscount Grey of Fallodon, Secretary of State for Foreign Affairs 9-12 (1916); Leo Kuper, *The Turkish Genocide of Armenians, 1915-1917*, *in* The Armenian Genocide in Perspective, at 43-59 (Richard G. Hovannisian ed., 1987); Suzanne Elizabeth Moranian, *Bearing Witness: The Missionary Archives as Evidence of the Armenian Genocide*, *in* The Armenian Genocide: History, Politics, Ethics, at 114-18 (Richard G. Hovannisian ed., 1992).

95. Martin Gilbert, 1 A History of the Twentieth Century 356 (1997).

96. Sir Martin Gilbert, *Twentieth Century Genocides*, *in* America and the Armenian Genocide of 1915, at 13 (Jay Winter ed., 2003); Bryce, *supra* note 94, at 9-12.

97. Donald E. Miller & Lorna Touryan Miller, *Women and Children of the Armenian Genocide*, *in* The Armenian Genocide: History, Politics, Ethics, at 153; Suzanne Elizabeth Moranian, *supra* note 94, at 114-18; *see generally* Donald E. Miller & Lorna Touryan Miller, Survivors: An Oral History of the Armenian Genocide 94 (1993).

98. Moranian, *supra* note 94, at 114-18.

was swept away, and the Armenian people were effectively eliminated from their native homeland of several millennia. Of the refugee survivors scattered throughout the Arab provinces and the Caucasus region in the southern reaches of the Russian Empire, thousands more were to die of starvation, epidemics, and exposure.[99] Even memory of the nation was marked for obliteration—churches and cultural monuments were desecrated and dismantled; small children, snatched from their parents, were stripped of their Armenian Christian identities by parceling them out to Muslim families, given new names, and subjected to measures to bring about the elimination or suppression of memory.[100]

Estimates of the Armenian dead vary from 600,000 to 2,000,000.[101] The figure of 1,500,000 has become standard in most Armenian sources.[102] A United Nations Human Rights Sub-Commission report in 1985 gives the figure of "at least one million."[103] The important point in understanding a tragedy of such magnitude is not the exact and precise count of the number who died—that will never be known—but the fact that more than half of the Armenian inhabitants of the Ottoman Empire perished and the rest were forcibly driven from their ancestral homeland or coercively assimilated.[104] What befell the Armenians was by the will and ordination of the dominant party-government. While a significant segment of the general population participated in the abductions and massacres and benefited from the resulting personal aggrandizement, many pious Muslims, shocked by what was happening, tried to help and even shelter some of the forlorn Armenian women and children.[105]

The decimation of the Armenian people and the destruction of millions of persons in Central and Eastern Europe during the Nazi

99. *Id.* at 116-18.

100. Kuper, *supra* note 94, at 53; *see also* Moranian, *supra* note 94, at 106 (stating that a contrived world of fantasy was necessary for the creation of a Turanic empire).

101. De Waal, *supra* note 90, at 34; Marjorie Housepian, *T*he Unremembered Genocide in 1 Encyclopedia of Genocide, *supra* note 82, at 63.

102. De Waal, *supra* note 90, at 35; *Armenian Genocide*, Arm. Genocide Museum-Inst., http://www.genocide-museum.am/eng/genocide.php (last visited Oct. 17, 2016); Robertson, *supra* note 47, at 109.

103. U.N. Comm'n on Human Rights, Report of the Sub-Comm'n on Prevention of Discrimination and Protection of Minorities, U.N. Doc. E/CN.4/Sub.2/1985/6 (July 2, 1985).

104. Kuper, *supra* note 94, at 45.

105. *See* Kévorkian, *supra* note 94, at 681-85 (detailing the efforts of a Turkish military commander of sparing Armenians in his jurisdiction); *see generally* Richard G. Hovannisian, *The Question of Altruism During the Armenian Genocide*, *in* Embracing the Other: Philosophical, Psychological, and Historical Perspectives on Altruism (Pearl M. Oliner & Samuel P. Oliner eds., 1992).

regime a quarter of a century later had particular and unique features. Accepting that fact, historians and sociologists who have pioneered the field of victimology have gone on to draw some striking parallels. The similarities include the perpetration of genocide under the cover of a major international conflict, thus minimizing the possibility of external intervention;[106] conception of the plan by a monolithic and xenophobic clique;[107] espousal of an ideology giving purpose and justification to racism, exclusivism, and elimination of elements resisting assimilation as in the case of the Armenians or deemed unworthy of integration as in the case of the Jews and the Gypsies;[108] imposition of strict party discipline and secrecy during the period of preparation;[109] formation of extralegal special armed forces to ensure the rigorous execution of the operation;[110] provocation of public hostility toward the victim group and ascribing to it the very excesses to which it would be subjected;[111] certainty of the vulnerability of the targeted group (demonstrated in the Armenian case by previous massacres of 1894-96 and in Cilicia in 1909, and in the Jewish case by the acts of disenfranchisement and violence during the 1930s);[112] exploitation of advances in mechanization and communication to achieve unprecedented means for control, coordination, and thoroughness;[113] and the use of sanctions such as promotions and the incentive to loot or, conversely, the dismissal and punishment, including assassinations, of reluctant officials and the intimidation of persons who might consider harboring members of the victim group.[114]

106. Robert Melson, *The Armenian Genocide and the Holocaust Compared*, 1 ENCYCLOPEDIA OF GENOCIDE, *supra* note 82, at 69-70.

107. Adalian, *supra* note 82, at 631-32.

108. *Id.*; Melson, *supra* note 106, at 70.

109. Adalian, *supra* note 82, at 631-32; *Source Document: Telegrams by Turkish Leaders Ordering the Armenian Genocide*, *in* 1 ENCYCLOPEDIA OF GENOCIDE, *supra* note 82, at 96.

110. Adalian, *supra* note 82, at 631-32.

111. KÉVORKIAN, *supra* note 94, at 169-70; Moranian, *supra* note 94, at 106.

112. KÉVORKIAN, *supra* note 94, at 107-08; *see also* Rouben Paul Adalian, *Adana Massacre, in* 1 ENCYCLOPEDIA OF GENOCIDE, *supra* note 82, at 47; Alan L. Berger, *Antisemitism*, *in* 1 ENCYCLOPEDIA OF GENOCIDE, *supra* note 82, at 55-56.

113. *See, e.g.,* Rouben Paul Adalian, *Documentation of Armenian Genocide in US Archives, in* 1 ENCYCLOPEDIA OF GENOCIDE, *supra* note 82, at 96 [hereinafter Adalian, *Documentation of Armenian Genocide*]; *Turkish Documents*, ARMENIAN GENOCIDE MUSEUM-INST., http://www.genocide-museum.am/eng/turkish.php (last visited Nov. 5, 2016); Rouben Paul Adalian, *Talaat Mehmet, in* 2 ENCYCLOPEDIA OF GENOCIDE, *supra* note 82, at 531 [hereinafter Adalian, *Talaat Mehmet*].

114. *See, e.g., Turkish Documents*, *supra* note 113.

III. THE DISPOSSESSION

An integral part of genocide is dispossession of all forms of material and cultural wealth of the victim group.[115] This has occurred throughout history and has been pronounced in the twentieth-century genocides.[116] In the Armenian case, the dispossession was given a deceptive framework, as if the seized goods and properties were to be held in trust for the deportees, a legal smokescreen for absolute fraudulence.[117] In a decree of the Ottoman Council of Ministers on May 30, 1915 and the regulations issued the next day by the Interior Ministry's Directorate of Tribal and Immigrant Settlement, the reasons for the relocation were explained, and the already underway dispossession was characterized as a protective measure for the relocated people's abandoned goods and properties (*Emval-i Metruke*).[118] The so-called "Administrative Instructions Regarding Movable and Immovable Property Abandoned by Armenians Moved as a Result of the War and the Extraordinary Political Circumstances" listed the following, as summarized below:

1. to safeguard the person and possessions of the deportees until they had reached their destination and to forbid any form of reprisals or persecution en route;
2. to compensate the relocated persons with new property, land, homes, and goods commensurate with their station in life in their places of origin and to distribute seed-grain, supplies, implements, and other necessities at the relocation sites;
3. to authorize immigration commissions to permit Muslim refugees (*muhajirs*, mainly from the Balkans) to settle in the abandoned villages and town quarters, but only after the value of the

115. *See* Cassirer v. Kingdom of Spain, 616 F.3d 1019, 1023, 1037 (9th Cir. 2010) (demonstrating an example of dispossession during genocide where German Nazi confiscated Plaintiff's "[grandmother's] oil painting based on grandmother's status as a Jew and as part of its genocide against Jews . . . in violation of international law."); *see also* Simon v. Republic of Hungary, 812 F.3d 127, 142, 143 (D.C. Cir. 2016) (demonstrating that dispossession of wealth can not only be considered a part of genocide, but genocide itself, if taking into account the definition of genocide under the International Criminal Court); *Elements of Crime,* INT'L CRIM. CT., https://www.icc-cpi.int/NR/rdonlyres/336923D8-A6AD-40EC-AD7B-45BF9DE73D56/0/ElementsOfCrimesEng.pdf (last visited Nov. 5, 2016).

116. *Introduction* to HRAYR S. KARAGUEUZIAN & YAIR AURON, A PERFECT INJUSTICE: GENOCIDE AND THEFT OF ARMENIAN WEALTH, at vii, xi (2009); *see* Simon v. Republic of Hungary, 812 F.3d 127, 143 (D.C. Cir. 2016) (demonstrating that dispossession of wealth as part of genocide was also very prominent some thirty or so years after the Armenian Genocide quite into the twentieth-century).

117. *See* TANER AKÇAM & UMIT KURT, THE SPIRIT OF THE LAWS: THE PLUNDER OF WEALTH IN THE ARMENIAN GENOCIDE 2 (2015).

118. BAYUR, *supra* note 87, at 40-42.

homes and land had been appraised and inventoried, it being made clear that the property still belonged to the absent legal owners;

4. to sell or rent income-producing fields and orchards, properties, and goods not needed by the Muslim refugees and to keep in the treasury, in the owner's name, an account of the derived income, after deducting administrative expenses;

5. to authorize the finance minister to create special three-member committees, including one representative each of the interior and finance ministries, to supervise these transactions and to publish circulars pertaining to the compensation for the properties and their protection;

6. to keep safe in their original places the goods, pictures, and holy books found in churches after they were registered and listed and later to send these objects to the places where the relocated population had been settled;

7. to oblige all officials to comply with the law and report to the government while the regulations were in effect.[119]

Thus the arrangements regarding "abandoned" property in May 1915 made it seem as though the deportees still held title over their property and that they would receive an equivalent value at their place of relocation, or alternatively, that income accrued from their immovable possessions would be held in special accounts in their names for them to claim upon their return. The decree disguised the fact that most of the movable property was quickly plundered, both by officials and by unrestrained mobs, and whatever immovable property that was made available for sale was transferred for a pittance to family and friends of the special committee members with the proceeds netted for personal use or, in some cases, transferred to branches of the Ottoman Treasury.[120]

A supplemental regulation of June 10, 1915 detailed the means by which properties would be impounded by the state.[121] Commissions to deal with "Abandoned Properties" were to administer the "immovable properties, possessions, and lands" of those transported to other places.[122] The commissions were to affix their seal to goods and buildings of the removed population, and after the kind, quantity, and

119. Levon Marashlian, *Finishing the Armenian Genocide, in* REMEMBRANCE AND DENIAL: THE CASE OF THE ARMENIAN GENOCIDE 113, 114 (Richard G. Hovannisian ed., 1998).

120. AKÇAM & KURT, *supra* note 117, at 22.

121. *Id.*

122. *Id.*

value of the goods had been determined and registered in the names of their owners, they were to be stored in secure places such as schools, churches, and warehouses.[123] Animals and perishable goods were to be sold at public auction with the equivalent value placed in a special account in the name of the original owner, or, absent that, of the village from which the goods originated.[124] All of these transactions were to be recorded in special account books.[125] The regulation prohibited all other sales of these goods and properties and annulled any such transactions that might have taken place during the fifteen-day period prior to the beginning of the deportation.[126] Thus, the Armenians were even deprived of the right to sell their possessions prior to their departure.[127] Perhaps, it did not matter much because, the legal trail aside, the Armenians were robbed outright in every way, and no comprehensive record or account for the massive expropriated goods was ever compiled.[128]

Additional ordinances and regulations in September and November 1915 created liquidation commissions, which were to collect all accounts receivable and pay all debts related to an abandoned property and then to hold the remainder of the proceeds from sale for the original owner.[129] It was not specified how these proceeds or any equivalent monetary value was to reach the owner after the property was liquidated.[130] Thus under the camouflage of a series of edicts, ordinances, and regulations, the Armenian people was stripped of its personal and collective wealth, which included some 2,500 churches, 450 monasteries, 2,000 schools, and numerous cultural establishments.[131] It is well known that in those areas where the local Muslim elites enriched themselves on the Armenian properties, these takings

123. *Id.*

124. *Id.* at 22-23.

125. *Id.* at 23.

126. *Id.* at 23, 25.

127. *Id.* at 23.

128. *See* KARAGUEUZIAN & AURON, *supra* note 116, at xiii-xv; KÉVORK K. BAGHDJIAN, THE CONFISCATION OF ARMENIAN PROPERTIES BY THE TURKISH GOVERNMENT SAID TO BE ABANDONED 102 (A.B. Gureghian trans., 2010); Ümit Kurt, *The Plunder of Wealth through Abandoned Properties*, ACADEMIA, 37, 48 https://www.academia.edu/23157025/The_Plunder_of_Wealth_through_Abandoned_Properties_Laws_in_the_Armenian_Genocide (last visited Nov. 5, 2016).

129. AKÇAM & KURT, *supra* note 117, at 24-25.

130. *Id.* at 24-29.

131. RAYMOND H. KÉVORKIAN & PAUL B PABOUDJIAN, LES ARMÉNIENS DANS L'EMPIRE OTTOMAN: À LA VEILLE DU GÉNOCIDE 57-60 (1992).

later provided the economic foundation for the emergence of a class of Turkish financial magnates.[132]

The fact that all these regulations were a cover for the complete dispossession of the Armenian people was soon apparent to nearly all observers. Already in July 1915, the U.S. consul in Trebizond, Oscar S. Heizer, reported:

> The 1,000 Armenian houses are being emptied of furniture by the police one after the other. The furniture, bedding and everything of value is being stored in large buildings about the city. There is no attempt at classification and the idea of keeping the property in "bales under the protection of the government to be returned to the owners on their return" is simply ridiculous. The goods are piled in without any attempt at labeling or systematic storage. A crowd of Turkish women and children follow the police about like a lot of vultures and seize anything they can lay their hands on and when the more valuable things are carried out of the house by the police they rush in and take the balance. I see this performance every day with my own eyes. I suppose it will take several weeks to empty all the houses and then the Armenian shops and stores will be cleared out. The commission which has the matter in hand is now talking of selling the great collection of household goods and property in order to pay the debts of the Armenians. The German Consul told me that he did not to believe the Armenians would be permitted to return to Trebizond after the war.[133]

There were only a few Turkish officials who were courageous enough to expose the charade. In December 1915, Senator Ahmed Riza Bey decried what was occurring:

> It is unlawful to designate the Armenian assets and properties as "abandoned goods," for the Armenians, the proprietors, did not abandon their properties voluntarily; they were forcibly, compulsively removed from their domiciles and exiled. Now the government through its officials is selling their goods. . . . This is atrocious. Grab my arm, eject me from my village, then sell my goods and properties, such a thing can never be permissible.[134]

Six months later, in June 1916, German Ambassador Count Paul Wolff Metternich reported that the deportations were still continuing, even though "the hungry wolves" of the ruling Young Turk party "can

132. UĞUR ÜMIT ÜNGOR & MEHMET POLATEL, CONFISCATION AND DESTRUCTION: THE YOUNG TURK SEIZURE OF ARMENIAN PROPERTY 79-80 (2011); Bedross Der Matossian, *The Taboo within the Taboo: The Fate of 'Armenian Capital' at the End of the Ottoman Empire*, EUR. J. OF TURKISH STUD. (Oct. 6, 2011), https://ejts.revues.org/4411.

133. Marashlian, *supra* note 119, at 115.

134. BAYUR, *supra* note 87, at 49; Marashlian, *supra* note 119, at 116.

no longer expect anything from these unhappy people except the satisfaction of their fanatic rage for persecution," because the goods of the Armenians "have long since been confiscated, and their capital has been liquidated by a so-called commission, which means that if an Armenian owned a house valued at, say, £T100 [100 Turkish lira], a Turk—a friend or member—could have it for around £T2."[135]

The avarice of the perpetrators was so great that, according to United States Ambassador Henry Morgenthau, Interior Minister Talaat asked him to assist in persuading the New York Life Insurance Company and other firms that had issued policies to now "vanished" Armenians to escheat their benefits to the Ottoman state, since the disappeared persons were Ottoman subjects and no living heirs were to be found. Morgenthau recounts the following exchange in the late summer of 1915:

> One day Talaat made what was perhaps the most astonishing request I had ever heard. The New York Life Insurance Company and the Equitable Life of New York had for years done considerable business among the Armenians. The extent to which this people insured their lives was merely another indicator of their thrifty habits.
>
> "I wish," Talaat now said, "that you would get the American life insurance companies to send us a complete list of their Armenian policy holders. They are practically all dead now and have left no heirs to collect the money. It of course all escheats to the State. The Government is the beneficiary now. Will you do so?"
>
> This was almost too much and I lost my temper
>
> "You will get no such list from me," I said, and I got up and left him.[136]

Few Armenian policyholders or their heirs ever received any life insurance benefits, and the issue lay dormant until the end of the twentieth century, when, as discussed briefly below, a class action lawsuit (following precedents set in Holocaust restitution litigation) was filed against New York Life for failure to make payment on more than 2,000 insurance policies taken out by Ottoman Armenians prior to 1915.[137]

135. Franz von Wolff-Metternich to Foreign Ministry, June 30, 1916, in DEUTCHLAND UND ARMENIEN, 1914-1918, at 277 (Johannes Lepsius ed., 1998).

136. HENRY MORGENTHAU, AMBASSADOR MORGENTHAU'S STORY 339 (1919).

137. Marootian v. N.Y. Life Ins. Co., No. CV-99-12073 CAS (MCx), U.S. Dist. LEXIS 22274 (C.D. Cal. 2001).

IV. The Postwar Period

As the Ottoman Empire prepared to surrender to the Allied Powers in October 1918, the Young Turk dictators escaped to Germany and Soviet Russia,[138] and a new government began to undo some of the wartime regulations.[139] That same month, it was announced that forcibly relocated "compatriots" were to be allowed to return to their previous homes and have their goods and properties (or compensation of equivalent values) restored to them.[140] In December, several weeks after the Ottoman capitulation, a circular was distributed on the manner and means for transferring the possessions back to their rightful owners.[141] Measures were to be taken for the immediate evacuation of people who had settled in Armenian homes and villages and, if this was not possible, arrangements for alternate shelter would be made for the returnees until they were able to reclaim their property.[142] In practice, however, the reclamation process was stringently resisted by the existing occupants and local officials, and heavily encumbered by the excuse-making and passivity of the central government.[143] As it happened, no Armenians were ever allowed to return to the traditional homelands in the eastern provinces of the empire, and only in areas near Constantinople and in Allied-occupied Cilicia was repatriation partially successful.[144] The complaints, threats, and cajolery of the Allied commissioners in Constantinople bore few results. It soon became evident that a Turkish nationalist front was forming against Allied plans to partition the Ottoman Empire, reinstate Armenian deportees, and set aside a part of the eastern provinces as an autonomous or independent Armenian state.[145] In the end, fewer than 10 percent of the dispossessed ever saw their homes again, and even those few who did would eventually be driven out a second time, this time permanently, by the victorious Turkish Nationalists headed by General Mustafa Kemal Pasha (later called Atatürk).[146]

138. *See Unfinished "Nuremberg": On the Occasion of the 90th Anniversary of the Trial of Young Turks*, *supra* note 45; *see also* Adalian, *Talaat Mehmet*, *supra* note 113, at 532.

139. Akc¸am & Kurt, *supra* note 117, at 34.

140. *Id.* at 36.

141. *Id.* at 37.

142. *Id.*

143. *Id.* at 51.

144. *Id.* at 42-43, 47.

145. *See Chronology*, Arm. Genocide Museum-Inst., http://www.genocide-museum.am/eng/chronology.php (last visited Nov. 5, 2016); *see also id*. at 51.

146. *Id.* at 46-51; 1 Richard G. Hovannisian, The Republic of Armenia 295-97 (1971); 2 Richard G. Hovannisian, The Republic of Armenia 41, 57-61, 407-08, 427-28 (1982).

In the immediate aftermath of World War I, it seemed that the defeat of the Ottoman and German empires presented the opportunity to enact the numerous wartime pledges by the victorious powers to punish the perpetrators and to rehabilitate the victims. In fact, after the Young Turk dictators fled the country, the new Turkish grand vizier (prime minister) admitted that these criminals had committed such misdeeds "as to make the conscience of mankind shudder forever."[147] United States General James G. Harbord, following an inspection tour in 1919 of the former Armenian population centers, confirmed the organized nature of the massacres and concluded: "Mutilation, violation, torture and death have left their haunting memories in a hundred beautiful Armenian valleys, and the traveler in that region is seldom free from the evidence of this most colossal crime of all the ages."[148] The Paris Peace Conference declared that the lands of Armenia would never be returned to Turkish rule, and in 1920 the Allied Powers ultimately drafted the Treaty of Sèvres, which provided for the return of exiled Armenians to their homes, the abrogation of the "Abandoned Property" law of 1915 and restoration of all movable and immovable possessions, the rescue of Armenian women and children from Muslim households, the annulment of religious conversions since 1914, and the gathering of evidence and prosecution of the authors of the crimes against humanity.[149]

Already, in June 1919, a Turkish military court-martial had tried and sentenced to death *in absentia* several organizers of the genocide: Young Turk Minister of Interior, Talaat Pasha; Minister of War, Enver Pasha; Minister of the Navy and Sixth Army commander in Syria, Jemal Pasha; and Central Committee member, Nazim Bey.[150] No attempt was made, however, to extradite these and other criminals from Germany, Italy, and other places of hiding, or to carry out the death sentences, and thousands of other culprits were neither tried nor even removed from office.[151] Within a few months, judicial proceedings were suspended and eventually terminated entirely, as scores of ac-

147. U.S. DEP'T OF STATE, 4 PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES: THE PARIS PEACE CONFERENCE 1919, at 509 (1943).

148. MAJOR GENERAL JAMES G. HARBORD, CONDITIONS IN THE NEAR EAST: REPORT OF THE AM. MILITARY MISSION TO ARM., S. Doc. No. 66-266, at 7 (1920).

149. . Treaty of Peace Between the British Empire and Allied Powers and Turkey—Sèvres, Aug. 10, 1920, 113 BRIT. & FOREIGN STATE PAPERS 652, 672-85, 706, 707.

150. *Unfinished "Nuremberg": On the Occasion of the 90th Anniversary of the Trial of Young Turks*, *supra* note 45.

151. Vahakn 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. OF INT'L L. 221, 281, 309-10 (1989); Vahkan N. Dadrian, *The Documentation of the World War I Armenian*

cused and imprisoned persons deeply implicated in the Armenian massacres were freed and sent home to responsible positions in the Kemalist government established at Ankara.[152]

The release of the perpetrators of genocide signaled a major shift in the political winds. The former Allied Powers, having become bitter rivals over the spoils of war, failed to act in unison towards the imposition of peace and did not pursue confronting the stiff resistance of the Turkish Nationalist movement. They concurred that the Armenians should be freed and guaranteed a secure life, yet failed to commit the necessary resources to enforce that decision.[153] They hoped that the United States would extend a protectorate over the devastated Armenian regions, however, America was already recoiling from its involvement in the war and turning its back on the new international organization known as League of Nations, as it moved toward "Splendid Isolation."[154] Unable to quell the Turkish Nationalist movement, which rejected the awarding of any territory for an Armenian state or even the large-scale return of Armenian refugees, the Allied Powers buckled and, during negotiations extending from 1921 to 1923, agreed to a drastic revision of the Treaty of Sèvres.[155]

The resulting Treaty of Lausanne, which came into force in 1923,[156] made no provision for the rehabilitation, restitution, or compensation of the Armenian survivors. In fact, Western abandonment of the Armenians was so complete that the new peace treaty made no mention whatsoever of "Armenians" or "Armenia."[157] It was as if the Armenians had never existed in the Ottoman Empire. In September

Massacres in the Proceedings of the Turkish Military Tribunal, 23 INT'L J. OF MIDDLE E. STUD. 549, 550-55; Adalian, *Talaat Mehmet*, *supra* note 113, at 532.

152. Marashlian, *supra* note 119, at 15.

153. Artin H. Arslanian, *British Wartime Pledges, 1917-18: The Armenian Case*, 13 J. OF CONTEMP. HIST. 517, 517-18 (1978).

154. *See* JAMES B. GIDNEY, A MANDATE FOR ARMENIA 232-33, 254 (1967); 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); SIMON PAYASLIAN, UNITED STATES POLICY TOWARD THE ARMENIAN QUESTION AND THE ARMENIAN GENOCIDE 153-54, 158-60, 169, 172-75 (2005).

155. *See* GIDNEY, *supra* note 154, at 245-46, 249-50.

156. Treaty of Lausanne, Fr. -Gr. Brit. -Greece -It. –Japan -Kingdom of Serb., Croat., and Slovn -Rom. -Turk., July 24, 1923, 28 L.N.T.S. 11.

157. *See* 117 *British And Foreign State Papers* 308-09, 543-91 (His Majesty's Stationery Office 1926); LAUSANNE CONFERENCE ON NEAR EASTERN AFFAIRS: RECORDS OF PROCEEDINGS AND DRAFT TERMS OF PEACE, TURKEY No. 1, CMD. 1814 (His Majesty's Stationery Office 1923) (showing no mention of Armenians or Armenia throughout the entire work, which is a collection of the records, letters, documents, and proceedings associated with the Lausanne Conference and resulting Treaty); MINISTÈRE DES AFFAIRES ETRANGÈRES, RECUEIL DES ACTES DE LA

and October 1922, even before conclusion of the Lausanne Treaty, the Kemalist government annulled any directives requiring the return of properties to the Armenians, and essentially put the "Abandoned Property" regulations of 1915 back into effect and even extended their applicable dates to include the postwar period.[158]

Despite these monumental successes, the ghost of its past could not be cast out by the Turkish Republic. It became obsessed with achieving the designs of the Young Turk regime by continuing the process of ethnic cleansing by coercing surviving Christians to leave, often after signing papers relinquishing all present and future claims, and stamping their travel documents with the words to the effect of "return forbidden."[159] Throughout the 1920s and 1930s, additional regulations were adopted concerning the "abandoned properties," such as: seizure of all possessions of Armenians no longer living in Turkey (regardless of the reasons or circumstances of their departure); prohibitions on return to Turkey of persons who had emigrated without obtaining official permission or who had changed their citizenship; non-recognition of lawsuits by expatriates for the reclamation of properties on grounds that these people were still Ottoman citizens and, as such, were prohibited from filing suits while living abroad; and refusal to accept citizenship granted to Armenian refugees by other governments as a means of preventing foreign diplomats or law firms from making representations on their behalf.[160] An ordinance in 1924 prohibited all non-Muslims from traveling in the interior provinces of the country on grounds that these were now military security zones, and in 1927, the government expelled from Turkish citizenship anyone who had not participated in the Turkish "War of Independence" leading to the establishment of the Turkish Republic in 1923 or those who had not returned since that time.[161] Such denationalized persons were to be denied entry into Turkey.[162]

Ironically, although the original owners were prohibited from returning and occupying so-called "abandoned properties," technically

CONFÉRENCE DE LAUSANNE (Fr., Imprimerie Nationale, 1923); LAURENCE EVANS, UNITED STATES POLICY AND THE PARTITION OF TURKEY, 1914-1924, at 411 (1965).

158. *See* AKÇAM & KURT, *supra* note 117, at 64.

159. *See, e.g.*, Vahram L. Shemmassian, *The Exodus of Armenian Remnants from the Interior Provinces of Turkey*, in ARMENIAN TSOPK/KHARPERT 389-413 (Richard G. Hovannisian ed., 2002); Zaven Messerlian, *The Forced Exodus of the Armenians of the Internal Provinces of Turkey (1929-1930)*, *in* BEFORE AND AFTER THE ARMENIAN GENOCIDE 173-90 (Maral O. Sarkissian-Kaloustian trans., 2015).

