# AMERICAN JOURNAL OF CRIMINAL LAW

Published at The University of Texas School of Law

## ARTICLES



## NOTE



VOLUME 39 FALL 2011 NUMBER 1

# AMERICAN JOURNAL OF CRIMINAL LAW

VOLUME 39 FALL 2011 NUMBER 1

Published at The University of Texas School of Law

# AMERICAN JOURNAL OF CRIMINAL LAW

Published at The University of Texas School of Law

VOLUME 39

## SUBSCRIPTIONS

The *American Journal of Criminal Law* (ISSN 0092-2315) is published triannually (Fall, Spring, Summer) under license by The University of Texas School of Law Publications, P.O. Box 8670, Austin, Texas 78713. The annual subscription price is $30.00 except as follows: foreign, $35.00; Texas, $32.48. Please make checks payable to the *American Journal of Criminal Law*. Complete sets and single issues are available from William S. Hein & Co., Inc., 1285 Main Street, Buffalo, New York 14209.

## MANUSCRIPTS

The *American Journal of Criminal Law* is pleased to consider unsolicited manuscripts for publication, but regrets that it cannot return them. One double-spaced, typewritten manuscript should be submitted to the attention of the Chief Articles Editor along with an electronic copy of the article in Microsoft Word format. WordPerfect submissions will not be accepted. Citations should conform to *The Bluebook: A Uniform System of Citation* (19th ed. 2010). Except when content suggests otherwise, the *American Journal of Criminal Law* follows the guidelines set forth in the *Texas Law Review Manual on Usage, Style & Editing* (12th ed. 2011) and the *Chicago Manual of Style* (15th ed. 2003). The *Journal* is printed by Joe Christensen, Inc., P.O. Box 81269, Lincoln, Nebraska 68501.



Editorial Offices:
American Journal of Criminal Law
University of Texas School of Law
727 Dean Keeton St., Austin, TX 78705-3299
Email: Managing.AJCL@gmail.com
Website: http://www.ajcl.org
Main Office: (512) 471-9200

Circulation Office:
Paul Goldman, Business Manager
School of Law Publications
University of Texas School of Law
P.O. Box 8670, Austin, TX 78713
(512) 232-1149
Website: http://www.texaslawpublications.com

## THE UNIVERSITY OF TEXAS SCHOOL OF LAW

## ADMINISTRATIVE OFFICERS

STEFANIE A. LINDQUIST, B.A., J.D., Ph.D.; *Interim Dean, A.W. Walker Centennial Chair in Law.*
ALEXANDRA W. ALBRIGHT, B.A., J.D.; *Associate Dean for Academic Affairs, Senior Lecturer.*
ROBERT M. CHESNEY, B.S., J.D.; *Associate Dean for Academic Affairs, Charles I. Francis Professor in Law.*
WILLIAM E. FORBATH, A.B., B.A., Ph.D., J.D.; *Associate Dean for Research, Lloyd M. Bentsen Chair in Law.*
EDEN E. HARRINGTON, B.A., J.D.; *Associate Dean for Clinical Education & Program Initiatives, Dir. of William Wayne Justice Ctr. for Public Interest Law, Clinical Professor.*
KIMBERLY L. BIAR, B.B.A.; *Assistant Dean for Financial Affairs, Certified Public Accountant.*
CARLA COOPER, B.A., M.A., Ph.D.; *Assistant Dean for Alumni Relations and Development.*
MICHAEL J. ESPOSITO, B.A., J.D., M.B.A.; *Assistant Dean for Continuing Legal Education.*
KIRSTON FORTUNE, B.F.A.; *Assistant Dean for Communications.*
MICHAEL HARVEY, B.A., B.S.; *Assistant Dean for Technology.*
MONICA K. INGRAM, B.A., J.D.; *Assistant Dean for Admissions and Financial Aid.*
DAVID A. MONTOYA, B.A., J.D.; *Assistant Dean for Career Services.*
REYMUNDO RAMOS, B.A.; *Assistant Dean for Student Affairs.*

## FACULTY EMERITI

HANS W. BAADE, A.B., J.D., LL.B., LL.M.; *Hugh Lamar Stone Chair Emeritus in Civil Law.*
RICHARD V. BARNDT, B.S.L., LL.B.; *Professor Emeritus.*
WILLIAM W. GIBSON, JR., B.A., LL.B.; *Sylvan Lang Professor Emeritus in Law of Trusts.*
ROBERT W. HAMILTON, A.B., J.D.; *Minerva House Drysdale Regents Chair Emeritus.*
DOUGLAS LAYCOCK, B.A., J.D.; *Alice McKean Young Regents Chair Emeritus.*
J. L. LEBOWITZ, A.B., J.D., LL.M.; *Joseph C. Hutcheson Professor Emeritus.*
JOHN T. RATLIFF, JR., B.A., LL.B.; *Ben Gardner Sewell Professor Emeritus in Civil Trial Advocacy.*
MICHAEL M. SHARLOT, B.A., LL.B.; *Wright C. Morrow Professor Emeritus in Law.*
JOHN F. SUTTON, JR., J.D.; *A.W. Walker Centennial Chair Emeritus.*
JAMES M. TREECE, B.A., J.D., M.A.; *Charles I. Francis Professor Emeritus in Law.*
RUSSELL J. WEINTRAUB, B.A., J.D.; *Ben H. & Kitty King Powell Chair Emeritus in Business & Commercial Law.*

## PROFESSORS

JEFFREY B. ABRAMSON, B.A., J.D., Ph.D.; *Professor of Law and Government.*
DAVID E. ADELMAN, B.A., Ph.D., J.D.; *Harry Reasoner Regents Chair in Law.*
DAVID A. ANDERSON, A.B., J.D.; *Fred & Emily Marshall Wulff Centennial Chair in Law.*
MARK L. ASCHER, B.A., M.A., J.D., LL.M.; *Joseph D. Jamail Centennial Chair in Law.*
RONEN AVRAHAM, M.B.A., LL.B., LL.M., S.J.D.; *Thomas Shelton Maxey Professor in Law.*
LYNN A. BAKER, B.A., B.A., J.D.; *Frederick M. Baron Chair in Law, Co-Director of Center on Lawyers, Civil Justice, and the Media.*
MITCHELL N. BERMAN, A.B., M.A., J.D.; *Richard Dale Endowed Chair in Law.*
BARBARA A. BINTLIFF, M.A., J.D.; *Joseph C. Hutcheson Professor in Law.*
LYNN E. BLAIS, A.B., J.D.; *Leroy G. Denman, Jr. Regents Professor in Real Property Law.*
ROBERT G. BONE, B.A., J.D.; *G. Rollie White Teaching Excellence Chair in Law.*
OREN BRACHA, LL.B., S.J.D.; *Howrey LLP and Arnold, White, & Durkee Centennial Professor.*
J. BUDZISZEWSKI, B.A., M.A., PH.D.; *Professor.*
NORMA V. CANTU, B.A., J.D.; *Professor of Law and Education.*
LOFTUS C. CARSON, II, B.S., M. Pub. Affrs., M.B.A., J.D.; *Ronald D. Krist Professor.*
MICHAEL J. CHURGIN, A.B., J.D.; *Raybourne Thompson Centennial Professor.*
JANE M. COHEN, B.A., J.D.; *Edward Clark Centennial Professor.*
FRANK B. CROSS, B.A., J.D.; *Herbert D. Kelleher Centennial Professor of Business Law.*
WILLIAM H. CUNNINGHAM, B.A., M.B.A., Ph.D.; *Professor.*
JENS C. DAMMANN, J.D., LL.M., Dr. Jur., J.S.D.; *William Stamps Farish Professor in Law.*
JOHN DEIGH, B.A., M.A., Ph.D.; *Professor of Law and Philosophy.*
MECHELE DICKERSON, B.A., J.D.; *Arthur L. Moller Chair in Bankruptcy Law and Practice.*
GEORGE E. DIX, B.A., J.D.; *George R. Killam, Jr. Chair of Criminal Law.*
JOHN S. DZIENKOWSKI, B.B.A., J.D.; *Dean John F. Sutton, Jr. Chair in Lawyering and the Legal Process.*
KAREN L. ENGLE, B.A., J.D.; *Cecil D. Redford Prof. in Law, Director of Bernard & Audre Rapoport Center for Human Rights & Justice.*
KENNETH FLAMM, Ph.D.; *Professor.*
JULIUS G. GETMAN, B.A., LL.B., LL.M.; *Earl E. Sheffield Regents Chair.*
JOHN M. GOLDEN, A.B., J.D., Ph.D.; *Loomer Family Professor in Law.*
STEVEN GOODE, B.A., J.D.; *W. James Kronzer Chair in Trial and Appellate Advocacy, University Distinguished Teaching Professor.*
LINO A. GRAGLIA, B.A., LL.B.; *A. Dalton Cross Professor.*
CHARLES G. GROAT, B.A., M.S., Ph.D.; *Professor.*
PATRICIA I. HANSEN, A.B., M.P.A., J.D.; *J. Waddy Bullion Professor.*
HENRY T.C. HU, B.S., M.A., J.D.; *Allan Shivers Chair in the Law of Banking and Finance.*
BOBBY R. INMAN, B.A.; *Professor.*
DEREK P. JINKS, B.A., M.A., J.D.; *The Marrs McLean Professor in Law.*
STANLEY M. JOHANSON, B.S., LL.B., LL.M.; *James A. Elkins Centennial Chair in Law, University Distinguished Teaching Professor.*
CALVIN H. JOHNSON, B.A., J.D.; *Andrews & Kurth Centennial Professor.*
EMILY E. KADENS, B.A., M.A., Dipl., M.A., Ph.D., J.D.; *Baker and Botts Professor in Law.*
SUSAN R. KLEIN, B.A., J.D.; *Alice McKean Young Regents Chair in Law.*

SANFORD V. LEVINSON, A.B., Ph.D., J.D.; *W. St. John Garwood & W. St. John Garwood, Jr. Centennial Chair in Law, Professor of Gov't.*
VIJAY MAHAJAN, M.S.Ch.E., Ph.D.; *Professor.*
BASIL S. MARKESINIS, LL.B., LL.D., DCL, Ph.D.; *Jamail Regents Chair.*
INGA MARKOVITS, LL.M.; *"The Friends of Joe Jamail" Regents Chair.*
RICHARD S. MARKOVITS, B.A., LL.B., Ph.D.; *John B. Connally Chair.*
THOMAS O. MCGARITY, B.A., J.D.; *Joe R. & Teresa Lozano Long Endowed Chair in Administrative Law.*
STEVEN A. MOORE, B.A., Ph.D.; *Professor.*
LINDA S. MULLENIX, B.A., M. Phil., J.D., Ph.D.; *Morris & Rita Atlas Chair in Advocacy.*
STEVEN P. NICHOLS, B.S.M.E., M.S.M.E., J.D., Ph.D.; *Professor.*
ROBERT J. PERONI, B.S.C., J.D., LL.M.; *The Fondren Foundation Centennial Chair for Faculty Excellence.*
H. W. PERRY, JR., B.A., M.A., Ph.D.; *Associate Professor of Law and Government.*
LUCAS A. POWE, JR., B.A., J.D.; *Anne Green Regents Chair in Law, Professor of Government.*
WILLIAM C. POWERS, JR., B.A., J.D.; *President of The University of Texas at Austin, Hines H. Baker & Thelma Kelley Baker Chair, University Distinguished Teaching Professor.*
DAVID M. RABBAN, B.A., J.D.; *Dahr Jamail, Randall Hage Jamail, & Robert Lee Jamail Reg. Chair, Univ. Distinguished Teaching Prof.*
ALAN S. RAU, B.A., LL.B.; *Mark G. & Judy G. Yudof Chair in Law.*
DAVID W. ROBERTSON, B.A., LL.B., LL.M., J.S.D.; *W. Page Keeton Chair in Tort Law, University Distinguished Teaching Professor.*
JOHN A. ROBERTSON, A.B., J.D.; *Vinson & Elkins Chair.*
WILLIAM M. SAGE, A.B., M.D., J.D.; *Vice Provost for Health Affairs, James R. Dougherty Chair for Faculty Excellence.*
LAWRENCE G. SAGER, B.A., LL.B.; *John Jeffers Research Chair in Law, Alice Jane Drysdale Sheffield Regents Chair.*
JOHN J. SAMPSON, B.B.A., LL.B.; *William Benjamin Wynne Professor.*
CHARLES M. SILVER, B.A., M.A., J.D.; *Roy W. & Eugenia C. MacDonald Endowed Chair in Civil Procedure, Professor in Government, Co-Director of Center on Lawyers, Civil Justice, & the Media.*
ERNEST E. SMITH, B.A., LL.B.; *Rex G. Baker Centennial Chair in Natural Resources Law.*
JAMES C. SPINDLER, B.A., M.A., J.D., Ph.D.; *The Sylvan Lang Professor.*
MATTHEW L. SPITZER, B.A., Ph.D., J.D.; *Hayden W. Head Regents Chair for Faculty Excellence.*
JANE STAPLETON, B.S., Ph.D., LL.B., D.C.L., D. Phil.; *Ernest E. Smith Professor.*
JORDAN M. STEIKER, B.A., J.D.; *Judge Robert M. Parker Endowed Chair in Law.*
MICHAEL F. STURLEY, B.A., J.D.; *Fannie Coplin Regents Chair.*
GERALD TORRES, A.B., J.D., LL.M.; *Bryant Smith Chair in Law.*
GREGORY J. VINCENT, B.A., J.D., Ed.D.; *Professor.*
WENDY E. WAGNER, B.A., M.E.S., J.D.; *Joe A. Worsham Centennial Professor.*
LOUISE WEINBERG, A.B., J.D., LL.M.; *William B. Bates Chair for the Administration of Justice.*
OLIN G. WELLBORN, A.B., J.D.; *William C. Liedtke, Sr. Professor.*
JAY L. WESTBROOK, B.A., J.D.; *Benno C. Schmidt Chair of Business Law.*
ABRAHAM L. WICKELGREN, A.B., Ph.D., J.D.; *Bernard J. Ward Professor in Law.*
ZIPPORAH B. WISEMAN, B.A., M.A., LL.B.; *Thos. H. Law Centennial Professor.*
PATRICK WOOLLEY, A.B., J.D.; *Beck, Redden & Secrest Professor in Law.*

## ASSISTANT PROFESSORS

MARILYN ARMOUR, B.A., M.S.W., Ph.D.
DANIEL M. BRINKS, A.B., J.D., Ph.D.
JUSTIN DRIVER, B.A., M.A., M.A., J.D.
ZACHARY S. ELKINS, B.A., M.A., Ph.D.
JOSEPH R. FISHKIN, B.A., M.Phil., D.Phil., J.D.
CARY C. FRANKLIN, B.A., M.S.T., D.Phil., J.D.
MIRA GANOR, B.A., M.B.A., LL.B., LL.M., J.S.D.
JENNIFER E. LAURIN, B.A., J.D.
ANGELA K. LITTWIN, B.A., J.D.
MARY ROSE, A.B., M.A., Ph.D.
SEAN H. WILLIAMS, B.A., J.D.

## SENIOR LECTURERS, WRITING LECTURERS, AND CLINICAL PROFESSORS

WILLIAM P. ALLISON, B.A., J.D.; *Clinical Prof., Dir. of Criminal Defense Clinic.*
MARJORIE I. BACHMAN, B.S., J.D.; *Clinical Instructor*
PHILIP C. BOBBITT, A.B., J.D., Ph.D.; *Distinguished Sr. Lecturer.*
KAMELA S. BRIDGES, B.A., B.J., J.D.; *Lecturer.*
CYNTHIA L. BRYANT, B.A., J.D.; *Clinical Prof., Dir. of Mediation Clinic.*
PAUL J. BURKA, B.A., LL.B.; *Senior Lecturer.*
JOHN C. BUTLER, B.B.A., Ph.D.; *Clinical Assoc. Prof.*
MARY R. CROUTER, A.B., J.D.; *Lecturer, Asst. Dir. of William Wayne Justice Center for Public Interest Law.*
TIFFANY J. DOWLING, B.A., J.D.; *Clinical Instructor, Dir. of Actual Innocence Clinic.*
LORI K. DUKE, B.A., J.D.; *Clinical Prof.*
ARIEL E. DULITZKY, J.D., LL.M.; *Clinical Prof., Dir. of Human Rights Clinic.*
ELANA S. EINHORN, B.A., J.D.; *Lecturer.*
TINA V. FERNANDEZ, A.B., J.D.; *Lecturer.*
LYNDA E. FROST, B.A., M.Ed., J.D., Ph.D.; *Clinical Assoc. Prof.*
DENISE L. GILMAN, B.A., J.D.; *Clinical Prof., Dir. of Immigr. Clinic.*
KELLY L. HARAGAN, B.A., J.D.; *Lecturer, Dir. of Environmental Law Clinic.*
HARRISON KELLER, B.A., M.A., Ph.D.; *Vice Provost for Higher Education Policy, Senior Lecturer.*
JEANA A. LUNGWITZ, B.A., J.D.; *Clinical Prof., Dir. of Domestic Violence Clinic.*
TRACY W. MCCORMACK, B.A., J.D.; *Lect.; Dir. Trial Advoc. Prg.*
ROBIN B. MEYER, B.A., M.A., J.D.; *Lecturer.*
JANE A. O'CONNELL, B.A., M.S., J.D.; *Lecturer, Assoc. Dir. for Patron Services, Instruction, & Research.*
RANJANA NATARAJAN, B.A., J.D.; *Clinical Prof., Dir. of National Security Clinic.*
ROBERT C. OWEN, A.B., M.A., J.D.; *Clinical Prof.*
SEAN J. PETRIE, B.A., J.D.; *Lecturer.*
WAYNE SCHIESS, B.A., J.D.; *Sr. Lecturer, Dir. of Legal Writing.*
STACY ROGERS SHARP, B.S., J.D.; *Lecturer.*
PAMELA J. SIGMAN, B.A., J.D.; *Adjunct Prof., Dir. Juv. Just. Clinic.*
DAVID S. SOKOLOW, B.A., M.A., J.D., M.B.A.; *Distinguished Sr. Lecturer, Dir. of Student Life.*
LESLIE L. STRAUCH, B.A., J.D.; *Clinical Prof. Child. Rights Clinic.*
GRETCHEN S. SWEEN, B.A., M.A., Ph.D., J.D.; *Lecturer.*
MELINDA E. TAYLOR, B.A., J.D.; *Sr. Lecturer, Exec. Dir. of Ctr. for Global Energy, Int'l Arbitration, & Environmental Law.*
HEATHER K. WAY, B.A., B.J., J.D.; *Lecturer, Dir. of Commun. Dev. Clinic.*

BARBARA HINES, B.A., J.D.; *Clinical Prof., Dir. of Immigr. Clinic.* ELIZABETH M. YOUNGDALE, B.A., M.L.I.S., J.D.; *Lecturer.*

## ADJUNCT PROFESSORS AND OTHER LECTURERS

ROBERT J. ADAMS, JR., B.S., M.B.A., Ph.D.
WILLIAM R. ALLENSWORTH, B.A., J.D.
CRAIG D. BALL, B.A., J.D.
SHARON C. BAXTER, B.S., J.D.
KARL O. BAYER, B.A., M.S., J.D.
WILLIAM H. BEARDALL, JR., B.A., J.D.
JERRY A. BELL, B.A., J.D.
ALLISON H. BENESCH, B.A., M.S.W., J.D.
CRAIG R. BENNETT, B.S., J.D.
JAMES B. BENNETT, B.B.A., J.D.
MELISSA J. BERNSTEIN, B.A., M.L.S., J.D.
ROBERT S. BICKERSTAFF, B.A., J.D.
MURFF F. BLEDSOE, B.A., J.D.
WILLIAM P. BOWERS, B.B.A., J.D., LL.M.
HUGH L. BRADY, B.A., J.D.
STACY L. BRAININ, B.A., J.D.
ANTHONY W. BROWN, B.A., J.D.
JAMES E. BROWN, B.A., LL.B.
TOMMY L. BROYLES, B.A., J.D.
W.A. BURTON, JR., B.A., M.A., LL.B.
JOHN C. BUTLER, B.B.A., Ph.D.
AGNES E. CASAS, B.A., J.D.
RUBEN V. CASTANEDA, B.A., J.D.
EDWARD A. CAVAZOS, B.A., J.D.
ELIZABETH S. CHESTNEY, B.A., J.D.
JEFF CIVINS, A.B., M.S., J.D.
GARY COBB, B.A., J.D.
ELIZABETH COHEN, B.A., M.S.W., J.D.
JAMES W. COLLINS, B.S., J.D.
PATRICIA J. CUMMINGS, B.A., J.D.
DICK DEGUERIN, B.A., LL.B.
ADAM R. DELL, B.A., J.D.
STEVEN K. DEWOLF, B.A., J.D, LL.M.
CASEY D. DUNCAN, B.A., M.L.I.S., J.D.
PHILIP DURST, B.A., M.A., J.D.
BILLIE J. ELLIS, JR., B.A., M.B.A., J.D.
JAY D. ELLWANGER, B.A., J.D.
TORIA J. FINCH, B.S., J.D.
JOHN C. FLEMING, B.A., J.D.
KYLE K. FOX, B.A., J.D.
DAVID C. FREDERICK, B.A., Ph.D., J.D.
GREGORY D. FREED, B.A., J.D.
FRED J. FUCHS, B.A., J.D.
CHARLES E. GHOLZ, B.S., Ph.D.
MICHAEL J. GOLDEN, A.B., J.D.
DAVID HALPERN, B.A., J.D.
ELIZABETH HALUSKA-RAUSCH, B.A., M.A., M.S., Ph.D.
JETT L. HANNA, B.B.A., J.D.
KELLY L. HARAGAN, B.A., J.D.
CLINT A. HARBOUR, B.A., J.D., LL.M.
ROBERT L. HARGETT, B.B.A., J.D.
JAMES C. HARRINGTON, B.A., M.A., J.D.
CHRISTOPHER S. HARRISON, Ph.D., J.D.
JOHN R. HAYS, JR., B.A., J.D.
P. MICHAEL HEBERT, A.B., J.D.
STEVEN L. HIGHLANDER, B.A., Ph.D., J.D.
SUSAN J. HIGHTOWER, B.A., M.A., J.D.
KENNETH E. HOUP, JR., J.D.
RANDY R. HOWRY, B.J., J.D.
MONTY G. HUMBLE, B.A., J.D.
PATRICK O. KEEL, B.A., J.D.
DOUGLAS L. KEENE, B.A., M.Ed., Ph.D.
SCOTT A. KELLER, B.A., J.D.
CHARI L. KELLY, B.A., J.D.
ROBERT N. KEPPLE, B.A., J.D.
MARK L. KINCAID, B.B.A., J.D.
KURT H. KUHN, B.A., J.D.
AMI L. LARSON, B.A., J.D.
MAURIE A. LEVIN, B.A., J.D.
JIM MARCUS, B.A., J.D.
PETER D. MARKETOS, B.A., J.D.
HARRY S. MARTIN, A.B., M.L.S., J.D.
FRANCES L. MARTINEZ, B.A., J.D.
LAURA A. MARTINEZ, B.A., J.D.
RAY MARTINEZ, III, B.A., J.D.
LISA M. MCCLAIN, B.A., J.D., LL.M.
BARRY F. MCNEIL, B.A., J.D.
ANGELA T. MELINARAAB, B.F.A., J.D.
MARGARET M. MENICUCCI, B.A., J.D.
JO A. MERICA, B.A., J.D.
RANELLE M. MERONEY, B.A., J.D.
ELIZABETH N. MILLER, B.A., J.D.
DARYL L. MOORE, B.A., M.L.A., J.D.
EDWIN G. MORRIS, B.S., J.D.
SARAH J. MUNSON, B.A., J.D.
MANUEL H. NEWBURGER, B.A., J.D.
MILAM F. NEWBY, B.A., J.D.
DAVID G. NIX, B.S.E., LL.M., J.D.
PATRICK L. O'DANIEL, B.B.A., J.D.
M. A. PAYAN, B.A., J.D.
ELIZA T. PLATTS-MILLS, B.A., J.D.
LAURA L. PRATHER, B.B.A., J.D.
JONATHAN PRATTER, B.A., M.L.S., J.D.
VELVA L. PRICE, B.A., J.D.
BRIAN C. RIDER, B.A., J.D.
ROBERT M. ROACH, JR., B.A., J.D.
BRIAN J. ROARK, B.A., J.D.
BETTY E. RODRIGUEZ, B.S.W., J.D.
JAMES D. ROWE, B.A., J.D.
MATTHEW C. RYAN, B.A., J.D.
KAREN R. SAGE, B.A., J.D.
MARK A. SANTOS, B.A., J.D.
CHRISTOPHE H. SAPSTEAD, B.A., J.D.
SUSAN SCHULTZ, B.S., J.D.
AMY J. SCHUMACHER, B.A., J.D.
SUZANNE SCHWARTZ, B.J., J.D.
RICHARD J. SEGURA, JR., B.A., J.D.
DAVID A. SHEPPARD, B.A., J.D.
JUDGE ERIC M. SHEPPERD, B.A., J.D.
RONALD J. SIEVERT, B.A., J.D.
AMBROSIO A. SILVA, B.S., J.D.
STUART R. SINGER, A.B., J.D.
HON. BEA A. SMITH, B.A., M.A., J.D.
LYDIA N. SOLIZ, B.B.A., J.D.
KATHERINE J. SOLON, B.A., M.S., J.D.
JAMES. M. SPELLINGS, JR., B.S., J.D.
DAVID B. SPENCE, B.A., J.D., M.A., Ph.D.
KACIE L. STARR, B.A., J.D.
WILLIAM F. STUTTS, B.A., J.D.
MATTHEW J. SULLIVAN, B.S., J.D.
JEREMY S. SYLESTINE, B.A., J.D.
BRADLEY P. TEMPLE, B.A., J.D.
SHERINE E. THOMAS, B.A., J.D.
TERRY O. TOTTENHAM, B.S., LL.M., J.D.
MICHAEL S. TRUESDALE, B.A., M.A., J.D.
JEFFREY K. TULIS, B.A., M.A., Ph.D.
ROBERT W. TURNER, B.A., LL.B.
TIMOTHY J. TYLER, B.A., J.D.
SUSAN S. VANCE, B.B.A., J.D.
LANA K. VARNEY, B.J., J.D.
SRIRAM VISHWANATH, B.S., M.S., Ph.D.
DEBORAH M. WAGNER, B.A., M.A., J.D.
CLARK C. WATTS, B.A., M.D., M.A., M.S., J.D.
JANE M. WEBRE, B.A., J.D.
WARE V. WENDELL, A.B., J.D.
RODERICK E. WETSEL, B.A., J.D.

KEVIN R. LASHUS, B.A., J.D.
JODI R. LAZAR, B.A., J.D.
KEVIN L. LEAHY, B.A., J.D.
MARK B. WILSON, B.A., M.A., J.D.
CHRISTINA T. WISDOM, B.A., J.D.
JUDGE PAUL L. WOMACK, B.S., J.D.
LUCILLE D. WOOD, B.A., J.D.

DARA J. WHITEHEAD, B.A., M.S.
RANDALL B. WILHITE, B.B.A., J.D.
DAVID G. WILLE, B.S.E.E., M.S.E.E., J.D.
DENNEY L. WRIGHT, B.B.A., J.D., LL.M.
LARRY F. YORK, B.B.A., LL.B.
DANIEL J. YOUNG, B.A., J.D.

## VISITING PROFESSORS

OWEN L. ANDERSON, B.A., J.D.
ANTONIO H. BENJAMIN, LL.B., LL.M.
PETER F. CANE, B.A., LL.B., D.C.L.

VICTOR FERRERES, J.D., LL.M., J.S.D.
LARRY LAUDAN, B.A., M.A., Ph.D.
NADAV SHOKED, LL.B, S.J.D.

# AMERICAN JOURNAL OF CRIMINAL LAW

Published at The University of Texas School of Law

VOLUME 39 FALL 2011 NUMBER 1

## Articles



## Note

# ARTICLE

## The "Dominant Influence" Test: The FCPA's "Instrumentality" and "Foreign Official" Requirements and the Investment Activity of Sovereign Wealth Funds

Court E. Golumbic & Jonathan P. Adams*



---

*Court E. Golumbic is a Managing Director at a financial services firm. He is also an Adjunct Professor at the University of Pennsylvania Law School and a former Assistant United States Attorney with the United States Attorney's Office for the Southern District of New York.

Jonathan P. Adams is an associate at Sidley Austin LLP and is a member of that firm's Complex Commercial Litigation, White Collar Crime, and Privacy, Data Security, and Information Law practice groups in its Washington, D.C. office. The views expressed herein are those of the authors and do not express those of Sidley Austin LLP. The authors would like to express their gratitude to Robert Werner, Robert Ruff, Russell Leino, and Robert deButts for their assistance in writing this article.

## I. Introduction

The financial crisis of 2008–2009 brought staggering losses to many U.S. financial institutions.[1] As these losses mounted, many institutions sought significant capital infusions to bolster their troubled balance sheets.[2] For some, partial salvation came in the form of direct investments from sovereign wealth funds ("SWFs").[3] Financial giants such as Blackstone, Carlyle Group, Citigroup, Merrill Lynch, Morgan Stanley and Standard Chartered raised funds from SWFs as traditional lenders were reluctant to make them available during the financial crisis.[4] Defined as government-owned investment vehicles funded by foreign exchange reserves and export revenues that are managed separately from the official reserves of the government's monetary authorities, SWFs play an increasingly prominent role in global capital markets.[5] Indeed, SWFs have grown substantially both in numbers and in total assets, and increasingly have taken significant ownership interests in U.S. public companies.[6] This includes the billions of dollars SWFs invested in the aforementioned financial firms, providing stability and liquidity during one of the most tumultuous economic periods in history.[7]

---

1. *See, e.g.*, David Enrich et al., *U.S. Agrees to Rescue Struggling Citigroup*, WALL ST. J., Nov. 24, 2008, at A1. Citigroup received a $7.5 billion capital injection from Abu Dhabi Investment Authority, a sovereign wealth fund, in November 2007. Eric Dash & Andrew Ross Sorkin, *Escalating Losses Force Citigroup to Seek More Foreign Investment*, N.Y. TIMES, Jan. 12, 2008, at C1. For a more detailed discussion of sovereign wealth funds' investments in U.S. financial firms prior to and during the economic crisis of 2008–2009, *see infra*, Part III.C.

2. *See, e.g.*, Eric Langland, Comment, *Misplaced Fears Put to Rest: Financial Crisis Reveals the True Motives of Sovereign Wealth Funds*, 18 TUL. J. INT'L & COMP. L. 263, 273–74 (2009) (describing the predicament of financial firms in a liquidity crisis and the role of SWFs as "First Responders" in the 2008 crisis); Paul Rose, *Sovereign Wealth Fund Investment in the Shadow of Regulation and Politics*, 40 GEO. J. INT'L L. 1207 (2009). *See also infra* Part III for a discussion of the evolution of SWFs and their market impact.

3. Francesco Guerrera, *SEC 'Sweep' Examines SWF Support for Banks*, Financial Times (Jan. 14, 2011), http://www.ft.com/intl/cms/s/0/8fb6c830-1f7e-11e0-87ca-00144feab49a.html#axzz1iKjVdtwU; Peter Lattman & Michael J. De La Merced, *S.E.C. Looking into Deals with Sovereign Wealth Funds*, N.Y. TIMES Dealbook (Jan. 13, 2011, 12:08PM), http://dealbook.nytimes.com/2011/01/13/s-e-c-looking-into-deals-with-sovereign-funds/.

4. *See* Guerrera, *supra* note 3; Lattman & De La Merced, *supra* note 3.

5. U.S. DEP'T OF THE TREASURY, REP. TO CONG. ON INT'L ECON. & EXCH. RATE POLICIES (Dec. 2007), *available at* http://www.treasury.gov/resource-center/international/exchange-rate-policies/Documents/Dec2007-Report.pdf. There is not a universally agreed upon definition of a SWF. *See* Ping Xie & Chao Chen, *The Theoretical Logic of Sovereign Wealth Funds* 2, 4 (China Inv. Corp. Working Paper Series, 2009), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1420618 ("[A] SWF is a market-oriented and professional investment body owned and managed by a state's central government, which uses mainly foreign exchange reserves and export revenues to make overseas investment and seeks to maximize long term return.").

6. *See* Langland, *supra* note 2, at 268.

7. Lattman & De La Merced, *supra* note 3; Guerrera, *supra* note 3. *See also* INT'L FIN. SERVS LONDON, SOVEREIGN WEALTH FUNDS 2010 2, Mar. 2010, *available at*

The Foreign Corrupt Practices Act ("FCPA") prohibits the corrupt influence of "foreign officials" via the offer or payment of anything of value to such foreign officials, directly or indirectly, for the purpose of obtaining or retaining business.[8] The United States Securities and Exchange Commission ("SEC") and the United States Department of Justice ("DOJ"), the agencies with enforcement authority under the FCPA, historically have applied the Act to industries like oil and gas, technology, pharmaceuticals, and medical supplies industries.[9] In the past decade, however, both agencies have increased substantially their enforcement efforts, employing more aggressive investigative techniques and expanding their reach to encompass a wider array of targets.[10] A recent "sweep" investigation into financial firms' dealings with SWFs has signaled the government's "intent to scrutinize an entire new area under the FCPA."[11]

This article examines the implications of extending the FCPA to SWFs, and in particular the potential application of the FCPA to SWFs' investments in U.S. financial firms and other companies. The article begins in Part II with a review of the legislative history of the FCPA, noting the absence of any clear expression of congressional intent to include private investment activity within its scope. Part II also contains an analysis of the FCPA's provisions, with particular focus on the terms "foreign official" and "instrumentality." The FCPA proscribes corrupt payments to "foreign officials," which are defined to include employees of government "instrumentalities." The term "instrumentality" has not been statutorily or judicially defined. To fill in the gap, the DOJ and the SEC have supplied their own definitions, enforcing the FCPA rigorously and construing its provisions broadly.[12]

---

http://www.thecityU.K..com/assets/Uploads/Sovereign-Wealth-Funds-2010.pdf [hereinafter IFSL].

8. Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (1977) (codified at 15 U.S.C. § 77m(2006)). For a discussion of the legislative history of the FCPA and an analysis of its provisions, *see infra,* Parts II.A and II.B.

9. For a breakdown of cases brought by the DOJ and the SEC from the 1970s through 2010, see Michael S. Bixby, *The Lion Awakes: The Foreign Corrupt Practices Act – 1977 to 2010*, 12 SAN DIEGO INT'L L.J. 89, App. A-C (2010) (illustrating the focus of FCPA enforcement on certain industries).

10. *See* GIBSON DUNN & CRUTCHER LLP, *2009 FCPA Year-End Update* (2010), *available at* http://www.gibsondunn.com/Publications/Pages/2009Year-EndFCPAUpdate.aspx ("[F]or the fourth time in the last five years, the [DOJ] and [SEC] . . . set a record by bringing more FCPA prosecutions than in any prior year in the FCPA's history."). For a discussion of recent trends in FCPA enforcement, *see infra*, Part II.C.

11. CLIFFORD CHANCE LLP, *SEC Initiates Sweep of Firms Doing Business with Sovereign Wealth Funds* (Jan. 2011), *available at* http://www.cliffordchance.com/content/dam/cliffordchance/PDF/SEC_Initiates_Sweep_of_Firms_Doing_Business_with_Sovereign_Wealth_Funds_1_21_11.pdf. In January 2011, ten U.S. financial institutions, including banks and private equity firms, received information requests from the SEC instructing them to retain documents relating to, and responding to general questions about, the firms' dealings with SWFs. According to public reports, the letters were part of an SEC "sweep," an investigation targeting an industry and not a single firm, examining whether the financial institutions' interactions with SWFs gave rise to any issues under the FCPA. *Id.*

12. *See* Michael Koehler, *The Façade of FCPA Enforcement*, 41 GEO. J. INT'L L. 907, 1009 (2010) (describing the factors that contribute to the "façade of FCPA enforcement" while arguing "that

Part III of the article provides an overview of SWFs, from their inception to their emergence as a significant force in modern capital markets. While some observers have expressed concern that SWFs' lack of transparency can be exploited to promote political agendas contrary to U.S. interests, the funds generally have been viewed as having a positive impact on the global economy.[13] The role of the SWFs as a ready source of capital for the above-mentioned financial institutions in crisis is an illustration of this impact.[14]

Part III also examines the applicability of the FCPA to SWFs, drawing parallels to the government's successful efforts to characterize state-owned enterprises ("SOEs") as "instrumentalities."[15] SOEs are entities at least partially owned by a government that operate like a corporation, funded with profits from operations and engaging in active investment activity.[16] As reflected in a number of recent cases where corporate defendants settled FCPA charges with the government, the DOJ and the SEC have designated SOEs as "instrumentalities"—and thus their employees as "foreign officials"—even in cases where a foreign state owns significantly less than a majority ownership interest in the SOEs.[17] Moreover, in a series of recent attempts by corporate and individual defendants to challenge the validity of this designation, the courts have consistently ruled in the government's favor.[18] It is important to note, however, that in each of these cases the extent of government control has factored heavily in the government's decision to bring charges against SOEs.[19] In evaluating the applicability of the FCPA to the activities of a SWF, then, control is the operative concept.

The final section of Part III explores the challenges the ambiguous definitions of "instrumentality" and "foreign official" present for U.S. companies seeking to solicit investments by SWFs. Because SWFs are wholly owned by foreign governments, their investments in U.S. companies could potentially convert these companies into "instrumentalities" in the eyes of the DOJ and SEC, thus subjecting their employees to scrutiny under the FCPA.[20] This seems to be a logical and appropriate extension of the FCPA in cases where SWFs exercise majority ownership and/or affirmative control over a company in which they invest. When applied to the minority ownership interests SWFs have taken in U.S. financial firms and other companies, however, the logic and propriety is less clear. A SWF's simple

---

addressing the facade and subjecting FCPA enforcement actions to greater judicial scrutiny is in the public interest, and encourages more FCPA defendants to challenge the enforcement agencies").

13. *See infra*, Part III.C.
14. *See id.*
15. *See infra*, Part III.D.
16. *See id.*
17. *See infra*, Part III.D.1.
18. *See infra*, Part III.D.2.
19. *See infra*, Part III.D.1.
20. *See infra* Part III.D.2.

minority stake should not, in isolation, render the FCPA applicable to the SWF.[21] Among other things, the prospect of FCPA exposure may cause SWFs to avoid making significant investments in U.S. companies, depriving these companies of a ready source of capital.[22]

The article concludes in Part IV by arguing for a more restrictive definition of "instrumentality" and "foreign official." Specifically, Congress should amend, or the courts should interpret, the FCPA to identify the attributes of affirmative control a foreign government must exercise for a company to qualify as an instrumentality. Borrowing from the Foreign Sovereign Immunities Act,[23] a presumption in favor of "instrumentality" status should be established when a U.S. corporation is majority owned by an entity such as a SWF. To provide more clarity in cases where SWFs are minority owners, Congress can similarly track a major international treaty to which the U.S. is a signatory: the Organization for Economic Cooperation and Development's "Convention on Combating Bribery of Foreign Public Officials in International Business Transaction."[24] This treaty identifies the elements of control that give rise to a finding that an entity, such as a SWF, exercises "dominant influence" over a company, including majority voting rights and the ability to appoint directors.

By amending or interpreting the FCPA to incorporate such a "dominant influence" test, Congress or the courts will permit U.S. companies to make reasoned, fact-based judgments regarding their FCPA exposure when considering strategic transactions with SWFs.

## II. The Foreign Corrupt Practices Act

### A. The SEC Investigation and the Enactment of the FCPA

The FCPA is the primary mechanism by which the United States penalizes companies and individuals engaging in corruption abroad.[25] Congress enacted the FCPA in 1977, in response to a disturbing pattern of American firms providing bribes to foreign public officials for competitive

---

21. *See infra* Part III.D., IV.

22. *See id.*

23. Foreign Sovereign Immunities Act, Pub. L. No. 94-583 (codified in scattered sections of 28 U.S.C.). For a discussion of the Foreign Sovereign Immunities Act, *see infra* Part IV.

24. *See* INT'L MONETARY FUND, Report on OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (Sept. 18, 2001). For a discussion of this convention, *see infra* Part IV.

25. Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (1977) (codified as amended at 15 U.S.C. §§ 78dd-1(2011)). The FCPA was the first law internationally to ban firms from one country from engaging in extraterritorial bribery or corruption. Subsequent decades saw the remainder of the international community move to institute equivalent measures. See David Dworsky, *Foreign Corrupt Practices Act*, 46 AM. CRIM. L. REV. 671, 672 n.3, 690–94 (noting that the FCPA was the first anti-corruption law of its kind and that many, if not most, industrialized economies followed the United States' lead in subsequent decades).

advantages.[26] Specifically, during the Congressional "Watergate" investigation, which examined the connection between the Nixon Administration and the attempted burglary of the Democratic National Committee headquarters,[27] investigators uncovered a pattern of illegal contributions by members of the corporate elite to the Nixon reelection campaign, as well as bribes and other "gifts" aimed at politicians in the United States and abroad.[28] In response to this latter discovery, the SEC commenced a separate investigation into U.S. corporate bribery and corrupt activities.[29] In May 1976, the SEC presented an initial report to Congress disclosing questionable payments or bribes by over 117 of the Fortune 500 companies relating to a wide range of transactions across several continents.[30] By the conclusion of an SEC-sponsored, voluntary disclosure program, over 400 U.S. companies had self reported paying hundreds of millions of dollars in bribes.[31]

The FCPA addressed the concerns raised by the SEC's investigation by prohibiting corporations from bribing foreign officials for purposes of securing improper business advantages.[32] In passing the Act, Congress expressed its objection to bribery on several grounds.[33] First, it found the bribery of foreign officials to be unethical and "counter to the moral expectations and values of the American public."[34] Bribery, Congress asserted, damages a company's image and can cast a shadow on

---

26. Justin F. Marceau, *A Little Less Conversation, A Little More Action: Evaluating and Forecasting the Trend of More Frequent and Severe Prosecutions Under the Foreign Corrupt Practices Act*, 12 FORDHAM J. CORP. & FIN. L. 285, 286 (2007) (summarizing Congressional and SEC findings in the mid-1970s that several hundred American corporations had engaged in foreign corruption).

27. For a definitive account of the Watergate Scandal, *see generally* STANLEY I. KUTER, THE WARS OF WATERGATE: THE LAST CRISIS OF RICHARD NIXON (1992). The nexus between Watergate and the corporate bribery scandal that led to the enactment of the FCPA is described in Michael Bixby, *The Lion Awakens*, *supra* note 9 at 92–93; Rollo C. Baker, *Foreign Corrupt Practices Act*, 47 AM. CRIM. L. REV. 647, 648 n.2 (2010).

28. Michael Bixby, *The Lion Awakens*, *supra* note 9 at 92–93; Rollo C. Baker, *Foreign Corrupt Practices Act*, 47 AM. CRIM. L. REV. 647, 648 n.2 (2010).

29. *See* H.R. REP. NO. 95-640, at 4 (1977) (Conf. Rep.).

30. Report of the Securities and Exchange Commission on Questionable and Illegal Corporate Payments and Practices (May 12, 1976) [hereinafter "SEC Report"]. The SEC Report identified four primary patterns of bribery directed at government officials: (1) payments "made in an effort to procure special and unjustified favors or advantages in the enactment or administration of the tax or other laws of the country in question"; (2) payments "made with the intent to assist the company in obtaining or retaining government contracts"; (3) payments "to persuade low-level governmental officials to perform functions or services which they are obliged to perform as part of their governmental responsibilities, but which they may refuse or delay unless compensated" [the precursor of what later would be defined as facilitation or "grease" payments]; and (4) political contributions. SEC Report. at 619. The SEC Report further noted that the Commission had observed payments "made to improperly influence a non-governmental customer's use of a company's product or services," but these activities received little or no congressional scrutiny. *Id.*

31. H.R. REP. NO. 95-640, at 4 (1977) (Conf. Rep.); S. REP. NO. 95-114, at 6 (1977) (Conf. Rep.).

32. *Id.*

33. Statement on Signing § 305 into Law, 2 PUB. PAPERS 2157 (Dec. 20, 1977) ("I share Congress's belief that bribery is ethically repugnant and competitively unnecessary.").

34. H.R. REP. NO. 95-640, at 4 (1977) (Conf. Rep.).

all U.S. companies.[35] Congress also found bribery unnecessary and, as a result, inefficient.[36] Congress further concluded that the revelation of bribes can embarrass friendly governments and support the view that U.S. corporations corruptly influence those governments.[37] Finally, Congress argued that a strong anti-bribery law would help U.S. corporations fend off improper demands by foreign officials.[38] The over-arching objective of the FCPA, then, is the prevention of corporate corruption of foreign government officials.[39]

This objective is seen often throughout the legislative history of the FCPA. Initial hearings undertaken by subcommittees of the Senate and House of Representatives in the 94th Congress during the summer of 1975, for example, focused on bribery of government or political party members for business advantages within a foreign nation, particularly to the extent that these payments would have "important ramifications for [U.S.] foreign relations and economic interests."[40] Later, as the issue was taken up again

---

35. *Id.* at 5; S. REP. NO. 95-114, at 3–4 (1977) (Conf. Rep.) ("The image of American democracy abroad has been tarnished.").

36. H.R. REP. NO. 95-640, at 4. ("It erodes public confidence in the integrity of the free market system" by allowing companies that cannot compete in terms of price, quality, or service to nonetheless succeed through improper means, thus rewarding corruption instead of efficiency).

37. H.R. REP. NO. 95-640, at 5.

38. *Id.*

39. The Senate's concern regarding the foreign policy impact was expressed succinctly in the Senate Report No. 94-1031 as to S. 3664 (July 2, 1976), which noted that:

> Bribery of foreign officials by U.S. Corporations also creates severe foreign policy problems. The revelation of improper payments invariably tends to embarrass friendly regimes and lowers the esteem for the United States among the foreign public. It lends credence to the worst suspicions sown by extreme nationalists or Marxists that American businesses operating in their country have a corrupting influence on their political systems . . . . Bribery by U.S. Companies also undermines the foreign policy objectives of the United States to promote democratically accountable governments and professionalized civil services in developing countries.

*The Activities of American Multinational Corporations Abroad: Hearing Before the H. Subcomm. On Int'l Econ. Policy of the Comm. on Int'l Relations*, 94th Cong. 22 (1975) (statement of Michael Feldman, Deputy Legal Advisor, Dep't of State).

40. *Protecting the Ability of the United States to Trade Abroad: Hearing Before the S. Subcomm. on Int'l Trade of the Comm. On Fin.*, 94th Cong. 9 (1975) (statement of Sen. Frank Church). In a May 16, 1975 hearing before the Senate Subcommittee on Multinational Corporations, for instance, Senator Church noted that Gulf Oil Corporation had admitted to making millions of dollars in both foreign and domestic political contributions that had an impact on U.S. relations with countries in the Persian Gulf. Hearing Before the S. Subcomm. on Multinational Corps., 94th Cong. (1975) (the "Political Contributions" Hearing). Later hearings before related Senate subcommittees examined other instances of corrupt behavior aimed at influencing foreign public officials, including significant bribes by defense and energy companies. These activities occurred throughout the developed and developing world, and included "a $4 million illegal political contribution in Korea," a payment of "$450,000 to [an] agent in Saudi Arabia for the purpose of bribing the former and present Minister of Aviation," "questionable political payments by the major oil companies" to Italian politicians (including "$46 million . . . allegedly paid to Italian political parties" by Exxon Corporation). *Lockheed Bribery: Hearing Before the Comm. On Banking Hous. And Urban Affairs*, 94th Cong. (1975); *Protecting the Ability of the United States to Trade Abroad: Hearing Before the Subcomm. On Int'l Trade of the Comm. on Fin.*, 94th Cong. (1975). Most notably, the payments implicated the former Prime Minister of Japan and the monarchy of the Netherlands, leading to indictment in the former and the near abdication of Queen

by the 95th Congress in the spring of 1977, the primary concern remained payments used to bribe government or political actors within foreign states. The Senate and House Reports,[41] summarizing the origins, intent, and interpretation of the language contained in the two bills that would eventually become the FCPA, suggest the same—Congress never significantly departed from its effort to combat the foreign policy implications of American companies bribing foreign public officials.[42]

---

Juliana in the latter. *See generally* Declaration of Professor Michael J. Koehler in Support of Defendants' Motion to Dismiss Counts One Through Ten of the Indictment, United States v. Carson, 8:09-cr-00077, (C.D. Cal. Mar 21, 2011).

The House of Representatives Subcommittee on International Economic Policy held similar hearings in the summer of 1975. The Subcommittee, chaired by Representative Robert N.C. Nix, sought to examine the use of "secret funds for the payment of gratuities to foreign *government* and *political* figures" by American corporations in contravention of the laws of foreign states. *The Activities of American Multinational Corporations Abroad Hearing Before the Subcomm. On Int'l Econ. Policy*, 94th Cong. 1 (1975). Indeed, one member of Congress characterized these funds as "secret 'slush funds', derived from the creation of expenses for fictitious purposes and disbursed without accountability by corporate executives." *Id.* at 37. The House Subcommittee examined corrupt acts similar to those discussed in the Senate Hearing, including contributions to Korean political campaigns and direct payments to the Honduran leader Oswaldo Lopez Areliano. *Id.*

The House and Senate held several further hearings during the 94th Congress (in 1975–1976) concerning the corrupt practices of American firms involved with foreign governments, and no fewer than fifteen bills relating to foreign corruption originated in this session of Congress. (These bills and resolutions of the 94th Congress included, in chronological order: S. Res. 265, H.R. 11987, S. 3133, S. 3150, S. 3379, S. 3418, H.R. 13870, H.R. 13953, H.R. 14340, H.R. 14358, H.R. 14681, S. 3664, S. 3741, H.R. 15149, and H.R. 15481.) The remaining 1975–76 hearings, like the first hearings following the release of the SEC's initial findings, maintained a focus on unearthing bribery and corrupt acts directed at individuals who clearly maintained some political or governmental role within third world countries. Corrupt payments related to obtaining favorable energy and defense expenditures or tax status in foreign states continued to dominate the Senate debate, and the Senate on multiple instances noted that it was attempting to bridge the jurisdictional gap between the United States and foreign states with laws that outlaw the bribery of their government officials. *See, e.g., Multinational Corporations and United States Foreign Policy Hearing Before the S. Subcomm. On Multinational Corps.*, 94th Cong. (1975). (statement of Sen. Church) ("What we are talking about is a concerted effort by the petroleum industry to buy favorable tax and energy legislation in a European country in which one U.S. company alone made over $50 million in contributions to the government parties and members of the cabinet over a 9-year period. What we are talking about is an arms industry campaign to flood the Middle East with weapons, in which a U.S. aircraft company paid over $100 million in agents' fees in one country to sell an airplane which has no competitor. A large part of that $100 million is known to have ended up in the Swiss bank accounts of high military and civilian defense officials of the purchasing country."); *Foreign and Corporate Bribes: Hearing Before the Comm. on Banking, Hous., and Urban Affairs*, 94th Cong. 8–9 (1976) (statement of Sen. Proxmire) ("What we are concerned about is . . . where a payment is made to a foreign official indirectly for the purpose of selling what that corporation has to sell to that country. It is a bribe. Now that kind of payment is not outlawed at the present time in our law and while it is outlawed in many foreign countries . . . it's very hard for those countries to prosecute because they don't have the facts. We may have the facts but we don't prosecute because it's not against the law. We are trying to bridge that situation . . . .").

Other concerns that Congressmen or witnesses raised during the hearings included the existence of kick-back provisions in government sales, how best to respond to acts of bribery, and the extent to which sunshine provisions would serve as a deterrent to corrupt acts. These issues are reflected in the concerns referenced in S. REP. NO. 95-114 and H.R. REP. NO. 95-640.

41. Respectively, S. REP. NO. 95-114 (1977) and H.R. REP. NO. 95-640 (1977). The Conference Report addressed the same topics.

42. *See, e.g.*, S. REP. NO. 95-114, at 3 (1977) (listing "[r]ecent investigations by the SEC have revealed corrupt foreign payments by over 300 U.S. companies involving hundreds of millions of

Notably absent in the record underlying the FCPA is any indication that the Senate or House contemplated that the legislation would encompass acts of bribery in the private context.[43] This is not to say that testifying witnesses and individual members of Congress did not propose such measures.[44] They were in the minority, however, and their proposals never

---

dollars. These revelations have had severe adverse effects. Foreign governments friendly to the United States in Japan, Italy, and the Netherlands have come under intense pressure from their own people" as the "need for legislation"). In examining the public nature of the corruption, S. Rep. No. 95-114 notes that the bribe recipients encompassed in the Bill include any "foreign government official, foreign political party or candidate for foreign political office[.]" *Id.* Likewise, H.R. Rep. No. 95-640 listed that the purpose of the law was to "prohibit the corrupt use of the mails or other means and instrumentalities of interstate commerce by U.S. corporations . . . to bribe foreign officials, foreign political parties, or candidates for foreign political office." H.R. REP. NO. 95-640, at 4 (1977). The criminalization of such acts was aimed at preventing "improper payments [which] invariably tend[] to embarrass friendly governments, lower the esteem for the United States among the citizens of foreign nations, and lend credence to the suspicions sown by foreign opponents of the United States that American enterprises exert a corrupting influence on the political processes of their nations." *Id.* Significantly, the House Report noted that "the proposed law *will not reach all corrupt payments overseas*." *Id.* at 8 (1977) (emphasis added).

43. In an exchange during the testimony of Ian MacGregor, then the Chairman of AMAX Inc., between MacGregor and Senator Joseph Biden of Delaware, MacGregor stated that one concern of his company was the "interface with . . . increasingly Government-controlled businesses run in many cases by officials whose compensation is generally regarded as inadequate by people in other parts of the world . . . The biggest area of problem is in the interface between our business organizations and these Government and quasi-Government industrial establishments." Hearings Before the Comm. on Banking, Housing and Urban Affairs, *supra* note 40, at 63 (statement of Ian MacGregor). Senator Biden queried "What do we do about that? What are you suggesting?" *Id.* MacGregor's eventual response, being "help" in the "form of recognized international practices hopefully backed by legislation in the major countries of the world," did not address whether he believed Congress should involve itself in criminalizing transactions with quasi-governmental firms. *Id.* Nor did Congress take any action to incorporate MacGregor's perspective into the explicit language of bills arising in the 94th Congress or in the text of the final FCPA.

44. *See, e.g., Unlawful Corporate Payments Act of 1977: Hearings Before the Subcom. on Consumer Prot. and Fin. of the H. Comm. On Interstate and Foreign Commerce* , 95th Cong. 30 (1977) (statement of Dr. Gordon Adams, Director of Military Research, Council on Econ. Priorities) (noting that the primary categories Congress should consider were bribes of government officials and politicians or political parties). Notably, in his testimony Dr. Adams also cited "questionable commercial practices by U.S. firms abroad" including payments of labor unions, "questionable commercial payment[s] involv[ing] gifts and payments to employees of foreign customers, to obtain business or to celebrate a successful commercial relationship," and "overbilling and illegal rebating to foreign customers"). *Id.* None of these practices were incorporated into the text of the FCPA.

One bill proposed during the 94th Congress, H.R. 14340, introduced by Representative Solarz, would have required issuers to report *all* acts of foreign bribery, regardless of government involvement, but this proposal never emerged from the Interstate and Foreign Commerce, International Relations, and Ways and Means Committees. This bill specifically required that issuers "provide a complete accounting of any offer or agreement of any agent or employee of a company or its parent, to make any contribution, pay any fee, or give anything of significant value in connection with . . . direct and indirect payments and gifts to employees of foreign, nongovernmental purchasers and sellers which are intended to influence normal commercial decisions of their employer and which are made without the employer's knowledge or consent." *Prohibiting Bribes to Foreign Officials: Hearing Before the S. Comm. On Banking, Housing, and Urban Affairs*, 94th Cong. 33 (1977) (statement of Rep. Stephen Solarz).

Likewise, Senator Warren Magnuson introduced a bill, S. 3741, in August 1976 which included in the ambit of "foreign government" the following: "a corporation or other legal entity established or owned by, and subject to control by, a foreign government." S. 3741 (95th Cong.). The full definition of "foreign government" included: "(1) the government of a foreign country, irrespective of recognition by the United States; (2) a department, agency, or branch of a foreign government; (3) a corporation or

gained traction.[45] The overall focus remained on payments made to corrupt government or political actors within foreign states, and entreaties to consider commercial bribery within the scope of the proposed legislation were generally ignored.[46]

On December 20, 1977, President Carter signed the FCPA into law, marking the culmination of two years of intense congressional colloquy and debate.[47]

1. The 1988 Amendments

Congress amended the FCPA twice. In both instances, amendments were introduced to address concerns that the FCPA lacked clarity and imposed "unanticipated and unnecessary burdens" on U.S. business interests.[48] Congress first amended the FCPA in 1988 to correct a perceived competitive disadvantage for American firms in the international market.[49] While the FCPA prohibited American companies from bribing foreign officials, other countries had not adopted similar legislation and

---

other legal entity established or owned by, and subject to control by, a foreign government; (4) a political subdivision of a foreign government, or a department, agency, or branch of the political subdivision, or (5) a public international organization." All of these definitional characteristics of foreign governments *except* the corporate/legal entity clause have nearly direct counterparts in the current text of the FCPA. S. 3741 was referred to the Senate Committee on Commerce, and was never brought to a vote on the Senate floor. An identical House counterpart, H.R. 15149, proposed on August 10, 1976 by Rep. Harley Staggers, was referred to—and stayed in—the House Committee on Interstate and Foreign Commerce.

If anything, the language of H.R. 14340 and S. 3741 and related testimony suggest that Congress was aware of commercial corruption, including corrupt acts involving state-controlled entities, and contemplated action, but ultimately declined to pursue the criminalization of such behavior. *See* Hearings Before the Subcomm. on Consumer Prot. and Fin., 94th. Cong. (Sept. 21–22, 1976) (statement of Roderick Hills, Chairman, SEC) (describing patterns of corrupt acts, including "foreign commercial payments made in a manner suggesting impropriety. Excessive sales commissions, over-compensated foreign business agents or consultants, or inflated invoicing to facilitate kickbacks . . . ."). The FCPA ultimately banned none of these.

45. *See* S. REP. NO. 95-114 and H.R. REP. NO. 95-640, *supra* note 41.

46. *See, e.g., Unlawful Corporate Payments Act of 1977: Hearings Before the Subcomm. on Consumer Prot. and Fin. of the H. Comm. On Interstate and Foreign Commerce*, *supra* note 44, 95th Cong. 30 (1977) (statement of Dr. Gordon Adams, Director of Military Research, Council on Econ. Priorities) (noting that the primary categories Congress should consider were bribes of government officials and politicians or political parties, but likewise citing "questionable commercial practices by U.S. firms abroad" including payments of labor unions, "questionable commercial payment[s] involv[ing] gifts and payments to employees of foreign customers, to obtain business or to celebrate a successful commercial relationship," and "overbilling and illegal rebating to foreign customers"). None of these practices were incorporated into the text of the FCPA, nor is there any indication that Congress seriously considered this aspect of Dr. Adams's testimony.

47. Presidential Statement on Signing S. 305 into Law, 13 PUB. PAPERS 1909 (Dec. 20, 1977).

48. *Business Accounting and Foreign Trade Simplification Act: Joint Hearing Before the Comm. On Banking, Housing, and Urban Affairs*, 97th Cong. 25 (1981) (statement of William Brock, U.S. Trade Representative).

49. Foreign Corrupt Practices Act Amendments of 1988, Pub. L. No. 100-418, § 5003(a), 102 Stat. 1107 (codified, with minor changes, in 15 U.S.C. §§ 78dd-1(b), -2(b), -3(b) (2000)) [hereinafter "1988 Amendments"]. *See also* Baker, *supra* note 28, at 648.

were thus able to avail themselves of bribery as a means to win business.[50] Congress responded by instructing the President to negotiate with the OECD to establish laws similar to the FCPA in other countries.[51] Additionally, Congress clarified the "grease payments" exception, which was originally couched in the definition of "foreign official."[52] The amendment reframed it as an exception for "any facilitating or expediting payment to a foreign official . . . the purpose of which is to expedite or to secure the performance of a routine governmental action by a foreign official."[53] Further, Congress refined the definition of "foreign official" to remove reference to the "ministerial or clerical" function associated with such employees.[54]

The amendments also added two affirmative defenses. The first permits conduct expressly allowed by the target country.[55] The second defense allows "reasonable and bona fide expenditure[s], such as travel and lodging expenses . . . directly related to [either] the promotion, demonstration, or explanation of products or services or the execution or performance of a contract with a foreign government or agency."[56] In addition, the 1988 amendments created a mechanism, the "Opinion Procedure," by which the DOJ would establish a means for interested parties to query the DOJ on the FCPA implications of a particular transaction and for the DOJ to "issue an opinion in response to that request."[57]

As with the record underlying the FCPA itself, the colloquy that preceded the 1988 amendments to the Act reflected no intent to address bribery in the private context. Occasional attempts to expand the FCPA's scope to expressly cover government-owned private enterprises never came to fruition.[58] Instead, Congress concentrated on "clarify[ing] the bribery

---

50. Bixby, *supra* note 9, at 98; Lauren Giudice, Note, *Regulating Corruption: Analyzing Uncertainty in Current Foreign Corrupt Practices Act Enforcement*, 91 B.U. L.REV. 347, 351 (2011); Amy Dean Westbrook, *Enthusiastic Enforcement, Informal Legislation: The Unruly Expansion of the Foreign Corrupt Practices Act*, 45 GA. L. REV. 489, 510–15 (2011); David E. Dworsky, *Foreign Corrupt Practices Act*, 46 AM. CRIM. L. REV. 671, 671–72 (2009); Jennifer Dawn Taylor, *Ambiguities in the Foreign Corrupt Practices Act: Unnecessary Costs of Fighting Corruption?*, 61 LA. L. REV. 861, 867–70 (2001).