160. *See* AKÇAM & KURT, *supra* note 117, at 69-75.

161. *See id*. at 149-55, 176.

162. *See id*.

the proceeds of the liquidation transactions were still held in their names.[163] The pretense continued until 1964 when it was decreed that "lost people," and those who had left the country with passports stamped "return is illicit," were considered to have forfeited their Turkish citizenship, which means that any legal claim to erstwhile goods and possessions were forfeited as well.[164] By that time, of course, it made very little difference, as only a very few tenacious survivors continued to guard their original property deeds and believed that these may someday be useful in making claims for recovery or compensation.

V. THE SEQUEL

In the decades after their expulsion, the dispersed Armenian survivors concentrated their collective energies on readjustment to new environments and the creation of a diasporan infrastructure of cultural, educational, and religious institutions.[165] Disillusioned by the world's indifference to their plight, the Armenian Diaspora internalized its frustrations, trauma, and even creative manifestations.[166] It commemorated the genocide through requiem services and community programs, yet, on substantive issues, it could not make its voice heard in the international arena. Meanwhile, the strategy of the perpetrator side was to suppress public discussion of the genocide, believing that in due course the survivors would pass from the scene, their children would assimilate in their host countries, and the issue would gradually fade away.[167] And in fact, by the time World War II broke out a generation later, the Armenian calamity had virtually transformed into "the forgotten genocide."[168] It became even more obscure as millions of new victims were claimed in the horrendous conflagration of warfare and the Nazi-perpetrated Holocaust. The Armenians continued to remember their terrible losses, but in this they were virtually alone.

It was not until the fiftieth anniversary of the Armenian Genocide in 1965, and collaterally, the growing attention paid by the media

163. *See id.* at 171-72.

164. *See id*. at 132-34, 176-79.

165. *See* Susan P. Pattie, *Longing and Belonging: Issues of Homeland in Armenian Diaspora*, 22 POLAR 80, 80-82 (1999).

166. *See* Belinda Cooper & Taner Akc¸am, *Turks, Armenians, and the "G-Word,"* 22 WORLD POL'Y J. 81, 83 (2005).

167. *Id.* at 83-84, 89.

168. KEVORK B. BARDAKJIAN, THE ZORYAN INSTITUTE SPECIAL REPORT NUMBER 3: HITLER AND THE ARMENIAN GENOCIDE 6 (1985).

and in official circles to the Holocaust after the kidnapping and trial of Adolph Eichmann in 1973,[169] that the Armenians began to find opportunities to externalize their concerns and broaden remembrance of the genocide. Such efforts went beyond the confines of the Armenian community, and now had its reach into corridors of legislatures, classrooms, and channels of public discourse. Armenian activism reached unprecedented levels in the final decades of the twentieth century. Success came in the form of gaining the confirmation by a number of governments of their past recognition of the genocide and in making repeated serious attempts to gain U.S. Congressional reaffirmation in the face of enormous pressure exerted by the State Department, Pentagon, Office of the President, the international business community, and the Turkish government itself.[170] In an odd twist, the unresolved issue of the Armenian Genocide continues to generate more attention at the present than it ever did during the many years after international abandonment of the Armenian Question at Lausanne in 1923.[171]

In November 1999, nearly eighty-five years after Talaat Pasha requested the assistance of Ambassador Henry Morgenthau to have the proceeds of insurance policies issued to disappeared Armenians escheated to the Ottoman state, California resident Martin Marootian, with twelve other plaintiffs, filed a class-action lawsuit in Los Angeles Federal Court against the New York Life Insurance Company to recover benefits that had been wrongfully withheld.[172] The suit sought an order to require New York Life to identify insurance policies issued to Ottoman Armenians before 1915 and the rightful heirs of such policies, and to pay the benefits to the descendants in a proper fashion.[173] For years, the company had rejected all such claims and had demanded, among other things, concrete evidence, such as death certificates—which was certainly an impossibility because almost all poli-

169. Yechiam Weitz, *The Holocaust on Trial: The Impact of the Kasztner and Eichmann Trials on Israeli Society*, 1 ISR. STUD., no. 2, 1 (1996).

170. *See, e.g.,* MICHAEL BOBELIAN, CHILDREN OF ARMENIA: A FORGOTTEN GENOCIDE AND THE CENTURY-LONG STRUGGLE FOR JUSTICE 167, 169, 206 (2009); Vigen Guroian, *Post-Holocaust Political Morality: The Litmus of Bitburg and the Armenian Genocide Resolution*, 3 HOLOCAUST & GENOCIDE STUD. 305, 310-17 (1988).

171. *See,* Michael J. Bazyler, *The Holocaust Restitution Movement in Comparative Perspective*, 20 BERKELEY J. INT'L L. 11, 33-34 (2002).

172. *See* Marootian v. N.Y. Life Ins. Co., No. CV-99-12073 CAS (MCx), U.S. Dist. LEXIS 22274, at *2-4 (C.D. Cal. 2001).

173. *See* Diane Zakian Rumbaugh, *Armenian Genocide Heirs Settle New York Life Class Action Lawsuit*, BUS. WIRE (Jan. 28, 2004), http://www.businesswire.com/news/home/20040128005216/en/Armenian-Genocide-Heirs-Settle-York-Life-Class.

cyholders had been massacred or died along the routes of deportation.[174]

During the course of the litigation, attorneys for New York Life tried to have the case dismissed based on the statute of limitations and the contention that it should be moved to France, because a number of policies contained forum selection clauses stating that any disputes should be resolved in French courts.[175] The issue of statutes of limitation was addressed by the California legislature in the year 2000 by adopting the "Armenian Genocide Victims Insurance Act,"[176] which extended the permissible time limit for California residents to sue insurance companies until the end of 2010, and New York Life's attempt to change the venue was rejected by California U.S. District Judge Christina A. Snyder.[177] Faced with bad publicity and perhaps somewhat influenced by similar cases relating to Holocaust victims, New York Life in 2001 offered to settle the case for 10 million dollars, with an additional 3 million dollars to be distributed to Armenian charitable and educational organizations.[178] The company even hired a well-known Armenian attorney and former California state legislator to help achieve a favorable resolution of the dispute.[179] Marootian and his counsels rejected the offer as being sorely inadequate. During the course of the litigation, New York Life acknowledged that its records indicated an estimated 2,400 policies sold to Armenians prior to 1915 might remain unpaid.[180] The company ultimately doubled the offer to 20 million dollars, plus 3 million dollars for Armenian charitable and educational organizations. A settlement based on that offer, and facilitated by Judge Snyder and California Insurance Commissioner John Garamendi, was reached at the beginning of 2004.[181]

In 2005, the French insurance firm, AXA, was next to come to terms with a settlement equivalent to about 17.5 million dollars, with 3 million of that sum distributed to Armenian benevolent organizations

174. Kristen Kidd, *The Lives They Kept: Insurers and a Debt of History*, ARM. INT'L MAG., Apr. 2002, at 24-25.

175. *Marootian*, 2001 U.S. Dist. LEXIS 22274, at *8-10.

176. CAL. CIV. PRO. CODE § 354.5 (West 2006 & Supp. 2016), *invalidated by* Movsesian v. Victoria Versicherung AG, 670 F.3d 1067 (9th Cir. 2012).

177. Kidd, *supra* note 174, at 26; Joseph B. Treaster, *Insurer to Pay Armenian Massacre Claims*, N.Y. TIMES, Apr. 12, 2001, at A24.

178. Kidd, *supra* note 174, at 25.

179. *Id.* at 27.

180. *Id.* at 25.

181. Henry Weinstein, *Insurer Settles Armenian Genocide Suit*, L.A. TIMES, Jan. 29, 2004, at B1; *New York Life Settles Armenian Claims*, INS. J., Apr. 13, 2001, http://www.insurancejournal.com/news/national/2001/04/13/13912.htm.

in France.[182] These were landmark cases for Armenians in the obstacle-ridden bid to receive even token compensation for the inestimable losses sustained during the years of deportation, massacre, and exile.[183]

CONCLUSION

In conclusion, it is noteworthy that those who deal with the psychological aspects of genocide have pointed out that the resulting deep trauma shapes not only the outlook of immediate victims but also of subsequent generations.[184] Victim groups, rather than viewing the world as a good place with a sense of order, are filled with mistrust and fear of what may come from an evil world. It becomes essential, therefore, for victims to understand the terrible events that they have experienced are not normal, but rather are aberrations of a generally proper world order. Continued denial makes this impossible, and reinforces the feelings of insecurity, abandonment, and betrayal. To overcome these emotions, the victims need to share their pain and sorrow, to voice their outrage, to have the world recognize their suffering, and especially to receive expressions of regret and remorse from the perpetrator side. Only then can a sense of justice and correctness be restored.[185]

The belated successes in the United States legal system in the recourse against insurance companies may be largely symbolic, but that achievement is of vital importance as it offers the Armenian descendants of the victims a small degree of reassurance. The difficult and uncharted precipitous path to more than symbolic restitution may lie ahead.

182. Kyurkjian v. Axa, No. 2:02-cv-01750-CAS(Mcx), 2014 U.S. Dist. LEXIS 55867, at *3 (C.D. Cal. Apr. 21, 2014).

183. *See*, *e.g.*, Michael J. Bazyler, *From "Lamentation and Liturgy to Litigation": The Holocaust-Era Restitution Movement as a Model For Bringing Armenian Genocide-Era Restitution Suits in American Courts*, 95 MARQ. L.R. 245, 255-56 (2011); Carol J. Williams, *Armenian Genocide Victims' Descendants May Sue, Court Rules*, L.A. TIMES (Dec. 11, 2010), http://articles.latimes.com/2010/dec/11/local/la-me-armenian-genocide-20101211; Dennis Romero, *Armenian-American Lawyers, Including Mark Geragos, Seek Class-Action Status in Suit Against Turkey*, L.A. WEEKLY BLOG (July 30, 2010, 6:05 AM), http://www.laweekly.com/news/armenian-american-lawyers-including-mark-geragos-seek-class-action-status-in-suit-against-turkey-2398700; Elaine Woo, *Martin Marootian Dies at 95; Lead Plaintiff in Suit Over Armenian Genocide Victims' Insurance Policies*, L.A. TIMES (Mar. 12, 2011), http://articles.latimes.com/2011/mar/12/local/la-me-martin-marootian-20110312.

184. *See* Anie Kalayjian & Marian Weisberg, *Generational Impact of Mass Trauma: The Post-Ottoman Turkish Genocide of the Armenians*, *in* JIHAD AND SACRED VENGEANCE 268 (Jerry S. Piven et al. eds., 2002).

185. Ervin Staub, *Healing and Reconciliation, in* LOOKING BACKWARD, MOVING FORWARD: CONFRONTING THE ARMENIAN GENOCIDE 263, 263-73 (Richard G. Hovannisian, ed., 2003).

THE UNFINISHED BUSINESS OF THE ARMENIAN GENOCIDE: ARMENIAN PROPERTY RESTITUTION IN AMERICAN COURTS

Michael J. Bazyler & Rajika L. Shah***

ABSTRACT:

Because of its striking success, the modern Holocaust restitution movement was initially seen as a model for other victim groups seeking compensation in American courts for financial injustices committed on a large scale by public entities and complicit private actors during a genocide or other mass atrocities. Lawyers seeking restitution for property takings during the Armenian genocide explicitly sought to emulate this success in a number of lawsuits filed in United States courts beginning in the early 2000s. Now, more than a decade later, it is clear that the early success of multi-million dollar settlements with insurance companies for unpaid policies held by Armenian families represented a high point in this litigation. Courts have consistently declined to hear later-filed cases founded on California state statutes explicitly designed to grant relief to a particular class of Armenian genocide victims. The courts have dismissed these cases by

* Professor of Law and The 1939 Society Law Scholar in Holocaust and Human Rights Studies, Fowler School of Law, Chapman University, California; former Research Fellow, United States Holocaust Memorial Museum, Washington, D.C.; former Research Fellow and holder of the *Baron Friedrich Carl von Oppenheim Chair for the Study of Racism, Antisemitism and the Holocaust*, Yad Vashem (The Holocaust Martyrs' and Heroes' Remembrance Authority of Israel), Jerusalem. In the interest of full disclosure, the author acted as legal advisor to some of the Armenian genocide-era suits discussed in this article. The author was not involved in any of the Holocaust-era suits discussed herein.

** Adjunct Professor of Law, Fowler School of Law, Chapman University, California; LL.M. (with Distinction) in Public International Law, London School of Economics and Political Science. The author has been in private practice in California focusing almost exclusively on complex international disputes involving multinational corporations, foreign sovereigns, and claims before the U.S. Foreign Claims Settlement Commission. In the interest of full disclosure, the author has acted as counsel to plaintiffs in some of the Armenian genocide-era suits discussed in this article. She expresses her thanks to K. Lee Boyd and Kristen Nelson, plaintiffs' co-counsel in these suits.

holding the state statutes to be unconstitutional on the ground that they interfere with the foreign affairs powers of the federal government. A 2015 amicable settlement between the Armenian church and the J. Paul Getty Museum regarding Armenian artworks stolen during the Armenian genocide may offer the best example of the way forward for Armenian genocide-era litigation.

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I. INTRODUCTION

By the second decade of the twenty-first century there was much reason for optimism regarding the lawsuits filed in American courts arising from Armenian genocide-related financial wrongs.[1] The Holocaust restitution movement and accompanying litigation that began in the late 1990s led to multi-billion dollar settlements with Swiss banks, French banks, Austrian companies, German companies, and multiple European insurance companies for their roles in facilitating and/or benefiting from the massive thievery that took place as European

1. *See generally* Michael J. Bazyler, *From "Lamentation and Liturgy to Litigation": The Holocaust-Era Restitution Movement As a Model For Bringing Armenian Genocide-Era Restitution Suits In American Courts*, 95 MARQ. L. REV. 245 (2011) [hereinafter Bazyler, *Lamentation and Liturgy*]; MICHAEL BAZYLER, HOLOCAUST, GENOCIDE AND THE LAW: A QUEST FOR JUSTICE IN A POST-HOLOCAUST WORLD 153-183 (2016) [hereinafter BAZYLER, HOLOCAUST, GENOCIDE AND THE LAW].

Jews were being persecuted and then murdered.[2] The perceived successes of the Holocaust restitution litigation led American lawyers representing Armenian claimants to file suits against private actors who likewise benefited from the thievery during the Armenian genocide. The Armenian genocide civil suits explicitly followed the Holocaust civil litigation model. The Armenian genocide restitution movement began with insurance litigation filed in California federal courts against New York Life Insurance Company and French insurance company AXA.[3] Both companies did business in Ottoman Turkey, where they had sold insurance policies to the Ottoman Armenians during the early years of the twentieth century, but had never paid on these policies. These Armenian suits likewise were successful, reaching separate settlements totaling nearly $40 million.[4]

Spurred by these early successes, additional Armenian genocide-era lawsuits began to be filed. These suits focused on other financial wrongs committed during the mass murder of the Armenians in Ottoman Turkey. The California legislature, cognizant of the approximately 800,000 Armenians living in California,[5] signaled its interest in providing a forum for Armenian genocide-era claims by extending the limitations period on certain claims.[6] The later suits called for the return of bank deposits lost during the Armenian genocide. They also sought compensation for Armenian-owned land expropriated by Turkey and its state-owned entities during the genocide.[7] While each of these suits presented challenges—including prescription, forum non conveniens, federal preemption, political question, act of state, choice of law, and sovereign immunity defenses—it appeared that there were

2. *See* Bazyler, *Lamentation and Liturgy*, *supra* note 1, at 248-49; *see also America's Role in Addressing Outstanding Holocaust Issues: Hearing Before the House of Representative's Committee on Foreign Affairs, Subcommittee on Europe*, 110th Cong. 8 (2007) (statement of Hon. J. Christian Kennedy, Special Envoy for Holocaust Issues) [hereinafter Kennedy Hearing]; *see generally* MICHAEL MARRUS, SOME MEASURE OF JUSTICE: THE HOLOCAUST ERA RESTITUTION CAMPAIGN OF THE 1990s (2006).

3. *See Turkey Sued in California Over Armenian Genocide*, REUTERS, July 30, 2010, http://www.reuters.com/article/us-usa-turkey-genocide-idUSTRE66T5LH20100730.

4. *Id.*

5. California is home to the largest number of Armenians outside Armenia. *See* Deirmenjian v. Deutsche Bank A.G., No. CV 06-00774 MMM(CWx), 2006 WL 4749756, at *16 (C.D. Cal. Sept. 25, 2006).

6. *See* CAL. CIV. PROC. CODE §§ 354.4-354.45 (West 2006); *see also* Rajika L. Shah, *The Making of California's Art Recovery Statute: The Long Road to Section 338(c)(3)*, 20 CHAP. L. REV. 1 (2017).

7. *See generally Deirmenjian*, 2006 WL 4749756; Davoyan v. Republic of Turkey, 116 F. Supp. 3d 1084 (C.D. Cal. 2013) and Complaint in related case Bakalian v. Republic of Turkey, No. CV 10-09596 DMG (SSx) (C.D. Cal. Dec. 15, 2010).

likewise solid legal arguments available to plaintiffs to counter each such defense.[8]

As the contours of the legal landscape for Armenian genocide-era litigation began to be filled in by these later lawsuits, the results have not been positive for the Armenian claimants. Federal appellate courts, particularly the Ninth Circuit Court of Appeals, took a narrow, rather than expansive, view of whether and in what circumstances Armenian genocide cases should be allowed to proceed in American courts. Insurance litigation beyond New York Life and AXA was shut down on federal field preemption grounds. A California federal district court's dismissal of the bank deposit litigation against German banks doing business in Ottoman Turkey was affirmed on choice of law and statutes of limitations grounds.[9] As of this writing in early 2017, the Ninth Circuit has yet to issue its decision in the cases seeking compensation for real property takings in Turkey. In that litigation, another California federal district court rejected the Republic of Turkey's sovereign immunity defense, but nevertheless dismissed the lawsuits on political question grounds.[10]

Amidst these successive legal defeats, there appeared one legal victory. The West Coast branch of the Armenian Apostolic Church successfully beat back legal challenges and convinced a California state trial court in Los Angeles to allow a lawsuit filed against the world's wealthiest museum, the J. Paul Getty Museum, to proceed to trial. The suit involved several rare illuminated manuscript pages separated from the Zeyt'un Gospels, a book of gospels created in the Middle Ages, during the Armenian genocide.[11] The decoration was created by T'oros Roslin (circa 1210-1270), the most prominent Armenian manuscript illuminator in the High Middle Ages.[12] The illumi-

8. *See* Bazyler, *Lamentation and Liturgy, supra* note 1, at 255-301.

9. *See generally* Movsesian v. Victoria Versicherung AG, 670 F.3d 1067 (9th Cir. 2012) (holding the suit against a German insurance company brought by Armenian genocide victims alleging breach of contract, unjust enrichment, and constructive trust was preempted because the California statute intruded on the federal government's power); Deirmenjian v. Deutsche Bank AG, 548 F. App'x 461, 463 (9th Cir. 2013) (affirming the district court's dismissal).

10. *See* Davoyan v. Republic of Turkey, 116 F. Supp. 3d 1084 (C.D. Cal. 2013) and Minute Order in related case Bakalian v. Republic of Turkey, No. CV 10-09596 DMG (SSx) (C.D. Cal. Mar. 26, 2013) (holding that, although the expropriation exception to foreign sovereign immunity was met, the court lacked subject matter jurisdiction when plaintiffs brought suit against the Republic of Turkey for constructive trust, breach of statutory trust, and unjust enrichment for property taken during the Armenian genocide because the court could not resolve "such an inherently political question").

11. Complaint and Demand for Jury Trial at 1, Western Prelacy of the Armenian Apostolic Church v. J. Paul Getty Museum, No. BC438824 (Cal. Super. Ct. filed June 1, 2010).

12. *Id.*

nated pages, once separated, appeared to be lost. They resurfaced in the United States in the 1990s and were purchased in 1994 by the Getty from an American family of Armenian descent. As the case began moving towards trial, the Getty and the Church jointly announced a "Solomonic settlement." The Getty recognized that the illuminated pages were part of the Zeyt'un Gospels and legally belonged to the Church, and the Church in turn transferred the pages to the Getty for safekeeping and preservation. The settlement took place at an auspicious time, on the hundred-year anniversary of the beginning of the Armenian genocide in 1915.[13]

The Getty suit was modeled on the numerous and high-profile Nazi-looted art cases filed in American courts since the 1990s. These suits were filed against museums and private collectors worldwide found to have in their collections art stolen from the Jews of Europe during the Nazi era. The Getty suit was the first such suit arising from thievery of Armenian art and cultural objects during the Armenian genocide. This art likewise has found its way into collections of museums and private collectors. The successful resolution of the first Armenian genocide-looted art case opens the door for other such lawsuits.[14]

Section II of this article will examine the Holocaust restitution model and evaluate its success as a model for other victim groups. Section III will explore the legal landscape for Armenian genocide litigation as it exists today and examine what has changed in the past five years. Section IV will look at the successful settlement of the Getty art case. In the Conclusion, we discuss the outlook for the future of Armenian genocide restitution litigation.

II. THE HOLOCAUST RESTITUTION MODEL AS REFERENCE

A. What Does the Term "Armenian Genocide" Mean?

In all, between 1 million and 1.5 million Armenians died between 1915 and 1920 as a result of the forcible expulsion by Turkish authori-

13. Mike Boehm, *Getty, Armenian Church Settle*, L.A. TIMES, Sept. 22, 2015, at E6; Press Release, J. Paul Getty Museum, J. Paul Getty Museum and the Western Prelacy of the Armenian Apostolic Church of America Announce Agreement in Armenian Art Restitution Case (Sept. 21, 2015), http://news.getty.edu/images/9036/manuscript2015release.pdf [hereinafter Getty Press Release].

14. See MICHAEL J. BAZYLER, HOLOCAUST JUSTICE: THE BATTLE FOR RESTITUTION IN AMERICA'S COURTS 202-268 (2003) [hereinafter BAZYLER, HOLOCAUST JUSTICE], and MELISSA MÜLLER & MONIKA TATZKOW, LOST LIVES, LOST ART: JEWISH COLLECTORS, NAZI ART THEFT, AND THE QUEST FOR JUSTICE (2010), for a discussion of Nazi-looted art litigation in American courts.

ties of the entire Armenian population from eastern Anatolia into the deserts of Mesopotamia, a region now in modern-day Iraq, Kuwait, and Syria.[15] The expulsion was carried out through forced marches, where the expelled Armenian civilians died for lack of food, water, or shelter.[16] Many were also murdered by local Kurdish and Turkish populations that the Armenians encountered during the forced marches.[17] Village-by-village mass killings led to additional deaths.[18]

Was this genocide? There is no dispute that the Armenian minority in Ottoman Turkey was a distinct ethnic and religious group, and so would be a protected legal group under the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention), as adopted by the United Nations in 1948 and entered into force in 1951.[19] There is also little doubt that three *actus rea* of genocide, found in Article 2 of the Genocide Convention, were committed. With regard to subsection (a) "killing members of the group,"[20] it is unrefuted that a substantial number of Armenians, whether in the tens or hundreds of thousands or a million or more, were killed. With regard to subsection (b) "causing serious bodily or mental harm to members of the group,"[21] there is also no dispute that the same number of Armenians incurred serious bodily and mental harm. With regard to subsection (c) "deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part,"[22] the forced deportation of the Armenians ("conditions of life") inflicted conditions that brought about the physical destruction of a substantial part of the Armenian people.

In 1915, approximately 2.5 million Armenians were living in the Ottoman Empire.[23] By 1923, only about 200,000 Armenians re-

15. *See* CHRISTOPHER J. WALKER, *World War I and the Armenian Genocide*, *in* THE ARMENIAN PEOPLE FROM ANCIENT TO MODERN TIMES 239, 271 (Richard G. Hovannisian ed., 1997).

16. *See* RAYMOND KEVORKIAN, THE ARMENIAN GENOCIDE: A COMPLETE HISTORY 581 (2006).

17. *See id.* at 294.

18. *See* Norman M. Naimark, *Preface* to A QUESTION OF GENOCIDE: ARMENIANS AND TURKS AT THE END OF THE OTTOMAN EMPIRE, at xvii (Gôcek Naimark Suny et al. eds., 2011); *see also* KEVORKIAN, *supra* note 16.

19. Convention on the Prevention and Punishment of the Crime of Genocide, art. II, Dec. 9, 1948, 78 U.N.T.S. 277 [hereinafter Genocide Convention].

20. *Id.*

21. *Id.*

22. *Id.*

23. *See* JAMES BRYCE & ARNOLD TOYNBEE, THE TREATMENT OF ARMENIANS IN THE OTTOMAN EMPIRE 1915-1916, at 664 (1916).

mained.[24] In all, two-thirds of the Armenian population living in Ottoman Turkey in 1915 was gone by 1923, either deported or massacred by the Ottoman government.[25]

Did the Ottoman leaders also possess the necessary *mens rea*, "intent to destroy, in whole or in [substantial] part," the Ottoman Armenians by committing acts (a), (b), and (c)? Prominent British human rights barrister Geoffrey Robertson deftly summarized in 2009 the circumstantial evidence of genocidal intent on the part of the Ottoman Turkish rulers who initiated the expulsions and killings:

> [The Ottoman rulers] were well aware, throughout the time when the deportations were underway, that they had turned into death marches. The Armenians were dying in their tens of thousands, and those who put them in these conditions did nothing to extract them or bring the conditions to an end by, for example, protecting the deportees or punishing those who attacked them. There is ample evidence that the CUP [Committee of Union and Progress, the Young Turks who wrestled rule from the Ottoman sultan] leadership knew of these massacres. The US ambassador, Henry Morgenthau, says he complained several times to Interior Minister Talaat Pasha about his government's "extermination" policy, and quotes Talaat as replying: "*We have already disposed of three quarters of the Armenians; there are none left in Bitlis, Van and Erzenum. The hatred between the Turks and the Armenians is now so intense that we have got to finish with them. If we don't, they will plan their revenge.*" In a modern war crimes trial, the ambassador's testimony would be relied on as evidence of an admission by Talaat to the knowledge (*mens rea*) sufficient for guilt of genocide, under the command responsibility principle.[26]

24. *See* DONALD E. MILLER & LORNA TOURYAN MILLER, SURVIVORS: AN ORAL HISTORY OF THE ARMENIAN GENOCIDE 44 (1999).

25. *See* 1 KAI AMBOS, TREATISE ON INTERNATIONAL CRIMINAL LAW: FOUNDATIONS AND GENERAL PART, at 4 (2013). The term "deportation" does not fairly describe what the Armenians were forced to endure. As genocide scholar William Schabas explains:

> The treatment of the Armenians by the Turkish rulers in 1915 provides the paradigm for the provision [of subsection (c)] dealing with imposition of conditions of life. These crimes have often been described as 'deportations'. But they went far beyond mere expulsions or transfer, because the deportation itself involved deprivation of fundamental human needs with the result that large numbers died of disease, malnutrition and exhaustion.

WILLIAM SCHABAS, GENOCIDE IN INTERNATIONAL LAW: THE CRIME OF CRIMES 192–93 (2nd ed. 2009).

26. Geoffrey Robertson, *Was There an Armenian Genocide?,* 4 U. OF ST. THOMAS J. OF L. & PUB. POL'Y 83, 94 (2010) (quoting HENRY MORGENTHAU, AMBASSADOR MORGENTHAU'S STORY 232 (1918)).

To buttress their claim, the Armenians and their supporters point to the links between the Holocaust and the Armenian genocide.[27] The Armenians and their supporters also marshal two additional pieces of evidence: (1) the reported utterance by Hitler in August 1939 to his generals in explaining that they would all enjoy impunity from prosecution for the naked attack on Poland, since "[w]ho, after all, speaks today of the annihilation of the Armenians?"[28] and (2) Raphael Lemkin apparently not only had the contemporaneous murder of the Jews in mind, but also the earlier murder of the Armenians when coining the term "genocide."[29]

Turkey steadfastly refuses to recognize the massacres of the Armenians as a genocide.[30] At most, the official position of the Republic of Turkey is to label the events as the "so-called Armenian genocide," but this is a disrespectful use of the word and hardly its recognition.[31] According to Turkey, the forced dislocation was "a war-related dislocation and security measure" that led to unfortunate deaths.[32] Under the Turkish narrative, aspirations of Armenian nationalists for independence in the waning days of the Ottoman Empire made the Armenian minority a security risk. Because the Armenians took up arms against the Ottoman government, they were relocated due to their political aims, and not their ethnicity or religion.[33] But according to British historian Donald Bloxham, "nowhere else during the First World War was the separatist nationalism of the few answered with the total destruction of the wider ethnic community from

27. K.B. BARDAKJIAN, HITLER AND THE ARMENIAN GENOCIDE 1-2 (1985).

28. *See id.* (discussing this statement and specifically noting Hitler's quote, saying, "Who still talks nowadays of the extermination of the Armenians?").

29. *See* RAPHAEL LEMKIN'S DOSSIER ON THE ARMENIAN GENOCIDE (manuscript from Raphael Lemkin's Manuscript Collection, American Jewish Historical Society) (Vartkes Yeghiayan ed., 2008) for Lemkin's writings on the massacres of the Armenians.

30. *See, e.g., The Events of 1915 and the Turkish-Armenian Controversy over History: An Overview*, REPUBLIC OF TURKEY MINISTRY OF FOREIGN AFF., http://www.mfa.gov.tr/the-events-of-1915-and-the-turkish-armenian-controversy-over-history_-an-overview.en.mfa (last visited Oct. 22, 2016).

31. *See, e.g., The Draft Law on the So-Called Armenian Genocide in the French Parliament*, REPUBLIC OF TURKEY MINISTRY OF FOREIGN AFF., http://www.mfa.gov.tr/the-draft-law-on-the-so-called-armenian-genocide-in-the-french-parliament-_br__unofficial-translation__br_no_20—_february-24_-2000.en.mfa (last visited Oct. 22, 2016).

32. According to Turkey's Ministry of Foreign Affairs website, the Armenian deaths were due to the effects of "inter-communal conflict" and a world war when 2.5 million Muslims also perished. *See The Armenian Allegation of Genocide: The Issue and the Facts*, REPUBLIC OF TURKEY MINISTRY OF FOREIGN AFF., http://www.mfa.gov.tr/the-armenian-allegation-of-genocide-the-issue-and-the-facts.en.mfa (last visited Nov. 23, 2016).

33. *Id.*

which the nationalists hailed."[34] Turkey also claims that not all Armenians were targeted for deportation, with much of the Armenian population in Istanbul untouched by the events, that the usually cited figure of 1.5 million deaths is an exaggeration, and that a comparable number of Turks also perished during the same period.[35]

In 2014, on the ninety-ninth anniversary of the Armenian genocide, some movement toward recognition was made when Turkish President Recep Tayyip Erdoğan offered condolences to the victims and their descendants and spoke of the "inhuman consequences" of the Armenians' expulsion. However, he did not speak of genocide.[36] Nevertheless, this was the first time that any Turkish head of state, or for that matter any high-ranking Turkish government official, acknowledged the suffering of the Armenians on one of the most sacred days for the Armenian people. In 2015, on the centenary of the massacres, Turkish Prime Minister Ahmet Davutoğlu issued an even stronger statement of condolence: "We once again respectfully remember Ottoman Armenians who lost their lives during the deportation of 1915 and share the pain of their children and grandchildren."[37]

It is beyond the scope of this article to analyze the denialist history of Turkey and the reaction of the international human rights community and reputable historians and their refutation of such denialism. However, we observe that the debate has become too centered on the word itself rather than the issue at hand: obtaining for the Armenians a long-overdue acknowledgment and apology from Turkey for the sufferings of their ancestors. As Thomas DeWaal observes: "For most Armenians, it seems that no other label could possibly describe the suffering of their people. For the Turkish government, almost any other word would be acceptable."[38] With regard to the

34. DONALD BLOXHAM, THE GREAT GAME OF GENOCIDE 92 (2007). For another well-researched study, see RONALD GRIGOR SUNY, "THEY CAN LIVE IN THE DESERT BUT NOWHERE ELSE": A HISTORY OF THE ARMENIAN GENOCIDE (2015). The title comes from a pronouncement made by Talaat Pasha, Ottoman Minister of Interior, considered the primary architect of the Armenian genocide. The book of notes from Talaat's private papers documenting the actions against the Armenians is now available in English. *See* ARA SARAFIAN, TALAAT PASHA'S REPORT ON THE ARMENIAN GENOCIDE 1917 (2011), http://www.gomidas.org/uploads/Talaat%20Pashas%20Report%20on%20the%20Armenian%20Genocide.pdf.

35. *See* REPUBLIC OF TURKEY MINISTRY OF FOREIGN AFF., *supra* note 32.

36. *See* YÜCEL GÜÇLÜ, HISTORICAL ARCHIVES AND THE HISTORIANS' COMMISSION TO INVESTIGATE THE ARMENIAN EVENTS OF 1915, at 293-95 (2015).

37. Carol J. Williams, *The Genocide Controversy*, L.A. TIMES, Apr. 22, 2015, at A4.

38. See Thomas de Waal, *The G-Word: The Armenian Massacre and the Politics of Genocide*, 94 FOREIGN AFF. 137 (2015), and THOMAS DE WAAL, THE GREAT CATASTROPHE (2015), for an excellent discussion of the century-old dispute between the Armenians and Turkey regarding what happened to the Ottoman Armenians.

Armenian genocide, it appears therefore that the use of the G-word stands today as an obstacle to reconciliation—even though the genocide designation for the atrocities committed against the Armenians is proper.

B. Why Does Property Restitution Matter?

Victims of genocide and other mass atrocities properly have personal claims under both international law and domestic law for their own personal injuries and for the loss of the lives of their loved ones.[39] They also have claims for unjust enrichment for property losses based on the value of the benefit received by the defendant perpetrators at the victim plaintiff's' expense.[40] These restitution claims include demands for the return of personal and real property, and represent an important component of lawsuits filed by plaintiffs alleging to have suffered genocide or other mass atrocities.[41]

Such claims exist against both state and non-state actors. The claims may be directed at: (1) those who directly perpetrated the genocide or another mass atrocity; (2) those who aided and abetted or facilitated the genocide or atrocity in some way; and (3) those who took no direct or indirect participation in the genocide or atrocity but nevertheless benefited from it by virtue of having received, purchased, or come into possession of property taken during the genocide or atrocity. Taking of the victim group's property is not merely incidental to, or a byproduct of, the genocide or the atrocity; rather, the property takings themselves constitute genocide, war crimes, and crimes against humanity.[42]

An important case from the U.S. Court of Appeals for the District of Columbia issued in 2016 illustrates well this point by holding that property takings themselves—apart from any murders—constitute a form of genocide. In *Simon v. Hungary*,[43] fourteen elderly Holocaust survivors originally from Hungary sued the Republic of Hungary and its state-owned Hungarian railway for having collaborated with the German Nazis in 1944-1945, during the waning months of the Second World War, to perpetuate the deportation and extermi-

39. *See, e.g.,* Genocide Convention, *supra* note 19; Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, G.A. Res. 60/147, U.N. Doc. A/RES/60/147 (Mar. 21, 2006).

40. *See generally* Simon v. Republic of Hungary, 812 F.3d 127 (D.C. Cir. 2016).

41. *Id.*

42. *See* Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90.

43. *Simon*, 812 F.3d at 127.

nation of nearly half a million Hungarian Jews.[44] The plaintiffs alleged a three-step governmental policy designed to inflict maximum destruction, carried out in the space of just three months.[45] First, Hungarian Jews were targeted in a persecution campaign that included travel and certain clothing bans, bans from eating in restaurants or using public pools, and the requirement that every Jew wear the yellow Star of David.[46] Second, Jews were forced into cramped, unsanitary ghettos and their clothing removed.[47] All of their property was systematically inventoried and confiscated by Hungarian officials going door-to-door.[48] Third and finally, Jews were rounded up and marched to the railways, all their remaining belongings confiscated, and they were transported to Nazi death camps (primarily Auschwitz-Birkenau in German-occupied Poland) under the direction of Nazi mastermind Adolf Eichmann, where they were virtually all murdered upon arrival.[49] As this description makes clear, widespread property confiscation was not merely incidental to the extermination of Hungarian Jews, it was part and parcel of the integrated plan to destroy the group, its way of life, and its culture.[50] The *Simon* plaintiffs brought causes of action for property loss, including conversion and unjust enrichment, as well as personal injury and international law claims.[51]

Because the plaintiffs sued Hungary and a Hungarian state agency, jurisdiction over the defendants was governed exclusively by the Foreign Sovereign Immunities Act (FSIA).[52] Unless one of the enumerated exceptions was met, the general rule applied and the foreign sovereign and the state railway would be immune from suit in U.S. courts.[53] The relevant exception, commonly known as the "takings" or "expropriation exception," holds that a foreign sovereign and its related entities are not immune from suit in U.S. courts if "[1] rights in property [2] taken in violation of international law are in issue and [3] that property or any property exchanged for such property

44. *Id.* at 132.

45. *Id.* at 133.

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.* at 133-34.

50. *Id.* at 142.

51. *Id.* at 134.

52. Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 433-34 (1989) (holding FSIA is "the sole basis for obtaining jurisdiction over a foreign state in our courts").

53. *See* 28 U.S.C. § 1604 (2012).

is present in the United States" in connection with [specified commercial activity with a U.S. nexus].[54]

The property-related claims for conversion and unjust enrichment satisfied the first element of the exception, and the state-owned railway did not dispute that it engaged in the requisite U.S.-based commercial activity.[55] Thus, the key issue in *Simon* was whether plaintiffs' property had been "taken in violation of international law."

Because there was no dispute that genocide itself violated international law, the court began its analysis by determining whether the alleged property takings "[bore] a sufficient connection to genocide that they amount to takings in violation of international law."[56] The court's starting point was the definition of genocide, as found in international law and incorporated into U.S. domestic law.[57]

The Genocide Convention set forth for the first time a legal definition of genocide and criminalized genocidal activity, whether committed in peacetime or during war. Article 2 of the Convention defines genocide as:

> [A]ny of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
>
> (a) Killing members of the group;
>
> (b) Causing serious bodily or mental harm to members of the group;
>
> (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
>
> (d) Imposing measures intended to prevent births within the group;
>
> (e) Forcibly transferring children of the group to another group.[58]

As the D.C. Circuit saw it, "the pivotal acts constituting genocide" that occurred in *Simon* "are those set out in subsection (c) of the definition."[59] In other words, the property takings alleged by plaintiffs were intended to "deliberately inflict[ ] on the group conditions of life calculated to bring about its physical destruction in whole or in part," which was the very reason such language was included in the defini-

54. 28 U.S.C. § 1605(a)(3) (2012).

55. *Simon*, 812 F.3d at 147.

56. *Id.* at 142.

57. *Id.* at 143.

58. Genocide Convention, art. II, *supra* note 19.

59. *Simon*, 812 F.3d at 143.

tion of genocide.[60] The court's view on this point was unambiguous: the property taken from Hungary's Jews did more than "finance Hungary's war effort" and was not merely incident to the ghettoization of the Hungarian Jews.[61] Rather, the "systematic, wholesale plunder of Jewish property" by Hungarian and German authorities was intended to deprive them of the resources they needed to survive as a people—the property was taken for the very purpose of ensuring the destruction of Hungary's Jews.[62] As a result, the international law violation required to establish the court's jurisdiction was not the uncompensated expropriations themselves, but rather genocide.[63]

This conclusion comports with victims' sense of why property takings are at the core of genocidal activity and places property claims at the heart of any effort to restore victims to wholeness. In agreeing with the plaintiffs, the *Simon* court confirmed and further articulated the conclusion reached by the Seventh Circuit four years earlier in another case involving the theft of property of Hungarian Jews during the Second World War. In *Abelesz v. Magyar Nemzeti Bank*, the appellate court explained that acts of thievery such as "the freezing of bank accounts, the [establishment of] straw-man control of corporations, the looting of safe deposit boxes and suitcases brought . . . to the train stations, and even charging third-class train fares to victims being sent to death camps" is both a "ghoulishly efficient" means of financing the rounding up and deportation or incarceration of the targeted group, and an "integral part" of the genocide itself.[64]

C. The Holocaust Restitution Model

Following the Second World War and murder of six million European Jews (the event known as the Holocaust, or *Shoah* in Hebrew), the world Jewish community (led by groups in the United States such as the World Jewish Congress) made restitution of property stolen by the Germans and other perpetrator groups a priority.[65] If the six million could not be brought back, at least the possessions of those murdered could be returned to the Jewish community.[66] Holocaust restitution efforts continued for the next seventy years, and included

60. *Id.*
61. *Id.*
62. *Id.*
63. *Id.* at 142.
64. Abelesz v. Magyar Nemzeti Bank, 692 F.3d 661, 675 (7th Cir. 2012).
65. *See* MARRUS, *supra* note 2, at 65.
66. *Foreword* to *id.* at ix.

restitution for both Jews and other victim groups.[67] The efforts to obtain what has been called "some measure of justice"[68] through restitution following the Holocaust still continue today.[69] The Holocaust "Some Measure of Justice" (HSMJ) movement can be divided into three separate periods, each of which faced its own set of challenges. Each period also provides important lessons for other victim groups, including those seeking a "measure of justice" through restitution for the Armenian genocide.

The HSMJ movement began immediately following the war. During this first period, the Allied countries focused on recovering and returning assets stolen by the Nazis throughout Europe, including but not limited to Jewish property.[70] Although this period saw the Allies enacting multiple laws governing seizure of assets owned or controlled by the Nazis and blocking the transfer of such assets, such efforts were only partially successful.[71] Many seized assets were later returned to their unlawful German owners, and the low financial penalties imposed on Nazis prosecuted for wartime criminal activity meant that there was little left to be passed on to victims.[72] Perhaps most devastating, private property in Soviet-occupied Germany and other Eastern bloc states was nationalized within a few years after the war and became the property of the new communist states, thus erecting a second barrier to restitution.[73]

The second period of HSMJ began in 1949, when sovereignty was restored to Germany after the Allied occupation. The major event in this period was a 1952 bilateral treaty between Germany and Israel known as the Luxembourg Agreement, following the location where the treaty negotiations took place. Under the Luxembourg Agreement, West Germany (but not East Germany), formally known as the Federal Republic of Germany (FRG), agreed to make payments to the new state of Israel over the following decade.[74] The treaty also

67. *See* Carol Kino, *Stolen Artworks and the Lawyers Who Reclaim Them*, N.Y. TIMES, Mar. 28, 2007, at H28.

68. *See* MARRUS, *supra* note 2.

69. *See id.* at xiv, 5.

70. *Id.* at 67.

71. *See* Monroe Karasik, *Problems of Compensation and Restitution in Germany and Austria*, 16 LAW & CONTEMP. PROBS. 457, 457-60 (1951).

72. *See* Seymour J. Rubin & Abba P. Schwartz, *Refugees and Reparations*, 16 LAW & CONTEMP. PROBS. 377, 379 (1951) (stating that the amount allotted is "pitifully small" given the large number of persons who need to be compensated).

73. *See* MARRUS, *supra* note 2, at 68-69.

74. Agreement between the State of Israel and the Federal Republic of Germany, art. III, Sept. 10, 1952, 162 U.N.T.S. 205.

included a provision for lifetime payments to individual Holocaust survivors living in the West (Jewish survivors living behind the Iron Curtain were not covered) for the duration of their lives.[75] The Luxembourg Agreement was revolutionary. For the first time in history, a nation complicit in the mass murder of a victim group and concomitant mass theft agreed to pay reparations to individuals in the victim group *and* to the state that represented the victim group: Israel, the nation state of the Jewish people.[76] The prime mover in West Germany for this unique form of state-to-state reparations and individual victim restitution was Konrad Adenauer, the first prime minister (called chancellor) of the postwar FRG.[77] Adenauer had to overcome significant domestic resistance to his plan by the German people and German politicians from his own party, the Christian Democrats.[78] The German parliament eventually approved the treaty, with most of the votes coming from opposing Social Democrats.[79] Many Israeli politicians (including future prime minister Menachem Begin) and a large segment of the Israeli public were also highly conflicted at the prospect of taking "blood money" from Germany, particularly to compensate for what many survivors viewed as essentially a moral wrong.[80] Massive street demonstrations took place in Tel Aviv and Jerusalem, with David Ben-Gurion, Israel's first prime minister, vilified for negotiating with the nation representing what until recently was the greatest enemy of the Jewish people, seeking its complete destruction.[81]

In the end, practicalities won out. West Germany was eager to rejoin the family of nations, and voluntarily paying reparations and individual restitutions was seen as an important symbolic act in that regard. The new state of Israel badly needed economic assistance, and so the initial payments in the form of German goods significantly boosted the Israeli economy.[82] Israel also had (and still has) the largest population of Holocaust survivors, many of whom badly needed economic assistance.[83] The surviving European Jews now living in

75. *Id.*
76. *See* MARRUS, *supra* note 2, at 72.
77. *See id.* at 70.
78. *See id.* at 72.
79. *See id.* at 73.
80. *See id.* at 72.
81. *See id.* at 73.
82. *See id.*
83. *Id.*

Israel often came to their new homeland with nothing more than the clothes on their backs.[84]

German payments to individual survivors still continue, but since the fall of the Berlin Wall, payments expanded to those living in the Communist east.[85] Since 1952, Germany has paid out more than $70 billion in individual payments, varying from lump-sum payments ranging from a few thousand euros to the equivalent of an annual salary, to monthly compensation payments lasting over decades.[86]

The third period of HSMJ began in the 1990s and was focused on litigation in U.S. courts. Its purpose was to tackle the "unfinished business" of the Holocaust by seeking to hold accountable private actors and state agencies for the benefits they received as a result of Nazi persecution of both Jews and non-Jews.[87] This included: restitution of unreturned bank deposits, the largest portion from Swiss banks; payments arising from insurance policies taken out by Jews from European insurance companies and never paid; and compensation made by German multinational corporations and the German state to still-living individuals who labored as slaves for these companies during the war.[88] The largest category of recipients of slave labor payments were non-Jewish nationals of Eastern European countries who were dragooned into unwillingly working for German industry.[89] The individual one-time payments were small: $7,500 to those, mostly Jews, that survived the Nazi "death-through-labor" regime and $2,500 for the non-Jews of Slavic origin that worked as forced laborers in the German Reich.[90]

A number of factors combined to make these suits appear viable only in United States courts, including the recognition of jurisdiction over foreign corporate defendants that do business in the United States, even over claims that occurred abroad; the ability of lawyers to

84. *See* TOM SEGEV, THE SEVENTH MILLION: THE ISRAELIS AND THE HOLOCAUST 173 (1993).

85. *See* MARRUS, *supra* note 2, at 75.

86. CONFERENCE ON JEWISH MATERIAL CLAIMS AGAINST GERMANY ANNUAL REPORT 21 (2012), http://forms.claimscon.org/ar/2012-CC-AR-web2.pdf.

87. *See, e.g.,* STUART E. EIZENSTAT, IMPERFECT JUSTICE: LOOTED ASSETS, SLAVE LABOR, AND THE UNFINISHED BUSINESS OF WORLD WAR II (2003); JOHN AUTHERS & RICHARD WOLFFE, THE VICTIM'S FORTUNE (2002); HOLOCAUST RESTITUTION: PERSPECTIVES ON THE LITIGATION AND ITS LEGACY 50 (MICHAEL BAZYLER & ROGER P. ALFORD eds., 2006); MARRUS, *supra* note 2, at 20-21.

88. *See* EIZENSTAT, *supra* note 87, at xiii; BAZYLER, HOLOCAUST JUSTICE, *supra* note 14, at 323.

89. *See* MARRUS, *supra* note 2, at 21.

90. *Id.*

take cases on a contingency basis, thereby giving Holocaust claimants top-notch legal representation when filing suits against European and American corporate giants; and a legal culture in which lawyers are willing to take high-risk cases with a low probability of success, in order to test the limits of the law.[91] Equally important to the positive outcome of the modern push for Holocaust restitution were the commitment and willingness of American public officials to shine a spotlight on the mass theft of Jewish property and broker settlement agreements, the effective advocacy of U.S.-based Jewish community organizations, and American media interest in Nazi reparations.[92] These remarkable efforts led to compensation totaling more than $8 billion in individual and community-based payments, with significant European and American government cooperation.[93] However, the success of HSMJ-3 should not be overstated. None of the lawsuits, most filed as class actions, ever reached trial and many were dismissed outright on technical grounds: statute of limitations, political question, lack of subject matter jurisdiction, and forum non conveniens.[94] As discussed later, the defendants sued for restitution arising out of the Armenian genocide would rely on the same defenses, usually with success.

While the lawsuits became the "loud knock on the door" of the defendants to recognize these long-dormant and forgotten claims, the eventual settlements took place outside the courtroom.[95] Germany and its corporations realized that, even if they succeeded in getting a particular lawsuit dismissed, they still faced a political and public relations problem that would not simply go away.[96] Victims' advocates were able to exert settlement pressure on them by reminding the American public that the German products they were buying—

91. BAZYLER, HOLOCAUST, GENOCIDE, AND THE LAW, *supra* note 1, at 161.

92. *See In re* Holocaust Victim Assets Litigation, 105 F. Supp. 2d 139, 147-48 (E.D.N.Y. 2000); Bazyler, *Lamentation and Liturgy*, *supra* note 1, at 286-88, 295-96; Ronald W. Zweig, *Holocaust Restitution, Reparation, and Indemnification*, YIVO ENCYCLOPEDIA OF JEWS IN E. EUR., http://www.yivoencyclopedia.org/article.aspx/Holocaust/Restitution_Reparation_and_Indemnification (last visited Dec. 2, 2016).

93. Kennedy Hearing, *supra* note 2.

94. *See In re* Holocaust Victim Assets Litigation, 105 F. Supp. 2d at 140-42; *see, e.g.,* Simon v. Republic of Hungary, 812 F.3d 127, 132 (D.C. Cir. 2016) (holding that federal courts do not have jurisdiction over claims for personal injury or death against a foreign sovereign).

95. *See In re* Nazi Era Cases Against German Defs. Litig., 198 F.R.D. 429, 430-32 (D.N.J. 2000) (discussing the lengthy negotiations between the numerous class action complaints filed in the United States against the German government which culminated in the creation of a foundation to make payments to victims of slave and forced labor).

96. *See* Sean D. Murphy, *Implementation of German Holocaust Claims Agreement,* 97 AM. J. INT'L L. 692, 693-94 (2003).

whether cars, computers, aspirin, or insurance—were from the same companies that were implicated in some of the most horrific crimes committed in human history.[97] Moreover, the lawsuits spurred many companies—both European and American—to review their archives and official histories in light of allegations of Nazi complicity, and in some cases even issue apologies.[98]

D. How Have Other Restitution Movements Fared in U.S. Courts?

The success of the Holocaust restitution litigation came at a time when a wide range of other victim groups was also attempting to achieve redress through lawsuits in U.S. courts, hoping for similar results. These included: (1) suits against Germany and German companies for their role in the Herero genocide in southwestern Africa (sometimes called the "first" genocide of the twentieth century);[99] (2) suits against Japan and Japanese industry arising out of the Second World War for slave labor;[100] (3) suits against multinationals arising out of their business activities in apartheid South Africa;[101] and, most prominently, (4) claims by African-Americans for reparations against the U.S. government and American companies involved in slavery arising from the American slave era.[102] None were able to duplicate the financial settlements reached during the HSMJ-3 campaign.

The Herero people in Southwest Africa (present-day Namibia) were enslaved by imperial Germany beginning in 1904 when Germany colonized the region.[103] After the Herero tribe revolted,[104] the Ger-

97. S. Jonathon Wiesen, *German Industry and the Third Reich: Fifty Years of Forgetting and Remembering*, DIMENSIONS J. OF HOLOCAUST STUD., http://archive.adl.org/braun/dim_13_2_forgetting.html#.VyznPfkrKM8 (last visited Nov. 3, 2016).

98. Maia de la Baume, *Survivors of Holocaust Hear Apology in France*, N.Y. TIMES, Jan. 26, 2011, at A6; *Hugo Boss Apology for Nazi Past a Book Is Published*, BBC (Sept. 21, 2011), http://www.bbc.com/news/world-europe-15008682; Murphy, *supra* note 96, at 682; Laurie C., *Bayer Sorry for Nazi Role*, N.Y. DAILY NEWS (Dec. 21, 1995), http://www.nydailynews.com/archives/news/bayer-nazi-role-article-1.701925.

99. *See* Herero People's Reparations Corp. v. Deutsche Bank, A.G., 370 F.3d 1192, 1193 (D.C. Cir. 2004); *see also* Hereros ex rel. Riruako v. Deutsche Afrika-Linien Gmblt & Co., 232 F. App'x. 90, 93 (3d Cir. 2007).

100. *See In re* World War II Era Japanese Forced Labor Litigation, 114 F. Supp. 2d 939, 940 (N.D. Cal. 2000).

101. *See* Balintulo v. Ford Motor Co., 796 F.3d 160 (2d Cir. 2015); *see also* Balintulo v. Daimler A.G., 727 F.3d 174, 175 (2d Cir. 2013); Khulumani v. Barclay Nat'l Bank Ltd., 504 F.3d 254, 255-256 (2d Cir. 2007).

102. *See In re* African-American Slave Descendants Litigation, 471 F.3d 754 (7th Cir. 2006).

103. *See* Herero People's Reparations Corp., 370 F.3d at 1193; *see also* Hereros ex rel. Riruako, 232 F. App'x at *93.

104. The smaller neighboring Nama tribe also revolted, and German soldiers massacred the Nama like the Herero.

man military killed approximately 100,000 and sent others to concentration camps where they were put to work as slave labor.[105] Many Herero were also beheaded, and their skulls sent to Germany for scientific research.[106] The mass killings of the Herero group certainly fall within the meaning of genocide under Article 2 of the Genocide Convention, and the *mens rea* is shown by a "smoking gun" document written by the commander of the German forces, Lotha von Trotha, who wrote: "I believe that the nation as such should be annihilated, or, if this is not possible by tactical measures, expelled from the country."[107]

In July 2016, Germany apologized to the Herero and admitted that the massacres constituted a genocide, but only after the Herero filed suits in American courts against German companies alleged to have profited from the genocide.[108] In 2004 and 2007, respectively, the suits were dismissed on the basis of lack of subject matter jurisdiction and statute of limitations.[109]

A more viable set of suits that followed the Holocaust restitution litigation model were those filed by American and other Allied soldiers who had been made to work as slave laborers for Japanese companies during the Second World War while being held as prisoners of war.[110] Akin to these suits, were suits filed by nationals of China and Korea who had been abused during the Japanese occupation of these states.[111] These suits likewise did not succeed, even though California sought to make the suits more viable by passing a statute giving California courts jurisdiction over such suits and extending the limitations period.[112] Federal courts held that the 1951 Peace Treaty between Japan and its wartime enemies barred litigation against the

105. Hereros ex rel. Riruako, 232 F. App'x at *90-*93; Jeremy Sarkin, *The Coming Age of Claims for Reparations for Human Rights Abuses Committed in the South*, 1 SUR J. INT'L HUM. RTS. 67, 89 (2004).

106. Justin Huggler, *Germany to Recognise Herero Genocide and Apologise to Namibia*, TELEGRAPH (July 14, 2016), http://www.telegraph.co.uk/news/2016/07/14/germany-to-recognise-herero-genocide-and-apologise-to-namibia.

107. *Id*.

108. *Id*.

109. *Herero People's Reparations Corp*., 370 F.3d at 1192; *Hereros ex rel. Riruako*, 232 F. App'x at *90.

110. *See* Deutsch v. Turner Corp., 324 F.3d 692 (9th Cir. 2003); Mitsubishi Materials Corp. v. Superior Court, 113 Cal. App. 4th 159 (2003).

111. *See In re* World War II Era Japanese Forced Labor Litigation 164 F. Supp. 2d 1160 (N.D. Cal. 2001).

112. *Deutsch*, 324 F.3d at 706; *see also In re* World War II Era Japanese Forced Labor Litigation, 164 F. Supp. 2d 1160 (N.D. Cal. 2001).