51. *See* H.R. REP. NO. 100-576, at 924 (1988), *reprinted in* 1988 U.S.C.C.A.N. 1547, 1957. *See also* Giudice, *supra* note 50, at 351.

52. The "grease" payments exception refers to the use of payments to expedite otherwise routine governmental action. *See* Pub. L. No. 100-418, Title V, § 5003. *See generally* Judith L. Roberts, *Revision of the Foreign Corrupt Practices Act by the 1988 Omnibus Trade Bill: Will it Reduce the Compliance Burdens and Anticompetitive Impact?*, 1989 B.Y.U. L. REV. 491, 497–99 (1989) (explaining pre-1988 complaints relating to grease payments). *See also* Cortney C. Thomas, Note, *The Foreign Corrupt Practices Act: A Decade of Rapid Expansion Explained, Defended, and Justified*, 29 REV. LITIG. 439, 446 (2010).

53. 15 U.S.C. § 78dd-3(b) (2000).

54. Pub. L. No. 100-418, Title V, § 5003.

55. *Id.* at (a).

56. *Id.* at (c).

57. *See, e.g.*, 15 U.S.C. § 78dd-1(e).

58. The issue of regulating quasi-public or quasi-private entities arose on occasion in the context

provisions to make them enforceable and to provide clear standards of conduct for American businessmen."[59]

2. The 1997 OECD Convention & 1998 FCPA Amendments

Congress again amended the FCPA in 1998, in response to the December 17, 1997 signing of the OECD "Convention on Combating Bribery of Foreign Public Officials in International Business Transaction" (the "OECD Convention").[60] The OECD Convention aimed to ensure that the major global market nations took measures to criminalize transnational acts of bribery and corruption.[61] It was the product, in part, of U.S. diplomatic efforts to standardize global practices, as called for in the 1988 amendments to the FCPA.[62] Among the OECD Convention's most significant contributions were provisions standardizing the definitions and elements of criminal bribery offenses.[63]

Unlike the FCPA, the OECD Convention defined "foreign officials" in a way that would encompass employees or other individuals associated with private-sector enterprises.[64] Specifically, the convention

---

of committee hearings on amendments to the FCPA during the 1980s. *Business Accounting and Foreign Trade Simplification Act: Joint hearing Before the Subcomm. on Int'l Fin. and Monetary Policy and the Subcomm. on Sec. of the Comm. On Banking Housing, and Urban Affairs*, 99th Cong. 52 (1986) (statement of Hon. Malcolm Baldrige, Secretary, Department of Commerce). ("In some countries, Senator, as you know, there aren't any really private businessmen. The businesses are all run by the government. They are government-owned businesses and you must deal with either the ministers or somebody in the ministerial department down the line . . . ."). A report submitted to the Committee, "The Price of Ambiguity: More Than Three Years under the Foreign Corrupt Practices Act," noted the ambiguity surrounding the definition of "foreign official" which, on its face, "leaves uncertain the status of employees of government-owned enterprises." *Id.* at 200. Ultimately, S. 430 died in the 99th Congress without impacting the FCPA.

59. *Id.* at 2 (statement of Sen. H. John Heinz III).

60. *See* Int'l Monetary Fund, OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Sept. 18, 2001. The OECD is an organization of thirty-four nations, including the United States, founded in 1961 "to promote policies that will improve the economic and social well-being of people around the world." *See* OECD, About OECD, http://www.oecd.org/pages/0,3417,en_36734052_36734103_1_1_1_1_1,00.html (last visited Dec. 31, 2011). The OECD Convention guidelines reflect, in part, the success of the Executive Branch in the years 1988–1997 in petitioning other developed economies to adopt anti-corruption legislation similar to the FCPA.

61. *See* OECD Convention, Preamble.

62. Letter from Ann Harkins, Acting Assistant Attorney General, U.S. Dep't of Justice, to Newt Gingrich, Speaker of the House, and Albert Gore, Vice-President and President of the Senate (May 4, 1998) ("Administrations of both parties have long urged our trading partners to criminalize bribery of foreign public officials by their nationals . . . . These bipartisan efforts finally succeeded when thirty-three countries signed the OECD Convention in Paris in December of last year.").

63. *Id.* (noting the creation of a "level playing field" among OECD member states).

64. OECD Convention at Art. 1.4.a (emphasis added). However, it bears noting that these private sector enterprises must exercise a "public function," which the OECD interprets to mean "any activity in the public interest, delegated by a foreign country, such as the performance of a task delegated by it in connection with public procurement." *See* OECD Convention Commentary at commentary 12. While this "public function" definition may bring within its fold SOEs or SWFs, OECD suggests that "[a]n official of a public enterprise . . . perform[s] a public function unless the enterprise operates on a normal commercial basis in the relevant market, *i.e.*, on a basis which is substantially equivalent to that of a

included "any person exercising a public function for a foreign country, including for a public agency or *public enterprise*" within the scope of the term "foreign public official."[65] "Public enterprise" was further defined as "any enterprise, regardless of its legal form, over which a government, or governments, may, directly or indirectly, exercise a dominant influence."[66] A "dominant influence" was determined to be present when, among other things, "the government or governments hold the majority of the enterprise's subscribed capital, control the majority of votes attaching to shares issued by the enterprise or can appoint a majority of the members of the enterprise's administrative or managerial body or supervisory board."[67]

The United States' participation as a signatory to the OECD Convention compelled Congress to introduce a number of conforming changes to the FCPA. These included: a specific ban on payments to secure "any improper advantage;" expanded liability encompassing "any person," not just issuers and domestic concerns; assertion of jurisdiction over offenses committed abroad;[68] and amended penalties to eliminate disparities between U.S. nationals and non-U.S. nationals employed by or acting as agents of U.S. companies.[69] Congress also modified the definition of "foreign public official" to include officials of public international agencies or organizations.[70] Yet, the language from the OECD Convention covering individuals associated with "public enterprises"—including the precise standards of ownership and control that would render a private concern such an enterprise—were conspicuously not incorporated.[71]

---

private enterprise, without preferential subsidies or other privileges." *Id.* at commentary 15. This would include some, but not all, SOEs. It also may include some SWFs.

65. *Id.* at Art. 1.4a (emphasis added).

66. *Id.* at commentary 14.

67. *Id.* at commentary 14. The commentary to the OECD Convention adds that "[a]n official of a public enterprise . . . perform[s] a public function unless the enterprise operates on a normal commercial basis in the relevant market, *i.e.*, on a basis which is substantially equivalent to that of a private enterprise, without preferential subsidies or other privileges." *Id.* at commentary 15.

68. As discussed more fully in Part II, the U.S. government has taken a broad view of this amendment, claiming that it applies even when a foreign person is not present in the U.S. but merely causes some act to take place in the U.S. *See* Department of Justice, Foreign Corrupt Practices Act Anti-bribery Provisions (January 2006), *available at* www.usdoj.gov/criminal/fraud/fcpa/legintx.htm. *See also* Betty Santangelo, Gary Stein & Margret Jacobs, *The Foreign Corrupt Practices Act: Recent Cases and Enforcement Trends*, 8 J. INVESTMENT COMPLIANCE 31, 34 (2007).

69. *See generally* International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-366 (codified in 15 U.S.C. §§ 78dd-1(c)(2), -2(c)(2), -3(c)(2) (2000)). Prior to the enactment of these amendments the Department of Justice noted in a May 1998 letter to Congress that adoption of the OECD Convention would require these changes to the FCPA. *See* Letter from Ann Harkins, *supra* note 62.

70. Pub. L. No. 105-366 (codified in 15 U.S.C. §§ 78dd-1(c)(2), -2(c)(2), -3(c)(2)(2000))

71. The House, in the process of discussing H.R. 4353, came close to acknowledging the fact that SWFs and similar entities may fall outside the scope of the FCPA. The exchange occurred between Representative Thomas Manton and Paul Gerlach, then-Associate Director, Division of Enforcement, SEC. After Manton and Gerlach agreed that "[t]he [FCPA] doesn't cover bribes to non-governmental people," Gerlach went on to note that "there are some interesting legal issues if what you're talking about is a foreign state operated enterprise where the foreign government perhaps has substantial ownership of the company. I can imagine certain scenarios where substantial government involvement

The 1998 amendments to the FCPA, much like the amendments enacted ten years earlier, reflect Congress' desire to strike a balance between curbing bribery of foreign public officials and maintaining the viability of American business interests abroad. Both sets of amendments sought to clarify many of the Act's more ambiguous terms so as to facilitate this balance. They provided no clarity, however, with respect to the FCPA's application to private sector affairs, despite Congress having been presented with several opportunities to do so.

As discussed more fully in Part II, the absence of congressional action in this area left a void that the DOJ and SEC would later seek to fill through enforcement proceedings.[72]

B. Statutory Analysis of the FCPA

The FCPA provides criminal and civil mechanisms for penalizing firms or individuals engaging in activity linked to foreign corruption. The Act includes two categories of rules: anti-bribery provisions[73] and accounting provisions.[74]

1. Anti-Bribery Provisions

The anti-bribery provisions of the FCPA proscribe the bribery of "any foreign official . . . any foreign political party or official thereof or any candidate for foreign political office . . . [or] any person with knowledge that the person will provide payment to any of the above entities."[75] The FCPA defines "foreign official" as:

> [A]ny officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public

---

in a commercial enterprise could provide us the basis for arguing that an official of that enterprise qualifies as a foreign government official." Manton did not ask any further questions on this point. *The International Anti-Bribery and Fair Competition Act of 1998: Hearing before the H. Subcomm. on Fin. and Hazardous Material*, 105th Cong. 22–23 (1998)

72. *See infra*, Part II.

73. 15 U.S.C. §§ 78dd-1(a), 78dd-2(a) (2006).

74. While the accounting and record-keeping provisions contained within the FCPA figure prominently in SEC enforcement of the statute, a lengthy analysis of the application of these requirements is unnecessary for the purposes of this Article.

75. 15 U.S.C. § 78dd-1(a)(1) (banning bribes of foreign officials "for the purposes of . . . (i) influencing any act or decision of such foreign official in his official capacity, (ii) inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official, or (iii) securing any improper advantage; or . . . inducing such foreign official to use his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality"). Similar statements apply to foreign political parties and political candidates. 15 U.S.C. §§ 78dd-1(a)(2), 78dd-1(a)(3) (2006). These provisions affect "domestic concerns" and others within the territory of the United States, in addition to securities issuers. *See* 15 U.S.C. §§ 78dd-2(a)(1)-(3); 15 U.S.C. §§ 78dd-3(a)(1)–(3) (2006).

international organization.[76]

Notably, the FCPA does not define what constitutes an "instrumentality" of a foreign government.[77] As discussed more fully in Part III below, this is problematic given that the DOJ considers every employee of an instrumentality—regardless of rank or position—to be a foreign official.[78]

The FCPA specifically bans "corruptly" made,[79] direct or indirect[80] payments of any value to these foreign officials[81] by domestic securities issuers, domestic concerns, or other persons or entities engaging in foreign corruption for business purposes while on U.S. territory.[82] Included within the scope of this provision are the directors, stockholders, officers, employees, and agents of companies or corporations that fall under the scope of the FCPA.[83] While foreign officials and corporations are generally beyond the scope of the FCPA,[84] foreign individuals and domestic agents or subsidiaries of foreign corporations can be prosecuted or held liable.[85] The FCPA bribery provisions apply to acts committed within the territory of the U.S. or by U.S. persons or entities outside of U.S. territory.[86]

The requirement that acts of bribery must be "corruptly"[87] made

---

76. 15 U.S.C. § 78dd-1(f)(1)(A).

77. Stacy Williams, *Grey Areas of FCPA Compliance*, 17 CURRENTS: INT'L TRADE L.J., Winter 2008, at 15.

78. *Id. See also* U.S. DEP'T OF JUSTICE, LAY-PERSON'S GUIDE TO THE FCPA 1, 3, *available at* http://www.justice.gov/criminal/fraud/fcpa/docs/lay-persons-guide.pdf (last visited Dec. 30, 2011) [hereinafter "DOJ Lay-Person's Guide"]. ("The FCPA focuses on the purpose of the payment instead of the particular duties of the official receiving the payment . . . ."). Additionally, the DOJ does not consider a foreign government's characterization of an individual to be dispositive. *See* U.S. Dep't of Justice, Opinion Procedure Release 94-01, at 1 (May 13, 1994), *available at* http://www.justice.gov/criminal/fraud/fcpa/opinion/1994/9401.pdf (classifying a person as a foreign official despite a foreign legal opinion that the person would not be considered a foreign official under the target country's laws).

79. 15 U.S.C. §§ 78dd-1(a), 78dd-2(a), 78dd-3(a) (2006).

80. 15 U.S.C. §§ 78dd-1(a)(3), 78dd-2(a)(3), 78dd-3(a)(3) (2006). Indirect payments through third parties fall under the purview of the FCPA if the payer made the payment "while knowing" that the payee would use the payment in connection with a bribe. *Id.* This standard includes both "positive knowledge" of the likely offense and what can best be described as willful ignorance of the fact. H.R. CONF. REP. No. 100-576, at 920.

81. 15 U.S.C. §§ 78dd-1(f), 78dd-2(h), 78dd-3(f) (2006).

82. *See* 15 U.S.C. § 78dd-3 (2006).

83. 15 U.S.C. §§ 78dd-1(a), 78dd-2(a), 78dd-3(a) (2006).

84. While this is generally the case, see *infra* Part II for discussion of how recent FCPA enforcement action suggests that the SEC may seek to expand its anti-bribery enforcement authority to apply to foreign nonissuers.

85. *See, e.g.*, 15 U.S.C. §§ 78dd-3(a) ("It shall be unlawful for any person other than an issuer that is subject to section 78dd-1 of this title or a domestic concern (as defined in section 78dd-2 of this title), or for any officer, director, employee, or agent of such person or any stockholder thereof acting on behalf of such person, while in the territory of the United States . . . ."). *See generally* Kari Lynn Dierson, *Foreign Corrupt Practices Act*, 36 AM. CRIM. L. REV. 753, 759 (1999).

86. 15 U.S.C. § 78dd-1(g) (2006).

87. *Id.* § 78dd-1(a). The knowledge or scienter requirement includes intentionally corrupt and unlawful acts as well as acts committed with neither "conscious disregard" nor "willful blindness." *See* DOJ Press Release 09-928, *Former Pacific Consolidated Industries Executive Pleads Guilty* (Sept. 3,

requires that the violator possess the intent to "influenc[e] any act or decision of such foreign official in his official capacity, induc[e] such foreign official to do or omit to do any act in violation of the lawful duty of such official, . . . secur[e] any improper advantage[,] or induc[e] such foreign official to use his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality[.]"[88] The offense must "make use of the mails or any means or instrumentality of interstate commerce"[89] to make "an offer, payment, promise to pay, or authorization of the payment of any money"[90] to the recipient of the bribe.

There are three affirmative defenses to FCPA violations. The FCPA allows: (1) "grease" payments where the purpose is to "facilitate" or expedite routine, non-discretionary government services,[91] (2) gifts in accordance with the written law of the country where the gift is given,[92] and (3) "reasonable and bona fide expenditure[s]" relating to the individual or corporation's products or services or to the execution of a contract with the foreign government or agency.[93]

The DOJ exercises near-exclusive enforcement authority concerning the bribery provisions of the FCPA.[94] The SEC may act against issuers in the civil context, seeking administrative fines and penalties.[95] Civil investigations may (and often do) proceed in parallel with criminal investigations,[96] and SEC civil investigations can serve as triggers for DOJ criminal investigations should evidence of criminal wrong-doing be

---

2009), http://www.justice.gov/opa/pr/2009/September/09-crm-928.html. *See generally* DONALD R. CRUVER, COMPLYING WITH THE FOREIGN CORRUPT PRACTICES ACT: A GUIDE FOR U.S. FIRMS DOING BUSINESS IN THE INTERNATIONAL MARKETPLACE 23 (2d ed. 1999).

88. 15 U.S.C. § 78dd-1(a)(1). As will be discussed later in this Article, the question of what constitutes a state "instrumentality" is central in examining the extent to which the FCPA may apply to SWFs and other state-associated or state-owned enterprises.

89. *Id.* § 78dd-1(a).

90. *Id.*

91. 15 U.S.C. §§ 78dd-1(b), 78dd-2(b), 78dd-3(b) (2006). These services may include customs clearances, import permits, licenses, and other similar non-discretionary functions common to international trade.

92. *Id.* §§ 78dd-1(c)(1), 78dd-2(c)(1), 78dd-3(c)(1) (2006) (requiring that the gift is "lawful under the written laws and regulations of the foreign official's, political party's, party official's, or candidate's country").

93. *Id.* §§ 78dd-1(c)(2), 78dd-2(c)(2), 78dd-3(c)(2) (2006).

94. Executive Legal Summary No. 5: The Foreign Corrupt Practices Act, *in* 2 FOREIGN CORRUPT PRACTICES ACT 1–67 (2007).

95. For an overview of how SEC antibribery enforcement actions have seen renewed focus in recent years, see Stuart H. Deming, *The Changing Face of White-Collar Crime: The Potent and Broad-ranging Implications of the Accounting and Record-keeping Provisions of the Foreign Corrupt Practices Act*, 96 J. CRIM. L. & CRIMINOLOGY 465, 497–500 (2006) [hereinafter Deming, *Recordkeeping*].

96. *See, e.g.*, SEC v. Dresser Indus., Inc., 628 F.2d 1368, 1374–77 (D.C. Cir. 1980) ("Effective enforcement of the securities laws requires that the SEC and Justice be able to investigate possible violations simultaneously. . . . [W]e should not block parallel investigations by these agencies in the absence of 'special circumstances' in which the nature of the proceedings demonstrably prejudices substantial rights of the investigated party or of the government.").

uncovered.[97] Historically, SEC investigations under the anti-bribery provisions have generally focused on a nexus between acts of international bribery and violations of the record-keeping and disclosure provisions by U.S. issuers.[98]

2. Accounting Provisions

The FCPA contains requirements for recordkeeping and disclosure by securities issuers registered under Section 15 of the Securities Act of 1933 (the "33 Act") and Section 12 of the Securities Exchange Act of 1934 (the "34 Act").[99] Issuers governed under the 33 or 34 Acts are required to "make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer"[100] and to "devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances" of being in accordance with general business practices.[101] The recordkeeping provisions apply to foreign subsidiaries of U.S. issuers when the issuer is a majority owner.[102] These "internal accounting controls" are evaluated holistically by the SEC, which has encouraged issuers to create audit committees to ensure full compliance.[103] The accounting provisions of the FCPA are designed to prevent the creation of falsified records and the mislabeling or omission of records indicating improper behavior.[104]

The SEC generally enforces most violations of the record-keeping provisions of the FCPA.[105] Criminal liability for accounting violations can only be imposed when an entity "knowingly circumvent[s] or knowingly fail[s] to implement a system of internal accounting controls or knowingly falsif[ies] any book, record, or account."[106] All other errors merit civil penalties.

---

97. 15 U.S.C. § 78u (2006).

98. Deming, *Recordkeeping, supra* note 95, at 498.

99. Specifically, these record-keeping requirements were integrated into the Securities Exchange Act of 1934 at 15 U.S.C. §§ 78a-78lll (2006).

100. 15 U.S.C. § 78m(b)(2)(A) (2006).

101. 15 U.S.C. § 78m(b)(2)(B) (2006). The term "reasonable" as seen in both (A) and (B) of §78m(b)(2) refers to the "level of detail and degree of assurance as would satisfy prudent officials in the conduct of their own affairs." 15 U.S.C. § 78m(b)(7) (2006).

102. 15 U.S.C. § 78m(b)(2).

103. *Id.* § 78m(b)(2)(b); CRUVER, *supra* note 87, at 18.

104. Dierson, *supra* note 85, at 756.

105. This is, of course, to the extent that the FCPA is subject to litigation: as discussed *infra*, the vast majority of firms targeted for FCPA investigations opt to cooperate with the SEC and DOJ under a deferred prosecution or non-prosecution agreement.

106. 15 U.S.C. § 78m(b)(5) (2006). As explained *supra* in note 87, the emphasis on the knowledge or scienter requirement includes in both intentionally corrupt and unlawful acts as well as acts committed with either "conscious disregard" or "willful blindness." *See* CRUVER, *supra* note 87, at 23.

3. Penalties

Violations of the FCPA are subject to both civil and criminal penalties. For criminal violations of the anti-bribery provisions by domestic or foreign entities, the FCPA authorizes fines of up to $2 million per violation or under the Alternative Fines Act, up to twice the benefit that the entity sought to obtain by making the corrupt payment, whichever is greater.[107] Officers, directors, employees, or agents of domestic or foreign entities can be sentenced to up to five years of imprisonment per violation, plus a fine of up to $100,000 or twice the benefit the individual sought to obtain.[108] The Sarbanes-Oxley Act amended the criminal penalties associated with the record-keeping and control requirements of the FCPA. Corporations now may be fined up to $25 million, and individuals may be punished by up to a $5 million fine and 20 years of imprisonment.[109] DOJ-imposed sanctions can also include forfeiture.[110] Importantly, corporations are unable to indemnify their employees or officers for these fines.[111]

For all provisions of the FCPA, the SEC can impose civil fines of up to $10,000 per violation against any issuer, as well as any officer, director, employee, or agent of the issuer.[112] The DOJ can also seek civil fines of up to $10,000 per violation against any person or entity subject to the FCPA.[113] In an SEC enforcement action, the court may also impose an additional fine not to exceed the gross amount of the pecuniary gain to the defendant as a result of the violation or a specified dollar range based on which statutory tier the violation falls under.[114] Civil penalties range from $5,000 to $10,000 per violation for a natural person and $50,000 to $500,000 for any other person.[115] The SEC is also empowered to impose disgorgement of ill-gotten gains for FCPA violations, often adding significantly to the monetary penalty resulting from FCPA violations.[116] Lastly, the DOJ or the SEC may seek injunctive relief against any entity or employee that is engaging, or about to engage, in a violation of the

107. 15 U.S.C. § 78ff(c)(2)(A) (issuers); 15 U.S.C. § 78dd-2(g) (domestic concerns); 15 U.S.C. § 78dd-3(e)(1)(A) (non-US persons); 18 U.S.C. § 3571(d) (Alternative Fines Act).

108. 15 U.S.C. § 78ff(c)(2)(A) (issuers); 15 U.S.C. § 78dd-2(g) (domestic concerns). In some instances, under the Alternative Fines Act, individuals can be fined up to $250,000. 18 U.S.C. § 3571(b). The 1998 amendments extended criminal liability to foreign employees or agents of U.S. companies, who previously had only been subject to civil liability. 15 U.S.C. § 78dd-3(e)(2)(A) (non-U.S. persons).

109. 15 U.S.C. §§ 78ff(a).

110. 18 U.S.C. §§ 981(a)(1)(C), 1956(c)(7)(B)(iv) (specifying "bribery of a public official" as an offense under which violators may risk civil forfeiture).

111. 15 U.S.C. §§ 78dd-2(g)(3), 78ff(c)(3) (2006).

112. 15 U.S.C. §§ 78ff(c)(1)(B), (c)(2)(B).

113. 15 U.S.C. §§ 78dd-2(g)(1)(B), (g)(2)(B) (domestic concerns); 15 U.S.C. §§ 78dd-3(e)(1)(B), (e)(2)(B) (non-U.S. persons).

114. 15 U.S.C. § 78u-2(b).

115. *Id.*

116. The SEC can seek disgorgement in administrative proceedings under 15 U.S.C. § 78u-2(e), or as an equitable remedy in civil enforcement actions in federal court. Santangelo, Stein and Jacobs, *supra* note 68, at 37 n. 49.

FCPA.[117]

C. FCPA Enforcement

1. History and Recent Trends

For approximately twenty-five years following its enactment, efforts to enforce the FCPA were less than robust. During this period a combined total of only sixty cases were brought by the two agencies, generating approximately $35 million in fines.[118] Following a rash of corporate accounting scandals in the early part of the twenty-first century, however, the DOJ and SEC began ratcheting up FCPA enforcement.[119] The number of FCPA investigations undertaken by the DOJ and the SEC rose from an average of three per year in the period of 1978–2000[120] to more than fifteen per year in the period of 2002–2009.[121]

This modest increase in enforcement activity pales in comparison to current efforts. U.S. authorities are investigating possible FCPA violations with greater intensity than ever before, bringing more cases, announcing more settlements and receiving more fines.[122] In 2010, the DOJ and the SEC brought seventy-four enforcement actions under the FCPA, up from forty such actions in 2009.[123] The agencies levied $1.885 billion in fines in 2010, compared to $2.7 million in 2002.[124] The average fine or penalty paid to the DOJ or the SEC per investigation by corporations rose to $25.1 million in 2010 from $300,000 in 2002.[125] Half of the top ten largest ever

117. 15 U.S.C. § 78dd-2(d) (domestic concerns); 15 U.S.C. § 78dd-3(d) (non-U.S. persons).

118. John Gibeaut, *Battling Bribery Abroad*, A.B.A. JOURNAL, Mar. 18, 2007, at 48. Prior to the 1977 enactment of the FCPA, the DOJ brought fifteen cases that may have fallen under the FCPA anti-bribery provisions. Bixby, *supra* note 9, at 102.

119. Many of these scandals are well known to the general public, including the investigations into accounting improprieties at Enron, WorldCom, Tyco, ImClone Systems, and Qwest Communications.

120. Priya Cherian Huskins, *FCPA Prosecutions: Liability Trend to Watch*, 60 STAN. L. REV. 1447, 1449 (2008).

121. Phillip Urofsky & Danforth Newcomb, *Recent Trends and Patterns in FCPA Enforcement 2*, FCPA DIGEST, SHEARMAN & STERLING LLP Jan. 20, 2011, at 1–2, *available at*, http://www.shearman.com/files/upload/FCPATrends-and-Patterns-Jan2-11.pdf. It is important to note that these figures are averages over this time period. The actual number of investigations has risen more dramatically since 2005. *Id.*

122. Henny Sender, *Bribery: Lines Less Blurred*, FINANCIAL TIMES, July 18, 2011, *available at* http://www.ft.com/intl/cms/s/0/382eb374-b0a7-11e0-a5a7-00144feab49.ahtml.

123. "Eyes on Goldman-Libya Dealings," WALL ST. J., (June 9, 2011) at C1. *See also* Urofsky & Newcomb, *supra* note 121, at 2.

124. Urofsky & Newcomb, *supra* note 121, at 2.

125. *See* SIDLEY AUSTIN LLP, ANTI-CORRUPTION QUARTERLY 2 (Apr. 2011) [hereinafter "Sidley Austin Anti-Corruption Quarterly"] available at http://www.sidley.com/sidleyupdates/Detail.aspx?news=4776. This reflects a division of $1.8851 billion in penalties paid over 75 cases brought by the DOJ and SEC.

FCPA penalties occurred in 2010.[126] In many cases—particularly those pursued both criminally and civilly—the SEC targeted the violators' ill-gotten gains through its disgorgement enforcement mechanism, which had the effect of dramatically increasing the penalties imposed.[127]

The heightened focus on FCPA enforcement has accompanied structural changes in the law enforcement agencies charged with investigating violations of the FCPA. The DOJ and the SEC have both increased the number of personnel for whom the FCPA is a significant element of their remits.[128] The DOJ now employs more than one dozen prosecutors in its Fraud Section who are tasked exclusively with bringing FCPA cases.[129] In addition, the Asset Forfeiture and Money Laundering Section has launched a new initiative targeting the proceeds of foreign corruption in the U.S.[130] The SEC has formed a special unit dedicated specifically to FCPA enforcement.[131] So too did the FBI, which created a FCPA task force dedicated to such investigations.[132] Through these staffing

126. Richard L. Cassin, *J&J Joins the Top Ten*, FCPA Blog (Apr. 8, 2011, 4:43 PM) http://fcpablog.squarespace.com/blog/2011/4/8/jj-joins-new-top-ten.html (this list incorporates criminal and civil as well as disgorgements). *See also* Amy Dean Westbrook, *Enthusiastic Enforcement, Informal Legislation, supra* note 50, at 492–93 (listing the major FCPA settlements since 2008).

127. *See* Sidley Austin Anti-Corruption Quarterly, *supra* note 125, at 5. Cases where the SEC has sought only disgorgement of unlawfully-acquired profits include *Halliburton/KBR* (2009), *Siemens* (2008), *Willbros* (2008), *El Paso Corp.* (2007), and *Statoil* (2006). *Id.* The SEC is entitled to seek disgorgement of an amount that is reasonably approximated to a violator's unlawfully-acquired revenues. *See* SEC v. Calvo, 378 F.3d 1211, 1217 (11th Cir. 2004) (citing SEC v. Warde, 151 F.3d 42, 50 (2d Cir.1998); SEC v. First Pac. Bancorp, 142 F.3d 1186, 1192 (9th Cir.1998); SEC v. First City Fin. Corp., 890 F.2d 1215, 1231–32 (D.C. Cir.1989)). The SEC efforts to reasonably approximate the amount of unlawfully-acquired revenues stemming from FCPA violations do not appear to err on the side of caution.

128. *See* Lanny A. Breuer, Assistant Attorney General, Address at the 24th National Conference on the Foreign Corrupt Practices Act, U.S.(Nov. 16, 2010), *available at* http://www.justice.gov/criminal/pr/speeches/2010/crm-speech-101116.html [hereinafter "Breuer Conference Speech"]; Robert Khuzami, Remarks Before the New York City Bar: My First 100 Days as Director of Enforcement(Aug. 5, 2009), *available at* http://www.sec.gov/news/speech/2009/spch080509rk.htm [hereinafter "Khuzami Speech"].