Japanese.[113] As for the California law, the Ninth Circuit declared the state statute unconstitutional on the ground that it unduly interfered with the foreign policy of the United States, which the federal government has exclusive power to conduct.[114] For the Holocaust restitution suits, the German companies that succeeded in having the suits dismissed continued to negotiate with the claimants to achieve a political resolution.[115] Japanese corporations that were sued because they committed atrocities by using slave labor, however, declined to engage in any further settlement discussions with the victims.[116]

The South African apartheid cases also ended in dismissal in 2015, after several years and multiple appeals.[117] There, the lapse of time between the actual events and the claims was not the issue, nor any alleged interference with U.S. foreign relations, but rather whether sufficient wrongdoing occurred in the United States so as to justify jurisdiction over the matter by a U.S. court.[118] Although the corporate defendants included Ford Motor Co. and IBM (as well as, originally, UBS, Credit Suisse, Deutsche Bank, Dresdner Bank, and Commerz Bank, all of whom were dismissed in earlier stages of the litigation), the court ultimately held that having knowledge of serious international law violations being committed was insufficient to establish the requisite *mens rea* required to show aiding and abetting liability, which required some purposeful activity directed towards facilitation of the crime.[119]

113. *In re* World War II Era Japanese Forced Labor Litigation, 114 F. Supp. 2d 939, 940 (N.D. Cal. 2000) (citing Article 14(b) of the Treaty of Peace with Japan, Sept. 8, 1951, 3 U.S.T. 3169, 136 U.N.T.S. 45, which states: "Except as otherwise provided in the present Treaty, the Allied Powers waive all reparations claims of the Allied Powers, other claims of the Allied Powers and their nationals arising out of any actions taken by Japan and its nationals in the course of the prosecution of the war, and claims of the Allied Powers for direct military costs of occupation.").

114. *Deutsch*, 324 F.3d at 706, 716.

115. *See* Madeline Doms, *Compensation for Survivors of Slave and Forced Labor: The Swiss Bank Settlement and the German Foundation Provide Options for Recovery for Holocaust Survivors,* 14 TRANSNAT'L LAW. 171, 174-75 (2001) (stating that the German government has paid more than $60 billion in reparations to Holocaust survivors).

116. *Deutsch*, 324 F.3d at 692; John Haberstroh, *In re World War II Era Japanese Forced Labor Litigation and Obstacles to International Human Rights Claims in U.S. Courts*, 10 ASIAN L. J. 253, 255-56 (2003).

117. *See* Balintulo v. Ford Motor Co., 796 F.3d 160 (2d Cir. 2015).

118. *See id*. at 163. The claims had been brought by South African citizens pursuant to the Alien Tort Statute, 28 U.S.C. § 1350, which provides for jurisdiction in U.S. courts over claims brought by aliens for torts only in violation of the law of nations (international law). Plaintiffs in the South African apartheid cases had brought claims for, inter alia, racial discrimination, torture, unlawful killings, and other human rights abuses. *Id.* at 167-70.

119. *See id.*

The success of the Holocaust reparations litigation sparked renewed calls for reparations arising out of America's own history of African-American slavery.[120] Litigation began in the early 2000s against insurance companies, railroads, and other companies which allegedly benefited from slave labor.[121] Again, statutes of limitations problems and the challenges posed by having to determine—150 years after slavery was officially abolished in the United States in 1865—who had standing to make a claim eventually resulted in dismissal of the cases.[122]

One major difference between the settlements achieved by Holocaust victims and the failure to obtain redress by these other disparate groups of victims is reflected in the difference in approach and attitude of the defendants: while Germany and German companies expressed remorse for the Holocaust and sought to move past that difficult chapter in their history by laying the outstanding claims to rest, it seems that different political considerations and pressures are at play in these other situations (although Mitsubishi Materials has, in the past two years, taken steps to apologize for its wartime activities and make symbolic reparations payments to certain Chinese wartime laborers).

In addition, the length of time that had passed between the events at issue and the claimant litigation was a major contributing factor. In the Holocaust, Japanese, and apartheid cases, for instance, many of the actual victims or their immediate heirs were still alive to make a claim.[123] That was simply not the case with the Herero and African-American reparations cases, which attempted to obtain compensation for events that had occurred in the more distant past.[124]

In 2011, Michael Thad Allen declared that "the Holocaust-era cases of the late 1990s have had few progeny. Despite their spectacu-

120. *See In re* African-American Slave Descendants Litigation, 471 F.3d 754 (7th Cir. 2006); *see also* Tamar Lewin, *Calls For Slavery Restitution Getting Louder*, N.Y. TIMES, June 4, 2001, at A15.

121. *See In re* African-American Slave Descendants Litigation, 231 F. Supp. 2d 1357 (J.P.M.L. 2002).

122. *In re* African-American Slave Descendants Litigation, 471 F.3d at 754.

123. *See generally In re* Holocaust Victim Assets Litigation, 105 F. Supp. 2d 139, 147 (E.D.N.Y. 2000); Deutsch v. Turner Corp., 324 F.3d 692 (9th Cir. 2003); Balintulo v. Ford Motor Co., 796 F.3d 160 (2d Cir. 2015).

124. *See In re* African-American Slave Descendants Litigation, 471 F.3d at 754; Herero People's Reparations Corp. v. Deutsche Bank, A.G., 370 F.3d 1192, 1193 (D.C. Cir. 2004); *see also* Hereros ex rel. Riruako v. Deutsche Afrika-Linien Gmblt & Co., 232 F. App'x. 90, 93 (3d Cir. 2007).

lar settlements, they are a legal cul-de-sac."[125] As of this writing in early 2017, he appears to have been right, though restitution litigation over Holocaust-era thievery continued during the Obama presidency. What lies in store during the Trump presidency is unknown.

III. Armenian Genocide Restitution Efforts to Date

HSMJ-3, the third phase of modern Holocaust restitution, corresponds to the recent efforts by Armenians to obtain some measure of redress for what they and their families suffered during the Armenian genocide, which has focused on lawsuits against Turkey, Turkish state agencies, and private entities that profited from Turkey's actions. Inspiration for this litigation came directly from the Holocaust restitution litigation. Attorney Vartkes Yeghiayan, himself a child of survivors of the Armenian genocide who initiated the use of American courts to litigate events surrounding the Armenian genocide, explained in an article in the *Los Angeles Times*: "For the first time [the Armenian community] has gone beyond lamentation and liturgy to litigation, from picketing and going to church every April 24 [the Armenian Day of Remembrance] and mourning to taking legal action. . . . Holocaust victims' heirs showed me the way."[126]

A. The Insurance Cases

Taking direct inspiration from suits brought by Holocaust survivors and heirs against European insurance companies that failed to pay on life insurance and other policies purchased by European Jews prior to the Second World War, Yeghiayan and his fellow Armenian-American co-counsel Brian Kabateck and Mark Geragos brought several suits in Los Angeles federal courts against various American and European insurance companies that failed to pay on policies purchased seventy or more years earlier by Armenians in Ottoman Turkey prior to the Armenian genocide.[127] The lawsuits arose out of a chance discovery made by Yeghiayan upon reading the memoirs of American Ambassador to Ottoman Turkey, Henry Morgenthau. In

125. Michael Thad Allen, *The Limits of Lex Americana: The Holocaust Restitution Litigation as a Cul-De-Sac of International Human Rights Law*, 17 Widener L. Rev. 1, 67 (2011).

126. Beverly Beyette, *He Stands Up in the Name of Armenians*, L.A. Times, Apr. 27, 2001, at E1 (internal quotation marks omitted) (quoting Armenian-American attorney Vartkes Yeghiayan, who represented plaintiffs in Armenian Genocide-era restitution suits).

127. *See* Marootian v. N.Y. Life Ins. Co., No. CV-99-12073 CAS (MCx), 2001 U.S. Dist. LEXIS 22274 (C.D. Cal. Dec. 3, 2001); Complaint, Kyurkjian, v. AXA, No. 2:02-cv-01750-CAS-Mc (C.D. Cal. Feb. 28, 2002); Complaint, Ouzounian v. AXA, No. 2:05-cv-02596-CAS-Mc (C.D. Cal. Apr. 8, 2005); Movsesian v. Versicherung AG, 670 F.3d 1067 (9th Cir. 2012).

the memoirs Morgenthau recalls how Talaat Pasha, the main instigator of the Armenian genocide, requests American insurance companies that sold policies to Armenians in Ottoman Turkey to make payment to the Turkish state, since the Armenians were no longer alive.[128]

Surprisingly, some children or grandchildren of the Armenian purchasers still had in their possession originals of such policies.[129] One of them was the Marootian family, living in Southern California. Martin Marootian, a retired pharmacist living in San Diego, still had his deceased uncle Setrak Cheytanian's original New York Life insurance policy, along with other documents showing how Martin's mother—one of the only two remaining family members who had survived the genocide—had tried unsuccessfully over the years to collect on the policy from New York Life.[130] New York Life refused to pay out on the policy even after the family spent more than thirty years obtaining the proper certification the company claimed it required.[131] After reading about attorney Vartkes Yeghiayan's efforts to locate surviving heirs, Martin's sister responded, but died before the suit could be filed.[132] Marootian thereby became the lead plaintiff in the first Armenian genocide insurance class action lawsuit, filed against New York Life in 1999.[133]

The second lawsuit was filed against the French insurance company AXA, by another group of Armenian plaintiffs, likewise arguing that their ancestors purchased policies in Ottoman Turkey before the First World War from AXA, but the French insurer never paid out on

128. The exchange in Morgenthau's diary reads as follows:

> One day Talaat made what was perhaps the most astonishing request I had ever heard. The New York Life Insurance Company and the Equitable Life of New York had for years done considerable business among the Armenians. The extent to which these people insured their lives was merely another indication of their thrifty habits. "I wish," Talaat now said, "that you would get the American life insurance companies to send us a complete list of Armenian policy holders. They are practically all dead now and have left no heirs to collect the money. It of course all escheats to the state. The Government is beneficiary now. Will you do so?" This was almost too much, and I lost my temper. "You will get no such list from me," I said, and I got up and left him.

HENRY MORGENTHAU, AMBASSADOR MORGENTHAU'S STORY 339 (1918).

129. Elaine Woo, *Martin Marootian Dies at 95; Lead Plaintiff in Suit Over Armenian Genocide Victims' Insurance Policies*, L.A. TIMES (Mar. 12, 2011), http://articles.latimes.com/2011/mar/12/local/la-me-martin-marootian-20110312.

130. *Id.*

131. *Id.*

132. *Id.*

133. Marootian v. New York Life Ins. Co., No. CV-99-12073, 2001 U.S. Dist. LEXIS 22274 (C.D. Cal. Dec. 3, 2001).

the policies when the policyholders perished during the Armenian genocide.[134]

The lawsuits against New York Life and AXA closely followed the Holocaust restitution litigation model. New York Life filed a motion to dismiss, arguing that, under a forum selection clause in the policies, the action should be heard in either France or England.[135] The judge denied the motion, holding that to adhere to the contractual forum selection clauses would be fundamentally unfair.[136] A specific statute passed by the California legislature, codified at California Code of Civil Procedure Section 354.4, established California as a forum for such cases despite any forum-selection clause in the contracts and extended the limitations period for filing the cases.[137] Section 354.4 was explicitly modeled after previous California statutes extending the limitations period for Holocaust-era insurance claims and World War II slave labor claims.[138]

In 2004, New York Life settled for $20 million.[139] In 2005, AXA likewise settled for $17 million.[140] Settlement funds were established in both cases, administered by a three-person settlement board with authority to review and decide on claims under the supervision of the presiding federal judges, to pay out the valid insurance claims.[141] The remainder of the funds was to be distributed in cy pres funds to various American and French Armenian non-profit groups.[142]

At this point, the Armenian genocide litigation hit a legal cul-de-sac. The subsequent suits were nearly all unsuccessful. In the third insurance case, *Movsesian v. Victoria Versicherung A.G.*, the Armenian claimants made similar claims against German insurers.[143] However, that case followed a different and a most unusual trajectory. In

134. *See* Complaint, Kyurkjian, v. AXA, No. 2:02-cv-01750-CAS-Mc (C.D. Cal. Feb. 28, 2002); Complaint, Ouzounian v. AXA, No. 2:05-cv-02596-CAS-Mc (C.D. Cal. Apr. 8, 2005).

135. *Marootian*, 2001 U.S. Dist. LEXIS 22274, at *7-9.

136. *Id*. at *54, 55.

137. *See* CAL. CIV. PROC. CODE § 354.4 (West 2006).

138. Movsesian v. Victoria Versicherung A.G., 578 F.3d 1052, 1054 (9th Cir. 2009).

139. *See* Woo, *supra* note 129.

140. *See Armenian Heirs Settle AXA Class Action Lawsuit*, BUS. WIRE (Oct. 12, 2005, 11:00 AM), http://www.businesswire.com/news/home/20051012005262/en/Armenian-Heirs-Settle-AXA-Class-Action-Lawsuit.

141. *See* Francie Grace, *$20M Settlement For Armenians*, CBS NEWS (Jan. 29, 2004), http://www.cbsnews.com/news/20m-settlement-for-armenians/; *see also* Marine Martirosyan, *AXA Settlement Fund Board Claims Embezzlement/Irregularities in Insurance Payments to Genocide Heirs*, HETQ (Aug. 1, 2014), http://hetq.am/eng/news/55882/axa-settlement-fund-board-claims-embezzlement-irregularities-in-insurance-payments-to-genocide-heirs.html/.

142. *See Armenian Heirs Settle AXA Class Action Lawsuit*, *supra* note 140.

143. Movsesian v. Victoria Versicherung A.G., No. CV-03-09407-CAS-JWJ (C.D. Cal 2008).

addition to the technical arguments made in the other suits such as statute of limitations, forum non conveniens and the like, the German defendants in *Movsesian* argued that Section 354.4 was unconstitutional, similar to the claim of unconstitutionality made in the claims against the Japanese companies discussed above.[144] As in the Japanese cases, defendants argued that the California statute impermissibly intruded on the federal government's conduct of foreign affairs, and was therefore preempted and should be struck down.[145] In particular, they argued that the statute was intended to benefit a particular class of victims—"Armenian Genocide victims"—and objected to the statute's definition of "Armenian Genocide victim" as "any person of Armenian or other ancestry living in the Ottoman Empire during the period of 1915 to 1923, inclusive, who died, was deported, or escaped to avoid persecution during that period."[146] The district court judge rejected the argument, and defendants appealed to the Ninth Circuit.[147]

The appellate court issued a split 2-1 decision in 2009 reversing the district court and holding for the defendants.[148] In an opinion authored by Judge Thompson and joined by Judge Nelson, from which Judge Pregerson dissented, the court held that Section 354.4 conflicted with an express federal policy to avoid recognizing an "Armenian genocide."[149] Although the Congressional House of Representatives regularly introduced measures to formally recognize the events targeting Armenians and other ethnic and religious minorities in Ottoman Turkey as a genocide, the court pointed to Executive efforts to prevent the measures from coming to a House vote, and letters to Congress from the State Department that such resolutions would "complicate our efforts to bring peace and stability to the Caucasus and hamper ongoing attempts to bring about Turkish-Armenian reconciliation," as evidence of clear executive policy.[150] The court noted that "the heart" of the conflict lay in the two-word phrase "Armenian genocide." "The symbolic effect of the words . . . is precisely the problem. The federal government has made a conscious decision not to apply the politically charged label of 'genocide' to the deaths of these

144. *Id.*

145. *Id.*

146. *Id.*

147. *See* Movsesian v. Victoria Versicherung A.G., 578 F.3d 1052, 1054 (9th Cir. 2009).

148. *Id*. at 1053.

149. *Id.* at 1063.

150. *Id*. at 1058.

Armenians during World War I."[151] Because such policy had preemptive force and Section 354.4 was in conflict with the policy, the court struck down the statute.[152]

Due to the importance of the issues at stake, the plaintiffs sought panel rehearing and rehearing en banc.[153] After more than a year, the same three-judge panel issued a new decision in 2010 granting the petition for rehearing, withdrawing the original 2009 decision, and filing a new opinion and dissent.[154] This time, Judge Pregerson wrote the majority opinion, joined by Judge Nelson, and Judge Thompson was in the dissent.[155] Evidently, Judge Pregerson had persuaded Judge Nelson that, in fact, there was no express federal policy against use of the term "Armenian genocide," and therefore Section 354.4 should be allowed to stand.[156] This time, the court held that "informal presidential communications" to Congress suggesting that the House decline to formally recognize the Armenian genocide were not sufficient to establish a federal policy against recognition, particularly in light of other executive and legislative statements favoring such recognition.[157] The court pointed to regular Congressional remembrance day celebrations in honor of genocide victims, including Armenians; Executive statements regarding the events using language "virtually indistinguishable" from "Armenian genocide"; and statements by then-presidential candidate Barack Obama urging recognition of an Armenian genocide.[158] Nor had the federal government previously expressed any opposition to the large number of states that individually recognized the Armenian genocide.[159] In the absence of a clear federal policy, Section 354.4 presented no conflict and was therefore not preempted on that basis.[160]

The second panel decision further held that the doctrine of field preemption did not apply, because California was validly acting within its traditional state interest in regulating the insurance field and was not, as the original panel decision had held, simply using the statute as a means of impermissibly taking a position on foreign affairs.[161] For

151. *Id*. at 1061.
152. *Id*. at 1063.
153. *See* Movsesian v. Victoria Versicherung A.G., 629 F.3d 901, 903 (9th Cir. 2010).
154. *Id*.
155. *Id*.
156. *Id*. at 909.
157. *Id*. at 906 (citing Medellin v. Texas, 552 U.S. 491, 31-32 (2008)).
158. *Id.* at 906-07.
159. *Id.* at 907.
160. *See id.* at 909.
161. *Id*.

these reasons, the court now found that Section 354.4 was a valid exercise of state power and was not preempted.[162]

The legal saga in *Movsesian,* however, did not end there. In December 2011, the Ninth Circuit reheard the case en banc.[163] In February 2012, the en banc panel, in a decision issued by Judge Susan Graber, found that Section 354.4 was preempted because it "intrude[d] on the field of foreign affairs without addressing a traditional state responsibility."[164] In other words, the en banc panel held that the doctrine of field preemption, also called dormant foreign affairs preemption, applied to make Section 354.4 unconstitutional. This was a completely new direction for the court, which in its previous two *Movsesian* decisions had focused almost exclusively on conflict preemption and the existence, or not, of an *express* federal policy with which Section 354.4 conflicted.[165]

Field preemption is a powerful doctrine, because it may apply regardless of whether the federal government has taken any action at all; or, if it has, regardless of whether the state action at issue was in any conflict.[166] Its purpose is to ensure that the states do not engage in foreign affairs policy, even if the federal government has not acted.[167] The en banc court relied on a little-used Supreme Court case from the 1960s, *Zschernig v. Miller*,[168] to illustrate its point. *Zschernig* struck down an Oregon probate statute providing that nonresident aliens could not inherit property in Oregon (it would escheat to the state) unless they could prove that the country in which they resided granted reciprocal rights to U.S. citizens.[169] Although the statute purported to be a traditional exercise of state power over property and inheritance rights, the Supreme Court determined that it would require Oregon state courts to engage in a detailed inquiry into foreign political systems and the nature of foreign property rights, including whether such rights were granted on an equal basis or based on governmental caprice and whether state confiscation of property was an important feature.[170] This being the height of the Cold War, the Supreme Court concluded that the real purpose of the statute was to take a particular

162. *Id*.

163. *See* Movsesian v. Victoria Versicherung A.G., 670 F.3d 1067 (9th Cir. 2012).

164. *Id*. at 1077.

165. *See* Movsesian v. Victoria Versicherung A.G., 629 F.3d 901 (9th Cir. 2010); Movsesian v. Victoria Versicherung A.G., 578 F.3d 1052 (9th Cir. 2009).

166. Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 418–20 n.11 (2003).

167. *Movsesian*, 670 F.3d at 1072.

168. *Id*. (citing Zschernig v. Miller, 389 U.S. 429 (1969)).

169. Zschernig v. Miller, 389 U.S. 429 (1969).

170. *Id.* at 433-34.

foreign policy position and make value judgments regarding certain countries' approach to property distribution in order to "keep United States money out of the grasp of communist or authoritarian nations."[171] Thus, even though the federal government had not established any policy that conflicted with Oregon's statute, it was nevertheless preempted because it would necessarily require judges to make determinations that would intrude into the field of foreign affairs.[172]

The en banc court also examined one of its own recent field preemption cases, *Von Saher v. Norton Simon Museum of Art at Pasadena*—a case decided by the same three-judge panel (Thompson, Nelson, and Pregerson) as the first two *Movsesian* decisions.[173] Marei von Saher was the surviving heir of Jacques Goudstikker, a prominent Jewish art dealer living in the Netherlands before World War II.[174] The family fled when war broke out and left all their assets behind, including Goudstikker's collection of over one thousand artworks, which were looted by the Nazis.[175] However, Goudstikker did bring his notebook containing a list of each of the paintings; it noted that his collection included the "Adam and Eve" diptych by Cranach the Elder, which the Norton Simon Museum had purchased in the 1970s.[176] Von Saher brought claims against the museum under California Code of Civil Procedure Section 354.3, which extended the statute of limitations on actions to recover artwork taken during the Holocaust.[177] Judge Thompson, writing for the majority, held that although Section 354.3 did not conflict with any federal foreign policy, it was nevertheless invalid under the doctrine of field preemption.[178] First, the potential class of defendants was not limited to museums or galleries operating in California, which indicated that California's true interest was in providing a friendly forum for Holocaust art claims—regardless of whether the claimant or even the art was located in California—and not in protecting California's residents and regulating businesses operating within its borders, as claimed.[179] Second, Section 354.3 established a particular remedy for wartime injuries perpetrated

171. *Id.* at 437-38.

172. *Id.* at 440.

173. *See generally* Von Saher v. Norton Simon Museum of Art at Pasadena, 592 F.3d 954 (9th Cir. 2010).

174. *Id.* at 959.

175. *Id.*

176. *Id.*

177. *Id*. at 957.

178. *Id.* at 954, 963, 965-66.

179. *Id.* at 964-65.

by the Nazis, and therefore intruded on the federal government's power to conduct war.[180] Moreover, California courts would have to inquire into the validity of European governments' restitution policies and decisions made after the war, which the U.S. government had expressly left to each nation to determine.[181]

With these precedents in hand, the *Movsesian* en banc court turned to Section 354.4. According to the court, the real concern with Section 354.4 was that it did the same thing as the unconstitutional statutes in *Garamendi* and *Von Saher*: it provided a particular remedy for a particular class of people for the purpose of righting what California had determined was a historical wrong; namely, the persecution of Armenians at the hands of the Ottoman Turks.[182] Such a goal fell outside the scope of traditional state responsibility.[183] The statute, according to the en banc panel, also had more than an incidental effect on foreign affairs, because it "expresse[d] a distinct political point of view on a specific matter of foreign policy" by labeling the events at issue a "genocide" and displayed sympathy for "Armenian Genocide victims."[184]

Finally, the court was concerned that, in order to determine whether a particular claimant qualified as an "Armenian Genocide victim" according to the statute's definition, a judge would have to make a politicized inquiry into the sensitive question of whether the policyholder had "escaped to avoid persecution" by the Ottoman Turks.[185] For these reasons, the court held Section 354.4 unconstitutional under the doctrine of field preemption.[186]

It did not escape the court's notice that, only a few days after the en banc oral argument was held, France and Turkey became embroiled in a diplomatic row after the French National Assembly passed a bill criminalizing denial of the Armenian genocide, much as Holocaust denial is also a crime in France.[187] Turkey recalled its ambassador to France, canceled bilateral visits, and refused cooperation

180. *Id.* at 965-67.

181. *Id*. at 967.

182. Movsesian v. Victoria Versicherung A.G., 670 F.3d 1067 (9th Cir. 2012).

183. *Id.* at 1076-77.

184. *Id.* at 1076.

185. *Id.* at 1076-77.

186. *Id.* at 1077.

187. *Id.* (citing a BBC news article from December 22, 2011 detailing the developments); *Turkey Retaliates over French 'Genocide' Bill*, BBC NEWS (Dec. 22, 2011), http://www.bbc.com/news/world-europe-16306376.

in certain areas.[188] Perhaps even more concerning for the court was the fear of angering Turkey, an important NATO ally, at a time of increasing tension in the Middle East.[189] The "Arab Spring" began less than a year before the en banc oral argument, with demonstrations and protests in Tunisia that spread to several surrounding countries and eventually led to the downfall of multiple regimes.[190] One of NATO's most important strategic airbases is located in Incirlik, Turkey, and continues to play a pivotal role in combating terrorism, providing support to Syrian rebels, and fighting the spread of the Islamic State (ISIS).[191] These events lend support to the court's conclusion that the question of whether a genocide occurred in Ottoman Turkey "continues to be a hotly contested matter of foreign policy" and that "Turkey expresses great concern over the issue."[192]

Given the sweeping nature of the court's decision that *any* state action promoting use of the term "Armenian genocide" was preempted, the *Movsesian* plaintiffs sought review by the Supreme Court and filed a petition for writ of certiorari.[193] In light of federal government interests at stake, the Supreme Court invited the Solicitor General to submit the views of the U.S. government.[194] The Obama Administration was unequivocal: Section 354.4 impermissibly intruded on federal foreign affairs powers, the en banc panel had reached the correct decision, and there was no need for further review by the Supreme Court.[195]

188. *See Turkey Retaliates over French 'Genocide' Gill*, *supra* note 187; *see also German MPs Recognise Armenian 'Genocide' amid Turkish Fury,* BBC NEWS (June 2, 2016), http://www.bbc.com/news/world-europe-36433114 (noting that Turkey took similar actions when the German Bundestag voted in June 2016 to declare the killings of Armenians in Ottoman Turkey a genocide).

189. *See Movsesian*, 670 F.3d at 1077 (citing a New York Times article describing President Obama's reluctance to use the term "Armenian Genocide" during a remembrance day celebration due to Turkey's fierce opposition).

190. *See* David Cutler, *Timeline–Arab Spring: A Year that Shook the Arab World*, REUTERS (Jan. 14, 2012), http://in.reuters.com/article/tunisia-revolution-anniversary-idINDEE80C0IT20120113.

191. *See* Jim Garamone, *Incirlik Provides Important NATO Capability*, DOD NEWS (Dec. 9, 2014), http://www.defense.gov/News/Article/Article/603781/incirlik-provides-important-nato-capability.

192. *Movsesian*, 670 F.3d at 1077.

193. Petition for Writ of Certiorari, Arzoumanian v. Munchener Ruckversicherungs-Gesellschaft Aktiengesellschaft A.G. (2012) (No. 12-9). The case name changed on petition for writ of certiorari as only certain plaintiffs elected to proceed with claims against certain defendants.

194. Opinion, Arzoumanian v. Munchener Ruckversicherungs-Gesellschaft Aktiengesellschaft A.G., 133 S. Ct. 404 (U.S. 2012).

195. Brief for the United States as Amicus Curiae at 5, Arzoumanian v. Munchener Ruckversicherungs-Gesellschaft Aktiengesellschaft A.G. (2013) (No. 12-9).

The Solicitor General also suggested that, while there was no express conflict between Section 354.4 and certain treaties and settlement agreements between the United States and Turkey after World War I to settle claims of U.S nationals, the existence of such documents demonstrated that the United States adopted a particular approach to the settlement of wartime claims—an approach with which California expressed dissatisfaction in the passage of Section 354.4.[196] Indeed, the government indicated that its consistent policy response, when faced with questions such as those presented by the *Movsesian* plaintiffs' claims, was to encourage Turkey and Armenia to reach a mutually agreeable solution.[197]

The Supreme Court thereafter denied appellant's petition for certiorari. Thus, the en banc decision stands as the final word on the *Movsesian* plaintiffs' claims.[198]

B. The Bank Deposit Case

In 2006, Yeghiayan and his co-counsel filed a new suit against the German banks Deutsche Bank and Dresdner Bank, seeking to recover money and property allegedly withheld by these defendants during the Armenian genocide from their Armenian depositors.[199] The German banks were accused of trading in assets stolen from the Armenian victims by the Ottoman Turkish state perpetrators.[200] The complaint in the action initially recited the historical facts of the murder and deportation of the Armenian population of Ottoman Turkey, including the death of 1.5 million to 2 million Armenians between 1915 and 1923.[201] The bulk of the complaint, however, focused not on the extermination of the Armenians but on the theft of the victims' property.[202] As the Holocaust has so aptly demonstrated, part and parcel of every genocide is not only murder but also massive theft of the victims' assets.[203] The Armenian genocide likewise contains this characteristic.

196. *Id.* at 15.

197. *Id.* at 17.

198. *Id*.

199. *See* Deirmenjian v. Deutsche Bank, A.G., No. CV 06-00774, 2006 U.S. Dist. LEXIS 96772, at *1-2 (C.D. Cal. Sept. 25, 2006).