129. Breuer Conference Speech, *supra* note 128. "[I]n the last 19 months, we've substantially increased the number of prosecutors in the FCPA Unit. We now have over a dozen attorneys dedicated solely to prosecuting FCPA cases, and we have attracted to the FCPA Unit prosecutors of extremely high caliber and profile."

130. *Id.* "Although our FCPA Unit stands at the center of our enforcement program, it now also has help from the prosecutors in our Asset Forfeiture and Money Laundering Section (known as AFMLS). As I have described to other audiences, AFMLS recently initiated a new Kleptocracy Asset Recovery Initiative, which will target and recover the proceeds of foreign official corruption that have been laundered into or through the United States."

131. Khuzami Speech, *supra* note 128 ("The Foreign Corrupt Practices Act unit will focus on new and proactive approaches to identifying violations of the Foreign Corrupt Practice Act, which prohibits U.S. companies from bribing foreign officials for government contracts and other business. While we have been active in this area, more needs to be done, including being more proactive in investigations, working more closely with our foreign counterparts, and taking a more global approach to these violations.").

132. *See* Bixby, *supra* note 9, at 104; Sue Reisinger, *On Bended Knee: Companies are Disclosing Overseas Bribes in Record Numbers. But is Confession Always Necessary?*, CORP. COUNSEL (July 1, 2007), *available at* http://www.law.com/jsp/cc/PubArticleCC.jsp?id=900005484219.

increases, the DOJ and the SEC have effectively placed the business community on notice that FCPA enforcement will continue at a brisk pace and that the current approach to enforcement, namely the aggressive pursuit of any perceived violation, will remain in effect on an ongoing basis.

Beyond personnel changes, the DOJ and SEC have rolled out new, highly aggressive investigative techniques in pursuit of FCPA violators. Of particular note among these new enforcement tools is the agencies' use of industry-wide sweeps. An industry-wide sweep is a process whereby the law enforcement agencies "examin[e] the suspected misconduct of one company and then expand[] the probe to other companies in the industry and its supply chain, suspecting that competitors operating in the same country likely were engaging in similar misconduct."[133] Perhaps the first notable example of an FCPA-related sweep is the enforcement action targeting six companies in the petroleum industry that emerged from an initial DOJ inquiry into the activities of the freight company Panalpina World Transport.[134] Similar sweeps have been undertaken in the tobacco, pharmaceutical, and medical device industries.[135] In one recent industry sweep relating to defense contractors, the DOJ employed an elaborate, undercover sting operation—a dramatic illustration of the more proactive nature of FCPA investigation.[136] The sweep of financial services firms in

133. GIBSON DUNN & CRUTCHER LLP, *2010 Year-End FCPA Update*, (Jan. 3, 2010), *available at* http://www.gibsondunn.com/publications/pages/2010Year-EndFCPAUpdate.aspx.

134. *Id.*

135. *Id.*; Urofsky & Newcomb, *supra* note 121, at 8.

136. In what is referred to as the "SHOT Show sweep," U.S. and U.K. law enforcement officials executed nearly two dozen search warrants and made twenty-two arrests when the suspects—who were employees of U.S. defense and security contractors—purportedly agreed to bribe undercover agents posing as Gabonese Defense Ministry officials in order to secure a supply contract. *Historically Massive Sting Operation*, http://fcpaprofessor.blogspot.com/2010/01/historically-massive-sting-operation.html (Jan. 19, 2010, 7:58 PM). The "SHOT Show sweep" was not the first DOJ undercover sting operation in a FCPA investigation. *FCPA Undercover*, http://fcpaprofessor.blogspot.com/2010/01/fcpa-undercover.html (Jan. 25, 2010, 10:25 AM). However, it was by far "the largest and most dramatic use of pro-active undercover investigative techniques" in the FCPA context. *Id.* Three of the SHOT Show defendants—Richard Bistrong, Haim Geri, and Daniel Alvirez—have pleaded guilty, while trials of the remaining defendants are pending, have ended in mistrial and, in two cases, acquittal. *See Jury Mulls Fate of Four Shot Show Defendants*, http://www.fcpablog.com/blog/2011/6/28/jury-mulls-fate-of-four-shot-show-defendants.html FCPA LAW BLOG (June 28, 2011, 7:05 AM) (discussing Bistrong); Thomas O. Gorman, *Two More FCPA Guilty Pleas*, FCPA LAW BLOG (MAY 2, 2011, 6:45 PM), http://www.lexisnexis.com/community/corpsec/blogs/fcpa-law-blog/archive/2011/05/02/two-more-fcpa-guilty-pleas.aspx; Hilary Russ, *Shot-Show Defendant Cops to FCPA Violations*, LAW360, Mar. 2, 2011, http://www.law360.com/articles/229204/shot-show-defendant-cops-to-fcpa-violations (discussing Alvirez); *Feds Should Forget the Shot Show Defendants*, FCPA BLOG, (July 10, 2011, 4:17 PM) http://www.fcpablog.com/blog/2011/7/10/feds-should-forget-the-shot-show-defendants.html (explaining the mistrial of four defendants and the division of defendants into separate groups for trial by Judge Leon of the U.S. District Court for the District of Columbia); C. M. Matthews and Joseph Palazzolo, *Jury Acquits Two Defendants In FCPA Sting Case*, CORRUPTION CURRENTS (Jan. 30, 2012, 4:09 PM) http://blogs.wsj.com/corruption-currents/2012/01/30/jury-acquits-two-defendants-in-fcpa-sting-case/ (discussing acquittal of two defendants); *Second Mistrial in African Sting*, FCPA BLOG, (Jan. 31, 2012, 4:49 PM) http://www.fcpablog.com/blog/2012/1/31/second-mistrial-in-africa-sting-prosecution.html (explaining that of a group of six defendants who were tried together, one was granted an acquittal by

early 2011, the first ever in the sector, only reinforces the conclusion that the use of this tactic as an investigative tool is on the rise.[137]

In addition to more robust investigative techniques employed by both the DOJ and the SEC, the SEC in particular has new weapons in its arsenal that will assist it in bringing more FCPA cases. The Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank")[138] requires the SEC to establish a program whereby whistleblowers who report securities law violations can receive between ten and thirty percent of any penalty assessed.[139] On May 25, 2011, the SEC adopted final rules implementing the whistleblower provisions of the Dodd-Frank Act,[140] and at least one report indicates that tips of FCPA violations have already begun pouring in.[141] The SEC has alsoimplemented an initiative designed to incentivize self-reporting of violations of federal securities laws by offering deferred prosecution agreements ("DPAs") in exchange for cooperation.[142]

---

directed verdict, two were acquitted by the jury, and the court declared a mistrial for the remaining three).

137. *See supra*, Part I; *see also 2010 Year-End FCPA Update*, *supra* note 133 ("Speaking to this trend recently, Cheryl J. Scarboro, Chief of the SEC's newly-formed FCPA Unit, said that the SEC will continue to focus on industry-wide sweeps, and no industry is immune from investigation.'").

138. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, § 922(a), 124 Stat. 1376, 1841 (2010) (to be codified at 15 U.S.C. § 78u-6). Section 922 of Dodd-Frank requires the SEC to pay awards to whistleblowers that voluntarily provide information to the SEC that leads to the successful enforcement of a violation of the federal securities laws resulting in monetary sanctions exceeding $1,000,000. *SEC Adopts Final Dodd-Frank Whistleblower Rules: What You Need to Know*, BAKER HOSTETLER LLP (June 2, 2011), http://www.bakerlaw.com/sec-adopts-final-dodd-frank-whistleblower-rules-what-you-need-to-know-06-02-2011/. Section 922 also prohibits retaliation by employers against individuals who provide the SEC with information about possible securities law violations. *Id.*

139. Pub. L. 111-203, § 922(a), 124 Stat. 1376, 1841 (2010) (to be codified at 15 U.S.C. § 78u-6). The SEC has been slow in establishing this program. *See* Jessica Holzer, *Still Waiting for Those Dodd-Frank Whistleblower Rules? Get Used to It*, WALL ST. J. L. BLOG (Apr. 27, 2011, 6:04 PM), http://blogs.wsj.com/law/2011/04/27/stillwaiting-for-those-dodd-frank-whistleblower-rules (reporting how the SEC has missed the original deadline).

140. SEC Press Release No. 2011-116, *SEC Adopts Final Rules to Establish Whistleblower Program* (May 25, 2011), http://www.sec.gov/news/press/2011/2011-116.htm. The new provisions of the Dodd-Frank Act direct the SEC to pay awards, under certain conditions, to whistleblowers who voluntarily provide the SEC with significant information leading to successful SEC enforcement actions. *Id.* Specifically, to be considered for an award, a whistleblower must voluntarily provide the SEC with original information that leads to the successful enforcement by the SEC of a federal court or administrative action in which the SEC obtains monetary sanctions totaling more than $1 million. *Id. See also SEC Adopts Final Dodd-Frank Whistleblower Rules: What You Need to Know*, Baker Hostetler LLP, *supra* note 138; *SEC Adopts Final Rules Implementing Dodd-Frank Whistleblower Provisions*, FIN. REFORM WATCH, http://www.financialreformwatch.com/2011/06/articles/reform-recommendations/sec-adopts-final-rules-implementing-doddfrank-whistleblower-provisions.

141. *See* Joe Palazzolo, *After Dodd-Frank, SEC Getting At Least One Tip a Day*, WALL ST. J. CORRUPTION CURRENTS BLOG (Sept. 30, 2010, 11:21 AM), http://blogs.wsj.com/corruption-currents/2010/09/30/after-dodd-frank-sec-getting-at-least-one-fcpa-tip-a-day/.

142. Press Release, SEC 2010-6, *SEC Announces Initiative to Encourage Individuals and Companies to Cooperate and Assist in Investigations* (Jan 13, 2010), http://sec.gov./news/press/2010/2010-6.htm. A more detailed discussion of the use of DPAs and non-prosecution agreements ("NPAs") to resolve FCPA cases is set forth in Part II (c)(2).

On May 17, 2011, the SEC entered into a DPA with Tenaris, S.A., a Luxembourg-based manufacturer, resolving an investigation into Tenaris' alleged violations of the FCPA—marking the first case in history in which the SEC has used this form of resolution in the enforcement context.[143]

The DOJ has further ramped up its prosecution of individuals in the last few years. In 2009, thirty-three individuals were named in enforcement actions involving FCPA violations.[144] In 2010, that number increased to fifty-three, with twenty-two indictments coming from an undercover sting of various companies in the military and law enforcement product industries—the first large-scale FBI sting of its kind.[145] The DOJ's

---

143. *See* SEC v. Tenaris, Deferred Prosecution Agreement (2011) [hereinafter "SEC DPA"]; *see also FCPA Settlement with Tenaris Includes SEC's First-Ever Deferred Prosecution Agreement,* Debevoise & Plimption LLP FCPA Update, Vol. 2, No. 10 (May 2011). Tenaris also settled a parallel criminal investigation by the DOJ by entering into an NPA. United States v. Tenaris, Non-Prosecution Agreement (2011) [hereinafter "DOJ NPA"].

As part the settlements, Tenaris admitted that in 2006 and 2007, when bidding on a series of supply contracts with an oil and gas production company that was wholly owned by the Government of Uzbekistan, OJSC O'ztashqineftgaz ("OAO"), it had offered and made payments to officials of OAO and failed to record those payments properly in its books and records. SEC DPA at 1,6,9,15; DOJ NPA at A1–A4. The offers and payments were made by an agent retained by Tenaris. *Id.* The agent obtained confidential information regarding competitors' bids, which Tenaris then used to revise its own bids. *Id.* Tenaris admitted that it had agreed to pay the agent 3 to 3.5% of the value of the contracts and was "aware or substantially certain" that the agent would pay at least a portion of that amount to employees of OAO and that certain of the payments would be routed through a New York bank account. Tenaris subsequently won the contracts and received nearly $5 million in profits from them. SEC DPA at 6(i), (k), (v).

Under the terms of the DPA with the SEC, Tenaris agreed to pay $5.4 million in disgorgement and prejudgment interest, but no penalty. SEC DPA at ¶ 8(c). Tenaris also agreed not to deny in any public statement or to contest in any future SEC enforcement proceeding a detailed statement of facts outlining the bribe scheme. In addition, it agreed to enhance its compliance policies and procedures and internal controls, implement additional due diligence requirements, provide training to its employees regarding FCPA and other anti-corruption compliance, and fully cooperate with the SEC's investigation. SEC DPA at 3,4,8,9. In exchange, the SEC agreed to defer an enforcement action against the company for violations of the accounting provisions of the FCPA. SEC DPA at 1–2,13–16.

The SEC emphasized that it used the deferred prosecution approach "to facilitate and reward cooperation" by Tenaris. Press Release, SEC, 2011-112, *Tenaris to Pay $5.4 Million in SEC's First-Ever Deferred Prosecution Agreement* (May 17, 2011), http://sec.gov/news/press/2011/2011-112.htm. Robert Khuzami, Director of the SEC's Enforcement Division, stated that although Tenaris' conduct was unlawful, "the company's response demonstrated high levels of corporate accountability and cooperation . . . . The company's immediate self-reporting, thorough internal investigation, full cooperation with the SEC staff, enhanced anti-corruption procedures, and enhanced training made it an appropriate candidate for the Enforcement Division's first Deferred Prosecution Agreement." *Id. See also FCPA Settlement with Tenaris Includes SEC's First-Ever Deferred Prosecution Agreement,* Debevoise & Plimpton LLP FCPA Update (May 2011), *available at* http://www.debevoise.com/files/Publication/064c31c9-70b6-4a0a-b4e1-370afcc230a3/Presentation/PublicationAttachment/f60f5be2-b084-4a53-8d00-636653e479e3/FCPAUpdateMay2011.pdf.

144. *See* Richard L. Cassin, *2009 FCPA Enforcement Index*, THE FCPA BLOG (Dec. 31, 2009, 3:15 AM), http://www.fcpablog.com/blog/2009/12/31/2009-fcpa-enforcement-index.html (listing individuals indicted, arrested, convicted, sentenced, or civilly charged).

145. *See* Richard L. Cassin, *2010 FCPA Enforcement Index*, THE FCPA BLOG (Jan. 3, 2011, 7:02 AM), http://www.fcpablog.com/blog/2011/1/3/2010-fcpa-enforcement-index.html (listing these individuals). There is some overlap with the 2009 list because some individuals were charged in one year and sentenced in the next; *see generally*, *supra* note 136.

expanded focus on individuals has included not just corporate employees but intermediaries, like agents and consultants, as well.[146] Public statements by a high-ranking DOJ official suggest that this enhanced scrutiny of individuals is a trend that is not likely to abate.[147]

Finally, corporations or individuals violating the FCPA can no longer easily seek cover abroad.[148] Over the past several years, the DOJ and SEC have increasingly worked with their foreign counterparts to investigate and prosecute parallel bribery and corruption cases.[149] These efforts at international cooperation are facilitated by the implementation of fifty-six new extradition and mutual legal assistance treaties.[150] U.S.

---

146. *See, e.g.*, United States v. Carson, No. 8:09-cr-00077-JVS, Dkt. No. 373 (C.D. Cal. May 18, 2011) (exhibiting this practice by charging the agents of Lindsey Manufacturing, Inc. and Control Components, Inc. with FCPA violations).

147. In a May 2010 speech, Assistant Attorney General Breuer reaffirmed the DOJ's strategy of focusing on individuals: "Charging individuals is part of a deliberate enforcement strategy to deter and prevent corrupt corporate conduct before it happens. And rest assured that we will seek equally tough sentences, including significant time if appropriate, to reinforce this message of deterrence." Lanny A. Breuer, Assistant Att'y Gen., Criminal Div., DOJ, Prepared Remarks to *Compliance Week* 2010- 5th Annual Conference for Corporate Financial, Legal, Risk, Audit & Compliance Officers (May 26, 2010), *available at* http://www.justice.gov/criminal/pr/speeches-testimony/2010/05-26-10aag-compliance-week-speech.pdf [hereinafter "Breuer Compliance Speech"].

148. Notably, five of the six largest settlements under the FCPA have been with companies headquartered outside the U.S. *See* Sender, *supra* note 122.

149. Law enforcement agencies in France, Germany, Japan, and the United Kingdom are joining the U.S. in working closely with other nations to investigate, prosecute and negotiate global resolutions of parallel bribery and corruption charges, as was evident in several cases brought in 2010. *See, e.g.*,Press Release, DOJ, BAE Systems PLC Pleads Guilty and Ordered to Pay $400 Million Criminal Fine, (March 1, 2010), *available at* http://www.justice.gov/opa/pr/2010/March/10-crm-209.html; SEC Litigation Release No. 21454, SEC Files Settled Foreign Corrupt Practices Act Charges Against Innospec, Inc. for Engaging in Bribery in Iraq and Indonesia with Total Disgorgement and Criminal Fines of $40.2 Million, (March 18, 2010), *available at* http://www.sec.gov/litigation/litreleases/2010/lr21454.htm.

150. Assistant Attorney General Lanny A. Breuer Speaks at the United Nations for International Anti-Corruption Day, New York, December 9, 2010, *available at* http://www.justice.gov/criminal/pr/speeches/2010/crm-speech-101209.html.

In addition, a new international standard is emerging in which corporations worldwide are held to increasingly exacting standards with respect to anti-bribery compliance. Timothy J. Coleman & Paul Lomas, *Bribery and Corruption Compliance: The Playing Field Levels*, 245 N.Y.L.J. 1 (Apr. 20, 2011) ("An international standard for anti-bribery compliance . . . has emerged over the past year as national governments and non-governmental organizations throughout the world have adopted strict new laws and detailed guidelines for compliance programs."). In the past year, the OECD and the U.S. and U.K. governments have issued elaborate new standards for anti-bribery compliance programs. *Id.* In February 2010, for example, the OECD adopted its Good Practice on Internal Controls, Ethics and Compliance (the "OECD Guidance"). Good Practice on Internal Controls, Ethics and Compliance, *available at* http://www.oecd.org/dataoecd/5/51/44884389.pdf. The guidance largely tracks the U.S. Sentencing Guidelines on the sentencing of organizations, originally adopted in 1991, which outline a standard for all corporate compliance programs. *Id. See also* Coleman & Lomas, *supre* at 1. In November 2010, the The DOJ announced a series of DPAs that resolved FCPA investigations against several companies. *Id.* (DPAs and other court documents available at http://www.justice.gov/opa/opa_documents.htm.) Attachment "C" to each of the DPAs contained detailed compliance program requirements tracking the new international standard. *Id.* Most recently, in March 2011 the U.K. Ministry of Justice published guidance on "adequate procedures" that companies must adopt to avoid strict liability for violations of the U.K. Bribery Act. *Bribery Act 2010: Guidance About Procedures Which Relevant Commercial Organisations Can Put Into Place to Prevent Persons Associated with Them From Bribing*, U.K.

outreach efforts have also worked to enhance international cooperation; the DOJ having provided recent assistance to approximately thirty-five countries in establishing and developing anti-corruption regimes.[151]

Moreover, many nations, including those which are signatories to the OECD Convention, are in the process of establishing anti-bribery or anti-corruption laws, or strengthening their existing legal regimes.[152] The U.K. Bribery Act ("UKBA"), enacted in 2010 and characterized by one U.S. expert as the "FCPA on steroids," is a dramatic and highly visible example of this latter trend.[153] Countries such as Brazil, India, Russia, Taiwan, and Ukraine are also in the process of strengthening their anti-corruption laws.[154] Even the People's Republic of China, which has been criticized as having a poor track record on anti-corruption enforcement, recently passed new legislation criminalizing official corruption.[155] Perhaps

---

MINISTRY OF JUSTICE, *available at* http://www.justice.gov.U.K./guidance/making-and-reviewing-the-law/bribery.htm. This guidance includes elements seen in both the OECD and U.S. guidelines. Taken together, the OECD, U.S. and U.K. guidance "establish an international standard for bribery and corruption compliance." Coleman & Lomas, *supra* at 1.

151. Breuer speech, *supra* note 150. The DOJ has also trained nearly 30,000 foreign law enforcement personnel through its International Criminal Investigative Training Assistance Program. *Id.*

152. Richard Smith, Michael Pacella & Josh Foster, *The Tipping Point in Global FCPA Enforcement*, LAW 360, New York (April 13, 2011).

153. Bribery Act, 2010, c. 23, §1 (U.K.) (the "U.K. Bribery Act"). Although some of the U.K. Bribery Act's provisions are similar to the FCPA, many provisions are, in fact, more stringent. For example, unlike the FCPA, the U.K. Bribery Act does not contain an exemption for so-called "facilitating payments." F. Joseph Warin, Charles Falconer, & Michael S. Diamant, *The British Are Coming!: Britain Changes Its Law on Foreign Bribery and Joins the International Fight Against Corruption*, 46 TEX. INT'L L.J. 1, 20 (2010) ("The Bribery Act contains no exception or defense for facilitating payments."). Another significant difference is that the Bribery Act criminalizes the receipt of a bribe, in addition to the payment or offer to pay. *Id.* at 23–24 (describing scenarios under which a recipient would violate the Bribery Act). Other differences may be less significant. While the U.K. Bribery Act does not include a books and records provision, for instance, U.K. companies remain subject to requirements of accurate accounting provisions contained in other legislation, such as the Companies Act of 2006. Companies Act 2006, c. 46, §§ 86–27, 464 (U.K.).

154. Smith, Pacella, & Foster, *supra* note 152; Developments in Indian Anti-Corruption Legislation, FCPA Update, Debevoise & Plimpton LLP, Vol. 2, No. 9, at 7–10 (Apr. 2011); *Anti-Corruption Agency to be Created: Ma*, THE CHINA POST (July 21, 2010), http://www.chinapost.com.tw/taiwan/national/national-news/2010/07/21/265394/Anti-corruption-agency.htm. It is expected that the Taiwanese agency will launch in late summer 2011. Elaine Hou, *Taiwan's Legislature OKs Anti-Corruption Agency*, TAIWAN TODAY (Apr. 6, 2011), http://www.taiwantoday.tw/ct.asp?xItem=158745&ctNode=413 (noting the April 1, 2011 passage of the Anti-Corruption Administration Act and its expected implementation).

155. The eighth amendment to the Criminal Law of the People's Republic of China ("PRC"), amending article 164, criminalizes conduct of offering money or property to foreign public officials or officials associated with international public bodies with an intent to obtain "unjust commercial benefits." Peter Yuen, *China's Tightening Law on Bribery of Officials*, Freshfields Bruckhaus Deringer (Mar. 2010), *available at* http://www.freshfields.com/publications/pdfs/2011/mar11/30020.pdf. It is unclear whether the law applies to PRC entities (it clearly applies to citizens under article 7 of the Criminal Law), but what may prove particularly worrisome for foreign firms is that the amended article 164 should apply extraterritorially. Under article 6 of the Criminal Law, any act that has consequences within Chinese territory is deemed to be committed within the PRC; therefore, a bribe exchanging hands between an entity and any foreign official, regardless of location, will render that entity liable under Chinese law if the bribe has an effect within the PRC.

most remarkably, Nigeria—a nation often viewed as the world's most corrupt—has recently increased its own enforcement efforts in this context, having initiated an investigation into entities and individuals alleged to have bribed Nigerian government officials in connection with several multi-billion dollar natural gas contracts.[156]

Together, these attributes of recent FCPA enforcement—increased law enforcement resources, more proactive enforcement techniques, and the promotion of global cooperation—indicate that the FCPA has entered into a "new era."[157] As discussed more fully below, the extension of FCPA enforcement efforts to new industries suggests that it is an era that is "here to stay."[158]

2. "Instrumentalities" and "Foreign Officials"

In another example of the prevailing emphasis on FCPA enforcement, the U.S. government has broadened the scope of the industries it targets.[159] Historically, the FCPA was thought of as applying mostly to

156. In 2010, the Nigerian government's Economic and Financial Crimes Commission ("EFCC") settled criminal charges against two companies regarding bribes paid in connection with the Bonny Island Liquified Natural Gas project. *See* Smith, Pacella, & Foster. *supra* note 152. Between 1995 and 2004, a joint venture comprised of four companies paid $182 million in "consulting fees" to two agents. DOJ Press Release, Kellogg Brown & Root LLC Pleads Guilty to Foreign Bribery Charges and Agrees to Pay $402 Million Criminal Fine (Feb. 11, 2009), *available at* http://www.justice.gov/opa/pr/2009/February/09-crm-112.html. These agents subsequently bribed Nigerian officials in order to obtain four contracts, worth over $6 billion, to construct liquefied natural gas facilities on Bonny Island in offshore Nigeria. The DOJ and SEC opened investigations into the Bonny Island bribery scheme in 2008, which resulted in large settlements against three of the four joint venture partners (the investigation into the fourth partner is pending). For example, in February 2009 one US-based partner pled guilty to one criminal conspiracy count and four substantive FCPA counts and agreed to pay a fine of $402 million. The partner also settled civil FCPA charges with the SEC and agreed to disgorge $177 million. In 2010, two additional joint venture partners, one based in France and the other in Italy, agreed to pay $338 million and $3 million, respectively, in joint DOJ/SEC enforcement actions. The fourth joint venture, headquartered in Japan, reportedly is in settlement discussions with the DOJ and SEC. Smith, Pacella, & Foster, *supra* note 152.

Following the DOJ's and SEC's lead, the Nigerian EFCC arrested at least 10 employees of the U.S. joint venture company's former parent company in November 2010. Elisha Bala-Gbobo, *Nigeria Files Charges Against Dick Cheney, Halliburton, Over Bribery Case*, BLOOMBERG NEWS, Dec. 7, 2010, *available at* http://www.bloomberg.com/news/2010-12-07/nigeria-files-charges-against-dick-cheney-halliburton-over-bribery-case.html. On December 20, 2010, the U.S. joint venture company announced that it had entered into a settlement with the Nigerian government, agreeing to pay $32.5 million in penalties. Press Release, Halliburton, Halliburton Confirms Agreement to Settle with Federal Government of Nigeria (Dec. 21, 2010), *available at* http://halliburton.com/public/news/pubsdata/press_release/2010/corpnws_12212010.html. The following day, the U.S. parent company lso reported that it had entered into a $35 million settlement.

While these enforcement actions by the Nigerian government essentially "piggybacked" on an investigation conducted by the DOJ and SEC, it marks a significant shift in terms of that government's willingness to take action when confronted with evidence of illicit payments to its officials. Smith, Pacella, & Foster, *supra* note 152.

157. *See supra* note 128. ("As our track record over the last year makes clear, we are in a new era of FCPA enforcement; and we are here to stay.").

158. *Id.*

159. Breuer Speech, *supra* note 128.

resource-extraction industries doing business in overseas markets.[160] Yet in recent years, the DOJ has brought FCPA actions involving telecommunications, construction, and manufacturing industries, among others.[161] The SEC sweep of the financial services sector represents the most recent incursion into previously uncharted waters.[162] The DOJ and SEC have justified their forays into these new industries with an increasingly expansive view of what makes an enterprise an "instrumentality" of a foreign government and, therefore, what makes employees of such enterprises "foreign officials." Neither agency has offered much in the way of guidance regarding how these terms are defined, however.[163] Yet, as discussed more fully in Section II.D. below, they have aggressively pursued cases involving bribes to employees of SOEs and various other entities over which foreign governments exercised some form of control.[164]

Despite the U.S. government's aggressive interpretation of the FCPA's provisions, virtually no corporate defendants, big or small, have contested FCPA charges in court for the past two decades.[165] A challenge

---

160. *See* Mike Koehler, *The Foreign Corrupt Practices Act in the Ultimate Year of its Decade of Resurgence*, 43 IND. L. REV. 389, 396–98 (2010).

161. *Id.* at 397–98 (summarizing the industries and jurisdictions of FCPA actions in 2009). *See also* Westbrook, *supra* note 50, at 523–24 ("The oil and gas, technology, pharmaceuticals, and medical supplies industries have been 'heavily hit by actions in the last few years.'").

162. *See supra* notes 129–137 and accompanying text.

163. The lack of clarity surrounding the definition of "instrumentality" has been a source of consternation for outside observers, including the OECD. *See* OECD, REPORT ON APPLICATION OF THE CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS AND THE 1997 RECOMMENDATION ON COMBATTING BRIBERY IN INTERNATIONAL BUSINESS TRANSACTIONS 32 (2002) *available at* http://www.oecd.org/dataoecd/52/19/1962084.pdf.

> Neither the statute nor its history define the term 'instrumentality,' thus leaving it to U.S. companies to determine whether an enterprise is an instrumentality or not. This can be difficult in some cases. For instance, are 'instrumentalities' only enterprises that are wholly or majority-owned by the foreign government? Does the term 'instrumentality' cover enterprises that are controlled by the government, or entities in the process of privatisation?

164. *See* Koehler, *supra* note 160, at 410–12 (summarizing FCPA actions and what types of entities were considered foreign officials). *See infra*, Part III.D., for a discussion of recent FCPA cases in which the government assumes that SOEs can meet the definition of "instrumentality," and thus their employees the definition of "foreign official," under the FCPA.

165. *See* Joel M. Cohen, Michael P. Holland & Adam P. Wolf, *Under the FCPA, Who Is a Foreign Official Anyway?*, 63 BUS. LAW. 1243, 1245–46 (2008) ("The vast majority of FCPA cases end with swift settlement agreement . . . ."); Lauren Giudice, Note, *Regulating Corruption: Analyzing Uncertainty in Current Foreign Corrupt Practices Act Enforcement*, 91 B.U. L. REV. 347, 368 (2011) (noting that such agreements are now common in FCPA enforcement against corporations); Koehler, *supra* note 12, at 933–39 (discussing the use of DPAs and NPAs in FCPA enforcement); Cortney C. Thomas, Note, *The Foreign Corrupt Practices Act: A Decade of Rapid Expansion Explained, Defended, and Justified*, 29 REV. LITIG. 439, 457 (2010) ("Since DPAs and NPAs avoid the courtroom, very little case law has developed with respect to the terms or provisions of the FCPA."); Richard L. Cassin, *A Gesture of Justice*, FCPA BLOG (Feb. 9, 2010 5:27 PM), http://fcpablog.squarespace.com/blog/2010/2/10/a-gesture-of-justice.html; Westbrook, *supra* note 50, at 557 (listing some instances of DPAs being used in FCPA enforcement). Past efforts to challenge the government's interpretation have been rebuffed with relative ease. *See* United States v. Esquenazi, 09-CR-21010, Order Denying Motion to Dismiss (S.D. Fla. Nov. 19, 2010) (denying motion challenging

of this sort would require the business to be criminally indicted, which is generally regarded as tantamount to a "corporate death sentence."[166] Instead, corporations routinely settle FCPA charges through non-prosecution agreements ("NPAs") and deferred prosecution agreements ("DPAs"), a practice which has essentially excused the U.S. government from providing any real justifications for its interpretations of the Act.[167] Per these agreements, the enforcing agency consents not to indict the alleged offending company provided that the company ceases violating the statute, undertakes a series of measures to improve its compliance procedures, and, often, pays a substantial fine.[168] Since NPAs are not subject to judicial review and DPAs are only reviewed on a limited basis, the result is extremely limited case law on the provisions of the FCPA.[169]

The government seems perfectly content with the lack of judicial definitions of "foreign official" and "instrumentality."[170] Indeed, while

---

DOJ interpretation dismissed in relation to bribery of Haitian officials); United States v. Nguyen., 08-CR-522, Order Denying Motion to dismiss (E.D. Pa. Nov. 23, 2009) (denying motion challenging FCPA enforcement in the context of bribery in connection with sales of airport equipment to Vietnam). Indeed, only once in the twenty years prior to 2011 did a corporation ever take the government to trial on its FCPA charges. Bruce Carton, *The Summer of the Foreign Corrupt Practices Act*, COMPLIANCE WEEK. (June, 2011) at 28. This corporate defendant, Harris Corporation, was acquitted in 1991 in what was described as a "'stunning defeat for the Justice Department.'" *Id.*

As discussed more fully in Part IV, *infra,* defendants in several recent cases have challenged DOJ and SEC interpretations of the statutory term "foreign official."

166. Candace Zierdt & Ellen S. Podgor, *Corporate Deferred Prosecutions Through the Looking Glass of Contract Policing*, 96 KY. L.J. 1, 2 (2007). Arthur Andersen, LLP was convicted in 2002 of a single criminal count of witness tampering in relation to the firm's handling of documents belonging to a major client, Enron. Linda Greenhouse, *Justices Dubious of U.S. Case on Andersen*, N.Y. TIMES (Apr. 28, 2005), *available at* http://www.nytimes.com/2005/04/28/business/28bizcourt.html. Ultimately, the Supreme Court in a unanimous opinion overturned the conviction on the basis of faulty jury instructions, an outcome which proved to be "little more than a Pyrrhic victory for Andersen, which lost its clients after being indicted on obstruction of justice charges and has no chance of returning as a viable enterprise. The accounting firm [] shrunk from 28,000 employees in the United States to a skeleton crew of 200, who [attended] to the final details of closing down the partnership." Linda Greenhouse, *Justices Unanimously Overturn Conviction of Arthur Andersen*, N.Y. TIMES, May 31, 2005, at C1. The fact that the firm ultimately won the legal battle related to the indictment, but lost its ability to function as a going concern, illustrates the disastrous effects of a criminal indictment of a corporation.

167. *See* Zierdt & Podgor, *supra* note 1676, at 14 (describing how the government has had little "judicial oversight or participation" in using deferred and non-prosecution agreements).

168. Cortney C. Thomas, Note, *The Foreign Corrupt Practices Act: A Decade of Rapid Expansion Explained, Defended, and Justified*, 29 REV. LITIG. 439, 452 (2010).

169. *See* Koehler, *supra* note 12, at 935–36 (explaining the almost non-existent judicial review of DPAs).

170. "The reluctance of companies to take these cases to trial really skews the interpretation of the FCPA because it has allowed the Justice Department to take some fairly aggressive positions." Jaclyn Jaeger, *First-Ever Jury Verdict to Limit Scope of FCPA*, COMPLIANCE WEEK, July, 2011, at 20 (quoting Jessie Liu, Jenner & Block). It is possible that in 2012 the public will be able to see precisely how the DOJ interprets the FCPA. On November 8, 2011, speaking at the 26th National Conference on the Foreign Corrupt Practices Act, Assistant Attorney General Lanny Breuer noted that the DOJ "expect[s] to release detailed new guidance on the Act's criminal and civil enforcement provisions" in 2012 in response to an OECD review of the agency's enforcement efforts. Lanny A. Breuer, Assistant Att'y Gen., Crim. Div., DOJ, Remarks Before the 26th National Conference on the Foreign Corrupt Practices Act (Nov. 8, 2011), *available at* http://www.justice.gov/criminal/pr/speeches/2011/crm-speech-111108.html.

acknowledging the ambiguity of the definition of "foreign official" in a November 2009 speech, Assistant Attorney General Breuer nonetheless declined to provide guidance on the issue, yet affirmed the DOJ's commitment to aggressive FCPA enforcement:

As important for your clients, consider the possible range of "foreign officials" who are covered by the FCPA:

> Some are obvious . . . [b]ut some others may not be . . . . Indeed, it is entirely possible, under certain circumstances and in certain countries, that nearly every aspect of the approval, manufacture, import, export, pricing, sale and marketing of a drug product in a foreign country will involve a "foreign official" within the meaning of the FCPA . . . . The Criminal Division stands ready to ferret out this illegal conduct and we are uniquely situated to do so.[171]

## III. Sovereign Wealth Funds and the FCPA

With an increasing number of enforcement actions, larger fines, and an ever-expanding definition of "foreign official," the SEC's recent inquiry into financial firms' dealings with SWFs is a cause for concern for the funds and for U.S. firms seeking to solicit their investment capital.

### A. Sovereign Wealth Funds Defined

There is no standard definition for what constitutes a SWF.[172] The U.S. Department of the Treasury defines a SWF in general terms as "a government investment vehicle which is funded by foreign exchange assets, and which manages those assets separately from official reserves of the monetary authorities."[173] Other sources, such as the Sovereign Wealth

---

171. *See* Lanny A. Breuer, Assistant Att'y Gen., Crim. Div., DOJ, Prepared Keynote Address to The Tenth Annual Pharmaceutical Regulatory and Compliance Congress and Best Practices Forum (Nov. 12, 2009), *available at* http://www.justice.gov/criminal/pr/speeches-testimony/documents/11-12-09breuer-pharmaspeech.pdf.

172. Brendan J. Reed, Note, *Sovereign Wealth Funds: The New Barbarians at the Gate? An Analysis of Legal and Business Implications of their Ascendency*, 4 VA. L. & BUS. REV. 97, 98 n.1 (2009); Larry Cata Backer, *Sovereign Wealth Funds as Regulatory Chameleons: The Norwegian Sovereign Wealth Funds and Public Global Governance Through Private Global Investment*, 41 GEO. J. INT'L L. 425, 436 (2010) ("Like much else about sovereign wealth funds, there is little consensus on a definition. The differences in definition reflect the ambiguity of the instrument itself—formally sovereign yet functionally private. It also reflects the further ambiguity even with respect to function—again traditionally sovereign but now also more aggressively private."). Note also that the term "sovereign wealth fund" did not even come into existence until 2005. *See* EDWIN TRUMAN, SOVEREIGN WEALTH FUNDS: THREAT OR SALVATION? 1 (2010).

173. MARTIN A. WEISS, CONGRESSIONAL RESEARCH SERVICE, SOVEREIGN WEALTH FUNDS: BACKGROUND AND POLICY ISSUES FOR CONGRESS 4 (2008), http://fpc.state.gov/documents/organization/110750.pdf [hereinafter "CRS REP'T"]. The U.S. Treasury further divides SWFs into two categories, depending on whether the fund's assets are derived from commodity surpluses or other means. *See* Backer, *supra* note 172, at 441. The International Monetary Fund ("IMF") provides an even simpler and more expansive definition, noting that SWFs "can generally be defined as special investment funds created or owned by governments to hold foreign assets for long-

Fund Institute, provide a more detailed description:

> A Sovereign Wealth Fund is a state-owned investment fund composed of financial assets such as stocks, bonds, real estate[,] or other financial instruments funded by foreign exchange assets. These assets can include: balance of payments surpluses, official foreign currency operations, the proceeds of privatizations, fiscal surpluses, and/or receipts resulting from commodity exports. Sovereign Wealth Funds can be structured as a fund, pool, or corporation. The definition of sovereign wealth fund exclude [sic], among other things, foreign currency reserve assets held by monetary authorities for the traditional balance of payments or monetary policy purposes, state-owned enterprises (SOEs) in the traditional sense, government-employee pension funds, or assets managed for the benefit of individuals.[174]

However broadly or narrowly they are defined, SWFs generally share the following common elements: 1) state-ownership;[175] 2) funding from foreign exchange reserves or excess export revenues;[176] 3) limited explicit liabilities;[177] and 4) management separate from ordinary, official foreign exchange reserves.[178]

SWFs exist for a variety of reasons. They stabilize the revenues of and provide accumulated savings for resource-rich nations that benefit from

---

term purposes." INT'L MONETARY FUND, GLOBAL FINANCIAL STABILITY REPORT (2007), *available at* http://www.imf.org/external/pubs/ft/GFSR/2007/02/pdf/text.pdf. The IMF further divides SWFs into three major categories based on the functional purpose of the funds: stabilization funds, savings funds, and reserve investment corporations. *Id.* The OECD defines SWF as "essentially government-owned investment vehicles funded by foreign exchange assets." U.N. Econ. & Soc. Comm'n for Asia & the Pacific, Poverty & Dev. Div., *Key Economic Developments and Prospects in the Asia-Pacific Region 2008*, U.N. Doc. ST/ESCAP/2461 (2007), *available at* http://www.unescap.org/pdd/publications/key2008/key2008.pdf. The United Nations provides perhaps the most broad definition, which ignores form and function and simply declares that such funds "seek to diversify foreign exchange assets and earn a higher return by investing in a broad range of asset classes." *Id.*

174. Sovereign Wealth Fund Inst., What is a Sovereign Wealth Fund, Nov. 16, 2009, *available at* http://www.swfinstitute.org/what-is-a-swf/. *See also* Int'l Working Group of Sov. Wealth Funds, Sovereign Wealth Funds: Generally Accepted Principles and Practices (2008) [hereinafter The Santiago Principles] ("[SWFs are] special purpose investment funds or arrangements, owned by the general government. Created by the general government for macroeconomic purposes, SWFs hold, manage, or administer assets to achieve financial objectives, and employ a set of investment strategies which include investing in foreign financial assets. The SWFs are commonly established out of balance of payments surpluses, official foreign currency operations, the proceeds of privatizations, fiscal surpluses, and/or receipts resulting from commodity exports.").

175. *See* Xie & Chen, *supra* note 5, at 3 ("[A] SWF runs the wealth of a nation, aiming to benefit the citizens of the nation, and therefore has a nation-wide impact that cannot be restricted within a certain locality."); Richard Epstein & Amanda Rose, *Symposium: The Going-private Phenomenon: The Regulation of Sovereign Wealth Funds: The Virtues of Going Slow*, 76 U. CHI L. REV. 111, 114 (2009).

176. Xie & Chen, *supra* note 5 at 3; Epstein & Rose, *supra* note 175 at 114.

177. INT'L MONETARY FUND, GLOBAL FINANCIAL STABILITY REPORT, *supra* note 174, at 45–50.

178. Roland Beck & Michael Fidora, *The Impact of Sovereign Wealth Funds on Global Financial Markets* 8, Occasional Paper No. 91, European Central Bank (2008), *available at* http://ssrn.com/abstract_id=1144482 (using a functional analysis to look at SWFs in the absence of a universally agreed-upon definition); Epstein & Rose, *supra* note 175 at 114.

high commodity export prices.[179] They also invest excess government revenue resulting from inflexible exchange rate regimes.[180] Some Asian nations, such as China and Singapore, use SWFs to recycle their large trade surpluses outside their homelands, including in the United States, "where they in effect finance our nation's chronic trade deficit."[181] Importantly, SWFs are more than an average profit-seeking institution.[182] Their "sovereign" nature also allows them to assist in the country's "economic strategic development."[183]

B. History and Development

While the bulk of SWF creation and activity has occurred within the past twenty years, the existence of these funds dates back to 1953, when the Kuwaiti government established the Kuwait Investment Board with the "aim of investing surplus oil revenues."[184] In the 1970s, additional funds were established by several petroleum-rich states, seeking to invest the proceeds of their natural resources,[185] and certain Pacific-rim states, which aimed to enhance gains from other government revenues.[186] These SWFs developed as reserves rapidly exceeded the amount needed for balance of payment support, and the reserve managers sought to maximize returns on assets.[187] The increased globalization of the world economy in the years following the end of the Cold War saw the establishment of additional funds as many states, particularly oil producers and Asian nations with strong manufacturing bases and trade surpluses, began to accumulate

179. Xie & Chen, *supra* note 5, at 3. *See also* Tr. at 4–5, Brookings Institute, Rebuilding America: The Role of Foreign Capital, Sovereign Wealth Funds, and Global Public Investors, Mar. 11, 2011, *available at* http://www.brookings.edu/~/media/Files/events/2011/0311_sovereign_wealth/20110311_sovereign_wealth.pdf.

180. Since SWFs seek to maximize returns within an acceptable risk range, they are different than government monetary authorities that simply use reserves as a currency stabilizer. Xie & Chen, *supra* note 5, at 3.

181. Epstein & Rose, *supra* note 175 at 114–115.

182. Xie & Chen, *supra* note 5, at 3–4.

183. *Id.*

184. Beck & Fidora, *supra* note 178, at 6. The Kuwait Investment Board was soon followed by the Kiribati Revenue Equalization Reserve Fund in 1956. CRS REP'T, *supra* note 173, at CRS-6.

185. *See* Larry Cata Backer, *Sovereign Investing in Times of Crisis: Global Regulation of Sovereign Wealth Funds, State-Owned Enterprises, and the Chinese Experience*, 19 TRANSNAT'L L. & CONTEMP. PROBS. 3, 24 (2010) [hereinafter Backer, *Global Regulation*].

186. CRS REP'T, *supra* note 173, at CRS-8.

187. *Id.* at CRS-2. This does not, however, mean that SWFs are particularly adept at investing. Indeed, their average returns are "7.2 percentage points lower on average than the market return, consistent with the imperfect portfolio diversification and poor corporate governance, such as lack of manager discipline on the part of SWF shareholders." Vidhi Chhaochharia & Luc Laeven, *Sovereign Wealth Funds: Their Investment Strategies and Performance* 2 (Ctr. for Econ. Policy Research, Discussion Paper Ser. No. 6959, 2008). *See also* Gerard Lyons, *State Capitalism: The Rise of Sovereign Wealth Funds*, 14 LAW & BUS. REV. AM. 179, at 9 ("Growth rates were estimated last year for twelve funds, ranging from zero to 100%. Given such a wide spread, it is clear that it is hard to say anything definite about potential growth rates.").

massive amounts of global foreign asset reserves.[188]

SWFs have grown from their humble origins in the 1950s[189] to become large and increasingly important players in international capital markets.[190] Since 2000, the number of SWFs in existence has more than doubled, with twenty new funds launching during this period.[191] Asset holdings have increased rapidly as well; recent estimates of worldwide SWF holdings are in the range of $2–4 trillion.[192] "[S]everal SWFs already have estimated assets under management ("AUM") that dwarf those of the world's largest private-equity funds[.]"[193]

The influence of SWFs will almost certainly increase over time as authorities predict continued growth in SWF-held assets.[194] International Financial Services London "estimates that the value of SWF-held assets will increase to an approximate $5.5 trillion by the end of 2012."[195] U.S. authorities have estimated that by 2015 the aggregate value of SWF-held assets may reach $12 to $15 trillion.[196] Today there are more than forty

---

188. Weiss, CRS REP'T, *supra* note 173, at CRS-2.

189. *Id.* at CRS-6 (dating the origin of SWFs to 1953 when the Kuwait Investment Board began operations). *See also* Reed, *supra* note 172, at 100 (noting that "[T]he Kuwait Investment Office was set up in London in 1953 by Sheikh Abdullah Al-Salem Al-Sabah."); Simon Johnson, *The Rise of Sovereign Wealth Funds*, 44 FIN. & DEV. 56, 56 (Sept. 2007) (describing the rapid growth of SWFs from their inception in the 1950s).

190. Reed, *supra* note 172, at 100; Epstein & Rose, *supra* note 175 at 114–115 ("It is beyond dispute that SWFs have become important new players in global capital markets.").

191. *Foreign Government Investment in the U.S. Economy and Financial Sector: Joint Hearing Before the Subcomm. on Domestic and Int'l Monetary Policy, Trade, and Technology, and the Subcomm. on Capital Markets, Insurance, and Government Sponsored Entities of the H. Comm. on Financial Services*, 110th Cong. 8 (2008) [hereinafter 2008 House Hearing] (statement of David H. McCormick, Under Secretary for Int'l Affairs, U.S. Dep't of the Treasury). By March of 2010, 56% of the 50 largest SWFs were funds launched in the years 2000-2009. IFSL, *supra* note 7, at 3.

192. *Compare* Beck & Fedora, *supra* note 178, at 5, and Epstein & Rose, *supra* note 175, at 115, *with* IFSL, note 8, at 1 (estimating $3.8 trillion under SWF control at the end of 2009). Either estimate represents an increase from $500 billion in 1990. Epstein & Rose *supra* note 175, at 115.

193. Epstein & Rose, *supra* note 175, at 115; Johnson, *supra* note 189, at 56. The increase in SWF coffers has been attributed to surging oil prices and the accumulation of foreign currency by Asian central banks. Epstein & Rose, *supra* note 175, at 115; see also Arvind Subramanian and Aaditya Matoo, *Currency Undervaluation and Sovereign Wealth Funds: A New Role for the World Trade Organization* 12–13 (Center for Global Development, Working Paper No. 12, Feb. 2008) *available at* http://papers.ssrn.com/abstract=1086476 (arguing that the increase in SWF coffers is due in part to exchange rate manipulation by Asian central banks).

194. *See* Johnson, *supra* note 189, at 57. *See also* IFSL, *supra* note 7, at 1 ("SWFs are likely to become more important participants in global financial markets over the coming years as inflows from trade surpluses and commodities' exports continue."); *See* 2008 House Hearing, *supra* note 191, at 4 (Chairman Kanjorski).

195. IFSL, *supra* note 7, at 1.

196. *See* 2008 House Hearing, *supra* note 191, at 4 (Chairman Kanjorski); While this figure is small relative to the amount of assets under the control of private asset managers, or particularly as compared to the total value of global financial assets, the impact and importance of SWFs to modern markets and commerce is clearly increasing. Beck & Fidora, *supra* note 178 at 12 (estimating greater than $50 trillion under private asset manager control in 2008); 2008 House Hearing, *supra* note 191, at 8 (statement of David H. McCormick) (estimating the value of global financial assets at $190 trillion). For instance, the value of assets under SWF control exceeds the value under control of U.S. hedge funds or private equity funds. *Id.* In addition, the rate of growth for SWFs equals or exceeds that of hedge

SWFs in existence worldwide, reflecting investment from more than two dozen nations.[197]

## C. The Impact of Sovereign Wealth Funds

In the past decade, SWFs have pursued a more aggressive investment strategy, focusing on acquiring equity in foreign firms.[198] During this period, many funds have actively sought stakes in companies through cross-border mergers and acquisitions or by acquiring minority stakes.[199] These investments have amounted to approximately $187 billion.[200] Based on recent trends, at least one expert has predicted that, over time, SWFs will be "collectively and perhaps individually, the largest shareholders in many of the world's biggest companies."[201] Currently, many SWFs appear content serving as passive investors, "model minority owner[s]" of public companies.[202] While there have been reports that certain SWFs are beginning to abandon their roles as passive investors and move from holding preferred shares to common shares with voting rights, these are relatively rare occurrences and do not reflect the vast majority of SWF investments.[203]

---

funds. *See, e.g.*, Reed, *supra* note 172, at 101.

197. *See* Tamara Gomes, *The Impact of Sovereign Wealth Funds on International Financial Stability* 4 (Bank of Canada, Discussion Paper 2008-14, 2008) *available at* http://www.bankofcanada.ca/wp-content/uploads/2010/01/dp08-14.pdf. *Id.*; Johnson, *supra* note 189, at 56 ("[SWF] holdings remain quite concentrated, with the top five funds accounting for about 70 percent of total assets."). There are twenty of these funds, and these funds held an approximate $2–3 trillion in various assets. *Id.* As noted earlier, the two major trends that have generated many of the funds that emerged in the past two decades are the increasing price of oil (fueling Middle Eastern SWF growth) and the large trade surpluses, coupled with high savings rates, of many Asian nations. CRS REP'T, *supra* note 173, at CRS-6.

198. IFSL, *supra* note 7, at 5 ("Increasing SWF investment activity has been evident since 2003. During this period there has been a gradual shift from passive to active investment strategies.").

199. *Id.* at 5–6 ("This involves taking active control of companies through cross-border mergers and acquisitions or acquiring minority stakes.").

200. *Id.* at 6. The IFSL report helpfully breaks down the SWF foreign firm investments by the percentage size of the acquired stakes: 38 % of the investment capital went towards purchasing less than 20 % of a particular firm; 23 % towards stakes in the 20–49 % range; 11 % in the 50–79 % range; 3 % in the 80–99 % range; and 25 % went towards full acquisitions. *Id.* These investments are diversified; 42 % was invested in the financial sector, but significant investments were made in other areas, with 14 % invested in various industries, 13 % in services firms, 11 % in real estate, 10 % in commodities, and 10 % in other sectors of the economy. *Id.* at 7.

201. *See, e.g.*, 2008 House Hearing, *supra* note 191, at 10 (statement of Ethiopis Tafara).

202. *See* Paul Rose, *Sovereigns at Shareholders*, 87 N.C. L. REV. 83, 122 (2008) (citing Saudi Prince Al-waleed Bin Talal's Kingdom Holding Company as a model minority owner).

203. Backer, *Global Regulation, supra* note 185, at 120–21 (explaining CIC investments in common stocks of the private equity firm Blackstone). While preferred shares provide a greater likelihood of dividend payment, owners of common shares are allowed to vote on corporate governance matters, which is not the case for preferred shares. Thus, a shift towards common share ownership can be seen as harkening potential corporate governance activities by SWFs. *But see* Rose, *supra* note 202, at 99–100 (explaining how many SWFs are following cautious investment principles in the United States to avoid heightened regulatory scrutiny). Interestingly, it may be the case that SWFs from non-democratic regimes may prove to be more passive investors, as they are, like other SWFs, subject to

The ascendancy of SWFs has caused some concern among some U.S. officials and economists.[204] This concern centers on the lack of transparency regarding the funds' investments and objectives, which has led some experts to question the motivations of the state sponsors of the SWFs.[205] Given that foreign governments manage SWFs, they argue, the funds' incentive structures may not be entirely focused on profit-maximization and may instead reflect political or national agendas.[206] The prospect that SWFs can be manipulated for political purposes may be exacerbated when regimes face instability, as recently was the case in Libya and several other Middle Eastern states.[207] As a practical matter, however, the arguments against SWF investment on such grounds appear more rooted

---

Committee on Foreign Investment in the United States ("CFIUS") restraints (CFIUS being the inter-agency committee tasked with reviewing the national security implications of significant foreign investments in the United States), but are also less susceptible to internal political pressures. *See* Rose, *supra* note 2, at 1220 (evaluating the shareholder activism of the Norwegian fund, as well as CalPERS, to suggest that democratic sponsors of funds may consider factors like environmental or social welfare concerns when participating in corporate governance).

204. For example, Lawrence Summers, the former Treasury Secretary and Director of the National Economic Council, has expressed his fears that SWFs may not always act in ways which maximize the value of their shares. Lawrence Summers, *Sovereign Funds Shake the Logic of Capitalism*, FIN. TIMES, July 30, 2007, available at http://blogs.ft.com/economicforum/2007/07/sovereign-funds.html. Then-Chairman of the SEC Christopher Cox noted in 2007 that it is questionable "whether government-controlled companies and investment funds will always direct their affairs in furtherance of investment returns, or rather will use business resources in pursuit of other government interests." Christopher Cox, Chairman, Sec. & Exch. Comm'n, Keynote Address and Robert R. Glauber Lecture at the John F. Kennedy School of Government, Harvard University: The Role of Government in Markets (Oct. 24, 2007). *See also* 2008 House Hearing, *supra* note 191, at 11 (statement of Ethiopis Tafara, Dir., Office of Int'l Affairs, U.S. Sec. & Exch. Comm.).

205. *See* 2008 House Hearing, *supra* note 191, at 11 (statement of Ethiopis Tafara, Dir., Office of Int'l Affairs, U.S. Sec. & Exch. Comm.) ("In addition to market efficiency, transparency, enforcement, and information disparity, sovereign business and sovereign wealth funds raise other issues as well. One is increased opportunity for political corruption.").

206. Unable to identify an example where a SWF has in fact acted in this manner, critics of SWFs have pointed instead to Russia's state-owned oil company Gazprom, which has been accused of exerting strategic influence over its European investments. *See* Ian Traynor, *Sovereign Wealth Funds Likened to Gazprom as Brussels Calls for Rules: Commission Asks SWFs for Greater Openness: Fears of Growing Wealth Wielded for Political Aims*, GUARDIAN (U.K.) 28 (Feb. 28, 2008). But Gazprom's behavior has as much to do with its control over Europe's gas pipelines as the Kremlin's control over the company. Epstein & Rose, supra note 175 at 116. *See also* EDWARD LUCAS, THE NEW COLD WAR: PUTIN'S RUSSIA AND THE THREAT TO THE WEST(2008) (describing the origins of Gazprom's influence in Europe). Moreover, as discussed more fully in Part III *infra*, state-owned enterprises such as Gazprom present greater challenges than SWFs. Epstein & Rose, *supra* note 175 at 116–17. A government-controlled operating company may have the power to exact concessions from a foreign company as a condition precedent to doing business with the foreign company or as the price of entry into the market via a joint venture. *Id.*; *see also* Ronald Gilson and Curtis Milhaupt, *Sovereign Wealth Funds and Corporate Governance: A Minimalist Response to the New Mercantilism*, 60 STAN. L. REV. 1345, 1367 (2008).

207. The effort by western nations to freeze the assets of Libyan leader Muammar Qaddafi faced significant problems in attempting to identify, much less freeze or disrupt access to, the entirety of the estimated $50–70 billion held in the Libyan Investment Fund. *See From Tripoli to Mayfair: Tracking Down Libya's Mysterious Sovereign-Wealth Fund*, ECONOMIST, March 10, 2011, *available at* http://www.economist.com/node/18335210.

in fear than in fact.[208] Simply put, there is little evidence that any SWF has actively sought to leverage its assets for political purposes.[209] In any event, nations appear to be responding to calls to render their SWFs more transparent.[210]

Despite the criticism, numerous market observers, including the U.S. Treasury Department, have emphasized the positive roles that SWFs play in the modern economy.[211] SWFs may be credited for recycling international savings, adopting long-term investment growth strategies, and contributing to the economic and structural development of their home markets.[212] Recent investment activities by SWFs have directed capital to

---

208. Rose, *supra* note 202, at 84 ("International investment implicates much more than the flow of cash and goods; considerable political issues are often at stake. Commerce may affect national security and may stoke national pride."). For many, "SWFs are guilty until proven innocent." Backer, *supra* note 185, at 57 (quoting Mohamed Al-Jasser, Vice Governor of the Saudi Arabian Monetary Agency, on his suspicions concerning the treatment of SWFs in certain markets). *See also* TRUMAN, *supra* note 173, at 3 (noting the broader fears playing into debates over the role of SWFs in Western economies).

The Dubai Port World's proposed acquisition of a Peninsular and Oriental Stream Navigation Company, which would have placed management of certain U.S. ports under DP World control, is an example of such a fear-based reaction, this time in relation to a proposed transaction with a SOE. Epstein and Rose, *supra* note 175, at 114–19.

209. Epstein & Rose, *supra* note 175, at 116 ("To date there is little evidence that any SWF has sought to lever its investment positions for either political or collateral business purposes."); Rose, *supra* note 202, at 87 ("SWFs have generally refrained from political investments even in countries that do not have legislation comparable to the U.S.'s foreign acquisition regulations."); David Murray, *SWFs: Myths and Realities,* Keynote Address, Global Sovereign Funds Roundtable, May 5, 2011 at 16–17 ("Managing a nation's capital with a non-commercial strategy 'is a recipe for huge losses rather than world domination.'"); Reed, *supra* note 172, at 111. *See also* "Sovereign Wealth Funds Starting to Embrace Transparency, Institutional Investor, (September 15, 2011), http://www.institutionalinvestor.com/Article/2901392/Sovereign-Wealth-Funds-Starting-to-Embrace-Transparency.html?ArticleId=2901392.

210. *See* Anthony Wong, *Sovereign Wealth Funds and the Problem of Asymmetric Information: The Santiago Principles and International Regulations,* Note, 34 BROOKLYN J. INT'L L. 1081, 1084 (2009). As Wong notes, there is a concerted effort by governments and international bodies to make SWFs, as well as their dealings and structure, more transparent; as far as the authors are aware, no such efforts exist, or have been seriously contemplated, for SOEs.

211. *See* Remarks by Acting Under Secretary for International Affairs Clay Lowery on Sovereign Wealth Funds and the International Financial System (June 21, 2007), *available at* http://www.treasury.gov/press-center/press-releases/Pages/hp471.aspx (SWFs "are, in principle, long-term investors that can be expected to stick with a strategic asset allocation despite short-term losses. They are not highly leveraged. They cannot be forced by capital requirements or investor withdrawals to liquidate positions rapidly. They have access to, and frequently make use of, well-regarded private fund managers, administrators, consultants and custodians."). *See also* 2008 House Hearings, *supra* note 191, at 9 (statement of David H. McCormick) ("[T]he U.S. economy benefits from . . . open investment including investment from sovereign wealth funds."); Beck & Fidora, *supra* note 178, at 24 (suggesting that, if properly motivated, SWFs "may contribute to a widening of the long-term investor base. . . [and] exert a stabilising effect on financial markets . . . . In addition, SWFs may contribute to a more efficient sharing and diversification of risk at the global level.").

For further information on the mechanisms employed by SWFs that allow for increased market stability, *see generally* Gomes, *supra* note 197; Reed, *supra* note 172, at 103.