200. *Id.*

201. *See id.* at *7-8.

202. *Deirmenjian*, 2010 U.S. Dist. LEXIS 86957, at *3 (explaining the theories on which plaintiffs sought recovery).

203. DONALD BLOXHAM, THE FINAL SOLUTION: A GENOCIDE 41 (2009). There have been material motivations and benefits from genocide. "[B]yproducts like property theft from the victims were an important means of further binding the beneficiaries to each other and the re-

The filing of the suit against the two German banks marked an important step in closing in on the circle of perpetrators and beneficiaries of the Armenian genocide. In the claims by the Armenian heirs against the insurance companies, the Armenian genocide played a tangential role in the litigation; in contrast, the instant action accused the German banks of being directly involved in the theft of Armenian assets during the genocide.[204] While literature on the murder and deportation of the Armenians is voluminous and well-documented,[205] discussion of the property theft of the Armenians still awaits a thorough study.[206]

The *Deirmenjian* suit focused on the alleged role of the German banks as conduits for the theft of the Armenians' assets.[207] The allegations eerily paralleled those cases involving theft of Jewish property during the Holocaust and the role of Swiss and German financial institutions in facilitating such theft. In fact, the same two German banks were sued by Jewish victims of Nazism and their heirs, who alleged that Deutsche Bank and Dresdner Bank colluded with the Nazi regime to steal from Jews in Europe and profited from those dealings.[208] Procedurally, the Armenian suit against the German banks followed the model of the Holocaust restitution suits by proceeding as a class

gime" despite the primary goals, which were to "remov[e] 'problem' groups while simultaneously sharpening and rendering more exclusive the identity of the majority." *Id.*

204. *Deirmenjian*, 2010 U.S. Dist. LEXIS 86957 at *2, *9-20 (stating "Plaintiffs assert that the banks 'concealed and prevented' the recovery of assets that were deposited in accounts with 'Old Deutsche Bank' and 'Old Deutsche Orientbank' by Armenians prior to the First World War and the Armenian Genocide").

205. *See generally* TANER AKÇAM, A SHAMEFUL ACT: THE ARMENIAN GENOCIDE AND THE QUESTION OF TURKISH RESPONSIBILITY (2006) (showing recent studies on the Armenian Genocide); DONALD BLOXHAM, GREAT GAME OF GENOCIDE: IMPERIALISM, NATIONALISM, AND THE DESTRUCTION OF THE OTTOMAN ARMENIANS (2005).

206. For discussions of theft during the Armenian Genocide, see UGUR ÜMIT ÜNGÖR & MEHMET POLATEL, CONFISCATION AND DESTRUCTION: THE YOUNG TURK SEIZURE OF ARMENIAN PROPERTY (2011) (discussing theft of Armenian property); HRAYR S. KARAGUEUZIAN & YAIR AURON, A PERFECT INJUSTICE: GENOCIDE AND THEFT OF ARMENIAN WEALTH (2010); DICKRAN KOUYMJIAN, CONFISCATION AND DESTRUCTION: A MANIFESTATION OF THE GENOCIDAL PROCESS 1-2 (1998); Dickran Kouymjian, *When Does Genocide End? The Armenian Case*, THE ARMENIAN WEEKLY, vol. 69, no. 15 (Apr. 12, 2003), available at http://www.academia.edu/24784817/Dickran_Kouymjian_When_Does_Genocide_End_The_Armenian_Case_The_Armenian_Weekly_vol._69_no._15_April_12_2003_pp._8-9.

207. *Deirmenjian*, 2010 U.S. Dist. LEXIS 86957 at *9-20 (focusing on the banks' role and involvement in the genocide claims and its post-genocide responsibility to its insurers).

208. *See* CHRISTOPHER SIMPSON, INTRODUCTION TO WAR CRIMES OF THE DEUTSCHE BANK AND THE DRESDNER BANK: OFFICE OF MILITARY GOVERNMENT (U.S.) REPORTS 1 (2002) (studying the German bank activities during the Nazi era); HAROLD JAMES, DEUTSCHE BANK AND THE NAZI ECONOMIC WAR AGAINST THE JEWS: THE EXPROPRIATION OF JEWISH-OWNED PROPERTY 57-59, 63 (2006).

action.[209] Varoujan Deirmenjian and his six fellow plaintiffs did not sue just on their own claims, but also on behalf of all other similarly situated heirs of Armenian genocide victims.[210] All seven plaintiffs were American citizens and were grandchildren of the Armenian victims of the genocide.[211]

The complaint in *Deirmenjian* alleged that the Armenian minority in Ottoman Turkey relied on the stability of the European banks and, therefore, deposited assets in such banks for their protection.[212] The two German banks, operating in Ottoman Turkey under the name of Deutsche Orient Bank, allegedly had over a dozen branches throughout the Ottoman Empire and targeted affluent Armenians as their customers.[213] With the onset of the killings and deportations of Armenians, the German banks allegedly accepted gold deposits from the Ottoman Turkish government with full knowledge that such deposits were taken from the Armenian victims.[214] Moreover, the German banks allegedly transferred to their own books assets belonging to their deceased Armenian customers rather than returning those assets to the customers' heirs, and deliberately concealed the existence of the deposits from such heirs.[215]

In 2006, plaintiffs scored a major victory in the litigation when the Los Angeles-based federal judge presiding over the litigation, Margaret Morrow,[216] denied the banks' motion to dismiss the class action.[217] However, in a later decision in December 2007, Judge Morrow

209. *Deirmenjian*, 2010 U.S. Dist. LEXIS 86957 at *2.

210. *Id.*

211. *Id*. at *8-9, *12, *15, *17, *19.

212. First Amended Class Action Complaint and Demand for Jury Trial at 7, Deirmenjian v. Deutsche Bank, No. CV 06-0774 MMM (RCx) (C.D. Cal. Sept. 25, 2006) [hereinafter Deirmenjian Complaint].

213. *Id.* at 4-5. Similar allegations were made against the Swiss banks: Jews fearing the troubled times after Hitler's rise to power and as a result of historic anti-Semitism in Europe deposited money and assets in Swiss banks for protection and privacy. *See* BAZYLER, HOLOCAUST JUSTICE, *supra* note 14, at 43, 52.

214. *See* Deirmenjian Complaint, *supra* note 212, at 9; *cf.* BAZYLER, HOLOCAUST JUSTICE, *supra* note 14, at 26 (explaining that in the Holocaust restitution litigation, both Swiss banks and German banks were accused of knowingly accepting from the Nazis gold and other assets looted from the Jews).

215. Deirmenjian Complaint, *supra* note 212, at 10; *cf.* BAZYLER, HOLOCAUST JUSTICE, *supra* note 14, at 43, 57 (explaining that, in a similar vein, the Swiss banks were accused of keeping assets deposited for safekeeping by their Jewish customers who perished during the Holocaust; a similar allegation was made against the German companies).

216. Judge Morrow retired from the federal bench in early January 2016. *Public Counsel Announces New President and CEO*, PUB. COUNS. (Dec. 2, 2015), http://www.publiccounsel.org/stories?id=0190.

217. Deirmenjian v. Deutsche Bank, A.G., No. CV 06-00774 MMM (CWx), 2006 U.S. Dist. LEXIS 96772, at *150-51 (C.D. Cal. Sept. 11, 2006).

found that another California statute, California Code of Civil Procedure section 354.45 (akin to the previously-discussed section 354.4 utilized by the plaintiffs in *Movsesian*[218]) and adopted by the California legislature specifically to help claimants overcome the prescription obstacle when filing suit in California courts for recovery of assets stolen during the Armenian genocide,[219] was unconstitutional.[220] According to Judge Morrow, the new California law impermissibly intruded on the foreign affairs power of the federal government to settle wartime claims of American citizens against Turkey and Germany arising out of World War I.[221]

After this loss before Judge Morrow, the tide of litigation for both plaintiff classes turned against them. From this point on, every one of Judge Morrow's rulings in the *Deirmenjian* case went in favor of the German banks.[222]

On March 23, 2008, plaintiffs filed a motion for class certification, which Judge Morrow denied on May 13, 2010.[223] Under Federal Rule of Civil Procedure 23(d), Judge Morrow did allow the plaintiffs to engage in pre-certification communications with potential class members in order to find evidence of bank accounts.[224] After doing so, she held, however, that the evidence that the plaintiffs discovered through the pre-certification notices was insufficient to form an ascertainable class.[225] She explained that in making this determination, she took into account the fact that it was unlikely that the depositors and their heirs would have preserved any documentation of their accounts since

218. *See* Movsesian v. Victoria Versicherung A.G., 578 F.3d 1052, 1054 (9th Cir. 2009).

219. CAL. CIV. PROC. CODE § 354.45(c) (West 2006). The statute provides as follows:

> Any action, including any pending action brought by an Armenian Genocide victim, or the heir or beneficiary of an Armenian Genocide victim, who resides in this state, seeking payment for, or the return of, deposited assets, or the return of looted assets, shall not be dismissed for failure to comply with the applicable statute of limitation, if the action is filed on or before December 31, 2016.

Id; *see also* S. 1524, 2005-2006 Leg. Reg. Sess. (Cal. 2006) (explaining section 354.45's connection with the Armenian genocide).

220. Deirmenjian v. Deutsche Bank, A.G., 526 F. Supp. 2d 1068, 1085 (C.D. Cal. 2007).

221. *Id.* at 1089.

222. *See* Deirmenjian v. Deutsche Bank, A.G., No. CV 06-00774 MMM (CWx), 2010 U.S. Dist. LEXIS 86957 at *77 (C.D. Cal. July 30, 2010); *see also* Deirmenjian v. Deutsche Bank AG, 548 F. App'x 461 at 465-66 (9th Cir. 2013).

223. Motion for Class Certification at 2, Deirmenjian v. Deutsche Bank, A.G., No. CV 06-00774 MMM (RCx) (C.D. Cal. Mar. 23, 2009); Order Denying Plaintiffs' Motion for Class Certification and Motion for Leave to File a Third Amended Complaint at 53, Deirmenjian v. Deutsche Bank, A.G., No. CV 06-00774 MMM (RCx) (C.D. Cal. May 13, 2010) [hereinafter Order Denying Class Certification].

224. Order Denying Class Certification, *supra* note 223, at 21 (acknowledging that the court followed FED. R. CIV. P. 23(d)).

225. *Id.* at 27.

most were killed or deported from Turkey and any records that the banks had were probably lost to history.[226] In effect, Judge Morrow was denying class certification to the genocide victim group because the members of the victim group had been victims of a genocide.

On June 21, 2010, the defendant German banks, on the heels of their class certification victory, filed a motion for summary judgment seeking to dismiss the entire case without a trial.[227] On July 30, Judge Morrow granted that motion.[228]

On August 27, 2010, one of the plaintiffs, Khachik Berian (both on his own behalf and on behalf of the class plaintiffs similarly situated), filed an appeal before the U.S. Ninth Circuit Court of Appeals seeking to have Judge Morrow's ruling that the Turkish limitations period applies to Armenian genocide-era claims overturned.[229] Written briefing concluded in May 2011, but oral argument was not scheduled until November 2013. During that time, two developments occurred that impacted the issues on appeal in *Deirmenjian*. First, the Ninth Circuit issued its en banc field preemption opinion in *Movsesian III* striking down Section 354.4.[230] Second, the United States filed its wide-ranging amicus brief to the Supreme Court regarding the *Movsesian* plaintiffs' petition for certiorari.[231] In an unpublished Memorandum Opinion, issued December 9, 2013, the Ninth Circuit affirmed the district court's grant of summary judgment on statute of limitations grounds.[232]

By the end of 2013, a new narrative of Armenian genocide cases in U.S. courts was beginning to emerge. After early initial settlements with insurance companies still spooked by the success of Holocaust restitution litigation with high-level U.S. government support and massive pressure campaigns, companies that fought back against Armenian genocide-era claims found they could make significant head-

226. *Id.* at 29.

227. Defendants' Notice of Motion and Motion for Summary Judgment: Memorandum of Points & Authority at 3, Deirmenjian v. Deutsche Bank, A.G., No. CV 06-00774 MMM (RCx) (C.D. Cal. June 21, 2010).

228. Judgment for Defendants at 1-2, Deirmenjian v. Deutsche Bank, A.G., No. CV 06-00774 MMM (CWx) (C.D. Cal. July 30, 2010).

229. *See* Opening Brief of Appellant Khachik Berian at 1-2, 9, Deirmenjian v. Deutsche Bank, A.G., No. 10-56359 (9th Cir. Feb. 7, 2011) (explaining that Berian only appealed the judgment against Deutsche Bank because this is the bank where his ancestors allegedly deposited funds in Ottoman Turkey, and Defendant Dresdner Bank was, therefore, no longer a party on the appeal; additionally, since no Class B plaintiff (representing the looted assets claims) filed an appeal, those claims also were not before the Ninth Circuit).

230. *See* Movsesian v. Victoria Versicherung AG, 670 F.3d 1067 (9th Cir. 2012).

231. *See* Brief for the United States as Amicus Curiae, *supra* note 195.

232. Deirmenjian v. Deutsche Bank AG, 548 F. App'x 461, 463 (9th Cir. 2013).

way.[233] Courts, it turned out, were reluctant to hear hundred-year-old claims notwithstanding the circumstances giving rise to the claims and the difficulties faced by U.S. citizen survivors and heirs in bringing their claims in Turkey.[234] The United States was not willing to risk harming its relationship with strategic NATO ally Turkey over the genocide issue, instead urging courts to defer to its preferred approach of diplomatic negotiations between Turkey and Armenia.[235] California's numerous legislative attempts to provide a forum for its Armenian residents seemed to be going nowhere, as the courts repeatedly deferred to action at the federal level. The looming question was whether any further avenues for redress existed, or whether *Movsesian III*'s blanket prohibition would prove to be a malignant tumor infecting the entire body of Armenian genocide litigation.

C. The Real Property Cases

In the second half of 2010, the legal focus finally turned to the actual perpetrators. Suits were filed in American courts against the Republic of Turkey, as successor of Ottoman Turkey, and two state-owned banks: the Central Bank of Turkey and Ziraat Bank, a state-owned commercial bank with origins going back to 1863, making it the oldest bank in Turkey.[236]

The two suits were filed by two different sets of lawyers. The first suit, *Davoyan v. Republic of Turkey*,[237] was filed as a class action by plaintiff Garbis Davoyan, on behalf of beneficiaries of former Turkish citizens and their heirs, against the successor Turkish government, the Republic of Turkey.[238] The suit claimed the Turkish government had deprived plaintiffs of citizenship, brutally deported the plaintiffs' ancestors, and seized and expropriated the ancestors' property.[239] Fur-

233. *See* Jeffrey W. Stempel et al., *Stoney Road out of Eden: The Struggle to Recover Insurance for Armenian Genocide Deaths and Its Implications for the Future of State Authority, Contract Rights, and Human Rights*, 18 BUFF. HUM. RTS. L. REV. 1, 55-57 (2012).

234. *See Supreme Court Will Not Review Armenian Genocide-Era Insurance Claims Cases*, THE ARMENIAN WEEKLY (June 10, 2013), http://armenianweekly.com/2013/06/10/supreme-court-will-not-review-armenian-genocide-era-insurance-claims-case/.

235. *See* Bazyler, *Lamentation and Liturgy*, *supra* note 1 at 260-61; Brief for the United States as Amicus Curiae, *supra* note 195.

236. For information on Ziraat Bank's New York branch, *see About Us*, ZIRAAT BANKASI N.Y., http://www.ziraatnewyork.com/about-us/about-us (last visited Sept. 3, 2016).

237. Davoyan v. Republic of Turkey, No. CV 10-05636 DMG (SSx), 2011 U.S. Dist. LEXIS 53152 (C.D. Cal. May 5, 2011).

238. *Id*. This suit was filed by a team of lawyers headed by Brian Kabateck and Mark Geragos, who were also counsel in the *New York Life*, *AXA*, and *Deirmenjian* cases.

239. Class Action Complaint and Demand for Jury Trial, Davoyan v. Republic of Turkey, No. CV 10-05636 DMG (SSx) (C.D. Cal. July 29, 2010) [hereinafter Davoyan Complaint].

ther, the plaintiffs in *Davoyan* claimed that the defendant, the Republic of Turkey, is a legitimate successor of the predecessor government—the Ottoman Turkish Empire—and should be amenable to suit.[240]

The second suit, *Bakalian v. Republic of Turkey*, was filed by plaintiff Alex Bakalian and two other individuals, and seeks fair market rents and just compensation for some 122.5 acres of property located in the Adana region of Turkey, taken from their ancestors during the Armenian genocide.[241] On this Armenian property stands today the Incirlik Air Base, one of the most important American bases on foreign soil. Its importance comes from its use by the American military to stage NATO operations throughout the Middle East.[242] The irony, of course, is that the United States is fighting wars to establish democracy and freedom in the region on land stolen during a genocide.

Although the two suits are similar and proceeded along parallel tracks, some important differences exist. *Davoyan* was filed as a class action on behalf of all Armenian landowners and their descendants living in the United States whose real property was expropriated by Turkey during the genocide, while *Bakalian* was brought by three individual plaintiffs seeking compensation for their property only.[243] Additionally—and perhaps crucially—the *Davoyan* plaintiffs' causes of

240. *Id.*

241. Complaint and Demand for Jury Trial, Bakalian v. Republic of Turkey, No. CV 10-09596 DMG SS (C.D. Cal. Dec. 15, 2010) [hereinafter Bakalian Complaint]. A third case, *Manookian v. Republic of Turkey*, was filed in 2013 (Complaint and Demand for Jury Trial at 1, Manookian v. Republic of Turkey, No. CV13-01401 DMG SS (C.D. Cal. Feb. 26, 2013)). The case is broadly similar to *Bakalian* and *Davoyan*, and brought property claims for the land and improvements owned by Manookian's grandfather in Aintab, Turkey. Most notably, the Manookian family home had been turned into a museum operated by the Turkish Ministry of Culture and advertised to American tourists. Following service of process, the case was stayed pending a decision in the appeals in *Davoyan* and *Bakalian* relating to jurisdiction and the political question doctrine. Order Granting Plaintiff's Motion for Stay Pending Appeal Except for Service of Process at 2, Manookian v. Republic of Turkey, No. CV13-01401 DMG SS (C.D. Cal. July 16, 2013).

242. For information about the Incirlik base, see *U.S. Air Force: Incirlik Air Base*, INCIRLIK AIR BASE, http://www.incirlik.af.mil/ (last visited Nov. 21, 2016); *see also* Rouben Paul Adalian, *Adana Massacre*, *in* 1 ENCYCLOPEDIA OF GENOCIDE 47, 47 (Israel W. Charny ed., 2000) ("The Adana Massacre was the second series of large-scale massacres of Armenians to break out in the Ottoman Empire. The atrocities committed in the province of Adana . . . [resulted in] an estimated 30,000 Armenians [being] killed."). The Incirlik base website recognizes the area as historically Armenian land: "[T]he Seljuk dominance of Adana ended with the coming of the Crusaders in 1097. After which it was part of the kingdom of Cilician Armenia for nearly 300 years. . . From the end of the Renaissance to the modern era (1517-1918), the Ottoman Empire ruled the area."

243. Davoyan Complaint, *supra* note 239; Bakalian Complaint, *supra* note 241.

action were not just for property claims, but were also for "human rights violations and violations of international law," including "forced deportation, confiscation and extermination in furtherance of the commission of war crimes, crimes against humanity, crimes against peace, torture, rape, starvation, physical and mental abuse, summary execution and genocide."[244]

Both sets of plaintiffs asserted jurisdiction in the district court under the FSIA.[245] In particular, plaintiffs asserted that Turkey and the two bank defendants were not entitled to sovereign immunity pursuant to the exceptions to sovereign immunity found in 28 U.S.C. § 1605(a)(2) (the "commercial activity" exception) and 28 U.S.C. § 1605(a)(3) (the "expropriation" or "takings" exception).[246]

Turkey did not answer or otherwise respond to either complaint, and the clerk entered default against it.[247] Both actions proceeded against only Central Bank and Ziraat Bank. The banks fought every step, challenging the sufficiency of service of process in both actions, petitioning for a writ of mandamus to challenge the district court's finding that service was proper, and even filing an interlocutory appeal of the service order without obtaining permission from the district court.[248]

Eventually, in September 2011, the banks answered each complaint and simultaneously filed two Rule 12 motions—a motion to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1), and a motion for judgment on the pleadings pursuant to Rule 12(c).[249]

244. Davoyan Complaint, *supra* note 239, at 21.

245. *Id.* at 3; Bakalian Complaint, *supra* note 241, at 9.

246. Davoyan Complaint, *supra* note 239, at 3; Bakalian Complaint, *supra* note 241, at 9.

247. Default by Clerk at 1, Bakalian v. Republic of Turkey, No. CV 10-09596 DMG (SSx) (C.D. Cal. Mar. 11, 2011); Default by Clerk at 1, Davoyan v. Republic of Turkey, No. CV 10-05636 DMG (SSx) (C.D. Cal. Oct. 11, 2011). This is the first step in the two-step process of obtaining a default judgment against an absent defendant pursuant to the Federal Rules. City of N.Y. v. Mickalis Pawn Shop, LLC, 645 F.3d 114, 128 (2d Cir. 2011). The first step is to seek an entry of default, usually entered by the Clerk of the Court on a showing that the defaulting defendant failed to answer or otherwise respond to the complaint. *Id.*; *see also* FED. R. CIV. P. 55(a). The motion for default judgment is the second step. *Mickalis*, 645 F.3d at 128; *see also* FED. R. CIV. P. 55(b).

248. *See* Petition for Writ of Mandamus, Central Bank of the Republic of Turkey v. USDC-CALA, No. 11-72824 (9th Cir. Sept. 23, 2011). The writ petition was summarily denied, and the court held that it lacked jurisdiction to consider the interlocutory appeal. *See* Order Denying Bank Defendants' Motion to Dismiss at 1, Bakalian v. Republic of Turkey, No. CV 10-09596 DMG (SSx) (C.D. Cal. Aug. 2, 2011); Order at 1, Bakalian v. Republic of Turkey, No. 11-56516 (9th Cir. Dec. 9, 2011).

249. Answer to Complaint, Davoyan v. Republic of Turkey, No. CV 10-5636 DMG (SSx) (C.D. Cal. Sept. 3, 2011); Notice of Motion and Motion of Defendants to Dismiss, Davoyan v. Republic of Turkey, No. CV 10-5636 DMG (SSx) (C.D. Cal. Sept. 3, 2011); Notice of Motion and

The 12(b)(1) motions asserted that the banks were immune from suit pursuant to the FSIA.[250] In the 12(c) motions, the banks sought judgment based solely on the pleadings (complaint and answer) pursuant to multiple doctrines: the act of state doctrine, foreign affairs preemption, the political question doctrine, international comity, the failure to show a right to relief as plaintiffs had not demonstrated that they were the rightful heirs of the original landowners, and statute of limitations.[251] The motions were argued before the district court in December 2011.

In a sign of the complexity and difficulty of the issues at stake, the court did not issue a ruling on the Rule 12 motions until March 2013, fifteen months later. In a written decision issued in *Davoyan* and simultaneously made applicable to *Bakalian* via a minute order, the district court held that (1) although the FSIA's commercial activity exception to foreign sovereign immunity did not apply, (2) the plaintiffs had established a prima facie case that the expropriation exception applied because the expropriation of property of a state's own nationals without payment of compensation, when "integrally related to . . . government-sanctioned genocidal policies" such as those directed at Armenians in Turkey, violates international law.[252]

Motion of Defendants for Judgment on the Pleadings, Davoyan v. Republic of Turkey, No. CV 10-5636 DMG (SSx) (C.D. Cal. Sept. 3, 2011); Answer to Complaint, Bakalian v. Republic of Turkey, No. CV 10-9596 (C.D. Cal. Sept. 19, 2011); Notice of Motion and Motion of Defendants to Dismiss, Bakalian v. Republic of Turkey, No. CV 10-9596 (C.D. Cal. Sept. 19, 2011); Notice of Motion and Motion of Defendants for Judgment on the Pleadings, Bakalian v. Republic of Turkey, No. CV 10-9596 (C.D. Cal. Sept. 19, 2011). The banks also filed a motion to consolidate the two actions, which had been designated related cases. Notice of Motion and Motion of Defendants to Consolidate Related Cases at 1, *Davoyan*, No. CV 10-5636 DMG (SSx) (C.D. Cal. Nov. 3, 2011). The district court denied the motion to consolidate as moot in light of its order on the Rule 12 motions. Amended Order Re Bank Defendants' (1) Motion to Dismiss or, in the Alternative, for Judgment on the Pleadings, and (2) Motion to Consolidate Cases at 25, *Davoyan*, No. CV 10-05636 DMG (SSx) (C.D. Cal. Mar. 26, 2013).

250. *See* Notice of Motion and Motion of Defendants to Dismiss, Davoyan v. Republic of Turkey, No. CV 10-5636 DMG (SSx) (C.D. Cal. Sept. 3, 2011); Notice of Motion and Motion of Defendants to Dismiss, Bakalian v. Republic of Turkey, No. CV 10-9596 (C.D. Cal. Sept. 19, 2011).

251. *See* Notice of Motion and Motion of Defendants for Judgment on the Pleadings, Davoyan v. Republic of Turkey, No. CV 10-5636 DMG (SSx) (C.D. Cal. Sept. 3, 2011); Notice of Motion and Motion of Defendants for Judgment on the Pleadings, Bakalian v. Republic of Turkey, No. CV 10-9596 (C.D. Cal. Sept. 19, 2011).

252. *See* Amended Order Re Bank Defendants' (1) Motion to Dismiss or, in the Alternative, for Judgment on the Pleadings, and (2) Motion to Consolidate Cases at 21-22, Davoyan v. Republic of Turkey, 116 F. Supp. 3d 1084 (C.D. Cal. 2013) [hereinafter Memorandum Opinion]; In Chambers—Order Dismissing Action for Lack of Subject Matter Jurisdiction, Bakalian v. Republic of Turkey, No. CV 10-09596 (C.D. Cal. Mar. 26, 2013) [hereinafter Minute Order].

The district court nevertheless considered the political question issue raised by the banks in their Rule 12(c) motions. After first describing the governing standard and six factors set forth in *Baker v. Carr*,[253] the district court failed to undertake the required six-factor analysis and instead applied the federal field preemption principles underlying the appellate court's en banc decision in *Movsesian III* to find that a determination of whether the FSIA's jurisdictional requirements were met (as mandated for the courts by Congress) would constitute a political question.[254] Accordingly, the district court dismissed the two suits.[255]

Thus, the district court held that jurisdiction under the FSIA was sufficiently pled based on allegations that the unlawful taking of property occurred during the Ottoman Empire's perpetration of mass human rights atrocities—without inquiring whether the political question doctrine was necessary to the jurisdictional determination.[256] Once having determined that jurisdiction existed, the district court then revisited the jurisdictional finding again through the political question lens, examining the political question doctrine in a separate, second analysis focused on adjudication of the generic property claims, the elements of which raise no political question when analyzed under the six *Baker* factors and do not require a court to find that Turkey committed a genocide or any other human rights abuse.[257]

Both sets of plaintiffs appealed the district court's political question finding.[258] The *Davoyan* plaintiffs also appealed the court's finding that the commercial activity exception did not apply.[259] The banks cross-appealed to challenge the finding that the expropriation exception was met.[260] The cases thus presented a number of intertwined issues for the appellate court to resolve.

253. 369 U.S. 186 (1962).

254. *See* Memorandum Opinion, *supra* note 252, 116 F. Supp. 3d at 1102-04.

255. *See id*. at 1104; Minute Order, *supra* note 252.

256. *See* Memorandum Opinion, *supra* note 252, 116 F. Supp. 3d at 1100-02.

257. *See* Alperin v. Vatican Bank, 410 F.3d 532, 547-51 (9th Cir. 2005) (affirming that courts adjudicate generic property claims every day, but dismissing war crimes and slave labor claims as raising political questions and nothing that a "surgical approach" must be taken in "benchmarking the Baker formulations against the individual claims").

258. *See* Notice of Appeal to the United States Court of Appeals for the Ninth Circuit, Bakalian v. Republic of Turkey, No. CV 10-09596 (C.D. Cal. Apr. 19, 2013) [hereinafter Bakalian Notice of Appeal]; Notice of Appeal, Davoyan v. Republic of Turkey, No. CV 10-5636 DMG (SSx) (C.D. Cal. May 1, 2013) [hereinafter Davoyan Notice of Appeal].