212. *See* OECD Investment Committee, *Sovereign Wealth Funds and Recipient Country Policies* 2 (2008); Langland, *supra* note 2, at 266–67 ("Overall, SWFs are beneficial to the global economy because they recycle trade surpluses from the global South to equity investments in the global North."); Reed, *supra* note 172, at 115 ("If we want to encourage stable trade liberalization, SWFs are a useful

developing economies, and there have been calls for the World Bank "to raise and manage commercial capital from sovereign funds for equity investments in some of the poorest developing countries."[213] Ultimately, SWFs may serve as one of the more dynamic and powerful sources for expanding opportunities in developing economies, permitting these countries to leverage their own resource wealth to become shareholders in Western markets.[214]

Investments by SWFs in public companies have also been recognized as a vital source of stability and liquidity.[215] As discussed in Part I above, the funds were widely seen as providing a stabilizing effect when they injected capital into many western financial institutions immediately prior to and during the recent economic crisis.[216] A $7.5 billion investment by SWF Abu Dhabi Investment Authority ("ABIA"), for example, helped rescue Citigroup, which had witnessed an 87.2 percent drop in its stock price between January 2007 and December 2008.[217] Indeed, between January 2007 and December 2009, eight SWFs had invested in excess of $41 billion in U.S. financial giants Citigroup, Morgan Stanley, Merrill Lynch, Blackstone, Standard Chartered and the Carlyle Group.[218] The ownership interests ranged from a 1.6 percent stake the Kuwaiti Investment Authority ("KIA") took in Citigroup to an 11.3 percent

---

tool because SWF managers are incentivized to have long-term horizons . . . .").

213. Press Release, Int'l Fin. Corp., IFC Board Approves Initiatives for Financial Crisis Response and Sovereign Funds to Support Private Sector in Emerging Markets (Dec. 18, 2008). *See generally* Patrick J. Keenan & Christiana Ochoa, *The Human Rights Potential of Sovereign Wealth Funds*, 40 GEO. J. INT'L L. 1151 (2009).

214. *See generally* Gomes, *supra* note 197, at 1. While it is possible that these investment strategies might have negative repercussions in OECD states if adopted broadly by other investors, SWF investment strategies have not been widely adopted, in part owing to the funds' unique relationship with governments. *Id. See also* Gerard Lyons, *State Capitalism: The Rise of Sovereign Wealth Funds*, 14 LAW & BUS. REV. AM. 179, at *4 ("A protectionist backlash against strategic investments would be damaging for global trade. . . . The rise of SWFs should be seen as a further sign of a shift in the world economy and Western countries should seize this as an opportunity to work with emerging economies . . . to find common ground rules and a code of practice.").

215. Gomes, *supra* note 197, at Chart 2 (showing the relative gains of SWF investment targets on the first market day following the announcement of the investment). *See also* Reed, *supra* note 172, at 113, 115 ("If we want to encourage stable trade liberalization, SWFs are a useful tool because SWF managers are incentivized to have long-term horizons . . . ."). *See also* IMF Survey Online, *IMF Intensifies Work on Sovereign Wealth Funds*, IMF SURVEY MAG. (March 4, 2008) *available at* http://www.imf.org/external/pubs/ft/survey/so/2008/POL03408A.htm ("From the viewpoint of international financial markets, SWFs can facilitate a more efficient allocation of revenues from commodity surpluses across countries and enhance market liquidity, including at times of global financial stress.") (quoting John Lipsky, IMF's first Deputy Manager).

216. OECD Investment Committee, *Sovereign Wealth Funds and Recipient Country Policies* 2 (2008) [hereinafter "Sovereign Wealth Funds and Recipient Country Policies"]). *But see* Rose, *supra* note 202, at 97 ("While SWFs may provide needed capital for U.S. markets . . . they often take large stock positions (in terms of investment value, although typically not in terms of voting power). These large inflows of capital may inflate asset prices. Further, a SWF could cause significant turmoil if, for reasons of national exigency, the SWF must liquidate its positions.").

217. *See* Enrich et al., *supra* note 1; Dash & Sorkin, *supra* note 1.

218. Michael Rufino & William Jannace, *FCPA and Related Issues*, FINRA Presentation to the Madison Group (July 21, 2011) at 4 (on file with the authors).

interest Temasek, a Singapore-based SWF, took in Merrill Lynch.[219] By injecting funding when "risk-taking capital was scarce and market sentiment was pessimistic," SWFs were credited with insulating these institutions from even more damage during the financial crisis.[220]

D. Lessons Learned from State-Owned Enterprises

Until the recent SEC sweep, the U.S. government had not previously applied the FCPA to the activities of SWFs.[221] However, the DOJ and SEC have aggressively targeted another form of government-controlled entity acting in the private markets—SOEs.[222] SOEs are legal entities established under a sovereign's company law that act like a corporation, reporting directly to the government as the majority or sole shareholder.[223] SOEs often result from a political decision to retain government ownership.[224] One of the principle distinctions between SOEs and SWFs is the way the two entities are funded and managed. As previously discussed, SWFs are funded by government reserves, export revenues, and their own investment returns.[225] They are usually passive investors that do not seek controlling interests in companies.[226] SOEs, on

219. *Id.* In total during the approximately two-year period, Citigroup sold a 4.9 percent stake to ABIA, a 4.4 percent stake to the Government Investment Corporation of Singapore ("GIC"), and a 1.6 percent stake to KIA. *Id.* Blackstone sold a 10 percent stake to China Investment Corporation ("CIC"). *Id.* Carlyle Group sold a 7.5 percent stake to ABIA. *Id.* Merrill Lynch sold an 11.3 percent stake to Temasek, a Singapore-based SWF, and a 7 percent stake to KIA. *Id.* Morgan Stanley sold a 9.9 percent stake to the China Investment Corporation. *Id.* (citing statistics generated by the European Central Bank and the Sovereign Wealth Institute).

220. *See* Sovereign Wealth Funds and Recipient Country Policies, *supra* note 216, at 2. (By injecting funding when "risk-taking capital was scarce and market sentiment was pessimistic," SWFs may be credited in part with lessening the impact of the subprime mortgage-related crash of 2008); Langland, *supra* note 2, at 273 ("Eager to capitalize on what appeared to be low-hanging fruit, SWFs injected billions of dollars—much more than they would typically spend—to rescue some of Wall Street's biggest firms.").

221. As early as 2008, the DOJ had suggested that SWFs would fall within the scope of the FCPA if they were managed by government entities as opposed to private managers. Specifically, in October 2008, then-Chief of the DOJ's Fraud Section Steven Tyrrell told attendees of a securities industry conference that firms should determine whether SWFs they deal with are managed by government officials or private asset managers. Nicholas Rummell, *Cash Crunch Could Result in More Corruption Cases*, FIN. WEEK, Oct. 7, 2008, *available at* http://www.financialweek.com/apps/pbcs.dll/article?AID=/20081007/REG/810079983. *See also* Peter J. Henning, *For Wall Street, Antibribery Inquiry Is Cause for Concern*, N.Y. TIMES DEALBOOK BLOG (Jan. 18, 2011, 1:51 PM), http://dealbook.nytimes.com/2011/01/18/for-wall-street-antibribery-inquiry-is-cause-for-concern ("[W]hether dealings with [outside advisers] also falls under the law is not as clear.").

222. *See supra*, Part II.C.2.

223. Xie & Chen, *supra* note 5, at 6–7 (comparing SWFs to SOEs and other entities); Reed, *supra* note 172, at 110. David Murray, SWFs: Myths and Realities, Keynote Address, Global Sovereign Funds Roundtable (May 5, 2011) at 16–17.

224. *See id.* (noting that SOEs may emerge from pure state ownership of a particular industrial sector).

225. *See supra*, Part III.1.

226. *Id.*

the other hand, though they can be created through government grants, are generally funded via the companies' own profits.[227] SOEs are thought of more as corporations engaged in profit-driven activities and may invest with the purpose of acquiring control of a private, foreign economic entity.[228] While many commentators have noted that SOEs and SWFs are so distinct that they cannot be conflated,[229] others have found the distinctions illusory.[230] As one commentator notes, "SOEs can invest, and SWFs can acquire controlling interests in operating entities, and thus become, at least indirectly, SOEs."[231] Thus, despite their many differences, SOEs and SWFs are sufficiently similar that the DOJ's and SEC's treatment of these entities is instructive with regard to SWFs. The government has repeatedly considered SOEs to be "instrumentalities," thus making their employees "foreign officials."[232] Indeed, federal investigations predicated on characterizing employees of SOEs as "foreign officials" working for state "instrumentalities" have accounted for more than half of recent FCPA cases.[233] The DOJ and SEC have "interpreted the term 'foreign official' to include, for example, officials at state-owned oil and oil services companies, airport officials, employees of a regional health fund, physicians and laboratory employees at government-owned hospitals, and

---

227. *See also* Backer, *Global Regulation, supra* note 185, at 64–65.

228. *Id.*

229. *See, e.g.,* Murray, *supra* note 223, at 16–17 ("[SOEs] are typically corporations fully or partly managed by the state, that report directly to the central government with access to below market rate capital. SOEs often result from a political decision to retain government ownership. In contrast, SWFs are investment vehicles sponsored by states, run by financial experts and in some cases independent Boards. Given the problematic conflation of SOEs and SWFs, it is timely to recall that a definitional virtue of SWFs as set out by the GAPP is the distinction between these two entities."); Jocelyn Gachet, *Does the Rise of Sovereign Wealth Funds Require New Investment Regulations,* Dissertation, Grenoble Graduate School of Business, at 18 (on file with the authors) ("There is no possible confusion between SOEs' objectives and SWFs' ones as they are radically different; SWFs have financial purposes and investment logics specific to funds.").

230. *See, e.g.,* Joint Economic Committee of Congress, Hearing on "Do Sovereign Wealth Funds Make the U.S. Economy Stronger or Pose National Security Risks?", Feb. 13, 2008 (testimony of Stuart E. Eizenstat), *available at* http://jec.senate.gov/public/?a=Files.Serve&File_id=811e5838-a1ed-4479-85b3-61d173987982 ("There is a difference, for sure, between private foreign investment and that of SWFs and their close cousins, State Owned Enterprises (SOEs). But even there, the distinction is not always as clear as it may seem. Many European companies, for example, have some government ownership through 'golden shares'. Moreover, many European governments are trying to create 'national champions' to better compete in the global marketplace."); Phillippe Gugler & Julien Chaisse, *The Sovereign Wealth Funds in the European Union: General Trust Despite Concerns,* Swiss NCCR Trade Working Paper, Jan. 6 2009, *available at* http://82.220.2.60/images/stories/publications/IP11/WP%20NCCR%202009%204%20Gugler%20Chaisse%20SWF.pdf ("On the most superficial level, the difference between SWFs and SOEs is obvious: It is the same as that between any type of investment fund and any type of company. But in reality the difference is not that obvious, and is to some extent misleading, since there are SOEs that are used as a conduit for their respective state's sovereign wealth, as part either of a longer channel involving an SWF or of a shorter channel between the foreign reserve manager and the target company.").

231. Xie & Chen, *supra* note 5, at 6.

232. *See supra* Part II.C.2.

233. Ken Stier, *U.S. Crashes In on Corporate Corruption Overseas*, TIME (Apr. 7, 2010) http://www.time.com/time/business/article/0,8599,1977526-2,00.html.

employees of a government-owned bank."[234]

1. SOEs and Foreign Government Control

The DOJ and the SEC have successfully applied the FCPA to SOEs even in situations where the foreign state owns less than a majority of the company, as evidenced by several recent cases where corporate defendants settled FCPA charges.[235] In *United States v. Kellogg Brown & Root LLC*,[236] a 2009 action against Halliburton Company and its former engineering and construction unit, Kellogg, Brown & Root, Inc. ("KBR"), the DOJ accused KBR of bribing various Nigerian officials to obtain and perform engineering, procurement, and construction contracts related to off-shore Nigerian natural gas facilities, charges to which KBR ultimately plead guilty.[237] Included among the recipients of illicit payments were employees of Nigeria LNG Ltd ("NLNG").[238] Despite the fact that the Nigerian government held only a forty-nine percent stake in NLNG, the DOJ nevertheless asserted that these employees were "foreign officials" within the meaning of the FCPA.[239] In 2010, the DOJ charged Alcatel-Lucent with making improper payments to employees of Telekom Malaysia Berhard ("TMB"), a Malaysian telecommunications company, in exchange for non-public information relating to ongoing public tenders for which Alcatel-Lucent's Malaysia subsidiary was competing.[240] In entering into a DPA with the DOJ, Alcatel-Lucent assented to the government's allegation that the employees of TMB, which was forty-three percent owned by the Malaysian government, were "foreign officials" for FCPA purposes.[241] Most recently, in April 2011 Comverse Technology entered into a DPA with the SEC in which the company did not contest charges that it violated the FCPA's accounting provisions by failing to accurately record in its books and records payments made to employees of Hellenic

234. Colby Smith, *DOJ Challenged on Meaning of "Foreign Official,"* FCPA UPDATE (Debevois and Plimpton LLP), Nov. 2010, Vol. 2, No. 4 at 9, *available at* http://www.debevoise.com/files/Publication/ad10aedb-1582-4e2e-b4bb-983a55cd6736/Presentation/PublicationAttachment/40a912f9-485a-45ef-89ca-be27b63b9ba6/FCPAUpdateNovember2010.pdf. *See also* Koehler, *supra* note 160, at 410–12 (summarizing FCPA actions and what types of entities were considered instrumentalities).

235. The government has also interpreted "foreign official" broadly to include employees of SOEs "even if those employees or entities do not directly perform a traditional government function." *Id.*

236. Press Release, Department of Justice, Kellogg Brown & Root LLC Pleads Guilty to Foreign Bribery Charges and Agrees to pay $402 Million Criminal Fine (February 11, 2009) *available at* http://www.justice.gov/opa/pr/2009/February/09-crm-112.html.

237. Information, United States v. Kellogg Brown & Root LLC, No. 4:09-cr-00071 (S.D. Tex. 2009) [hereinafter *"KBR Information"*].

238. *Id.*

239. *Id.*

240. Deferred Prosecution Agreement, United States v. Alcatel-Lucent, Case No. 10-20907 CR-Moore, at A-24–A-26 [hereinafter *"Alcatel-Lucent DPA"*].

241. *Id.* at A-9.

Telecommunications Organization ("OTE") in exchange for purchase orders for Comverse's products and services.[242] OTE was a telecommunications provider in which the Government of Greece held between a thirty-three and thirty-eight percent ownership interest during the relevant period.[243] Although enforcement of the books and records provisions does not require the presence of a "foreign official," the SEC's references to Greece's ownership stake is nevertheless indicative of the government's willingness to invoke the FCPA against SOEs that are only minority owned by foreign states.[244]

While at least one prominent scholar has cited these cases as establishing a new 'limbo low' for an otherwise commercial enterprise to be deemed an 'instrumentality' of a foreign government, and thus employees of the enterprise to be deemed 'foreign officials,'[245] a closer examination of the government's charges suggests that it adopted a more nuanced approach. The DOJ and the SEC do not appear to have predicated their allegations of "instrumentality" and "foreign official" status on the mere fact the SOEs at issue had foreign governments as partial shareholders. Rather, they focused on the fact that in each case, the foreign state in question exercised a significant degree of control over the SOE despite holding a less than majority stake. In KBR, for example, the DOJ alleged that the Nigerian government "exercised control over NLNG" through board members appointed by the Nigerian National Petroleum Corporation.[246] NLNG's control "include[d] but [was] not limited to the ability to block the award of" the engineering, procurement, and

---

242. Deferred Prosecution Agreement, SEC v. Comverse Tech., Inc., 11-CV-1704-LDW [hereinafter *"Comverse DPA"*].

243. *Id.*; *see also* Mike Koehler, "Foreign Official" Limbo – The Bar Has Been Lowered, FCPA PROFESSOR (Apr. 15, 2011, 5:38 AM ), http://fcpaprofessor.blogspot.com/2011/04/foreign-official-limbo-bar-has-been.html (noting that the Greek government held stakes ranging from 33 to 38 percent during the time period specified in the SEC's complaint). The government's claim did not articulate what facts gave rise to OTE's "instrumentality" status with any precision, but rather the claim was based on the fact that the Greek government was the largest shareholder (a standard that could be well below the 33 to 38 percent percentage ownership that was operative in the case) and the largest customer of OTE. *Id.*

244. FCPA Spring Review 2011, Miller & Chevalier LLP, http://www.millerchevalier.com/Publications/MillerChevalierPublications?find=54204#Comverse (last visited Sept. 23, 2011). As part of its settlement with the government, Comverse also entered into an NPA with the DOJ. Justice News, Comverse Technology Agrees to Pay $1.2 Million Penalty to Resolve Violations of the Foreign Corrupt Practices Act, Apr. 7, 2011, *available at* http://www.justice.gov/opa/pr/2011/April/11-crm-438.html. DOJ's decision not to prosecute Comverse Technology criminally was based on "the company's thorough self-investigation and the results of its investigation, voluntary disclosure of the underlying conduct, and full cooperation with the department." *Id.* The DOJ also acknowledged that the company undertook "extensive remedial efforts and overhauled its overall compliance culture, including through the implementation of mandatory training programs focused on anti-corruption and the use of third-party agents and intermediaries, as well as more rigorous accounting controls for the approval of third-party payments." *Id.*

245. Mike Koehler, *"Foreign Official" Limbo . . . How Low Can it Go?*, FCPA PROFESSOR (Jan. 10, 2011, 5:30 AM), http://fcpaprofessor.blogspot.com/2011/01/foreign-official-limbo-how-low-can-it.html.

246. *See KBR Information, supra* note 237, at 7.

construction contracts KBR was coveting from the Nigerian government.[247] In *Alcatel-Lucent*, the DOJ averred that the Malaysian Ministry of Finance "had veto power over all [of TKM's] major expenditures, and made important operational decisions."[248] The Malaysian government also "owned its interest in . . . [TKM] through the Minister of Finance, who had the status of a 'special shareholder.'"[249] Even in the SEC's charges in Comverse, although comparatively cryptic with respect to the OTE, noted that the company was "*controlled* and partially owned by the Greek government."[250] Thus, control over the strategic decisions and business affairs over the SOE appears to have been the operative concept.

2. Recent Judicial Challenges and an Opportunity Lost

The government's wide prosecutorial latitude with respect to SOEs has survived unprecedented challenges in federal district courts. In a series of recent cases, *United States v. Noriega* ("*Lindsey*"),[251] *United States v. Carson* ("*Carson*"),[252] and *United States v. O'Shea* ("*O'Shea*"),[253] corporate and individual defendants alike have moved to dismiss the DOJ's FCPA charges, arguing that SOEs do not qualify as "instrumentalities" under the FCPA.[254] The defendants in all three cases made similar arguments, which were grounded in principles of statutory construction, legislative history, public policy, and due process.

Defendants have contended, for example, that as a matter of statutory construction the meaning of "instrumentality" should be gleaned from the other two operative terms in the definition of foreign official:

---

247. *Id.* at 2, 7.

248. *See Alcatel-Lucent DPA, supra* note 240, at A-9.

249. *Id.*

250. *See* Comverse DPA, *supra* note 242, at 3 (emphasis added); *see* Mike Koehler, *"Foreign Official" Limbo: The Bar Has Been Lowered*, FCPA PROFESSOR BLOG (Apr. 15, 2011, 5:38 AM), http://fcpaprofessor.blogspot.com/2011/04/foreign-official-limbo-bar-has-been.html.

251. United States v. Noriega, 2:10-cr-01031, Motion to Dismiss (C.D. Cal. Feb. 28, 2011) [hereinafter "*Lindsey Motion to Dismiss*"]. In the *Lindsey* case, the defendants are accused of violating the FCPA by bribing employees of the Comisión Federal de Electricidad ("CFE"), which the U.S. government alleges is an enterprise owned by the Mexican government. United States v. O'Shea, 4:09-cr-00629, Indictment at 5 (S.D. Tex. Nov. 16, 2009); United States v. Noriega, 2:10-cr-01031, Indictment (C.D. Cal. Sept. 15, 2010).

252. United States v. Carson, 8:09-cr-00077, Motion to Dismiss (C.D. Cal. Feb. 21, 2011) [hereinafter "*Carson Motion to Dismiss*"]. In *Carson*, the defendants are accused of making numerous, improper payments to employees of Chinese, Malaysian, South Korean, and UAE-based SOEs involved in petroleum exploration or power generation. United States v. Carson, 8:09-cr-00077, Indictment at 12 (S.D. Cal. Apr. 8, 2009).

253. United States v. O'Shea, 4:09-cr-00629, Indictment at 5 (S.D. Tex. Nov. 16, 2009) [hereinafter "*O'Shea Motion to Dismiss*"]. In the third case in which the defense has challenged the DOJ's application of the FCPA to SOEs, United States v. O'Shea, the defendants, like the defendants in *Lindsey*, are accused of violating the FCPA by bribing employees of the CFE. United States v. O'Shea, 4:09-cr-00629, Indictment at 5 (S.D. Tex. Nov. 16, 2009). The motion to dismiss in *O'Shea* is still pending. United States v. O'Shea, 4:009-cr-00629, Motion to Dismiss (S.D. Tex. March 7, 2011).

254. *Id.; see also* Smith, *supra* note 234, at 4.

"department" and "agency."[255] Because SOEs do not always share the characteristics of departments and agencies (i.e., performing governmental functions), they can never be considered instrumentalities.[256] Defendants have also argued that the legislative history of the FCPA does not reflect a congressional intent to include SOEs within the definition of "instrumentalities."[257] From a policy perspective, defendants have argued that the government's interpretation, if carried to its logical conclusion, would lead to "absurd results"—suggesting, for example, that if the government's view were to prevail, employees of General Motors and AIG would be considered "instrumentalities" of the U.S. government because of the recent government bailouts of both companies.[258] Finally, defendants have averred that any ambiguity in the statute be construed in defendants' favor and that if the government's broad interpretation is correct, then the FCPA is unconstitutionally vague.[259]

The *Lindsey* and *Carson* defendants' challenges to the

---

255. *Carson Ruling on Defendants' Challenge to the DOJ's Definition of "Foreign Official": A Fact-Based Approach*, FCPA Update, Debevoise & Plimpton, Vol. 2, No. 10 (May 2011) at 3 [hereinafter *"FCPA Update: Carson Ruling"*], *available at* http://www.debevoise.com/newseventspubs/publications/FCPA.

256. Carson Motion to Dismiss, *supra* note 252, at 15; O'Shea Motion to Dismiss, *supra* note 253, at 4 ("A business entity owned by the Mexican government . . . should not be deemed an 'instrumentality' because it has little in common with the rest of the series: unlike departments and agencies, it carries out commercial, not government functions.").

257. The defendants rely upon a 144-page declaration filed by Professor Michael J. Koehler (author of the FCPA Professor blog) in support of the motion to dismiss in *Carson*. United States v. Carson, 8:09-cr-00077, Declaration of Professor Michael J. Koehler in Support of Defendant's Motion to Dismiss Counts One Through Ten of the Indictment p. 15–16 (Feb. 28, 2011) [hereinafter "Koehler Declaration"]. Koehler's 144-page declaration in support of the motions to dismiss provides an extensive history of the FCPA, from early debates in 1975 before its enactment to hearings held in Congress in November 2010. *Id. See also FCPA Update: Carson Ruling, supra* note 255, at 3.

Koehler emphasizes the following: (1) Congress enacted the FCPA in 1977 because of concern over payments to foreign governments or foreign political parties; (2) some of the competing bills in the 94th and 95th Congresses (1975–76, 1977–78) defined "foreign government" to include, *inter alia*, corporations established or owned by, and subject to control by, a foreign government, but Congress chose not to include this definition in the bill that became law in December 1977; (3) the 1988 amendments clarified that facilitating payments made for "routine government action" were excluded, thus suggesting, according to Koehler, that Congress remained focused on government action; and (4) the 1998 amendments expanded the definition of "foreign official" to include officials of "public international organizations," e.g., the United Nations, following the adoption of the OECD Convention by the United States, but the 1998 amendments did not expand the FCPA to include "public enterprises," a term mentioned and defined in the OECD Convention. *Id.* at p. 16–17.

The government challenged what it described as defendants' selective reading of the FCPA's legislative history, arguing that Professor Koehler's history was "chiefly revealing for what it does not contain. In spite of 150 hours and 448 paragraphs spent distilling his research, Mr. Koehler is unable to find a single reference in any part of the legislative history that Congress intended to exclude state-owned companies from the definition of instrumentality. United States v. Noriega, No. 2:10-cr-01031, Opposition to Defendants' Motion to Dismiss the First Superseding Indictment at 30 (C.D. Cal. Mar. 10, 2011).

258. Carson Motion to Dismiss, *supra* note 252, at 19–21. The defendants also suggested that employees of Citigroup, Morgan Stanley, and Blackstone would be considered foreign officials by virtue of the fact that SWFs have taken ownership stakes in each of these companies. *Id.*

259. *Id.* at 39–48.

government's definition of "instrumentality" and "foreign official" were resolved in the spring of 2011. On April 1, 2011, in *Lindsey,* Judge A. Howard Matz denied corporate defendant Lindsey Manufacturing, Inc.'s motion to dismiss the DOJ's FCPA indictment charging the company with bribing officials of CFE, a utility company owned by the Government of Mexico. Judge Matz found that CFE is an "instrumentality" of the Mexican government and its employees are "foreign officials."[260] Judge Matz held that "a state-owned corporation having the attributes of CFE may be an instrumentality of a foreign government within the meaning of the FCPA, and officers of such a state-owned corporation . . . may therefore be 'foreign officials' within the meaning of the FCPA."[261] Construing the term "instrumentality" in light of the two words preceding it, "agency" and "department," Judge Matz set forth a non-exhaustive list of attributes that would qualify an entity, such as an SOE, to be an instrumentality: (1) the entity provides a service to the citizens or inhabitants of the jurisdiction; (2) the key officers and directors of the entity are, or are appointed by, government officials; (3) the entity is financed in large measure by the government; (4) the entity is vested with and exercises exclusive or controlling power to administer its designated functions; and (5) the entity is widely perceived and understood to be performing governmental functions.[262] Judge Matz considered the undisputed facts regarding CFE and found that it shares characteristics typical of agencies and departments (e.g., it performs a function the Mexican nation has described as a quintessential government function—the supply of electricity).[263]

On May 18, 2011, Judge James V. Selna denied a similar motion in *Carlson,* and in so doing reinforced Judge Matz's ruling that SOEs may be considered instrumentalities under the FCPA.[264] In *Carson,* the defendants,

---

260. United States v. Noriega, No. 2:10-cr-01031, Criminal Minutes – General (C.D. Cal. Apr. 20, 2011).

261. *Id.* at 2. In rendering his decision, Judge Matz focused on the particular facts of the case, including: that the provision of electric power is a government function under the Constitution of Mexico; CFE describes itself as a government agency; Mexican government officials comprise CFE's governing board; and the President of Mexico appoints the Director General of CFE. *Id.* at 15. *See also* Joe Palazzolo, *Judge Sides With DOJ In 'Foreign Official' Ruling*, WALL ST. J. CORRUPTION CURRENTS BLOG (Apr. 4, 2011, 10:34 AM ), http://blogs.wsj.com/corruption-currents/2011/04/04/judge-sides-with-doj-in-foreign-official-ruling/; Mike McCollum & Jaime Guerrero, *Lindsey "Foreign Official" Motion Denied,* FCPA PROFESSOR BLOG (Apr. 1, 2011, 10:35 PM), http://fcpaprofessor.blogspot.com/2011/04/lindsey-foreign-official-motion-denied.html.

262. *Noriega*, Crim. Mins. at 9.

263. *Id.* at 910. (CFE was created by statute as a 'decentralized *public* entity. Its Governing Board is comprised of various high-ranking government officials; it described itself as a government agency, and it performs a function the Mexican nation has described as a quintessential government function—the supply of electricity.).

As for the legislative history argument proffered argument by the defendants, Judge Matz found it inconclusive as to what Congress intended with regard to SOEs. *Id.* at 14.

264. United States v. Carson, Case No. 8:09-cr-00077-JVS, Dkt. No. 373 (C.D. Cal. May 18, 2011). Although the rulings in *Lindsey* and *Carson* are similar, Judge Selna sets out a framework for ascertaining the circumstances under which a SOE is not an "instrumentality" of a foreign government and, in turn, when employees of a SOE are not "foreign officials" under the FCPA. *See FCPA Update:*

former executives of Control Components, Inc., moved to dismiss the DOJ's indictment alleging that they violated the FCPA by making numerous, improper payments to employees of Chinese, Malaysian, South Korean, and United Arab Emirates-based SOEs.[265] In their motion, the defendants argued that "if the Government's view were adopted, even the janitor of a state-owned enterprise would be considered a government official."[266] In opposing the defendants' motion, the DOJ stated that it did not view the defendants' extreme examples as falling within the ambit of the term "foreign official," observing that "not all SOEs are, as a matter of law, agencies and instrumentalities."[267] "[S]ome SOEs may be instrumentalities," it asserted, "depending on the facts related to the entity."[268] The government did not offer a view, however, about the kind of factual scenarios that would cause an SOE to fall outside the scope of the term instrumentality.[269]

In rejecting the defendants' motion to dismiss, Judge Selna concurred with the DOJ view that whether an SOE qualifies as an instrumentality is a question of fact.[270] Judge Selna's decision makes clear, though, that mere ownership by a foreign state is insufficient to render an SOE an instrumentality of a foreign state.[271]

> [A] mere monetary investment by the government may not be sufficient to transform that entity into a governmental instrumentality. But when a monetary investment is combined with additional facts that objectively indicate the entity is being used as an instrument to carry out governmental objectives, that entity would qualify as a governmental instrumentality.[272]

Judge Selna went on to provide his own, non-exhaustive list of "additional facts" to be considered.[273] These include: (1) the foreign state's characterization of the entity and its employees; (2) the foreign state's degree of control over the entity; (3) the purpose of the entity's activities; (4) the entity's obligations and privileges under the foreign state's law (including whether the entity exercises exclusive or controlling power to administer its designated functions); (4) the circumstances surrounding the

---

*Carson Ruling, supra* note 255, at 4.

265. United States v. Carson, 8:09-cr-00077, Indictment at 12 (C.D. Cal. Apr. 8, 2009).

266. United States v. Carson, 8:09-cr-00077-JVS, Defendants' Notice of Motion and Motion to Dismiss Counts One Through Ten of the Indictment, Memorandum of Points and Authorities in Support Thereof at 16 (C.D. Cal. Feb. 21, 2011).

267. *Id.* at 12.

268. *Id.* The DOJ noted that the "terms are not coextensive." *Id.*

269. *FCPA Update: Carson Ruling, supra* note 255, at 5.

270. United States v. Carson, 8:09-cr-00077-JVS, Criminal Minutes – General at 5 (C.D. Cal. May 18, 2011). *See also FCPA Update: Carson Ruling, supra* note 255 at 5.

271. United States v. Carson, 8:09-cr-00077-JVS, Criminal Minutes – General at 5 (C.D. Cal. May 18, 2011) ("[S]imply assuming that a company is wholly owned by the state is insufficient for the Court to determine as a matter of law whether a company constitutes a government "instrumentality.").

272. *Id.* at 7.

273. *Id.* at 5.

entity's creation; and (6) the foreign state's extent of ownership (including the level of financial support by the state).[274]

*Lindsey* and *Carson* are landmark cases in that they represent the first significant effort to limit the government's historically broad latitude to define the terms "instrumentality" and "foreign official" by enforcement action. It appears unlikely, however, that the decisions will alter the government's trajectory with respect to FCPA enforcement actions generally, and the investment activity of SOEs in particular.[275] *Lindsey* and *Carson* clearly contemplate that at least some SOEs can be considered instrumentalities and that ownership and control are significant factors in assessing whether a given SOE qualifies.[276] Both cases failed to recognize, however, that it is the nature of such ownership and control that is dispositive. Judges Selna and Matz merely cited ownership and control as but two of several general categories of information that should be taken into account in conducting a fact-based analysis. In so doing, they missed an opportunity to articulate a more precise standard of ownership and control that could determine the conditions under which the application of the FCPA to SOEs is appropriate. This standard in turn could have provided valuable guidance to U.S. firms as they consider whether their potential strategic transactions with SWFs subject them to exposure under the FCPA.

## IV. Conclusion: A Call for Guidance

In 2008, Steve Tyrell, then-Chief of the DOJ Criminal Division's Fraud Section, suggested at a Securities Industry and Financial Markets Association conference that securities firms should consider SWF employees to be foreign officials.[277] In doing so, he foreshadowed the government's current view, as reflected in the SEC's probe of financial services firms' ties to SWFs. While academic arguments can be made that

---

274. *Id.*

275. In *Lindsey*, the company and two senior executives were ultimately found guilty after a jury trial, marking the first time in the FCPA's thirty-four year history that a case has ever gone to trial. *See* Jaeger, *supra* note 170. "In a statement after the verdict, Assistant Attorney General Lanny Breuer called the guilty verdicts "an important milestone" for FCPA enforcement efforts. . . . 'Lindsey Manufacturing is the first company to be tried and convicted on FCPA violations, but it will not be the last.'" *Id.*

276. *FCPA Update: Carson Ruling, supra* note 255, at 5; *see also* Jaeger, *supra* note 170, at 20 ("Until one decision finds in favor of the defense on the interpretation of foreign officials, you cannot expect to see many companies willing to take their case to trial") (quoting Sarah Wolff, Reed Smith).

277. *Are Sovereign Wealth Funds State-Owned Enterprises?*, COMPLIANCE BUILDING (Nov. 4, 2008), http://www.compliancebuilding.com/2008/11/04/are-sovereign-wealth-funds-state-owned-enterprises ("Mr. Tyrell was quoted: 'recent boom of sovereign wealth funds is an area at the top of the Justice Department's hit list.' Mr. Tyrell told *Financial Week* that 'the DOJ was looking at both passive and active investments by U.S. securities firms into sovereign funds, and vice versa.' [ . . . ] At a recent Securities Industry and Financial Markets Association conference, Mr. Tyrell indicated that securities firms should treat employees of sovereign wealth funds as government officials for purposes of the FCPA.").

this interpretation runs counter to Congressional intent,[278] as a practical matter the judiciary's recent efforts to define the terms "instrumentality" and "foreign official" in the context of SOEs are unlikely to prompt the government to revisit its position with respect to SWFs. If anything, the DOJ and the SEC may be emboldened to press forward with their efforts to extend the reach of the FCPA to these funds.[279]

At one level, the notion of holding U.S. firms accountable under the FCPA for acts of bribery in connection with their strategic unions with SWFs seems reasonable. Abu Dhabi Investment Authority ("ADIA") acquired a 5% stake in Citigroup for $7.5 billion in November 2007.[280] A year later, that investment was worth about $2 billion.[281] If Citigroup solicited ADIA's minority investment by paying bribes to ADIA employees, this would be a prima facie violation of the FCPA and a clear instance of foreign official corruption.

Much less clear, however, is whether the employees of that same U.S. firm ought to be deemed "foreign officials" following an investment by a SWF. Because SWFs are wholly owned by a government, the question is whether the companies in which they take an ownership interest can automatically be deemed "instrumentalities," and their employees "foreign officials." In *Lindsey*, the DOJ argued that "instrumentality" necessarily includes "any enterprise, regardless of its legal form, over which a government . . . may, directly *or indirectly*, exercise a dominant influence."[282] While SWFs are traditionally considered passive investors, there is nothing stopping a SWF from taking a more active ownership interest in a company.[283] When a SWF owns the majority of a company's shares and voting rights, and therefore has the ability to determine the

278. *See* Koehler Declaration, *supra* note 257. *See also supra*, Part II.A.

279. One report suggests that SWFs' use of quid pro quo arrangements could be the target of FCPA investigators. Rummell, *supra* note 221. SWFs are known to seek reciprocal investments from the companies they do business with. Paritosh Bansal, *Mideast Sovereign Funds Seek Reciprocal Investment*, REUTERS (Sept. 8, 2008, 7:46 PM), http://uk.reuters.com/article/2008/09/08/swf-mideast-idUKN0841486220080908. For instance, a SWF might agree to invest in a bank on the condition that the bank assists in developing the fund's local economy. *Id.* Although these arrangements seem to fit under the DOJ's broad application of "anything of value," it is difficult to see them as "corrupt" arrangements. In prohibiting payments that are made "corruptly," the FCPA implies that the briber must intend to "induce the recipient to misuse his official position[.]" H.R. REP. NO. 95-640, *supra* note 29, at 8. Is the fund manager misusing his position when he leverages the fund's wealth to secure a benefit for the fund's home country? What if the foreign government has directed the fund manager to secure these types of reciprocal investments? These quid pro quo arrangements where a bank agrees to conduct business in the SWF's home country do not seem to run afoul of the FCPA's prohibition of corrupt payments; rather, they are directly benefitting the government and its people. Nevertheless, the DOJ has always taken the broadest view of the FCPA, so firms engaging in these seemingly innocent arrangements should proceed with caution.

280. Langland, *supra* note 2, at 273–74.

281. *Id.* at 274.

282. Reply Brief of Petitioner, United States v. Noriega, 2:10-cr-01031 (quoting the OECD definition of "foreign official," not the FCPA definition) (emphasis added).

283. *See* Backer, *supra* note 185, at 66 (reasoning that SWFs could acquire controlling interests in operating entities).

company's leadership and affect the trajectory of its business, it arguably should be subject to the FCPA.

As the KBR and Alcatel-Lucent cases suggest, however, the government seems prepared to extend FCPA liability to the companies in which SWFs have less than a majority interest.[284] But where the SWF's investment is truly passive, extending the scope of the FCPA to such activity could have significant implications. For one thing, it can have a chilling effect on U.S. corporations' willingness to solicit investments by SWFs. Companies might think twice about selling a minority interest to a SWF if, in so doing, they believe they may subject themselves and their employees to FCPA liability.[285] At a minimum, uncertainty regarding whether the FCPA will apply to such companies will cloud their ability to rationally assess their exposure to potential legal liability. Further, applying the FCPA to corporations in which SWFs hold a minority interest can lead to illogical results. It would be odd, to say the least, if the DOJ and the SEC were to label all employees of Blackstone and Morgan Stanley to be "foreign officials" by reason of China Investment Corporation's minority investment in those firms.[286] This is a conceivable extension of the government's approach in KBR and Alcatel.

To address the frailties of the DOJ's current approach, clear guidance should be provided as to what constitutes sufficient control by a SWF to qualify an entity as an "instrumentality" and its employees "foreign officials." Simply put, Congress should amend, or the courts should interpret, the FCPA to articulate a standard of ownership and degree of control that a SWF must exercise over an entity to render that entity an "instrumentality" and its employees "foreign officials."[287] To define this standard, Congress or the courts can look to the Foreign Sovereign Immunities Act ("FSIA"),[288] the Foreign Investment and National Security Act of 2007 ("FINSA"),[289] and the OECD Convention for guidance.

Under the FSIA, a SWF may claim sovereign immunity, which grants foreign sovereigns and associated entities protection from U.S. civil

---

284. *See supra* Part III.3.

285. *See supra* Parts III.3, III.4.

286. Mike Koehler, *Sovereign Wealth Funds and the FCPA,* FCPA PROFESSOR BLOG (Mar. 8, 2010, 12:26 PM), http://fcpaprofessor.blogspot.com/2010/03/sovereign-wealth-funds-and-fcpa.html.

287. There is sufficient precedent for congressional intervention of this sort. When Congress revisited the FCPA in 1988, it did so in order to address concerns of the American business community, which had developed a fear of accidental non-compliance as a result of ambiguities in the language of the Act. *See supra* Part II.A. When then legislature returned ten years later to amend the FCPA yet again, it was in response to the OECD Convention and increased efforts at standardization of international norms concerning criminalization of bribery and other corrupt acts. *See id.* The first years of the 2010s provide a similar opportunity for Congress to address concerns regarding the government's broad latitude to define the contours of the terms "instrumentality" and "foreign officials."

288. Pub. L. No. 94-583 (1976), codified at 28 U.S.C. §§ 1330, 1332, 1391(f), 1441(d), and 1602–1611 (2006).

289. Pub. L. No. 110-49 (2007), codified in 31 C.F.R. 800 (2008). *See also* E.O. 13456 of Jan. 23, 2008 (implementing and altering FINSA).

liability, if the SWF is able to demonstrate that it falls within the aegis of the statute by being part of a "foreign state"[290] and that the SWF does not fall within any exception to the FSIA that would render a U.S. court's jurisdiction appropriate. To be so considered, SWFs must qualify as an "agency or instrumentality" of a foreign sovereign,[291] a standard virtually identical to the "instrumentality" requirement of the FCPA.[292] Unlike the FCPA, however, the FSIA actually defines "agency or instrumentality," requiring any such entity to be: 1) "a separate legal person," 2) "an organ of a foreign state or political subdivision thereof, *or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof*,"[293] and 3) "neither a citizen of a State of the United States . . . nor created under the laws of any third country."[294] The FSIA therefore establishes a presumption in favor of "instrumentality" status for entities that are majority owned by a foreign sovereign and, conversely, a presumption *against* instrumentality status for entities where foreign sovereigns hold a minority share.

The FINSA, which addresses foreign investment in the United States, takes a slightly different tack. The FINSA provides a safe harbor for partial acquisitions of domestic issuers solely for investment purposes. This rule exempts foreign owners from the application of the statute when they acquire ten percent or less of the outstanding voting shares for investment purposes.[295] Mirroring the approach it employed in the FSIA context, then, Congress or the courts can adopt a presumption *in favor* of "instrumentality" status when a foreign corporation holds a majority interest in a SWF, and *against* such status when it holds less than ten percent.[296]

---

290. 28 U.S.C. § 1603(a) (2005). Foreign states are defined in the FSIA as any foreign state, political subdivision of a foreign state, or "agency or instrumentality" of a foreign state. *Id.*

291. 28 U.S.C. § 1603(b) (2005).

292. *See, e.g.*, 15 U.S.C. § 78dd-1(f)(1)(A) (2006) (applying to cover transactions with "any such government or department, *agency, or instrumentality*" (emphasis added)).

293. 28 U.S.C. § 1603(b) (2005) (emphasis added). It bears noting that Congress does not appear to have intended to apply the FSIA to commercial activity,. *See* USX Corp. v. Adriatic Ins. Co., 345 F.3d 190, 207 (3d Cir. 2003) (citing H.R. Rep. No. 94-1487 at 7 (1976) to suggest that "[i]n passing the FSIA, Congress adopted the so-called restrictive theory of sovereign immunity, whereby a foreign state (including its agencies and instrumentalities) is immune from suit for its public or sovereign activities, but not for its commercial or private activities."). The House Report on the FSIA noted, however, that the following might be considered agencies or instrumentalities: "a state trading corporation, a mining enterprise, a transport organization such as a shipping line or airline, a steel company, a central bank, [or] an export association." H.R. Rep. No. 94-1487 at 15–16 (1976).

294. 28 U.S.C. § 1603(b) (2005).

295. 31 C.F.R. § 800.302(d) (2008). This presupposes that the foreign company has no intent to actively involve itself in the business decisions of the acquisitions.

296. *See id.* for language Congress may consider adopting. The regulation describes, as a possible transaction not subject to FINSA and Committee on Foreign Investment in the United States ("CFIUS"),

> [a] purchase of voting securities or comparable interests in a United States person solely for the purpose of investment, as defined in §800.219, if, as a result of the acquisition, (1) The foreign person would hold ten percent or less of the outstanding voting securities of the U.S. person, regardless of the dollar value of the voting securities so acquired or held, or (2) The purchase is made directly by a bank, trust company, insurance company, investment, company, pension fund,

While the FSIA and the FINSA can be leveraged to establish presumptions based on percentages of ownership interest, it is of limited use in defining what manner of control would alter those presumptions.[297] To define the full contours of the "instrumentality" and "foreign official" requirements, Congress or the courts should look to the OECD Convention. As discussed in Part II, the OECD Convention included within the ambit of "foreign public official" "any person exercising a public function for a foreign country, including for a . . . *public enterprise.*"[298] "Public enterprise" is defined as "any enterprise, regardless of its legal form, over which a government, or governments, may, directly or indirectly, exercise a dominant influence."[299] A "dominant influence" exists when, among other things, "the government or governments hold the majority of the enterprise's subscribed capital, *control the majority of votes attaching to shares issued by the enterprise or can appoint a majority of the members of the enterprise's administrative or managerial body or supervisory board.*"[300]

Applying this "dominant influence test", a SWF would be considered an "instrumentality" if its foreign state sponsors controlled the voting rights or otherwise had the ability to appoint a majority of the members of the SWF's board or senior management. This would be the case irrespective of the percentage of ownership interest the foreign state maintained. The OECD Convention's emphasis on these attributes of

---

employee benefit plan, mutual fund, finance company or brokerage company in the ordinary course of business for its own account, provided that a significant portion of that business does not involve the acquisition of entities.

297. Under the FSIA, control has no dispositive value in instrumentality status determinations absent majority ownership by a foreign state. Dole Food Co. v. Patrickson, 538 U.S. 468, 477 (2003) ("Majority ownership by a foreign state, not control, is the benchmark of instrumentality status. . . . A corporation is an instrumentality of a foreign state under the FSIA only if the foreign state itself owns a majority of the corporation's shares.").

While judicial interpretative guidance on the FSIA extends beyond the scope of the present Article, it suffices to say that the various federal appellate courts have found cause to develop mechanisms beyond mere ownership, reading these factors into the "organ" element of the definition of instrumentality and avoiding altogether the problematic ownership interest analysis. For instance, the Ninth Circuit has noted that "the ultimate question is 'whether the entity engages in a public activity on behalf of the foreign government.'" PowerEx Corp. v. Reliant Energy Servs., 391 F.3d 1011, 1026 (9th Cir. 2004). Presaging Judge Selna, the Fifth Circuit has employed a test that analyzes "(1) whether the foreign state created the entity for a national purpose; (2) whether the foreign state actively supervises the entity; (3) whether the foreign state requires the hiring of public employees and pays their salaries; (4) whether the entity holds exclusive rights to some right in the [foreign] country; and (5) how the entity is treated under foreign state law." Kelly v. Syria Shell Petroleum Dev. B.V., 213 F.3d 841, 846–47 (5th Cir. 2000) (citing Med. Corp. v. McGonigle, 955 F.Supp. 374, 379 (E.D.Pa. 1997)). The Third Circuit augments the Ninth and Fifth Circuits, adding "the ownership structure of the entity" as a consideration into whether the entity is an instrumentality for FSIA purposes, while stressing that the entity "must engage in a public activity on behalf of the foreign government. Requiring less would open the door to situations in which a party only tangentially related to a foreign state could claim foreign state status." *USX Corp.*, 345 F.3d at 209.

298. OECD Convention, *supra* note 61, at Art. 1 (emphasis added).

299. *Id.*

300. *Id.* (emphasis added).

actual control provides precisely the kind of clear guidance than can assist in determining whether a company is an instrumentality of a SWF. These are characteristics that are easily discoverable by diligent U.S. companies considering soliciting investments by SWFs.[301] Curiously, Congress declined to adopt the "dominant influence" test when enacting the conforming amendments to the FCPA in 1998, thereby depriving these companies of such transparency.

On June 14, 2011, former United States Attorney General Michael B. Mukasey testified before Congress in support of amending the FCPA to provide greater certainty to businesses that are trying to comply with the Act.[302] Judge Mukasey asserted, among other things, that the FCPA should be amended to clarify the meaning of "instrumentality" and "foreign official."[303] Specifically, he argued that the statute should indicate the percentage ownership by a foreign government that will qualify a company as an "instrumentality," "with majority ownership as the most plausible threshold," and to what extent "control" by a foreign government will qualify as an "instrumentality."[304] In pressing his case, Judge Mukasey noted the challenges U.S. companies face in the absence of such clarity:

> If the definitions of these fundamental statutory terms vary by circumstance and by case, and therefore must be determined by a jury rather than as a matter of law, it becomes impossible for companies to determine in advance what conduct may and may not present a meaningful risk of violating the FCPA . . . . Without a clear understanding of the parameters of "instrumentality" and "foreign official," companies have no way of knowing whether the FCPA applies to a particular transaction or business relationship, particularly in countries like China where most if not all companies are at least partially owned or controlled by the state.[305]

Congress or the courts should respond to Judge Mukasey's appeal.[306] Leveraging the templates provided by the FSIA and OECD

---

301. The OECD Convention defines "public function," as "any activity in the public interest, delegated by a foreign country, such as the performance of a task delegated by it in connection with public procurement." *Id.* at Commentary ¶ 15. While this may bring within its fold SOEs or SWFs, the Convention suggests that "[a]n official of a public enterprise . . . perform[s] a public function unless the enterprise operates on a normal commercial basis in the relevant market, i.e., on a basis which is substantially equivalent to that of a private enterprise, without preferential subsidies or other privileges." *Id.* at ¶ 15.

302. *The Foreign Corrupt Practice Act: Hearing Before the Crime, Terrorism, and Homeland Sec. Subcomm. of the H. Judiciary Comm.*, 112 th Cong. 8 (2011) (written statement of former AG Michael Mukasey), *available at* http://judiciary.house.gov/hearings/pdf/Mukasey06142011.pdf.

303. *Id.* at 8.

304. *Id.*

305. *Id.*

306. While the district courts in *Lindsey* and *Selna* failed to articulate functional standards for these terms (*see infra* notes 251–276 and accompanying text), it appears that the judiciary will shortly be presented with another opportunity to do so. In December 2011, Carlos Rodriguez, a former telecommunications executive who was convicted in October 2011 in the United States District Court for the Southern District of Florida for bribing employees of Telco, Haiti's state-owned

Convention, much needed content should be injected into the "instrumentality" and "foreign official" requirements. By establishing majority share ownership as a standard of presumptive control, and by delineating other elements of "dominant influence" such as majority voting rights and the ability to appoint the majority of directors and senior managers, Congress or the courts will permit U.S. companies to make rational assessments of their FCPA exposure when structuring strategic unions with SWFs.

---

telecommunications company, disclosed his intent to appeal his conviction in part based on the district court's interpretation of the terms "foreign official" and "instrumentality" under the FCPA. Appellant Carlos Rodriguez's Motion for Release Pending Appeal, United States v. Carlos Rodriguez, No 11-15331-C (December 29, 2011) at 7–14. Specifically, Rodriguez argued that the district court abused its discretion in refusing to adopt his proposed jury instruction defining "instrumentality" as "part of the foreign government itself." *Id.* at 7. Instead, the court instructed the jury that an instrumentality was "a means or agency through which a function of the foreign government is accomplished." *Id.* at 7–8. Rodriguez argued that this definition "impermissibly broadened the reach of the statute," and deprived him of the defense that Telco was not an instrumentality of the Haitian government. *Id* at 8–13.

The *Rodriguez* case marks the first time the question of how to define "foreign official" and "instrumentality" will be addressed at the appellate level. *See* Christopher Matthews, *The Big Test for the FCPA's Foreign Official Definition?*" CORRUPTION CURRENTS BLOG, (Jan. 3, 2012, 6:02 PM), http://blogs.wsj.com/corruption-currents/2012/01/03/the-big-test-for-the-fcpas-foreign-official-definition/. The Eleventh Circuit should capitalize on this opportunity and apply the "dominant influence" test.

# ARTICLE

## Providing Immigration Advice During Criminal Proceedings: Preempting Ineffective Assistance of Counsel Claims When Non-Citizen Aliens Seek to Withdraw Guilty Pleas to Avoid Adverse Immigration Consequences

By Maryellen Meymarian*

Abstract

Criminal aliens have long been deported from the United States. In the past decade, U.S. Immigration and Customs Enforcement (ICE) has stepped up efforts to identify, detain, and remove criminal aliens incarcerated across all jurisdictions. The possible immigration consequences of criminal actions are now at the forefront of many criminal pleas. The Supreme Court's recent decision in *Padilla v. Kentucky* now mandates that defense counsel inform non-citizen alien clients whether a possible criminal plea carries a risk of deportation. The complexities of the Immigration and Nationality Act (INA) only add to the difficulties faced by defense attorneys when providing advice to non-citizen aliens concerning pleading to criminal dispositions. Failure to provide competent and accurate advice concerning potential deportation consequences now clearly constitutes a Sixth Amendment violation. This Article examines how an alien's residence status may be altered by a criminal plea; how all parties in the criminal justice system need to understand the potential immigration consequences of a given plea; and steps that should be taken to preempt future attempts to

---

*J.D., C.P.P., Adjunct Professor, George Mason University; former Associate Legal Advisor and Assistant Chief Counsel for the Department of Homeland Security (DHS), Immigration and Customs Enforcement (ICE) and former Assistant District Attorney for the New York County District Attorney's Office.

withdraw convictions based on a failure to inform an alien of potential immigration consequences.



## I. Introduction

Deportation from the United States by immigration officials has always been a potential consequence of a criminal plea. However, with the growing implementation of Secure Communities[1]—the U.S. Immigration and Customs Enforcement's (ICE) plan to identify, detain, and remove criminal aliens incarcerated across all jurisdictions—the possible immigration consequences of criminal actions are now at the forefront of many criminal pleas.[2] The complexities of the Immigration and Nationality

1. *See* Press Release, U.S. Immigration and Customs Enforcement, ICE Unveils Sweeping New Plan to Target Criminal Aliens in Jails Nationwide (Mar. 28, 2008) http://www.ice.gov/news/releases/0804/080414washington.htm. *See also Secure Communities*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, http://www.ice.gov/secure_communities/ (last visited Jan. 3, 2012); *Criminal Alien Program*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, http://www.ice.gov/criminal-alien-program/ (last visited Jan. 3, 2012).

2. In the last several years, ICE has significantly increased deportations for criminal aliens. The numbers have increased from 102,024 in fiscal year 2007, to 114,415 in fiscal year 2008, to 136,343 in

Act (INA)[3] only add to the difficulties now faced by defense attorneys when providing advice to non-citizen aliens concerning pleading to criminal dispositions.[4]

The Supreme Court's recent decision in *Padilla v. Kentucky*[5] now mandates that defense counsel inform non-citizen alien[6] clients whether a possible criminal plea carries a risk of deportation. Although the penalty of deportation is "uniquely difficult to classify as either a direct or a collateral consequence,"[7] the Court restated its prior holding that deportation, as a consequence of a criminal conviction, is a "particularly severe penalty."[8] As such, failure to provide competent and accurate advice concerning potential deportation consequences constitutes a Sixth Amendment violation.[9] Additionally, when immigration consequences are "succinct, clear, and explicit," defense counsel must provide accurate advice as to possible immigration risks.[10] Although this decision directly affects defense counsel, prosecutors and judges must preserve limited judicial resources and affirmatively seek to prevent future ineffective assistance of counsel claims by defendants.[11]

---

fiscal year 2009, and finally 195,772 in fiscal year 2010. *See ICE Total Removals*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, http://www.ice.gov/doclib/about/offices/ero/pdf/ero-removals.pdf (last visited Jan. 3, 2012).

3. The Immigration and Nationality Act (INA) was originally created in 1952 and has been codified at 8 U.S.C. The INA has been modified numerous times by Congress. *See Immigration and Nationality Act*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, http://www.uscis.gov/portal/site/uscis (follow "LAWS" on top bar; then follow "Immigration Nationality Act" on page) (last visited Jan. 3, 2012).

4. The Department of Justice (DOJ), The Executive Office for Immigration Review (EOIR) provides free updated professional materials to aid counsel in understanding the INA. *See, e.g.*, CHARLES A. WIEGAND, III, FUNDAMENTALS OF IMMIGRATION LAW (2011), *available at* http://www.justice.gov/eoir/vll/benchbook/resources/Fundamentals_of_Immigration_Law.pdf. State-specific materials are also available. The Immigrant Defense Project has "Quick Reference Charts" for various states, including New York, New Jersey, Connecticut, Vermont, and Pennsylvania. *See* IMMIGRANT DEFENSE PROJECT, http://immigrantdefenseproject.org/?s=quick+reference (last visited Jan. 3, 2012). *See also* MARY HOLPER, REFERENCE GUIDE TO THE BASIC IMMIGRATION CONSEQUENCES OF SELECT VIRGINIA OFFENSES (2007), *available at* http://www.lexisnexis.com/Community/immigration-law/cfs-filesystemfile.ashx/__key/CommunityServer.Components.SiteFiles/ImmigrationLawPDFs/Virginia-Reference-Guide-TOTAL.pdf; BECKY SHARPLESS, FLORIDA IMMIGRANT ADVOCACY CTR., QUICK REFERENCE GUIDE TO THE BASIC IMMIGRATION CONSEQUENCE OF SELECT FLORIDA CRIMES (2003), *available at* http://www.nationalimmigrationproject.org/legalresources/cd_so_Guide%20-%20Florida%20Offenses%20-%202003.pdf.

5. Padilla v. Kentucky, 130 S. Ct. 1473 (2010).

6. An alien is defined as "any person not a citizen or national of the United States." Immigration and Nationality Act (INA) § 101(a)(3), 8 U.S.C. § 1101(a)(3) (2011).

7. *Padilla,* 130 S. Ct. at 1482.

8. *Id.* at 1481 (citing Fong Yue Ting v. United States, 149 U. S. 698, 740 (1893)).

9. *See id.* at 1482.

10. *See id.* at 1483.

11. The Court acknowledged the need for the government prosecutor to actively be informed of potential immigration consequences for defendant alien: "[I]nformed consideration of possible deportation can only benefit both the State and noncitizen defendants during the plea-bargaining process. By bringing deportation consequences into this process, the defense and prosecution may well

Immigration law is rarely clear and always changing.[12] Adding to the uncertainty, immigration statutes generally articulate categories of crimes, such as crimes involving moral turpitude (CIMTs),[13] controlled substances,[14] or aggravated felonies[15] that would require the initiation of removal proceedings.[16] Determining which statutes apply is not always straightforward, as is demonstrated by numerous court decisions at the administrative and federal level.

Immigration terminology also differs from the common understanding of most criminal practitioners. Terms such as an "aggravated felony offense" apply to crimes not generally thought of as aggravated in the criminal context. Furthermore, evaluating whether a plea to a criminal statute may result in removal requires specific knowledge regarding whether a specific part of a divisible statute results in removal and which part of the statute would not trigger a removal proceeding.[17] Additionally, virtually any criminal convictions could preclude a finding of good moral character and thereby reduce an alien's chance of obtaining certain types of immigration relief and benefits.

Immigration law provides for two separate means of removal based on criminal offenses. Aliens lawfully admitted to the U.S., as lawfully permanent residents or as nonimmigrants, are deported pursuant to grounds articulated in INA § 237(a), 8 U.S.C. § 1227(a). Aliens seeking admission, or petitioning to lawfully remain in the U.S., must be admissible under the INA pursuant to lawful status and not ineligible for admission because of criminal acts pursuant to INA § 212(a)(2), 8 U.S.C. § 1182(a)(2). During removal proceedings, aliens may be represented by counsel; however, legal counsel is not appointed or provided for free by the government.[18]

The intricacy between which criminal convictions permit an alien to remain in the U.S. and which convictions require removal are litigated vigorously in the immigration courts on a daily basis. In some instances, non-citizen aliens facing removal may be allowed to remain in the U.S. if they are granted discretionary relief. Discretionary relief may include

---

be able to reach agreements that better satisfy the interests of both parties." *Id.* at 1486.

12. "Immigration law can be complex, and it is a legal specialty of its own." *Id.* at 1483.

13. *See* INA § 212(a)(2)(A)(i)(I), 8 U.S.C. § 1182(a)(2)(A)(i)(I) (2011); INA § 237(a)(2)(A)(i), 8 U.S.C. § 1227(a)(2)(A)(i) (2011).

14. *See* INA § 212(a)(2)(A)(i)(II), 8 U.S.C. § 1182(a)(2)(A)(i)(II) (2011); INA § 237(a)(2)(B), 8 U.S.C. § 1227(a)(2)(B) (2011).

15. *See* INA § 101(a)(43), 8 U.S.C. § 1101(a)(43) (2011); INA § 237(a)(2)(A)(iii), 8 U.S.C. § 1227(a)(2)(A)(iii) (2011).

16. *See* INA § 240, 8 U.S.C. § 1229a (2011); *see also* 8 C.F.R. Part 1240 (2011).

17. *In re* Almanza-Arenas, 24 I. & N. Dec. 771, 773 (B.I.A. 2009) (holding that when a statute is divisible, the alien has the burden of establishing that the conviction was pursuant to the part of the statute that does not involve moral turpitude).

18. "In any removal proceedings before an immigration judge . . . the person concerned shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose." INA § 292, 8 U.S.C. § 1362 (2011).

adjustment of status[19] or cancellation of removal.[20] Humanitarian relief may be discretionary or mandatory relief such as asylum, withholding of removal, or Convention Against Torture (CAT) protection.[21] All aliens with criminal convictions, irrespective of the serious nature of the crime, may seek mandatory protection from removal if the alien's life or freedom would be threatened if returned to their country of citizenship.[22]

Furthermore, there are circumstances in which criminal aliens simply cannot be returned to their home countries. These include the failure to obtain an international treaty to permit aliens to be returned; the lack of a recognized government in power; or a refusal by a foreign government to issue a travel document.[23] At the same time, even if removal to certain countries may not be effectuated at this time, it is possible in the future those conditions could change and removal may be possible in the future. A non-citizen should never be assured or promised that discretionary or mandatory relief will be granted in immigration proceedings.