259. *See* Davoyan Notice of Appeal, *supra* note 258.

260. *See* Notice of Cross-Appeal at 1, Bakalian v. Republic of Turkey, No. CV 10-9596 (C.D. Cal. May 3, 2013); Notice of Cross-Appeal at 1, Davoyan v. Republic of Turkey, No. CV 10-5636 DMG (SSx) (C.D. Cal. May 8, 2013).

The primary written briefing on appeal was completed for both *Davoyan* and *Bakalian* by March 2014. Oral argument was scheduled for March 4, 2015 in Pasadena, California. However, in early February 2015, the clerk issued an order vacating oral argument and staying the appeals pending the Supreme Court's decision in *OBB Personenverkehr A.G. v. Sachs*, a case involving the commercial activity exception to the FSIA in which the Supreme Court had just granted a petition for certiorari.[261] The district court had found that the commercial activity exception did not apply in either *Davoyan* or *Bakalian*, a ruling which only the *Davoyan* plaintiffs had appealed.[262] *OBB* was argued and submitted in October 2015, and a decision was issued on December 1, 2015.[263] After a final round of supplemental briefing addressing the impact of *OBB*,[264] oral argument was again scheduled for August 4, 2016.

In the meantime, the D.C. Circuit issued its ruling in *Simon v. Hungary*, resolving in plaintiffs' favor many of the issues on appeal in *Bakalian* and *Davoyan*.[265] First, the court agreed that, where "plaintiffs . . . seek recovery based on garden-variety common-law causes of action such as conversion, unjust enrichment, and restitution," allegations that the property taking at issue violated international law are necessary only to satisfy the FSIA's jurisdictional requirement.[266] Second, where the taking of property "amounted to the commission of genocide," it constitutes a violation of international law as required by the FSIA.[267] Third, the "wholesale plunder of Jewish property . . . aimed to deprive Hungarian Jews of the resources needed to survive as a people," and therefore the takings themselves met the definition of genocide under international and U.S. law.[268] Fourth, because the "international-law violation on which the plaintiffs premise their argument for jurisdiction under [28 U.S.C.] § 1605(a)(3) is not the traditional prohibition against uncompensated takings" but rather

261. *See generally* OBB Personenverkehr A.G. v. Sachs, 136 S. Ct. 390 (2015).

262. *See* Memorandum Opinion, *supra* note 252, 116 F. Supp. 3d at 1097; *see also* Davoyan Notice of Appeal, *supra* note 258.

263. *OBB Personenverkehr A.G.*, 136 S. Ct. at 390.

264. *See generally id.* at 392-93 (*OBB* deals solely with the interpretation and application of the statutory term "based upon" found in the FSIA's commercial activity exception, 28 U.S.C. Section 1605(a)(2)) (The "based upon" analysis is not an issue in either *Bakalian* or *Davoyan*. It is not disputed that the acts alleged were "based upon" the defendant banks' conduct in Turkey, and the issue in *Davoyan* is rather the U.S. nexus, *e.g.*, whether those acts cause a "direct effect" in the United States as required by the third clause of Section 1605(a)(2)).

265. *See generally* Simon v. Republic of Hungary, 812 F.3d 127 (D.C. Cir. 2016).

266. *Id.* at 141.

267. *Id*. at 142.

268. *Id*. at 143.

genocide or other mass atrocities, the "so-called 'domestic takings' rule" was inapplicable.[269] Fifth, "the case does not present a non-justiciable political question."[270] Indeed, the court confirmed long-standing precedent that "[t]here is no across-the-board constitutional bar preventing the Judiciary's consideration of actions arising out of the wartime conduct of a foreign sovereign."[271] Nor was there any indication from the Executive Branch that "adjudication of the plaintiffs' lawsuit would . . . raise any broader foreign relations concerns."[272]

Given the length of time that had passed since the appeal had been filed (more than three years), the parties were eager to move forward.[273] The appellate panel was composed of Judges Stephen Reinhardt, Alex Kozinski, and Kim Wardlaw, all of whom have significant experience with cases involving international law, the FSIA, and the political question doctrine.[274]

Questioning at oral argument was active and began almost immediately, with questions from Judge Kozinski to Lee Boyd, counsel for plaintiffs in *Bakalian*.[275] Judge Kozinski took issue with plaintiffs' central premise, that the FSIA jurisdictional determination had been statutorily delegated exclusively to the judiciary and thus could not implicate the political question doctrine.[276] As he put it, "In principle, there is nothing wrong" with the court applying any of the constitutional doctrines limiting federal courts' power "that supersede any statute."[277] Whether the doctrine was applied at the jurisdictional stage or later in the case, from his perspective, did not make a difference if the case was going to involve a political question at some point.[278] Judge Reinhardt appeared to agree, asking "[w]hat's the difference?" between finding jurisdiction and applying the political question doctrine to the merits, versus applying the doctrine on the jurisdictional inquiry.[279]

269. *Id*. at 145.

270. *Id*. at 149.

271. *Id*. at 131.

272. *Id.* at 150.

273. The cases were filed in 2010.

274. The Foreign Sovereign Immunities Act (FSIA) establishes limitations as to whether a foreign sovereign nation may be sued in U.S. federal courts. *See* 28. U.S.C. §1330.

275. *See* Oral Argument, Bakalian v. Central Bank Republic of Turkey, No. 13-55664 (9th Cir. Aug 4, 2016), http://www.ca9.uscourts.gov/media/view.php?pk_id=0000016199 [hereinafter Bakalian Oral Argument]. Co-author Rajika Shah also attended oral argument, but did not make a formal appearance.

276. *See id.* at 0:54.

277. *Id.*

278. *See id*. at 3:52.

279. *Id.* at 4:30.

But the biggest point of contention between the judges and plaintiffs' counsel was the role that "genocide" played, or did not play, in the case. Each of the judges expressed concern that, at some point in the case, the question of whether genocide had been committed would have to be decided, whether it be: (1) to meet the FSIA's jurisdictional requirement that the taking be in violation of international law (because genocide is an exception to the domestic takings rule);[280] (2) because it was explicitly brought as one of the claims (in *Davoyan* only); or (3) because—as counsel for the bank defendants suggested—it would eventually be asserted as an exceptional circumstance justifying the delayed running of any applicable statute of limitations.[281]

The panel understood that Turkey's sensitivity to the claim of genocide distinguished it from Germany and the Holocaust. As Judge Kozinski noted: "The question of whether the takings during the Holocaust were . . . a genocide are not really politically controversial, whereas this is, for better for worse, our government has resisted calling this a genocide."[282] Judge Wardlaw phrased it in even starker terms:

> [E]ven with respect to the property claims, in doing an analysis of the political question doctrine, what weight would we give to the current situation in Turkey and the fact that the United States is their partner in defense, and that you want the very land returned to you that our money paid for . . . I mean, do we just put blinders on to the real world events?[283]

Out of all the judges, Judge Wardlaw seemed most interested in how the six-factor analysis required by *Baker* would play out in the case, asking counsel for the bank defendants whether he could point to any textual constitutional commitment giving the adjudication of property claims to the political branches.[284]

Counsel for both sets of plaintiffs clarified that, even absent genocide, international law norms that forbid widespread arbitrary and dis-

280. *See id.* at 1:15:00; *see also* Altmann v. Rep. of Austria, 317 F.3d 954, 968 (9th Cir. 2002) (the "domestic takings rule," as it is commonly referred to, posits that a taking by a state of property of its own nationals does not violate international law).

281. *See* Bakalian Oral Argument, *supra* note 275, at 1:04:00.

282. *Id.* at 16:25.

283. *Id.* at 31:43; *see generally* Paul Kirby, *Turkey Coup Attempt: Who's the Target of Erdogan's Purge?*, BBC NEWS (July 20, 2016), http://www.bbc.com/news/world-europe-36835340. Just days before oral argument was held on August 4, 2016, Turkey's president Recep Tayyip Erdoğan was the target of an attempted coup. In the wake of the coup, President Erdoğan initiated an extensive crackdown on those deemed supportive of the purported coup organizers. The crackdown targeted thousands people across sectors including the military, police, the judiciary, university administrators and faculty, and the education and finance ministries.

284. *See* Bakalian Oral Argument, *supra* note 275, at 1:10:00.

criminatory acts targeting a particular class of people would, on their own, satisfy the jurisdictional requirement.[285] Thus, the genocide question need never be reached, and if it were reached, it would only be at the jurisdictional stage pursuant to the FSIA's mandate that the courts determine whether a taking "in violation of international law" had occurred.[286] Indeed, after intense questioning from Judge Kozinski—asking why, if the word "genocide" was truly a non-issue in the case, counsel had not disclaimed it—Mark Geragos, counsel for the *Davoyan* plaintiffs, explicitly withdrew the genocide claim from the *Davoyan* causes of action.[287] Geragos also clarified that only the *Davoyan* plaintiffs had brought international law causes of action, a point that apparently had escaped the panel's notice during their preparations.[288] The *Bakalian* plaintiffs' claims only relate to property.[289] Whether this was enough to satisfy the panel or not remains to be seen; Judge Reinhardt's final comment on the issue was that, at least in *Bakalian*, genocide had still "crept back in."[290]

Counsel for the bank defendants, Neil Soltman of Mayer Brown, was questioned most closely about his clients' position regarding the domestic takings rule. In an extended exchange with Soltman, Judge Kozinski, supported by Judge Reinhardt, argued the case for why it was appropriate for the court to recognize that there were some circumstances in which a state could be held accountable in international law even for property takings from its own nationals:

> What I'm trying to point out is that, just the taking of one individual, good reasons or bad, is different from saying, a government saying, we're going to take away your people's property if they are a particular religion, ethnicity, something of that sort, race. They are different. And the principle that, we don't mess in your business because we don't want you to mess in our business, doesn't really hold when that happens, when a government chooses to, you know, Judge Reinhardt called it a caste system. It's not the same thing, is it?[291]

Judge Kozinski seemed disinclined to hold, as urged by the banks, that there were no exceptions at all to the rule, at least in part because that would create or exacerbate a split with both the D.C. Circuit (in

285. *See id.* at 20:20, 43:40.
286. *See id.* at 15:20.
287. *See id*. at 40:40.
288. *See id.* at 38:00.
289. *See id.* at 38:29.
290. *Id.* at 45:38.
291. *Id.* at 55:37.

Simon) and the Seventh Circuit (in *Abelesz*).[292] Searching for alternatives, Judge Kozinski expressed some interest—echoed by Judge Reinhardt—in issuing a formal request to the State Department to solicit the Executive's views as to the foreign affairs implication, if any, of adjudicating the cases.[293]

Interestingly, the panel did not mention *Movsesian III*, which indicates a judicial recognition of the limits of that decision as well. It will not be used as a blanket invocation to knock out any case even tangentially involving the Armenian genocide, and is likely to remain limited to clarifying the circumstances in which a state steps too far over the line reserving foreign affairs powers to the federal government.[294]

Clearly, the panel was most concerned with how to deal with the political question issue if it finds that jurisdiction exists under the FSIA's takings exception, because it appears convinced that "genocide" and all of its political ramifications with Turkey lie at the heart of the case, whether or not an American court would ever have to determine whether an Armenian genocide occurred. As of this writing in early 2017, the panel's decision is pending.

IV. Armenian Genocide Property Restitution Comes of Age

Attorney Vartkes Yeghiayan filed one more Armenian genocide-era case in 2010, this time on behalf of the Western Prelacy of the Armenian Apostolic Church of America.[295] The lawsuit, originally filed by the Western Prelacy in June 2010 in the Los Angeles Superior Court, named as defendants the J. Paul Getty Museum and the J. Paul Getty Trust—one of the wealthiest and most prominent art institutions in the world.[296] The complaint accused the Getty defendants of purchasing art which was stolen from the rightful owner, the

292. *Id*. at 1:01.

293. *Id.* at 1:12.

294. *Compare* Movsesian v. Vershicherung AG, 670 F.3d 1067, 1069 (9th Cir. 2012) (holding that "California statute vesting state courts with jurisdiction over insurance actions by 'Armenian Genocide' victims and extending statute of limitations for victims claims intruded on federal government's exclusive power to conduct and regulate foreign affairs, and thus was preempted") *with* Gingery v. City of Glendale, 831 F.3d 1222, 1231 (9th Cir. 2016) (holding that a city's installation of a monument to female wartime sex slaves did not intrude on the federal government's foreign affairs powers). *Gingery* was issued on the same day as the *Bakalian* oral argument and decided by two of the same panel members, Judges Reinhardt and Wardlaw.

295. Complaint and Demand for Jury Trial, Western Prelacy of the Armenian Apostolic Church v. J. Paul Getty Museum, No. BC438824 (Cal. Super. Ct. filed June 1, 2010).

296. *Id.*

Catholicosate of Cilicia, during the gravest days of the Armenian genocide, 1915-1923.[297]

The Western Prelacy's ownership of the art can be traced back to the church's origins. The One Holy Universal Apostolic Orthodox Armenian Church was founded in 301 A.D., when Armenia adopted Christianity as its official religion, and is recognized as the oldest organized Christian church in the world.[298] It continues as the key religious authority for the Orthodox Christian population in Armenia, and for the Armenian diaspora as well.[299] The Catholicosate of the Holy See of the Great House of Cilicia is a regional see currently located in Antelias, Lebanon with jurisdiction of the Dioceses of Lebanon, Syria and Cyprus, as well as Iran, India, Canada, and the United States.[300] The head of the Catholicosate of the Great House of Cilicia is the "Catholicos."[301]

Since the enormous disruption and displacement of the Armenian genocide, the Catholicosate has largely focused on reorganizing and reestablishing itself and the lines of communication both internally and to its parishioners.[302] The structure of the Armenian church has evolved and expanded, and today both the Catholicosate of Cilicia and the Mother See of Holy Echmiadzin (headquartered in Armenia, with different jurisdiction) have branches in the United States.[303] In the United States, the Western and Eastern Prelacies are each independently functioning units of the Catholicosate of the Holy See of the Great House of Cilicia.[304] The Western Prelacy of the Armenian Apostolic Church of America was established in 1973 and is headquartered in La Crescenta, California, where it serves southern California's large Armenian population.[305]

297. *Id.* at 1.

298. Second Amended Complaint and Demand for Jury Trial at 2, Western Prelacy of the Armenian Apostolic Church v. J. Paul Getty Museum, No. BC 438824 (Cal. Super. Ct. filed Aug. 1, 2011) [hereinafter Getty Complaint].

299. *Id.*

300. *Id.* Prior to the Armenian genocide, the Catholicosate of Cilicia had been located in Sis, a medieval Armenian city near the southern coast of Turkey (now located in modern-day Kozan, Turkey). *Id.* Sis was targeted by the Turks during the genocide, and then-Catholicos Sahak retreated with his followers to Aleppo, Syria. *Id.* In 1929, following the exodus of hundreds of thousands of Armenian inhabitants from Cilicia during the genocide, the Catholicosate was reestablished at Antelias, Lebanon, which remains its headquarters today. *Id.* at 2-3.

301. *Id.* at 2.

302. *Id.* at 3.

303. *Id.*

304. *Id.*

305. *Id.*

The facts of the complaint tell a story that could have come right out of a Hollywood film. It begins 800 years ago with T'oros Roslin (circa 1210-1270), the most prominent Armenian manuscript illuminator in the High Middle Ages.[306] Roslin's works occupy a central place in the history of Armenian book painting, and have been the subject of countless scholarly books and articles in multiple languages concerning not only Armenian art history, but art history in general.[307] Today, Roslin's illuminated manuscripts are held in collections around the world, including Jerusalem, Yerevan, Baltimore, Washington, Los Angeles, and Istanbul.[308] His works are considered to be Armenian national treasures.[309]

The artwork at issue in the Getty case was contained in a manuscript known as the Zeyt'un Gospels. Roslin illustrated the Zeyt'un Gospels at the scriptorium in Hromkla, Cilicia in 1256 for Catholicos Constantine I of the Holy See of the Great House of Cilicia.[310] A series of eight folios (sixteen pages) known as the Canon Tables—essentially an index to passages that describe the same events in more than one of the four Biblical New Testament gospels—contained the richest and most sumptuous decorations, including colorful birds, flowers, columns, and other ornamental designs.[311] Housed for centuries in the Armenian church in the town of Zeyt'un, the Gospel book was said to wield supernatural powers of protection for those who venerated and protected it.[312] The Armenians of Zeyt'un called on those powers during the darkest days of the Armenian genocide, when the full Armenian church hierarchy paraded the Zeyt'un Gospels through every street in Zeyt'un in order to create a "divine firewall of protection" around the city.[313]

The Gospel book was also protected through more practical means. From the late nineteenth century onwards, the Gospels were in joint possession of the church and the Sourenian family, a prominent Armenian family known as "Defenders of the Church."[314] The Gospels were held in an iron chest with two locks in the wall of

306. *Id.* at 5.

307. *Id.*

308. *Id.*

309. *Id.* at 5-6.

310. *Id.*

311. *See Canon Tables from the Zeyt'un Gospels*, GETTY (Sept. 21, 2015), http://www.getty.edu/art/collection/objects/5253/t'oros-roslin-t'oros-roslin-canon-tables-from-the-zeyt'un-gospels-armenian-1256/.

312. Getty Complaint, *supra* note 298, at 6.

313. *Id.*

314. *Id.*

Church of the Holy Mother of God in Zeyt'un.[315] The church held a key to one of the locks, and the Sourenian family held the key to the other lock.[316] Only by inserting both keys at once could the Gospels be "freed."[317]

In or about 1915, the Zeyt'un Gospel book was given to Prince Asadur Agha Sourenian to hold for safekeeping.[318] When Prince Asadur and his family were ordered deported in late 1915, the prince brought the Gospel book to the nearby town of Marash in order to save it from destruction, and also in the hopes that its divine power would protect him and his family.[319] However, in the spring of 1916, the Sourenians, who continued to safeguard the Zeyt'un Gospels in Marash, were ordered exiled to Der Zor in the Syrian desert.[320]

In Marash, the Sourenians had an Armenian friend named Dr. H. Der Ghazarian, who was working in a nearby German hospital.[321] When he discovered that the Sourenians were going to be deported, he persuaded them to let him borrow the Zeyt'un Gospels the day before they left.[322] That request ultimately saved the Gospel book, because Dr. Der Ghazarian was allowed to remain in Marash longer than other Armenians due to his work at the hospital.[323]

When Dr. Der Ghazarian and his family finally fled Marash in 1920, they were forced to leave behind the unwieldy Gospel book as they fled.[324] Sometime within the next few years, an unknown Turkish individual found the Zeyt'un Gospels and brought the manuscript to an Armenian named Melkon Atamian in Marash for him to sell.[325] It appears that Atamian then carefully cut out the eight folios bearing the Roslin illuminated Canon Tables and returned the rest of the manuscript to the Turk.[326]

From this point onward, in or about 1923, the separated Canon Tables and the remainder of the Zeyt'un Gospel manuscript continued on different paths. The Turk who possessed the manuscript, minus the eight folios, subsequently took it to the Prelate of the Armenian

315. *Id.*
316. *Id*.
317. *Id*.
318. *Id*.
319. *Id.*
320. *Id.*
321. *Id.*
322. *Id*.
323. *Id.*
324. *Id.* at 7.
325. *Id.*
326. *Id.*

Church of Marash, part of the Catholicosate of the Great House of Cilicia.[327] The Prelate, for his part, entrusted the Gospel book to Reverend James K. Lyman—an American missionary in Marash.[328] Rev. Lyman sent word from Marash to the "Zeyt'un Compatriotic Union" in Aleppo that he now possessed the Zeyt'un Gospels and wished for them to have it, although he was not allowed to take it outside of Turkey due to strict laws regarding objects with historical value.[329] Ultimately, and with the consent of the Patriarch of Marash, it was agreed that Lyman should pass the Gospel book on to the Patriarchate of the Armenian church in Istanbul.[330] In the late 1960s, with the consent of Catholicosate of the Great House of Cilicia, the Armenian Patriarch of Istanbul took the Gospel book to Armenia and entrusted it to the Catholicos at Echmiadzin.[331] Finally, the Zeyt'un Gospel book, minus the eight folios containing the Canon Tables, was then presented to the Matenadaran—a state museum located in Yerevan, Armenia and the main repository for Armenian manuscripts—for safekeeping, where it is currently housed.[332]

The illuminated Canon Tables followed a very different journey. Unbeknownst to the Catholicosate of the Great House of Cilicia, the Atamian family maintained the eight stolen folios in their private collection for the next seventy years, from the time Melkon Atamian removed them from the Zeyt'un Gospels until the Getty museum purchased them in 1994.[333] At some point, Melkon Atamian and/or his descendants made their way to the East Coast of the United States, bringing the Canon Tables with them. Throughout that entire period, the Catholicosate had no knowledge of facts to suggest that the pages had been stolen during the Armenian genocide.[334] No one, including scholars associated with the Catholicosate, was able to definitively conclude that the eight separated folios belonged to the Zeyt'un Gospels.[335]

In 1994, the Atamian family anonymously loaned the folios to the Pierpont Morgan Library in New York for an exhibition of Armenian art, entitled Treasures In Heaven: Armenian Art, Religion, and Soci-

327. *Id.*
328. *Id.*
329. *Id.*
330. *Id.* at 7-8.
331. *Id.* at 8.
332. *Id.*
333. *Id.*
334. *Id.*
335. *Id.*

ety.[336] The Atamians did not inform the Catholicosate either that they possessed the Canon Tables, or that Melkon Atamian had removed them from the Zeyt'un Gospels.[337] Nor did the Pierpont Morgan Library inform the Catholicosate that they temporarily possessed the stolen folios during the exhibition.[338] Sometime after the exhibition, in 1994, the Getty Museum purchased the eight stolen folios (Canon Tables) from the Atamian family.[339]

The Catholicosate of Cilicia did not discover that the Canon Tables had been stolen and were being housed in the Getty Museum in Los Angeles until on or about July 2006.[340] The Western Prelacy, as the authorized representative and assignee of the Catholicosate of the Great House of Cilicia, brought claims against the Getty in June 2010 in California state court in Los Angeles for replevin, conversion, damages under California Penal Code Section 496, quiet title, and declaratory relief.[341] The suit sought the return and reunification of the Canon Tables with the Zeyt'un Gospels.[342]

As with the other Armenian genocide cases, the timeliness of the claims was a major issue. Plaintiff's claims were brought pursuant to California Code of Civil Procedure Section 338(c)(3), adopted by the California legislature and signed into law in 2010, which relates particularly to the recovery of fine art taken by theft.[343] Specifically, the statute provides that:

> [A]n action for the specific recovery of a work of fine art brought against a museum, gallery, auctioneer, or dealer, in the case of an unlawful taking or theft, as described in Section 484 of the Penal Code, of a work of fine art, including a taking or theft by means of fraud or duress, shall be commenced within *six years of the actual discovery* by the claimant or his or her agent, of both of the following:
>
> > (i) The identity and the whereabouts of the work of fine art. In the case where there is a possibility of misidentification of the object of fine art in question, the identity can be satisfied by the identification of facts sufficient to determine that the work of fine art is likely to be the work of fine art that was unlawfully taken or stolen.

336. *Id.*
337. *Id.*
338. *Id.*
339. *Id.* at 8-9.
340. *Id.* at 9.
341. *Id.* at 10-13.
342. *Id.* at 1.
343. *Id.* at 9-10.

> (ii) Information or facts that are sufficient to indicate that the claimant has a claim for a possessory interest in the work of fine art that was unlawfully taken or stolen.[344]

The Getty filed a demurrer to the complaint on September 6, 2011.[345] In its demurrer, the Getty argued that the Catholicosate's claims were time-barred, claiming that the Catholicosate actually discovered in the 1940s that the Canon Tables had been stolen.[346] In November 2011, the court overruled the Getty's demurrer, rejecting the Getty's assertions that early dismissal was appropriate based upon statutes of limitations.[347] The court then ordered the parties to participate in mediation, which was unsuccessful.[348]

Developments in Nazi looted art cases soon began to have an impact on the litigation against the Getty. In October 2012, the Western Prelacy and the Getty museum asked the court to stay the case in light of a recent federal district court ruling in *Cassirer v. Thyssen-Bornemisza Collection Foundation*—an FSIA case against a Spanish state-run art museum brought by the heir to a Holocaust survivor whose valuable artwork had been stolen by the Nazis—declaring Section 338(c)(3) to be unconstitutional.[349] The decision was on appeal to the Ninth Circuit, and thus the resolution of the appeal could determine the outcome of the Western Prelacy's case.[350]

The Ninth Circuit issued its ruling in *Cassirer* in December 2013.[351] In a major victory for plaintiffs' advocates, the court held that—unlike the state statutes at issue in *Von Saher*, *Movsesian*, and a third case involving wartime claims, *Deutsch v. Turner*[352]—Section 338(c)(3) was not preempted under the foreign affairs doctrine.[353] According to the Ninth Circuit, Section 338(c)(3) "does not create a remedy for wartime injuries by creating a new cause of action for the recovery of artwork"; rather, it "extends the statute of limitations for

344. CAL. CIV. PROC. CODE § 338(c)(3) (West 2015) (emphasis added).

345. Defendant's Demurrer and Memorandum of Points and Authorities, Western Prelacy of the Armenian Apostolic Church v. J. Paul Getty Museum, No. BC438824 (Cal. Super. Ct. filed Sept. 6, 2011).

346. *Id.* at 1-4.

347. The court ruled from the bench and did not issue a written opinion. For a discussion of the November 3, 2011 demurrer hearing, see Boehm, *supra* note 13.

348. *Id.*

349. Cassirer v. Thyssen-Bornemisza Collection Foundation, 2012 WL 12875771 (C.D. Cal. May 24, 2012).

350. *See* Parties' Joint Stipulation Re: Stay of Proceedings, Western Prelacy of the Armenian Apostolic Church v. J. Paul Getty Museum, No. BC438824 (Cal. Super. Ct. filed Oct. 17, 2012).

351. Cassirer v. Thyssen-Bornemisza Collection Foundation, 737 F.3d 613 (9th Cir. 2013).

352. Deutsch v. Turner Corp., 324 F.3d 692 (9th Cir. 2003).

353. *Cassirer*, 737 F.3d at 618-19.

preexisting claims concerning a class of artwork that is unrelated to foreign affairs on its face."[354] The court noted that Section 338(c)(3) was neutral on its face and said nothing about wartime injuries or claims.[355] The statute did not limit the class of claimants only to "Holocaust" or "Armenian Genocide" victims, but rather any person could recover a work of fine art as long as the statute's other requirements were met.[356] In its decision, the Ninth Circuit specifically cited the Getty case as an example of a non-Holocaust-era case relying on the statute for recovery.[357]

Following the Ninth Circuit's February 2014 denial of the Thyssen-Bornemisza Collection Foundation's petition for rehearing en banc in *Cassirer*, the stay was lifted in the Getty case so that proceedings and discovery could recommence.[358] Trial was scheduled to begin on November 3, 2015.[359]

On September 21, 2015, in the year marking the hundredth anniversary of the start of the Armenian genocide, the parties announced in a joint press release that they had resolved their dispute over the ownership of the eight Canon Tables.[360] In the settlement, the Getty museum "acknowledges the Armenian Apostolic Church's ownership of the eight 13th Century manuscript pages. . . . Separately, in recognition of the Getty's decades-long stewardship of the Canon Tables and its deep understanding and appreciation of Armenian art, the Church will donate the pages to the Getty Museum in order to ensure their preservation and widespread exhibition."[361] The Canon Tables will continue to be housed at the Getty museum and will be available to museum visitors as well as scholars and researchers.[362]

As the first successful settlement of an Armenian genocide-era art case, the Western Prelacy's suit against the Getty may point the way towards the future of Armenian genocide litigation. Dozens of other Armenian manuscripts are known to exist in museum collections across the United States, including the Huntington Library and Art Gallery in San Marino, California; the Walters Art Gallery in Bal-

354. *Id*.

355. *Id*. at 618.

356. *Id*. at 619.

357. *Id*.

358. *See* Renewed Motion to Lift Stay and Restore Action to Active Civil Status, Western Prelacy of the Armenian Apostolic Church v. J. Paul Getty Museum, No. BC438824 (Cal. Super. Ct. filed Apr. 16, 2014).

359. *See id.*

360. Getty Press Release, *supra* note 13.

361. *Id.*

362. *Id.*

timore; the Museum of Fine Arts in Boston; the Pierpont Morgan Library in New York; the Philadelphia Museum of Art; and the Freer Gallery of Art at the Smithsonian in Washington.[363]

There are almost certainly more art and cultural objects stolen or taken during the Armenian genocide that have yet to be found and returned to their rightful owners. As is amply demonstrated by the complicated and confusing history of the Zeyt'un Canon Tables, it is not at all clear that the rightful owner(s) are even aware of the existence of their art, much less the location and how it came to be at its present location. Museums, galleries, and art dealers cannot acquire good title from a thief, and they have an obligation to look carefully into the provenance of any artworks they purchase and abide by ethical acquisition standards.[364] An independently funded group, similar to the Holocaust Art Restitution Project, which was founded in the late 1990s with the specific purpose of "document[ing] cultural property losses suffered by Jewish individuals, families, and institutions between 1933 and 1945 at the hands of the National Socialists and their Fascist allies across continental Europe" and "conduct[ing] historical research into the wartime and postwar fate of stolen, confiscated, misappropriated cultural property,"[365] could assist the Armenian diaspora in identifying and locating Armenian art stolen or looted during the genocide. For many, this is less about profit and more about justice, patrimony and memory.[366]

The Getty case is also an example of the "creative and mutually beneficial solution[s]" that can be achieved when the parties work together and acknowledge that there is often a middle ground.[367] Recognition of the suffering the Armenians faced during the genocide can go a long way towards reconciliation, and need not impede art institutions' laudable goals of protecting and preserving valuable artworks

363. *See, e.g.,* Melissa Conway & Lisa Fagin Davis, *Directory of Collections in the United States and Canada with Pre-1600 Manuscript Holdings*, 109 PAPERS BIBLIOGRAPHICAL SOC'Y AMERICA 273, 301, 357, 387 (2015).

364. *See, e.g.*, *Standards Regarding the Unlawful Appropriation of Objects During the Nazi Era*, AMERICAN ALLIANCE OF MUSEUMS, http://www.aam-us.org/resources/ethics-standards-and-best-practices/collections-stewardship/objects-during-the-nazi-era (last visited Dec. 1, 2016).

365. See Plunderedart, *Holocaust Art Restitution Project: About*, FACEBOOK https://www.facebook.com/plunderedart/about/?ref=page_internal (last visited Dec. 1, 2016) for a description of the nonprofit group and its activities.

366. *See* Phil Hirschkorn, *Why finding Nazi-looted art is "a question of justice,"* PBS NEWSHOUR (May 22, 2016), http://www.pbs.org/newshour/updates/why-finding-nazi-looted-art-is-a-question-of-justice/; *see also* Ronald S. Lauder, *Time to Evict Nazi-Looted Art from Museums*, WALL ST. J. (June 30, 2014), http://www.wsj.com/articles/ronald-lauder-time-to-evict-nazi-looted-art-from-museums-1404076759.

367. Getty Press Release, *supra* note 13.

and cultural artifacts so that everyone may enjoy and learn from them. Surely similarly creative solutions exist to resolve even the most intractable claims involving Turkey and its state agencies—if the parties can find the leadership, political will, and moral courage to step outside their comfort zones and search for mutual benefit, rather than scoring points.

V. CONCLUSION

After initial success in the New York Life and AXA insurance cases, fresh on the heels of successful multi-billion dollar settlements in Holocaust restitution cases, the movement for restitution through litigation for victims of the Armenian genocide was dealt a number of setbacks. Despite repeated efforts in the California legislature to pass plaintiff-friendly statutes extending the statutes of limitations for "Armenian Genocide victims" bringing various types of claims, defendants quickly realized that they could capitalize on Turkey's historic refusal to acknowledge the genocide and the U.S. government's reticence to consistently challenge Turkey's characterization of events. Armenian plaintiffs in U.S. courts have had to leave much on the table: bank deposits and looted assets deposited in banks, insurance claims against certain companies, and potentially hundreds of millions of dollars in real property claims.

Moreover, while the United States has historically provided a home and safe haven for refugee groups fleeing mass atrocities and has often negotiated post-war settlements on behalf of U.S. nationals, those settlements may leave refugees out in the cold—as happened to the Armenians fleeing Turkey in the wake of the genocide—if they cannot claim U.S. citizenship at the time of settlement or are excluded from the settlement at the request of the settling state.

Without the support of the political branches of government, accompanied by robust and targeted private advocacy efforts that can highlight the benefits of a comprehensive resolution and apply consistent pressure toward that end, as occurred in the Holocaust restitution cases, litigation in American courts may not be—for the foreseeable future—the most likely, or efficient, means of obtaining redress or restitution. The Obama Administration was not a friend of such litigation, whether filed by Armenians or other victim groups,[368] and it is

368. *See, e.g.*, Brief for the United States as Amicus Curiae, Arzoumanian v. Munchener Ruckversicherungs-Gesellschaft Aktiengesellschaft AG, No. 12-9 (S. Ct. filed May 2013); Supplemental Brief for the United States as Amicus Curiae in Partial Support of Affirmance, Kiobel v. Royal Dutch Petroleum Co., No. 10-1491 (S. Ct. filed June 2012); Brief for the United States

unlikely that the Trump Administration will act otherwise. The recent history of Armenian genocide restitution efforts in the United States, particularly in contrast with the successes of the modern Holocaust restitution movement, underscores that the struggle for justice for the financial wrongs arising from the Armenian genocide has yet to be won.

Yet there is reason for optimism: the Ninth Circuit appellate panel that is currently considering whether U.S. courts have jurisdiction over the Republic of Turkey to hear cases alleging the unlawful expropriation of real property is clearly grappling with the fact that there is no "political question" lurking in Congress's express delegation of the jurisdictional question to the judicial branch or in the "garden variety" property claims at issue. Whatever the outcome, the court's decision will likely be the subject of petitions for rehearing en banc and for certiorari to the Supreme Court.

California's stolen art recovery statute, Section 338(c)(3) of the Code of Civil Procedure, also stands out. After years of failed attempts by the California legislature to provide a forum for and extend limitations periods on claims brought by various defined victim groups, Section 338(c)(3)'s carefully neutral descriptions of the claimant class and the circumstances in which the limitations period would be extended finally passed constitutional muster.[369] It is also the template for a nearly identical federal statute, the Holocaust Expropriated Art Recovery Act of 2016 (the HEAR Act). Passed by Congress with unanimous bipartisan support and signed into law by President Obama on December 16, 2016, the HEAR Act enshrines in law the existing U.S. policy promoting the return of Nazi-confiscated art, and extends the statute of limitations on claims to stolen art.[370] The HEAR Act's six-year limitations period for filing claims applies in every court in the United States.[371]

Section 338(c)(3) set the stage for the successful, amicable settlement of the first Armenian genocide art recovery case, *Western Prelacy of the Armenian Apostolic Church of America v. The J. Paul Getty*

as Amicus Curiae, Von Saher v. Norton Simon Museum of Art at Pasadena, No. 09-1254 (S. Ct. filed May 2011).

369. For further discussion of the years of interplay between the California legislature and the federal courts in determining the limits of legislation in this area, see Shah, *supra* note 6.

370. *See* Holocaust Expropriation Art Recovery Act of 2016, Pub. L. No. 114-308, 130 Stat. 1524 (to be codified at 22 U.S.C. § 1621 note); *see also HEAR Act Signed Into Law*, COMMISSION FOR ART RECOVERY, http://www.commartrecovery.org/hear-act (last visited Feb. 17, 2017).

371. *See* Holocaust Expropriation Art Recovery Act, Pub. L. No. 114-308, § 5, 130 Stat. 1524, 1526-27.

Museum. The settlement took place in 2015, the hundred-year anniversary of the genocide. The Getty litigation points the way toward the future of Armenian genocide litigation in the United States: targeted efforts based on narrowly written statutes that avoid the "third rail" term for American courts—"Armenian genocide"; a willingness to be open to creative solutions; and political pressure that enhances and supports the litigation. If Armenians can learn to harness these energies as effectively as the Jewish survivors and heirs of the Holocaust, they may yet be able to achieve some measure of justice.

PANEL DISCUSSION: THE EL MONTE SWEATSHOP SLAVERY CASES*

Gowri Ramachandran, Hon. Audrey B. Collins, Julie Su, Scott Cummings & Muneer Ahmad†

I. INTRODUCTION

GOWRI RAMACHANDRAN: We are very lucky to have this panel of speakers with us today. With us are two of the attorneys and the judge who heard the El Monte sweatshop and trafficking cases. We also have an expert in social movements and their relationship to litigation and the court. It's truly an amazing panel. They've all won many, many awards, collectively, and individually.

I will begin my introductions with Justice Collins. Justice Collins was nominated in January 1994 to the Central District of California. She received her commission that May. She served well in that court, and eventually became Chief Judge of the District in 2009 to 2012. In 2014, she left the District Court and was appointed to the California Court of Appeal by Jerry Brown, where she is now serving. Before her appointment to the bench she was an associate at Los Angeles Legal Aid Foundation. She then joined the LA County D.A.'s office and became the first African-American woman to become a deputy there. She served as Deputy General Council on the Webster-Williams Commission that investigated the LAPD response to the 1992 riots. We are very, very honored to have her here. I know she had cases this morning, so we are really grateful that she made it out here. Justice Collins will say a few words about the decisions themselves and her involvement as the presiding judge in the case.

* What follows is an edited and annotated transcript of the live remarks made by selected panelists on March 18, 2016 during the Southwestern Journal of International Law's symposium, "The U.S. District Court for the Central District of California, 1966-2016: International Context."

† Gowri Ramachandran is a law professor at Southwestern Law School. She moderated the El Monte Sweatshop Slavery Cases panel and introduced the speakers. Introductions and brief biographies for the four panelists appear in Professor Ramachandran's opening remarks.

We are also going to have Commissioner Julie Su, who is the Labor Commissioner for the State of California. She's a nationally recognized expert on worker's rights and civil rights. She has dedicated her career to advancing justice on behalf of poor and disenfranchised communities. She is a MacArthur Foundation Genius, and was appointed by Governor Brown to be Labor Commissioner in April 2011. Prior to becoming Labor Commissioner, she was Litigation Director at Advancing Justice L.A, which is a non-profit civil rights organization devoted to issues affecting the Asian-American community. In 1994, which is a year relevant to this case, she started her legal career at Asian-Pacific American Legal Center (APALC), where she was doing a Skadden Fellowship at APALC. She was the lead attorney for Thai garment workers who were trafficked into the United States. We're going to hear from Commissioner Su on why the case was filed, the facts of the case that led up to it, and about the significance of the El Monte decision.

We also have Professor Muneer Ahmad from Yale Law School with us today. He's a clinical professor there, where he co-teaches the Transnational Development Clinic, and the Worker and Immigrant Rights Advocacy Clinic. He clerked for William Sessions in the US District Court for the District of Vermont. After that, he moved on to a Skadden Fellowship at APALC. Before he moved to Yale, he taught at American University in D.C. He has a lot of experience representing immigrants in all kinds of labor, immigration, and trafficking cases. He also represented a prisoner at Guantanamo Bay for three years. He's written quite a bit on all these topics. Professor Ahmad will talk about the specific social movement that resulted from this case, the anti-trafficking movement, and the legislation, policy, and reform that it has led to.

Last but not least, we also have Professor Scott Cummings from UCLA with us today. He's the Robert Henigson Professor of Legal Ethics and Professor of Law at UCLA. He's the Faculty Director of a new program there called LEAP, Legal Ethics and the Profession, which promotes research and programming on the challenges facing the contemporary legal profession. He has a history of dedication to public interest. He worked also as a Skadden Fellow, right around the same time as Commissioner Su and Professor Ahmad. He has also worked at the Community Development Project at Public Counsel, here in Los Angeles. He gave transactional legal assistance to non-profit organizations there and small businesses. He went on to clerk for Judge Wallace Tashima on the Ninth Circuit before he joined the

UCLA faculty. He does research on law and social change. He published the first public interest textbook called *Public Interest Lawyering: A Contemporary Perspective*.[1] He is also co-editor of a leading casebook on legal ethics.[2] Many people I know use that casebook. Professor Cummings will primarily talk about the relationship between litigation and courts and social movements. This El Monte case and the anti-trafficking movement is a really great example of that.

II. Panel Discussion

JULIE SU: Thank you so much. It is a pleasure to be here. I am going to set the stage for the panel by talking a little bit about the facts of this case,[3] and why we filed the kind of case that we did. This case involved seventy-two garment workers from Thailand who were trafficked into the United States from rural areas. They were promised good wages, a decent job, and a chance to help their families get ahead. Of the seventy-two workers, sixty-seven were women. This was no accident. The fact that an overwhelming majority were women attests to the burdens that women, not just in Thailand, but the world over, really face in terms of having to support their families.

They were all brought into the United States on false passports and when they got to Los Angeles, they were taken to this apartment complex in El Monte, which is no more than fifteen minutes from here. There, they were forced to sew garments for up to eighteen hours a day until their fingers were raw and their vision blurred. Then they had to drag their tired bodies upstairs to sleep in apartment-sized bedrooms made for two, with eight or ten to a room. A parameter of razor wire surrounded the entire apartment complex.[4] All the windows were boarded up, with only a little light sliver entering through. What they told me later when I met them was that in the middle of the night, when they would hear any noise outside, they would go to the window and wave desperately even though there was obviously no chance that they would ever be seen.

Over the duration of their imprisonment, a few workers escaped. It was interesting to both criminal prosecutors and to the public afterwards that the first few escapees did not say anything about what they had experienced. Even though, had they done so, there was a good

1. Alan K. Chen & Scott L. Cummings, Public Interest Lawyering: A Contemporary Perspective (2013).

2. Deborah Rhode & David Luban, Legal Ethics (5th ed. 2009).

3. Bureerong v. Uvawas, 922 F. Supp. 1450 (C.D. Cal. 1996).

4. George White, *Workers Held in Near-Slavery, Officials Say*, L.A. Times, Aug. 3, 1995, at A1.

chance their co-workers and friends would have been rescued. This really goes to show how deep the oppression and the sense of helplessness that they and the others felt. The entire time there, their captors told them that they are not supposed to be in this country, that they didn't speak English and had no rights, and that if they reported their captors, they would end up in a much worse situation.

Finally, in 1992, a worker drugged the guard, climbed over the fence, hailed a taxi, and was taken to the Thai temple in Hollywood.[5] Over a period of a few months, she ended up meeting some friends. They helped her write a letter to the local police. The letter said, "This place is dangerous. Bring guns. Help." That is what began a federal investigation into what was going on in the complex. Ultimately, in August of 1995, a multi-agency raid that included the Department of Labor, state labor law enforcement agencies, the local police, as well as the Immigration and Naturalization Service (INS) got the workers out of the complex and arrested their captors.[6] Unfortunately, after the raid, the fears of the workers who were held in this apartment complex happened and occurred. All of the workers were taken and were then thrown into federal detention where they were set for deportation.

That's where a small group of activists and myself became involved. We had actually been contacted before the raid because they were looking for Thai-speaking translators for assistance. After the raid, the front page of the Los Angeles Times said what had happened,[7] and we thought, "Where did the workers all go?" When we learned that they were being detained and being treated like criminals, we thought that was simply unacceptable and wrong.

We raced to the federal courthouse where they were being held and we made the policy argument that these workers shouldn't be held further because it really plays into the arguments of exploitative employers. Everybody's watching this case now. Every day workers are being told, in workplaces where they're being treated as subhuman, "if you speak out, you're the one who's going to be deported, and you're the one who's going to be punished." We don't want to reinforce that message. This is bad for workers, it's bad for the economy. It's not a good idea, and it's inhumane. Those arguments didn't go anywhere, so we decided to sit in at the federal building and did

5. Patrick Lee & George White, *INS Got Tip on Sweatshop 3 Years Ago*, L.A. TIMES, Aug. 4, 1995, at A1.

6. *Id.*

7. White, *supra* note 4.

not leave until we were permitted to see the workers. Over the next nine days, we argued for their freedom. When we were finally able to get them free, we helped to engage in the entire process of their readjustment to life outside of imprisonment.

There was a front shop for the slaves in that shop in El Monte. The front shop was in downtown L.A., not five minutes from here. There was a group of about twenty-two Latino workers who sewed garments. They were more like your typical sweatshop worker. They didn't work eighteen hours a day, but they worked ten or twelve. They weren't held against their will. It wasn't involuntary servitude, but it was economic servitude. They lived in poverty working full-time, year-round. They would clock-in after they started and they would clock-out before they ended. The garments that the Thai workers sewed started there. The companies would drop off cut cloth, patterns, orders, and thread. It would be taken by truck from the front shop to the apartment complex where the Thai workers were being held, sewn there, delivered back to the front shop, and given to the companies.

We filed our lawsuit on behalf of Thai and Latino workers, not only against the captors, but also the manufacturers and retailers they were sewing for.[8] The purpose of our suit, we argued—under the Fair Labor Standards Act (FLSA),[9] and under California law—was that the companies were joint employers of the workers.[10] The reason we did this was because we thought it was really important not just to address the case as an involuntary servitude and trafficking case, but to really focus on the ways that the demands of these companies on a regular, routine basis, created the conditions for exploitation and abuse of workers in their supply chain.

Our point was that the El Monte slave sweatshop was not an aberration. It was one end in a spectrum of abuse that low-wage workers face every day in Los Angeles. We wanted to be sure this case ended up in the casebooks and the history books, not as an isolated example, but that it was part of the economic life of a world in which some desperate workers live in, and those companies that profit from them get away with it. We also wanted to file the case, in large part, because of our belief that the courts and the law (at its best) should be a place where the most vulnerable among us are protected. Where, regardless of your race, education level, wealth, ability to speak English, or immigration status, you can get access, and make demands for justice.

8. *Bureerong*, 922 F. Supp. at 1450.
9. 29 U.S.C. § 216(b) (2012).
10. *Bureerong*, 922 F. Supp. at 1469.

Our civil suit was filed at the same time that the criminal case against the captors was going forward.[11] Our civil suit was actually stayed for some time while the criminal suit proceeded. Both of those cases were then assigned to Judge, now Justice, Audrey B. Collins.

JUSTICE COLLINS: Good afternoon. I'm going to discuss the sort-of "legal part" a little bit, but not too much because I see that you actually have the major motion, which was a motion to deny the manufacturer's motion to dismiss.[12] There was also a second order, about a year later;[13] you have it so you can read it later.

I am just going to cover the highlights of what happened. As Julie has stated, there was a criminal case[14] and a separate civil case,[15] and I had both on my docket. This does not always happen; sometimes the criminal case and the civil cases involving the same people will be assigned to different judges, but I had both of them. The criminal case concluded fairly quickly. The civil case was stayed while the criminal case proceeded. There were ten individuals charged in the criminal case, including: the leader, who was known as "Monte," some of her sons, her daughters-in-law, the guards, and a couple of people who had actually fled and were in Thailand when this happened. They were indicted on federal charges of kidnapping, conspiracy, indentured servitude, harboring and concealing illegal immigrants. That was around October/November 1995. By February 1996, the case was essentially over. The kidnapping charge was dismissed, the defendants pled guilty to lesser charges of conspiracy to commit several criminal violations, and were subsequently sentenced for up to seven years.[16] When that happened, the civil case was able to get back on track. I was amazed at the speed with which Julie and her team managed to organize and file this civil case together. All of you know—whether you are students or lawyers—that it can take months, even years sometimes to pull something like this together and that you need to watch for the statute of limitations.

11. The captors were indicted on November 9, 1994 by the US Attorney's Office and the Department of Justice on twenty-three counts of involuntary servitude, kidnapping, transporting and harboring undocumented aliens, and conspiracy to commit the foregoing. Press Release, U.S Dep't of Justice, Ten Thai Nationals Indicted on New Charges of Slavery and Kidnapping (Nov. 9, 1994), https://www.justice.gov/archive/opa/pr/Pre_96/November95/577.txt.html.

12. *Bureerong*, 922 F. Supp. 1450.

13. Bureerong v. Uvawas, 959 F. Supp. 1231 (C.D. Cal. 1997).

14. United States v. Manasurangkun, No. CR 95–714 (A) ABC (C.D. Cal. Nov. 9, 1995).

15. *Bureerong*, 922 F. Supp. at 1450.

16. *See Manasurangkun* No. CR 95–714 (A) ABC, ECF Nos. 499-523, 547-578.

Although there were of course later reiterations of the complaint, the amended complaint that was filed almost immediately in September of 1995 was the initial complaint against the operators. By the next month, Julie and her team had added the manufacturer defendants [to the complaint]; these were the apparel manufacturers, many of them whom I believe are out of business because I don't see these names around anymore, including Mervyns, which was certainly a big name at the time. A bit later Montgomery Ward and Hub distributors were added.[17]

By March of 1996, the manufacturer defendants had filed motions to dismiss. There were several motions since there were several groups of defendants.[18] I do want to mention, especially for those of you who are students who may not be familiar with the fact that pleading standards changed, that the rulings in this case came at a time when there were very liberal standards for pleading under Federal Rule 8[19], and a case called *Conley*.[20] Dismissal was proper only if there was either a lack of a cognizable legal theory or in the absence of sufficient facts alleged under a cognizable legal theory.[21]

The landscape changed in 2007 with *Bell Atlantic v. Twombly,*[22] and *Ashcroft v. Iqbal*,[23] which tightened the pleading standards, bringing us to the "plausibility standard."[24] Now I mention this not because I assert that the outcome would have been any different, but it is important to recognize that these motions were historically heard under a different pleading standard.

The initial motion to dismiss resulted in the major ruling that I issued in March of 1996. The first attack on the entire complaint was, ironically, that the plaintiffs waited too long, because all of these events had begun or happened so long ago.[25] But that was obviously not well founded. I found that the limitations period was tolled as to the plaintiffs who were released from the El Monte facility.[26] When you are being held against your will, it is probably pretty hard to get a lawyer and file a case. So that argument was rejected. Moving on to a more substantive argument, the major argument that the manufactur-

17. *Bureerong*, 922 F. Supp. at 1458.
18. *Id.* at 1459.
19. FED. R. CIV. P. 8.
20. Conley v. Gibson, 355 U.S. 41 (1957).
21. *See id*. at 47; FED. R. CIV. P. 8.
22. 550 U.S. 544 (2007).
23. 556 U.S. 662 (2009).
24. *Id.* at 678.
25. *Bureerong*, 922 F. Supp. at 1463.
26. *Id.*

ers made through all of this was, "You can't touch us. You can't really think that we could be liable for any of this. We didn't know what was going on. We were way over here and what was happening was at the hands of the operators, it was all their fault."[27]

In terms of the FLSA violations (failure to pay minimum wage and overtime),[28] essentially there was a two-pronged attack on that cause of action. The manufacturers first pointed out, which was true, that the Secretary of Labor had already filed these same kinds of charges against the operator-defendants.[29] The operators were of course the people actually holding the victims in indentured servitude. Their argument was that the Secretary of Labor had already filed against the operators so that's done—individual plaintiffs can't come now and file the same claims under the FLSA against the manufacturers.[30] And oddly enough, that issue had never resolved, probably because there had never been a case like this before. There had never been a situation like this.

Julie and her team pled this cause of action very creatively, but it was solidly grounded. I found that the legislative history and the basic purposes of the FLSA mitigated in favor of allowing the plaintiffs' action to proceed.[31] The argument had been that if the Secretary of Labor had already proceeded against anyone that would bar anyone else from proceeding against other defendants.[32] But that didn't make sense to me because the Secretary of Labor had only filed against the individual operators. I found that under the FLSA, a remedial statute should be construed liberally, and that the claim could proceed.[33] And then the core question of course was, "Had the plaintiffs done enough to allege that the defendants, the manufacturers, were employers within the meaning of the Fair Labor Standards Act?" Essentially the ruling was that at this stage this claim should go forward and be tested by economic reality rather than technical concepts. I didn't see any reason why there couldn't be more than one employer, at least at the pleading stage. So, the fact that the operators are there and are clearly in charge of the facility and employing or holding the plaintiffs in ser-

27. *See, e.g., id.* at 1462.

28. 29 U.S.C. §§ 206, 207, 216(b) (2015).

29. *Bureerong*, 922 F. Supp. at 1463.

30. *Id.*

31. *Id.* at 1466. (citing 29 U.S.C. § 216(c) (2012)).

32. *Id*. at 1464.

33. *Id.* at 1466.

vitude did not preclude the allegation that the manufacturers are also employers.[34]

It is certainly true that the manufacturers are way up at the top and far removed from the factory process. Although it's not a traditional employment relationship, Julie's team had certainly, creatively but solidly, alleged that the operators were acting as supervisors and managers for the manufacturers and that the facility, the factory, where they were held and worked all day, was an integral part of the process of the garment manufacturing.

For the most part, the plaintiffs' other claims were upheld. There was a claim or two that was dismissed because I did not find a private right of action.[35] But actually, one of those claims was still a very important one because it became the basis for a negligence per se claim. That was a claim that alleged violations of federal and state laws for unlawful manufacture of garments, by what are called "industrial homeworkers."[36] As to the plaintiffs' individual claims, I found that there was no private right of action.[37] Nevertheless, when it came to pleading negligence per se, I found that the plaintiffs had alleged enough for the negligence per se claim to survive because that allegation was essentially that the defendants were violating the provisions of the Industrial Homework Act.[38] Such violations are not allowed under California law, and federally this was also a very restricted provision.[39] Thus, even though there was no private right of action, you certainly could base a negligence per se claim on that. In fact, I found that it was a classic negligence per se allegation.[40]

The defendants argued that the harm the plaintiffs suffered here wasn't the harm the statute was intended to prevent.[41] But, with most of these statutes, there is more than one purpose, more than one harm that the statute seeks to prevent. In addition, Congress can attack problems incrementally. It seemed to me that this statute was in fact intended to combat abusive working conditions, among other things.

As to negligent hiring and supervision, the plaintiffs alleged that the manufacturer knew or should have known what was going on.

34. *Id.* at 1466-68.

35. *See id.* at 1471-77.

36. *Id.* at 1471.

37. *Id.*

38. *Id.* at 1478.

39. *See* CAL. LAB. CODE § 2666 (West 2011); 29 C.F.R. § 530.2 (1985).

40. *Bureerong*, 922 F. Supp. at 1478.

41. *Id*.

That claim also survived.[42] As Julie has mentioned, the complaint was later amended to include back-pay claims for the Latino garment workers who worked in the Downtown L.A. store, which was owned by the same operators. These workers weren't enslaved rather they were denied fair wages and paid very small amounts per hour—$1.63 an hour for working thirteen hours a day.[43] A later complaint included allegations as to Hub; Hub was the parent of Miller's Outpost, so that was a big deal.

Eventually, about a year later, Hub, the parent corporation, brought a motion to dismiss the claims for false imprisonment and invasion of privacy, and I found that the plaintiffs had sufficiently alleged that Hub was vicariously liable.[44] There was also another negligence per se claim, which was subsequently amended for clarity. The defendant never brought a motion for summary judgment, and the case never went to trial. I won't get into the settlements in great detail only because that may come up again, but there were settlements as early as October of 1997 and as late as July of 1999. In this staggered set of settlements, one defendant group after another settled with both groups of workers: both the Thai workers and the Latino workers who worked at the second factory in Downtown L.A.

I would like to say, in closing, it was not until I was preparing for this panel that I realized the extent of Julie's involvement. I knew then that Julie was a young dynamo who came into my court and just entranced everyone with how hard working she was, how on-top-of-it she was, and how creative her team was, but I didn't know then that she was literally working 24/7. I know a lot of attorneys are working extremely hard when you have a case like this, but I don't mean just on the legal issues. I find out, only now, in reading this background, the extent to which, at night, every night, she was with these workers who were, in a sense, "freaked out" by first being detained and then, when Julie got them released, were living in a foreign world and did not know what to do. They were in an alien territory. They might as well have been on Mars. Julie had to calm them down, walk them through what it was like to live in Los Angeles, and introduce them to the world.

She not only had to do the legal part, which we all know can itself be a 24/7 responsibility, but she was literally their light to the world; their contact to the world. I just want to thank her again for that.

42. *Id*.

43. *Bureerong*, 959 F. Supp. at 1233.

44. *Id.* at 1236.

JULIE SU: Because we're at a celebration of court, I thought it was really important to say something about what Justice Collins did at the end of the criminal case. We were in the courtroom on the very last day. Plea agreements were being entered and sentencing was underway. I had brought about fifty of the workers with me in the courtroom to watch this happen. They were, as Justice Collins has already said, really frightened throughout most of the beginning of our work together. They were reluctant to file suit, although they understood the value of doing so and scared about testifying, although courageous in the face of the possibility.

We were sitting in this courtroom and at the very end of the case, the criminal defendants had come in. These were their captors, now. All the workers kept their eyes down; they didn't want to make eye contact. Their captors came in, and at the very end, Justice Collins said, "I understand that there are some victims in the courtroom today. I would ask you all to raise your hands." Fifty hands went up. The news media was in there watching, and there was definitely a stir about that. She said to them, "I understand that you've been through something really horrible in this country. You've been denied many of your basic rights. You've come forward now to help us make the legal system work. I understand you've met people who've been helpful to you. I want to tell you that I'm very grateful to you for having stepped forward, for having done this, having played this role." The workers began to cry. It was really powerful for them to have a federal judge address them directly, acknowledge them, and thank them.

I cannot overstate the importance of that moment in the workers' own sense of self-worth, and also in their commitment to the rest of the case going forward. As Justice Collins mentioned, our civil suit took over four years to resolve.[45] Throughout this time, the workers and I were meeting, talking about the case and also about strategies. Every offered settlement was taken to them. They had to decide whether to accept or not. Their involvement and ability to stay engaged in the case was very much due to the fact that the tone was set at the very beginning by Justice Collins' recognition of their humanity and her speaking to them directly.

To talk just briefly about how the case was resolved. There were a number of settlements in the case. I just have to share a couple of crazy moments we had. One of the set initial settlement offer we got from a company was a letter that said, "Dear Ms. Su: Clearly my client

45. Connie Kang, *Final $1.2 Million Added to Thai Workers' Settlement*, L.A. TIMES, July 29, 1999, at A1.

didn't know what was going on. Clearly, we're not legally liable for this. Because we're a good company, we're offering $50 in gift cards to each of your clients to settle the case." Right. There were also a number of moments in which these lawyers would say things like, "Your clients are so poor, Julie, whatever we give them should be good enough. This should not be your crusade, it should be up to them." What these lawyers didn't understand and refused to acknowledge was that the workers themselves really felt like fighting this case. They rejected a number of settlements over time. They accepted some, which ended up being really useful in helping them adjust to life in the U.S. Frankly, Justice Collins' decisions, her rejections of those six motions were really critical in bringing a these companies to the table.

Then, almost four years later, we were set to go to trial against the final company. I really want to acknowledge Dorothy Wolpert who's here, and her firm Bird, Marella, Boxer, Wolpert, Nessim, Drooks, Lincenberg & Rhow came in and helped us prepare for trial against the very last defendant. We ended up settling the case. When we initially filed it, people said, "Don't do it. There's no way. The workers are already free. That's better than they were before. They were supposed to be deported, and they weren't. We filed to be able to keep them here and for better legislation that changed the ability for victims and survivors of trafficking and other kinds of crimes to stay in the country. They've got what they deserve. They got more than they needed." We refused to believe that that was all they deserved.

We ended up settling the case overall for a bit over $4 million.[46] The two published decisions that Justice Collins talked about not only were the catalyst for the positive resolution of their own case, but those decisions have been cited literally hundreds of times in cases involving low-wage workers at the bottom of the food chain in which the corporate employers at the very top insulate themselves from responsibility by contracting for labor. The theory behind the case and the decisions that she wrote ended up being marvelous for legislation in the state of California that now allow us to more easily hold those kinds of companies responsible. That's a legacy and impact of the case that I think is important to know.

The last thing that I'll say is that the workers really found their voice with this case. It made a big difference for them to be able to make demands in the system, and as I said, now 20 years later, we still get together every school year. We get together every year in August

46. *Id.*

to commemorate their struggles. To commemorate what they went through, and to enjoy the progress in life that they've had. I just want to say that, for me personally, this case changed my life.

SCOTT CUMMINGS: Thank you for allowing me to join this incredible event and to participate in the discussion of the El Monte case as a seminal event in the illustrious fifty year history of the Central District of California. As you can see, I have the distinction of being the only person on this panel who can claim absolutely no credit in this epic case, which as Commissioner Su so eloquently put it, was not just about compensating the victims of horrific trafficking (though it was certainly about that), but also about building a movement to bring accountability and fairness to a garment industry that had lost those qualities in the last half of the twentieth century. My privilege was to be a (quite nonobjective) observer of this struggle, to watch it unfold and to root on an incredibly talented and visionary team of lawyers, who were lucky enough to hook up with an incredibly fair and courageous judge, to use law to make a difference in the lives of some of the most marginalized workers in America.

I suppose I am here because I also had the privilege of writing an article about this incredible case and the movement that grew out of it.[47] And as I looked back at that piece in preparing for today, I recalled words from the conclusion, which I wanted to start by sharing with you here. It reads as follows:

> Stepping back from the decade-long struggle against sweatshops in Los Angeles, one is struck by the scope of the campaign and the courage of the activists involved. It was an effort that challenged a complex, global economic system with a sophisticated approach that sought to fuse the best of law and organizing into a potent weapon to change an industry built on labor exploitation. . . In the face of powerful adversaries, the advocates managed to leverage public outrage and legal might to shine the spotlight of attention on an industry operating in the shadows. They managed to defy the odds, win significant cases, pass major laws, garner the support of powerful allies—and knock a global industry back on its heels.[48]

I wanted to use my time this afternoon to reflect upon how this happened—how this case helped to "knock a global industry back on its heels." And because the other panelists lived this case and thus know far better than I ever could about its details, I thought I would

47. *See* Scott L. Cummings, *Hemmed In: Legal Mobilization in the Los Angeles Anti-Sweatshop Movement*, 30 BERKELEY J. EMP. & LAB. L. 1 (2009).

48. *Id.* at 83.

offer some broader thoughts about what lessons we might take from it about the role of litigation and court decisions in social movements.

Here I would like to frame my remarks by setting out an important train of thought in the legal academy about the role of litigation in producing sustainable social change. This position holds that court decisions generally do very little good, but can often do a lot of harm, to progressive social movements. In perhaps the most prominent social science account of this position, one scholar, reflecting on the legacy of the critical civil rights-era cases, including *Brown*[49] and *Roe*,[50] has argued that "U.S. courts can almost never be effective producers of significant social reform."[51] This argument has become prominent in law schools, where diverse scholars have claimed that courts are rarely at the forefront of producing social change. In this vein, Lani Guinier and Gerald Torres, in discussing the NAACP, called its litigation approach "important but insufficient"[52] precisely because "the required focus on doctrine and rules deflected time, energy, and resources from the harder work of changing the culture."[53]

What I want to assert is that, against these voices of skepticism, what the El Monte Sweatshop case teaches more than anything is that litigation and adjudication can work to *spark* a social movement. Litigation, when conducted by the right lawyers, and court decisions, when authored by the right judges, can in fact "change culture" and deepen democracy.

The question I want to explore is how does this happen? What are the key ingredients that go into converting a case, here *Bureerong v. Uvawas*,[54] from something that gets decided and filed in an opinion that sits on the shelf, into an audacious, brilliant campaign to change the way an entire industry, comprised of some of the most powerful economic actors in the world, treats its workers?

I want to suggest that you need three things, which in the El Monte case were both necessary and sufficient. First, you need a visionary and courageous—even fearless—lawyer, someone willing to devote her entire being to a cause. A lawyer that choses to ignore those who would say it isn't possible or advisable—those who would

49. *See* Brown v. Bd. of Educ., 347 U.S. 483 (1954).

50. *See* Roe v. Wade, 410 U.S. 113 (1973).

51. GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 422 (2d ed. 2008).

52. Lani Guinier & Gerald Torres, *Changing the Wind: Notes Toward a Demosprudence of Law and Social Movements*, 123 YALE L.J. 2740, 2748-49 (2014).

53. *Id.* at 2748.

54. 922 F. Supp. 1450 (C.D. Cal. 1996).

urge incrementalism and who would discount the lives of immigrant workers as part of the cost of doing business. You would need, in short, the singular Julie Su.

Now, to appreciate her courage and her vision, you must understand the context and the ambition of the anti-sweatshop campaign. The garment industry in the U.S., as many of you know, used to be based almost entirely in New York, where it was large and mostly unionized.[55] In the mid-1950s, at its peak, the International Ladies Garment Workers Union represented nearly half a million workers—over seventy percent of the entire garment industry owing to the strength of union organizing under the New Deal labor law regime.[56] By the early 1990s, garment production had shifted almost entirely to L.A. There were roughly 100,000 garment workers—*only one percent of whom were unionized*.[57] As a result of this and other changes in the industry, particularly the outsourcing of production to low-wage countries like China and the in-sourcing of low-wage immigrant workers, conditions were ripe for worker exploitation.

In 1994, the year before the "discovery" of the Thai workers, the federal government reported that there were 4,500 sweatshops in L.A. defined by systematic labor violations, which included violations such as the failure to pay minimum wage and overtime,[58] violations of health and safety laws,[59] and arbitrary punishment and abuse.[60] This structure was authorized, perhaps more than anything else, by a legal system within which the most powerful actors in the garment industry—the retailers themselves and the manufacturers or "brands" that put their labels on the clothes—were insulated through the *practice of subcontracting* from legal responsibility for the sweatshop conditions under which their garments were produced. Under the old union system, it was not possible to contract out of responsibility for labor standards,[61] but under the new L.A. system of subcontracting, that was the

55. Cummings, *supra* note 47, at 10-11.

56. Katie Quan, *Strategies for Garment Worker Empowerment in the Global Economy*, 10 U.C. DAVIS J. INT'L L. & POL'Y 27, 30 (2003).

57. Ruth Milkman & Kent Wong, *Organizing Immigrant Workers: Case Studies from California*, *in* REKINDLING THE MOVEMENT: LABOR'S QUEST FOR RELEVANCE IN THE 21ST CENTURY 100, 112 (Lowell Turner et al. eds., 2001).

58. U.S. GEN. ACCOUNTING OFFICE, GAO/HEHS-95-29, GARMENT INDUSTRY: EFFORTS TO ADDRESS THE PREVALENCE AND CONDITIONS OF SWEATSHOPS 5 (1994); Stuart Silverstein, *Survey of Garment Industry Finds Rampant Labor Abuse*, L.A. TIMES, Apr. 15, 1994, at D1.

59. Tara J. Radin & Martin Calkins, *The Struggle Against Sweatshops: Moving Towards Responsible Global Business*, J. OF BUS. ETHICS 261, 262 (2006).

60. *Id.*

61. Cummings, *supra* note 47, at 16.

norm. The move from unionized joint employment to nonunionized contracting out subverted the system of labor compliance[62]—normalizing the sweatshop and rendering exceptional the garment firm that actually complied with labor law.

So the question is: How could a lawyer challenge this massively complicated problem? Part of the answer is to point out that transformative leaders like Julie Su are born, but they are also made—in the sense that they are given opportunity. What makes them unique, however, is that unlike most people with opportunity, they use it not to benefit themselves, but to fight for others. Julie Su received a Skadden Fellowship in 1994 to provide legal assistance to low-wage Asian Americans, with a special focus on the garment industry, at APALC—part of a small cohort of lawyers in California who entered public interest law that year to address the garment problem. What was unique about her and relevant to the impact of the case is that she came to the fellowship with an already formed and very sophisticated approach to litigation. She viewed litigation as a vehicle not just to win legal cases, but also to organize workers. It is worth emphasizing that when seventy-two Thai workers were discovered on August 2, 1995, now-Commissioner Su was still a first-year lawyer. It is incredible to reflect back on the courage and skill it took to move from that moment of reaction to only a year later being the leader of an impressive team of the very best civil rights lawyers in this city, in filing this seminal federal lawsuit against the El Monte sweatshop operators and the manufacturers that contracted with it.

The point I want to stress is that it took not just a lawyer with legal acumen to do this, but more significantly, a lawyer with a political analysis: someone who understood how the case fit into the broader landscape of the garment industry; how her work connected to the work of unions and other groups fighting similar battles; and how litigation fit into a broader struggle for social change.

But she also needed more than that. History is full of stories of the best strategists, with incredibly important cases, meticulously litigated, nonetheless drawing a judge who refuses to see the merits of their claims, who does not have the insight, or the courage, or the work ethic to get to the bottom of the case and do what the law requires. This, then, leads to the *second ingredient* explaining how a case becomes a social movement.

What you need on top of the courageous and brilliant lawyer who initiates the suit is: an equally courageous, brilliant, and fair-minded

62. *Id.* at 17.

judge, who is willing to follow the letter of the law to side with the powerless against the powerful, even if that means upsetting business as usual in ways that have significant consequences. In short, you need Justice Audrey Collins.

Let me say one thing, because I think Commissioner Su already hit this point on the head: If you go back and read her decision in the *Bureerong*[63] motion to dismiss, what you immediately appreciate is that this is someone who not only cares deeply about law as a set of rules, but who thinks about how those rules actually operate in the real world to affect people's lives. That is, she got the deep doctrinal structure of joint employment exactly correct and she clearly understood how the doctrine worked in practice—or rather, how it *had not* worked to protect the Thai workers and countless others from the treatment they had and continued to receive. Here, if I may respectfully say so, is where in my own reading Justice Collins did something that she did not have to do, but did nonetheless because she understood that law matters to people. She decided that she was not going to allow manufacturer defendants—including Mervyns—to profit on the backs of workers just because the companies had signed contracts saying that they were formally not employers.[64] Instead, she looked at the realities of the situation—the fact that the manufacturers must have known that the amounts they were paying for goods were too low to allow the contractor to pay minimum wage—as evidence of manufacturer responsibility.[65] She did not have to do that; she could have taken the easy way out. The fact that she took the harder path made all the difference, and that difference was this: she gave Julie Su and her colleagues a precedent—a tool that they could use to say to others in this industry, "You can't continue to conduct business as usual. This must change."

This leads me to the third and final ingredient for movement success. With a gift of a decision like *Bureerong* in hand, you need a team of lawyers and activists, as committed, as fearless, and as smart as Julie Su, to figure out how to mobilize the victory in this case to have an impact on the thousands of other workers, whose experiences might not have been as sensational as the Thai workers, but who nonetheless labored every day under a system of total oppression and exploitation.

You need, in short, Muneer Ahmad, and the other lawyers who joined APALC and allied organizations to fight for garment industry

63. Bureerong v. Uvawas, 922 F. Supp. 1450 (C.D. Cal. 1996).

64. *Id.* at 1467-68.

65. *Id.* at 1468.

accountability. On a personal note, I have had the incredible luck of knowing Muneer from my very first day as a law student, nearly twenty-five years ago. What still stands out is that he was always someone who forced you to never take things at face value—to probe deeper, to get to the underlying cause, and to never be satisfied with the complacency that said things just were the way they were.

Professor Ahmad also arrived at APALC on a fellowship in 1997, part of what I think was one of the most brilliant legal teams ever assembled, and I am including here the NAACP Legal Defense Fund of the 1930s with Charles Houston and Thurgood Marshall. Similar to that team, this one understood that winning a case is only the beginning of a struggle, never the end. I know that Muneer will talk about some of the repercussions of this case, but let me just give you two of what I consider to be the most important highlights.

First, the case spawned a legal campaign that permanently changed law and irrevocably changed industry behavior. The APALC team litigated a series of sweatshop cases after El Monte that were notable for their success and for the attention they brought to the system-wide problem of garment worker exploitation.[66] Perhaps more than anything else, this series of cases, and their deft use of the media, caused garment manufacturers to revise their relationships and clean up their act. And the lawyers used this litigation as a platform to build a new statewide law, AB 633,[67] which effectively codified the legal theory that the team was using in these cases. For the first time, it established as a matter of state law that garment manufacturers were absolutely liable for the labor violations of their contractors,[68] and set up an entirely new expedited administrative process to allow workers to resolve their claims.[69] This was an incredible victory. Now, of course in an incredible example of good things coming full circle, it is the architect of that law, Julie Su, who is now leading the very agency charged with enforcing it.

The second outcome I would like to highlight is this case, and the anti-sweatshop movement it spawned, gave rise to an infrastructure of organizations and a network of alliances that have fueled low-wage worker activism in Los Angeles and beyond. This includes the creation of Sweatshop Watch, which spearheaded policy reforms like AB 633,[70] and the Garment Workers Center, which continues to support

66. Cummings, *supra* note 47, at 40-42, 51-58.
67. CAL. LAB. CODE § 2673.1(a) (West 2001); *see also* Cummings, *supra* note 47, at 42-48.
68. CAL. LAB. CODE § 2673.1(a) (West 2001).
69. *Id*. § 2673.1(d)(1)-(5).
70. Cummings, *supra* note 47, at 44.

advocacy and education on behalf of garment and other low-wage workers. The point is that the creation of these groups depended on the success of this litigation and would not have happened *but for* the prescient strategic decision by the APALC lawyers to build movement organizations and not just law. There are many organizational ripple effects that continue to be felt, including at places like the UCLA Labor Center and the Wage Justice Center. These groups are built upon and emulate the anti-sweatshop advocacy pioneered by Su, Ahmad, and their colleagues, and, in my mind, are inconceivable without their foundational work.

In the end, what I want to emphasize is the legacy of this case, which went well beyond the specific outcome—which was on its own terms quite significant and should not be forgotten. In total, when one added the settlements from the El Monte litigation to those from related actions, the workers' ultimate recovery stood at over $4.5 million—or about $10,000 to $80,000 per worker based on the length of employment.[71]

But beyond the money, it was the movement and what it has done for organization of L.A. economic justice, which is the central legacy of this case. For a case to truly spark a movement, you need to have a judge who appreciates how law works in the real world. You need to have lawyers who are willing to give up control, to see that the victory in the case is only the first step in the movement for change.

So for all of you law students and lawyers out there who want to be like these lawyers, to make a difference like they have and continue to do, you have to be confident enough to take yourself out of the center, to share power with others, to build power with those you are working so hard to help. That is the true definition of leadership and that is the essential factor that distinguished this case from thousands like it—that made this case spark a movement.

So, in the end, what do I say to those naysayers who would tell us that litigation and courts aren't important for progressive causes, that they are, at best, ineffective, and at worst counterproductive? I would say that you don't know Justice Audrey Collins, Commissioner Julie Su, and Professor Muneer Ahmad, and if you did, you would know how, in the right hands, in the right circumstances, and with the right allies, law can be a force to stand up to powerful interests. Thank you all for taking that stand—which will endure forever as a testament to the democratic ideal of "equal justice under law."

71. Kang, *supra* note 45.

MUNEER AHMAD: I don't know who decided the speaking order, but I regret being the last of these wonderful presentations. I will say, just sitting here, that there is a sense of nostalgia hearing the descriptions from each of the speakers. As Scott said, I just want to make sure you all know this. Julie was literally one year out of law school when she became lead counsel on this case. I also want to say that Justice Collins is absolutely right that there was never a motion for summary judgment. I can tell you there was a draft motion for summary judgment because Julie, who was my supervisor when I was one year out of law school, said to me, "We need to draft a statement of undisputed facts." I said, "What is that?" She told me, and I said, "Are you crazy? You're helping them to make a list of every undisputed material act?" Somebody spent a lot of time on this, and somewhere on a three and a half inch floppy disk, there's a draft motion floating around.

Scott did such a masterful job talking about the movement aspects of the El Monte work. I just want to enumerate very quickly all that flowed out. Julie talked about the ways in which the decisions from Justice Collins have been used now. Those decisions, the case law originated actually in the agriculture industry, about these chains of production and liability going up the chain. It was a massive innovation for them to adapt those to the garment industry, which differs in a lot of ways from agriculture. Julie alluded to this, but those cases now have been used on moving forward to apply to a number of other industries. That's one legacy. It's purely a doctrinal one.

Scott mentioned that there's a legislative one, AB 633,[72] which was a whole other campaign. There was an ongoing social justice movement around an anti-sweatshop movement, which was huge on college campuses in the late '90s, into much of the 2000's, which then dovetailed with the global anti-sweatshop campaign. These things basically didn't exist in 1994, yet soon after the case broke and the advocacy that was done, they came into full-form.

What I'm going to talk about is yet another movement, which I think the El Monte case helped spark, having to do with trafficking and the anti-trafficking movement. Julie mentioned that when the workers from the El Monte slave sweatshop were freed, the first place that they landed was another form of captivity—at an INS detention center. There's a little bit of cruel irony in the fact that when we celebrate the workers' freedom, we call a freedom party every year in

72. Assemb. B. 633, 2013-2014, Leg. Reg. Sess. (Cal. 2013) (codified as CAL. LAB. CODE § 2673.1 (West 2001)).

August. What we're actually celebrating is freedom from one captor and incarceration by another.

This happened before I came to Los Angeles and was a part of the case, so I had some critical distance from it. What I understand is that the first wave of work was not just to get the Thai workers out of INS detention, but to actually give them some security and residence in the United States, so they wouldn't be deported either before or after the criminal case was over, or thereafter.

That was done through use of something called an "S" visa.[73] It's a temporary visa, sometimes referred to as a "snitch visa." The legislative history on S visas is relatively thin, but it seems pretty clear that it was designed to provide a temporary ability to stay in the country for those who cooperate with law enforcement in the prosecution of organized criminals.[74] You can see how El Monte might be viewed as an organized crime case, but that really wasn't what it was. That was as close a thing as one could find in immigration law, but not a very good one. It took an enormous amount of advocacy that Julie spearheaded to convince the Justice Department and the White House that they should use these S visas for the Thai workers. This went all the way up to Janet Reno, who was Attorney General at the time. It was an enormous victory.

Following the El Monte case, there were a number of other instances of trafficking that came to light relatively quickly. One involved a group of deaf and mute Mexican workers who were trafficked into the United States and forced to sell trinkets on the subways of New York City.[75] Another involved a woman who was trafficked into the United States essentially for sex slavery.[76] In these and other cases, advocates followed the template that Julie had established, which was to seek and obtain S visas for these workers.

The S visas were not only a weak categorical mechanism for trafficked people, but due to many other constraints, only two hundred are available per year by statute.[77] They require that the immigrant possess critical, reliable information concerning a criminal organization or enterprise.[78] Which again, that is a category of criminal organi-

73. 8 U.S.C. § 1101(a)(15)(S) (2006).

74. *Id.* § 1101(a)(15)(S)(i).

75. Mark Fineman, *Deaf Migrants' Families Had Feared Abuse*, L.A. TIMES, July 22, 1997, at Al.

76. Jane Doe I v. Lakireddy Bali Reddy, No. C 02-05570 WHA, 2003 WL 23893010 (N.D. Cal. filed Aug. 4, 2003).

77. 8 U.S.C. § 1184(k)(1).

78. § 1101(a)(15)(S)(i).

zation or enterprise; you may or may not be able to fit that category. The process for obtaining an S visa was cumbersome. Because these visas were primarily concerned with aiding prosecutions, they tended to privilege law enforcement needs over humanitarian considerations. This led to advocacy for creation of a dedicated visa for people who have been trafficked into the United States.

In the late 1990's, as trafficking became an increasingly visible issue, a sophisticated anti-trafficking lobby began to take shape. It's interesting to me in this regard; immigrants' rights advocates were a part of this, but were not the loudest voices. This was a campaign that was led to a much more significant degree by women's rights organizations, feminist abolitionists, and religious conservatives who were committed to rooting-out prostitution, and who saw anti-trafficking as one way to advance that agenda.[79]

President Clinton first proposed an anti-trafficking bill in 1998, and in 2000, he signed the Trafficking Victims Protection Act (TVPA).[80] The bill took a "Three Ps" approach to trafficking, as it is still referred to today. Those P's are: Prevention, Prosecution, and Protection. The prevention took the form of a minimal standards regime for elimination of trafficking against which every country in the world is now measured and ranked each year by the State Department.[81] Funding can actually be made contingent upon where those rankings fall.[82] Prosecution took the form of expanded categories of criminal liability for trafficking. The protection category—which is what I will focus on—created two new visa categories: T visa for severe forms of trafficking, and the U visa, which is most related, for victims of certain qualifying crimes.[83]

Now, the creation of the T visa is one of the legacies of the advocacy that Julie led around El Monte. An extension of the T visa template to victims of other crimes, in the form of the U visa, is a further salutatory development of immigration law that flowed from El Monte. That's to say that there's this whole other field of immigration law, which was really irrevocably changed by the path of the first several weeks and months of advocacy on El Monte. It had nothing to do

79. *See, e.g.,* James C. Hathaway, *The Human Rights Quagmire of "Human Trafficking*," 49 VA. J. INT'L L. 1, 43 (2008).

80. Trafficking Victims Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (2000) (codified as in scattered sections of U.S.C.).

81. *See, e.g.,* U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 1 (2016), http://www.state.gov/documents/organization/258876.pdf.

82. *See id.* at 39.

83. 8 U.S.C. § 1101(a)(15)(T)-(U).

with wage and hour law, and nothing to do with the garment industry. It's had this lasting impact now, for nearly twenty years in the form of the TVPA. This is an enormous accomplishment.

Having said that, what I want to do with my remaining comments is talk about the ways in which the thinking about El Monte as a paradigm might lead us to think about different forms of protection than just the T and U visas as they have been created to date. Part of the reason I say that is because, in many ways, the T and U visas were premised on a paradigm of female victims of severe forms of violence, particularly sexual violence. The TVPA was passed along with the Violence Against Women Act in 2000 (VAWA).[84] Taken together, those two pieces of legislation constituted the TVPA and VAWA, and you can see the ways in which trafficking and violence against women become almost collapsed upon one another.

Although the TVPA covers explicitly both sex trafficking and labor trafficking, what one sees in the legislative history and the enforcement thereafter is that sex trafficking gets an out-sized, and prurient kind of interest or attention. Those kinds of preoccupations with the legislation and the way in which it's been implemented, in many ways, have obscured the labor rights dimensions of El Monte. When Julie talked about the workers of El Monte, yes, they were trafficked, but I have never heard Julie describe them as trafficking victims. I've always heard her describe them as the Thai garment workers.

There's a big difference between those two. I think that one of the dangers in the ways in which the anti-trafficking legislation developed is that it has sharpened a popular and legal distinction between what we might think of as extreme forms of immigrant worker population in the form of trafficking, and what we might think of as routine forms of immigrant worker exploitation. Which is to say, the work that most undocumented workers do in the country every day and in every corner of the nation, in turn, contributes to a normalization of immigrant worker exploitation, which does its own kind of damage.

A full recount of El Monte would recognize the inextricability of the slave sweatshop in El Monte from the downtown L.A. front sweatshop. As Julie said, they were an integrated whole. They were part of a single system of production who merely embodied different ends, or different points on the spectrum of immigrant worker exploitation. We might think about whether there are ways then to conceive of a

84. Violence Against Women Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (codified in scattered sections of U.S.C.).

visa strategy in a way that treats so-called routine labor exploitation as deeply problematic and worth of special attention. This would have the effect of recasting visa beneficiaries from victims to active rights-based, rights-asserting individuals. Rather than passive, they're active. Rather than being saved, they are engaged in their own advancement. In this, I think we're actually being more faithful to the lessons of El Monte.

The litigation was enormously powerful, not just for El Monte and all these movements, but for the workers themselves. There was a very important strategic decision that she made early on, against the advice of most of the seasoned lawyers that she was collaborating with, to bring the Latino front shop workers into the same case as the Thai workers. Before El Monte broke, Julie had been engaged in for the first eleven months of her Fellowship on a large campaign to represent Asian and Latino garment workers together. They worked side-by-side in the factories, so they ought to be represented side-by-side in the courtroom. There was an opportunity for cross-racial solidarity that the case represented. That was deeply powerful to the workers.

I just want to end by saying that trafficking is a very compelling framework, which in turn provides a moral and legal basis for action. That, again, is one of the many important legacies of El Monte. I think that if we really recuperate the memory of El Monte, what we'll see is that so-called ordinary immigrant worker exploitation is not so far off from the extreme forms of immigrant worker exploitation. If we learned from El Monte that trafficking is a powerful rubric for moral and legal action, we might think about recasting so-called ordinary immigrant worker exploitation as extraordinary.

Instead of thinking of the seven or eight million undocumented workers, who are part of the eleven million undocumented people in the country, as just par for the course, what if we instead recognize that as a caste? That is, a large, persistent, racially-marked, labor-subordinate population, who by law and social norm are rendered to the absolute margins of the economy and of society. If we thought about this as what my colleague Owen Fisk refers to as a "debasement of society," rather than just life as usual, that might provide us the moral and legal basis for thinking about front shop and not just sweatshop. Thinking about immigrant workers, and not just trafficking victims. That would be a wonderful advancement of the legacy of El Monte.