The complexities of the INA now place defense counsel in an untenable position when counseling a non-citizen client. Although there is great debate whether *Padilla v. Kentucky* should be applied retroactively or as a new rule, this article focuses on the need for defense counsel to provide general immigration advice to prevent future claims of ineffective assistance of counsel. Prosecutors and judges should also actively seek to prevent future ineffective assistance claims by understanding when potential immigration consequences will apply to guilty pleas and by making the record clear that the defendant is aware of the possible consequences.

So that all parties to the criminal proceeding can adequately determine the possible immigration consequences of a plea disposition, defendants should clearly acknowledge their general immigration status. A defendant's immigration status will rarely be clear on a rap sheet or police report, and it may be outright wrong.[24] If the defendant fails to articulate his general immigration status or declines to provide accurate information to the prosecution as part of the negotiation process, then the alien should

---

19. *See, e.g.*, INA § 204, 8 U.S.C. § 1154 (2011); 8 C.F.R. § 1245.10 (2011).

20. *See, e.g.*, INA § 240A, 8 U.S.C. § 1229b (2011).

21. *See* 8 C.F.R. § 208 (2011).

22. *See* 8 C.F.R. §§ 1208.16–.17 (2011).

23. *See* INA § 241(b), 8 U.S.C. § 1231(b) (2011). However, recent statistics indicate that removals have been made in some instances to virtually every country worldwide. *See generally* OFFICE OF IMMIGRATION STATISTICS, 2009 YEARBOOK OF IMMIGRATION STATISTICS (2010), *available at* http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2009/ois_yb_2009.pdf.

24. ICE acknowledges that fingerprints taken prior to 2005 may not be in the IDENT database. *See* Tom Jackman, *Rape Suspect's Fingerprints Not in ICE Database*, WASH. POST., Mar. 25, 2011, at B5. Only individuals processed by ICE will have their fingerprints in the IDENT system. *See id.* Therefore, aliens who entered illegally but were not caught by immigration officials, or aliens who simply overstayed their visa, would not be in the IDENT database.

be prevented from receiving any favorable plea disposition by government prosecutors. Prosecutors have an affirmative obligation to prevent future claims arising under *Padilla*, and since the process is completely voluntary on the defendant's part, the alien defendant has the choice to disclose his immigration status or plea without any offers of consideration. Without affirmative steps by the prosecution, any alien's plea may be overturned on appeal when the alien asserts misadvice by counsel.

A defendant always has the right to assert a Fifth Amendment claim when the alien's immigration status relates to the element of a present or future criminal charge.[25] The Court has held that an alien does not have "to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings."[26] A valid argument exists that ICE could use the alien's immigration acknowledgement in a criminal proceeding to seek a future removal, but removal is a civil proceeding, not a criminal one. However, if an alien wishes to contest the advice given by his counsel under the *Padilla* decision, the alien will, at some point in the proceedings, have to reveal his actual immigration status to indicate that wrong advice was given. Aliens generally do not dispute their legal or illegal immigration admission status during removal proceedings, but rather contest removal on the basis of other legal grounds or seek relief options available to them.[27]

A distinct legal difference needs to be made if a defendant has entered the U.S. illegally, has overstayed the permitted term of visa admission, or has reentered the U.S. illegally after previously being removed. In these instances, the alien defendant is not in legal status and has no legal claim to presently remain in the U.S. Any relief sought by the unlawfully present alien to remain in the U.S. is only speculative, not subject to *Padilla*, and should not be considered by the prosecution when plea considerations are made.[28] Additionally, in the event that a defendant falsely asserts a claim to U.S. citizenship, then *Padilla* does not apply and should not be allowed to be raised later. A false claim to U.S. citizenship is

---

25. The Fifth Amendment provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V.

26. Baxter v. Palmigiano, 425 U.S. 308, 316 (1976) (quoting Lefkowitz v. Turley, 414 U.S. 70, 77 (1973)).

27. Aliens charged under INA Section 212 have the burden of proof to demonstrate they are admissible in the U.S. already. *See* INA § 291, 8 U.S.C. § 1361 (2011). For aliens who lawfully enter and are deportable under INA Section 237, the government has the burden of proof. *See* INA § 240(c)(3), 8 U.S.C. § 1229a(c)(3) (2011). The government can demonstrate lawful entry through the use of computer records or alien files to document the alien's lawful entry into the U.S.

28. *Padilla* addressed advice being given to a permanent resident who was lawfully in the U.S. rather than an alien who may have some speculative relief available if placed in removal proceedings. "The consequences of Padilla's plea could easily be determined from reading the removal statute, his deportation was presumptively mandatory, and his counsel's advice was incorrect." Padilla v. Kentucky, 130 S. Ct. 1473, 1483 (2010).

also a removable offense[29] and is not subject to a general waiver.[30]

As part of any favorable criminal plea disposition, it is recommended that the government require that the defendant acknowledge: (1) the alien's general immigration status; (2) that the defendant has been advised of his rights under *Padilla*; (3) that there are potentially several immigration consequences as a result of the guilty plea, including a permanent bar to living in the U.S.;[31] (4) that the defendant could be detained during the pendency of immigration proceedings;[32] and (5) that no promises have been made that the defendant would not be detained or deported by ICE.[33] The alien may also need to provide additional residency and admission information if the alien wishes the government to assess the alien's eligibility to apply for certain relief from removal. For example, a plea disposition that allows an alien's sentence to be 364 days, as opposed to one year, may only matter if the alien can meet the minimum residency qualifications necessary to seek relief from removal.[34] An alien should not receive a favorable sentence, for immigration purposes, unless the alien can demonstrate that he is actually eligible and likely to receive some form of relief from removal.

Also, non-legal permanent residents should be aware that certain crimes may permit ICE to administratively remove the alien and there will not be an opportunity to apply for discretionary relief before an immigration judge.[35] Additionally, a defendant should also be required to acknowledge prior to a criminal trial that he has received advice pursuant to *Padilla* and

---

29. A criminal conviction is not required to sustain a removal charge when an alien asserts a false claim to U.S. citizenship. *See* INA § 212(a)(6)(C)(ii)(I), 8 U.S.C. § 1182(a)(6)(C)(ii)(I) (2011); INA § 237(a)(3)(D)(i), 8 U.S.C. § 1227(a)(3)(D)(i) (2011).

30. The only waiver for a false claim to U.S. citizenship is if (1) there is a reasonable belief by the alien; (2) the alien's parents are or were U.S. citizens; and (3) the alien was a permanent resident prior to age 16. *See* INA § 212(a)(6)(C)(ii)(II), 8 U.S.C. § 1182(a)(6)(C)(ii)(II) (2011); INA § 237(a)(3)(D)(ii), 8 U.S.C. § 1227(a)(3)(D)(ii) (2011).

31. Even in the event that the present conviction does not make the alien removable, this conviction, in conjunction with future convictions, could contribute to the alien's removal. *See Padilla*, 130 S. Ct. at 1481 n.8 ("The disagreement over how to apply the direct/collateral distinction has no bearing on the disposition of this case because, as even Justice Alito agrees, counsel must, at the very least, advise a noncitizen 'defendant that a criminal conviction may have adverse immigration consequences.'") (internal citation omitted).

32. *See* 8 C.F.R. § 1236.1(b) (2011) ("At the time of issuance of the notice to appear, or at any time thereafter and up to the time removal proceedings are completed, the respondent may be arrested and taken into custody . . . ."); *see also In re* Rojas, 23 I&N Dec. 117 (B.I.A. 2001). A criminal alien who is released from criminal custody is subject to mandatory detention pursuant to INA 236(c), even if not immediately taken into custody by ICE when released from incarceration. *See In re* Kotliar, 24 I&N Dec. 124 (B.I.A. 2007).

33. *See* INA § 236, 8 U.S.C. § 1226 (2011) (giving a great deal of discretion to the Attorney General and ICE).

34. *See* INA § 240A(a), 8 U.S.C. § 1229b(a) (2011) (detailing the residency requirements for cancellation of removal for certain permanent residents).

35. INA § 238(b)(3), 8 U.S.C. § 1228(b)(3) (2011).

fully discussed the immigration consequence of any possible plea offers. While the defendant in *Padilla* was adversely affected by pleading guilty, a defendant could likely also make a claim of ineffective assistance of counsel if counsel fails to discuss the potential *advantages* of taking a plea rather than going to trial, particularly when an offered plea may not have resulted in similar immigration consequences.

## II. Determining a Defendant's Citizen and Immigration Status

In seeking to provide advice pursuant to *Padilla*, or to simply understand the immigration consequences of any criminal plea, one must first determine the individual's citizenship status and then look to the nature of the criminal conviction. A citizenship determination may require a complicated analysis and examination of the naturalization laws as applied to an alien during a specific period of time and which have changed significantly over the years. As a U.S. citizen cannot be deported,[36] the ramifications of who is a U.S. citizen now matter greatly when examining the potential consequence of a criminal disposition. Generally, a person born in the U.S. is automatically a U.S. citizen.[37] Citizenship for individuals born outside of the U.S. may only be acquired though Acts of Congress.[38] U.S. citizenship by either parent at the time of an individual's birth or adoption, or through the naturalization of a parent, may or may not convey U.S. citizenship on an individual.[39]

The nationality of a single parent is not the only determining factor. For instance, acquisition of citizenship or derivative citizenship may require U.S. citizenship or naturalization of both parents, the presence of the non-citizen in the United States for a residential period, and the lawful admission of the non-citizen as a permanent resident.[40] Additionally, children born out of wedlock may also need to determine whether paternity was established pursuant to the laws of the country of birth and at the time of birth.[41] Stepchildren who are not adopted are not eligible to derive

---

36. *See, e.g.*, Fierro v. INS, 81 F. Supp. 2d 167, 168 (D. Mass. 1999) (discussing that Fierro defended his own deportation on the grounds that he was an American citizen).

37. INA § 301(a), 8 U.S.C. § 1401(a) (2011). Children born to foreign government officials entitled to diplomatic privileges in the United States are not entitled to citizenship by birth. U.S. Const. amend. XIV, § 1.

38. Miller v. Albright, 523 U.S. 420, 423 (1998).

39. *See, e.g.*, INA §§ 301, 303, 309, 324, 8 U.S.C. §§ 1401, 1403, 1409, 1435 (2011) (dealing with both "nationality at birth" and "nationality through naturalization").

40. *See In re* Nwozuzu, 24 I. & N. Dec. 609, 610 (B.I.A. 2008) (applying these requirements under former INA § 321(a), 8 U.S.C. § 1432(a) (1994)).

41. *See In re* Rowe, 23 I. & N. Dec. 962, 966–67 (B.I.A. 2006) (holding that under former INA § 321(a)(3), 8 U.S.C. § 1432(a)(3) (1994), a child born out of wedlock—absent subsequent marriage of the natural parents—was illegitimate under Guyanese law and therefore did not make the child a U.S. citizen upon the naturalization of his mother); *In re* Hines, 24 I. & N. Dec. 544, 547 (B.I.A. 2008) (same under former INA § 321(a)(3), 8 U.S.C. § 1432(a)(3) (1988), applying Jamaican law). When determining acquisition or derivation of citizenship based upon the natural father's citizenship at the time of birth, INA § 101(c) requires the child's legitimating. *See also* INA §§ 301 and 309.

citizenship from a stepparent.[42]

The burden of proof to establish eligibility for acquired or derivative citizenship lies with the petitioner.[43] An individual with a valid claim to U.S. citizenship through parental lineage should affirmatively file an N-600[44] application with the U.S. Citizenship and Immigration Services (USCIS) for a determination on citizenship status. A determination that a foreign born individual has a valid claim to U.S. citizenship should never be assumed or relied upon to make a recommendation for plea purposes.

Application times for processing the N-600 vary significantly and it is unlikely that a final determination on citizenship may be obtained prior to the completion of criminal proceedings. USCIS's web site provides general processing times for these applications so that a general idea can be obtained as to the time it will take for an initial USCIS determination.[45] A negative decision from USCIS can be appealed to the Administrative Appeals Office (AAO).[46] Upon exhaustion of the administrative appeals process, an individual may sue in the U.S. District Court under 8 U.S.C. § 1503(a).

A non-citizen may also be eligible for naturalization if certain criteria have been met. Naturalization confers citizenship on an individual after birth.[47] Generally, only lawful permanent residents may apply for naturalization; however, some limited exceptions do exist.[48] U.S. citizenship through naturalization is not completed by simply filing the N-400 naturalization application.[49] Naturalization[50] requires an Oath of Allegiance to the U.S., generally administered in a formal naturalization ceremony.[51] Naturalization applicants must demonstrate good moral character,[52] and a criminal conviction could temporarily or permanently bar

---

42. *See In re* Guzman-Gomez, 24 I. & N. Dec. 824, 824–26 (B.I.A. 2009).

43. Berenyi v. Dist. Dir., INS, 385 U.S. 630, 636–37 (1967).

44. Instructions detail which aliens qualify to fill out an N-600 form. *See* USCIS, FORM N-600, APPLICATION FOR CERTIFICATE OF CITIZENSHIP, *available at* http://www.uscis.gov/files/form/n-600instr.pdf.

45. *See* USCIS PROCESSING TIME INFORMATION, USCIS.GOV, https://egov.uscis.gov/cris/processTimesDisplayInit.do (last visited Jan. 3, 2012).

46. *See generally* THE ADMINISTRATIVE APPEALS OFFICE (AAO), USCIS.GOV, http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=dfe316685e1e6210VgnVCM100000082ca60aRCRD&vgnextchannel=dfe316685e1e6210VgnVCM100000082ca60aRCRD (last visited Jan. 3, 2012).

47. INA § 101(a)(23), 8 U.S.C. § 1101(a)(23) (2011).

48. *See, e.g.*, USCIS, FORM M-480, NATURALIZATION ELIGIBILITY WORKSHEET INSTRUCTIONS, *available at* http://www.uscis.gov/files/article/attachments.pdf (including a checklist that states "You are not eligible to apply for naturalization" if the applicant is not a permanent resident). *See also* 8 INA § 329, 8 U.S.C. § 1440, and 8 INA § 329, 8 U.S.C. § 1446.

49. *See In re* Navas-Acosta, 23 I. & N. Dec. 586, 587 (B.I.A. 2003) (holding that respondent did not attain the status of a "national" of the United States "by applying for naturalization and taking an oath of allegiance").

50. *See* INA § 316, 8 U.S.C. § 1427 (2011); 8 C.F.R. Part 316 (2011).

51. *See* INA § 337, 8 U.S.C. § 1448 (2011).

52. *See* INA § 316(e), 8 U.S.C. § 1427(e) (2011) (referencing the burden of the applicant to

an application from being approved.[53] In general, most criminal convictions resulting in a temporary or permanent bar to naturalization could also result in the initiation of removal proceedings.

A. Lawful Permanent Resident

A Lawful Permanent Resident (LPR),[54] commonly referred to as a "Green Card" holder, has been accorded the privilege of residing permanently in the United States. However, an LPR is subject to removal from the U.S. or may be inadmissible to the U.S. for many, but not all crimes. Furthermore, there may also be situations where a criminal conviction may not make the individual removable on the first conviction, but may make the individual removable or inadmissible after a subsequent conviction.[55]

Even if determined to be removable in immigration proceedings,[56] an LPR may be eligible to apply for some forms of discretionary or mandatory relief.[57] For example, a form of discretionary relief includes Cancellation of Removal. This provision of the INA allows grounds of inadmissibility or deportability to be cancelled if the LPR: (1) has been lawfully admitted for permanent residence for not less than 5 years; (2) has resided in the U.S. continuously for 7 years after having been admitted in any status; and (3) has not been convicted of any aggravated felony.[58]

Even if eligible to apply for relief, there is no guarantee that an LPR will be granted the discretionary or mandatory relief from removal desired. Most relief from removal is discretionary and requires that the alien not only demonstrate eligibility, but demonstrate compelling reasons why the alien should be granted the relief sought.[59] Furthermore, if the immigration proceedings are held close in time to the conviction, the LPR may not be able to demonstrate many positive rehabilitation factors to make an

---

demonstrate good moral character). Good moral character is not solely tied to criminal activity. A court may find that an alien failed to demonstrate good moral character when the alien: practiced or is practicing polygamy; earns his or her income principally from illegal gambling activities; is or was a habitual drunkard; willfully failed or refused to support dependents; or even had an extramarital affair which tended to destroy an existing marriage. 8 C.F.R. § 316.10(b) (2011). *See also* INA § 101(f), 8 U.S.C. § 1101(f) (2011).

53. For example, a simple DWI offense is generally not a removable offense. However, a DWI arrest and/or conviction may be used to bar naturalization under the provision related to being a habitual drunkard. *See* 8 C.F.R. § 316.10(b)(2)(xii) (2011).

54. INA § 101(a)(20), 8 U.S.C. § 1101(a)(20) (2011).

55. *See generally* INA § 212(a)(2)(B), 8 U.S.C. § 1182(a)(2)(B) (2011); INA § 237(a)(2)(A)(ii), 8 U.S.C. § 1227(a)(2)(A)(ii) (2011) (addressing in part the deportation of aliens who are "convicted of two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct"). Note that these provisions apply to *all* non-citizens or nationals of the United States. *See* INA § 101(a)(3); 8 U.S.C. § 1101(a)(3) (2011) (defining "alien").

56. *See generally* INA § 240, 8 U.S.C. § 1229a (2011) (addressing removal proceedings).

57. *See, e.g.*, 8 C.F.R. §§ 1240.11(a)(1), 1240.20 ,1240.21 (2011).

58. INA § 240A(a), 8 U.S.C. 1229b(a) (2011).

59. *See, e.g., infra* notes 71–72, 88–89 and accompanying text.

effective application for relief, such as making positive life changes since the criminal activity.

The *Padilla* decision primarily addressed the particularly severe immigration penalty faced by a long term LPR with significant ties to the community and prior military service.[60] In that case, Padilla pleaded guilty to the possession and trafficking of a large amount of marijuana in his tractor-trailer.[61] Only later did he assert that he would have gone to trial had he known about the potential immigration consequences.[62] The evidence against Padilla was rather overwhelming, and it is unclear whether going to trial would have further benefitted him.[63] When aliens are facing controlled substances charges, especially crimes involving trafficking in a controlled substance, "removal is practically inevitable."[64]

B. Nonimmigrant

A nonimmigrant alien is an individual who was lawfully admitted to the U.S. on a visa for a temporary purpose, such as a tourist, student, or for business.[65] A nonimmigrant can be in-status, within the period of legal admission, or out-of-status, meaning the period of admission has expired. Individuals who are in-status are subject to removal if they do not comply with the terms of their visa, such as a tourist who was illegally employed or by committing a removable crime.[66] Individuals who are out-of-status, generally known as "overstays," are immediately subject to removal from the U.S. for overstaying the terms of their admittance, as they no longer have a legal right to remain in the U.S.[67]

It is important to note that since a nonimmigrant does not have permanent legal status, virtually *any* crime committed by a nonimmigrant can be used to deny renewal of a U.S. visa or for readmission at the border into the U.S.[68] Admittance to the U.S. is a privilege, not a right, and individuals who commit a crime in the U.S. are not easily welcomed back. Additionally, a nonimmigrant with a criminal conviction that facilitates the initiation of removal proceeding may also have much greater limited relief

60. Padilla v. Kentucky, 130 S. Ct. 1473, 1477–78 (2010).

61. *Id.* Further factual details of the Padilla case are found in the lower court decision. *See* Commonwealth v. Padilla, 253 S.W.3d 482, 483 (Ky. 2008).

62. *See Padilla*, 130 S. Ct. at 1478 (noting that Padilla brought such claims "[i]n this post conviction proceeding . . . .").

63. *See id.*

64. *Id.* at 1480.

65. *See* INA § 101(a)(15), 8 U.S.C. § 1101(a)(15) (2011).

66. *See* INA § 237(a)(1)(C)(i), 8 U.S.C. § 1227(a)(1)(C)(i) (2011) (defining "nonimmigrant status violators").

67. *See* Equan v. U.S. I.N.S., 844 F.2d 276, 278 (5th Cir. 1988).

68. *See* INA § 214(b), 8 U.S.C. § 1184(b) (2011) ("Every alien . . . shall be presumed to be an immigrant until he establishes to the satisfaction of the consular officer, at the time of application for a visa, and the immigration officers, at the time of application for admission, that he is entitled to a nonimmigrant status . . . .").

options available.

Even with certain criminal convictions, excluding aggravated felony offenses,[69] an in-status or overstay nonimmigrant may still seek LPR status under certain limited circumstances. To seek adjustment to an LPR, an alien must have a valid immigration petition that is immediately available[70] and a qualifying relative to seek a hardship waiver.[71] Aliens with certain criminal convictions must demonstrate that extreme hardship would be caused to a U.S. citizen or lawfully permanent residence spouse, parent, son, or daughter of the nonimmigrant.[72] An alien is unlikely to satisfy this requirement if the alien is detained for a lengthy period of time, and therefore, not financially, emotionally, or physically supporting the qualifying family member.

Adjustment of status eligibility requirement are found in 8 C.F.R. § 1245.1. There are numerous categories of restricted aliens who cannot adjust their status in the U.S.[73] For instance, individuals who enter as alien crewman, aliens continuing or accepting unauthorized employment, and aliens admitted in Transit Without Visa (TWV) are prohibited from seeking adjustment of status in the U.S.[74] Additionally, an alien who entered the U.S. on a fiancé visa also has limitations on adjusting status.[75] Therefore, it is essential to understand the general categories of aliens who can and who cannot adjust status in the U.S.

A nonimmigrant seeking LPR status must first have a validly filed immigrant petition. The two most common forms of immigrant petitions are family and labor based.[76] For family petitions, an alien must have an approved or immediately approvable I-130 relative petition.[77] The relative petition must be immediately available at the time the nonimmigrant seeks adjustment of status, such as relief in a removal hearing.[78] The following

---

69. INA § 101(43), 8 U.S.C. § 1101(43) (2011).

70. 8 C.F.R. § 1245.10(b) (2011) (requiring the alien to "ha[ve] an immigrant visa number immediately available" and "[p]roperly file[] Form I-485," among other things).

71. *See, e.g.*, INA § 212(h)(1)(B), 8 U.S.C. § 1182(h)(1)(B) (2011) (giving the Attorney General discretionary authority to waive inadmissibility provisions as they would otherwise apply to "a single offense of simple possession of 30 grams or less of marijuana," conditioned on a showing of hardship to a related U.S. citizen).

72. *See id.*

73. 8 C.F.R. § 1245.1(b) (2011) (listing several categories of aliens who generally "are ineligible to apply for adjustment of status to that of a lawful permanent resident").

74. *See* INA § 245(c), 8 U.S.C. 1255(c) (2011).

75. *See, e.g., In re* Sesay, 25 I. & N. Dec. 431 (B.I.A. 2011) (noting several limitations, but ultimately holding that the applicant alien was eligible for adjustment).

76. *See* INA § 203(a), 8 U.S.C. § 1153(a) (2011) (setting preference allocation for family-sponsored immigrants); INA § 203(b), 8 U.S.C. § 1153(b) (2011) (setting preference allocation for employment-based immigrants). LPR status can also be obtained by winning the "Green Card Lottery." *See* INA § 203(c), 8 U.S.C. § 1153(c) (2011) (setting preference allocation of visas for "diversity immigrants").

77. *See* USCIS, I-130, PETITION FOR ALIEN RELATIVE, *available at* http://www.uscis.gov/files/form/i-140.pdf.

78. 8 C.F.R. § 1240.11(a)(1) (2011) (stating that an alien may apply for adjustment of status under

relatives can receive an immediately available petition: (1) spouses of U.S. citizens; (2) unmarried children under age twenty-one of U.S. citizens; and (3) parents of U.S. citizens, when the citizen is at least twenty-one years old.[79]

Other categories of family preference exist, but can have significant waiting periods. It is not uncommon for the waiting period to be five to ten years depending on the classification.[80] INA Family sponsored preference visas are issued to eligible immigrants in the order in which a petition has been filed.[81] The preference category includes the following: (1) unmarried sons and daughters over age twenty-one of U.S. citizens; (2) spouses of lawful permanent residents, and unmarried children (any age) of lawful permanent residents; (3) married children (any age) of U.S. citizens and; (4) brothers and sisters of U.S. citizens, when the citizen is at least twenty-one years old.[82]

A nonimmigrant may also seek adjustment of status with a labor petition.[83] The alien must have an immediately available I-140 labor petition[84] and a U.S. employer who is willing to immediately employ or continue to employ the alien in order for the alien to seek the adjustment of status.[85] In either case of a family or labor petition, a criminal conviction will prevent an alien from adjusting to LPR status unless the alien can demonstrate—among other things—that the alien's removal will result in extreme hardship to a qualifying U.S. citizen or LPR resident spouse, parent, or child.[86] In a rare twist, there may also be situations where an alien's conviction may make the individual deportable as an aggravated

---

INA § 245 during a removal proceeding if all the application requirements are met).

79. *See* INA § 204(a)(1), 8 U.S.C. § 1154(a)(1) (2011); USCIS, INSTRUCTIONS FOR FORM I-130, PETITION FOR ALIEN RELATIVE 5, *available at* http://www.uscis.gov/files/form/i-130instr.pdf ("When a petition is approved for the husband, wife, parent, or unmarried minor child of a United States citizen . . . . [t]hey do not have to wait for a visa number because immediate relatives are not subject to the immigrant visa limit.").

80. *See generally Visa Bulletin*, U.S. DEP'T OF STATE, http://www.travel.state.gov/visa/bulletin/bulletin_1360.html (last visited Jan. 3, 2012). The preference categories change on a month to month basis.

81. INA § 203(e)(1), 8 U.S.C. §1153(e)(1) (2011).

82. INA § 203(a), 8 U.S.C. § 1153(a) (2011) (describing annual allocation of immigrant visas). First: (F1) Unmarried Sons and Daughters of Citizens: 23,400 plus any numbers not required for fourth preference. 8 U.S.C. § 1153(a)(1) (2011). Second: Spouses and Children, and Unmarried Sons and Daughters of Permanent Residents: 114,200, plus the number (if any) by which the worldwide family preference level exceeds 226,000, and any unused first preference numbers. *See id.* at § 1153(a)(2). Third: (F3) Married Sons and Daughters of Citizens: 23,400, plus any numbers not required by first and second preferences. *Id.* at § 1153(a)(3). Fourth: (F4) Brothers and Sisters of Adult Citizens: 65,000, plus any numbers not required by first three preferences. *Id.* at § 1153(a)(4).

83. INA § 203(b), 8 U.S.C. § 1153(b) (2011) (setting preference allocation for employment-based immigrants).

84. USCIS, FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER, *available at* http://www.uscis.gov/files/form/i-140.pdf.

85. *See supra* note 79 and accompanying text; USCIS, INSTRUCTIONS FOR I-140, IMMIGRANT PETITION FOR ALIEN WORKER, *available at* http://www.uscis.gov/files/form/i-140instr.pdf.

86. *See supra* notes 71–72 and accompanying text.

felon under INA § 237(a)(2)(A)(iii), 8 U.S.C. § 1227(a)(2)(A)(iii), but not inadmissible under INA § 212(a)(2)(A), 8 U.S.C. § 1182(a)(2)(A) for having committed a CIMT. [87]

A nonimmigrant without an immediate visa petition may also seek to remain in the U.S. if the alien can demonstrate—among other things—that removal would result in exception and extremely unusual hardship to the alien's spouse, parent or child who is a US citizen or an LPR.[88] The exceptional and extremely unusual hardship threshold is a very high standard and granted in only very limited cases, such as in the case of a sick or disabled child. In order to be eligible for Cancellation Removal and Adjustment of Status for Certain Nonpermanent Resident, the alien must also demonstrate ten years of continuous physical presence in the U.S. and good moral character during this period of time.[89] Therefore, a criminal conviction would defeat the good moral character requirement.[90]

C. Unlawfully Entered Without Inspection

An illegal entrant or immigrant violator is an individual who entered the U.S. without proper permission or parole.[91] This type of illegal entrant is commonly referred to as having entered without inspection (EWI).[92] EWI's are not in the U.S. legally and are subject to immediate removal for failing to lawfully enter.[93] Illegally entering or reentering the U.S. is also a federal crime.[94]

EWI's may seek relief from removal by applying for immigrant status similar to nonimmigrants. However, EWI's seeking adjustment of status based on an immediately available relative petition must also demonstrate that they have been grandfathered under the provision of INA Section 245(i).[95] In general, only individuals who have entered the U.S. prior to December 21, 2000 and who filed a valid immigrant petition prior to April 30, 2001 may qualify for grandfathering.[96] Some aliens may also

87. For example, a crime of violence with a one year sentence and that is not domestic violence related is an aggravated felony subject to deportation under INA § 237(a)(2)(A)(iii), but not a CIMT under § 212(a)(2)(A)(ii)(II). *See In re* Torres-Varela, 23 I. & N. Dec. 78, 78, 86–87 (B.I.A. 2001) (LPR who committed an aggravated felony offense and was found removable, sought relief in the form of a new adjustment of status as the conviction did not render him inadmissible as a CIMT offender).

88. *See* INA § 240A(b)(1)(D), 8 U.S.C. § 1229b(b)(1)(D) (2011).

89. INA § 240A(b)(1), 8 U.S.C. § 1229b(b)(1) (2011).

90. *See* INA § 101(f), 8 U.S.C. § 1101(f) (2011) (including several criminal offenses that preclude a finding of good moral character). *See also* INA § 316(d), 8 U.S.C. § 1427(d) (2011); 8 C.F.R. § 316.10 (2011).

91. INA § 212(a)(6)(A), 8 U.S.C. § 1182 (a)(6)(A) (2011).

92. *See, e.g.*, Villanueva v. Holder, 615 F.3d 913, 914 (8th Cir. 2010).

93. *See* INA § 212(a)(6)(A), 8 U.S.C. § 1182 (a)(6)(A) (2011); Villanueva v. Holder, 615 F.3d 913, 914 (8th Cir. 2010).

94. INA § 275(a), 8 U.S.C. § 1325(a) (2011); INA § 276, 8 U.S.C. § 1326 (2011).

95. INA § 245(i), 8 U.S.C. § 1255(i) (2011).

96. *See* INA § 245(i)(1)(B)–(C), 8 U.S.C. § 1255(i)(1)(B)–(C) (2011).

be covered dependants when qualifying for the grandfathering requirements.[97] Therefore, an EWI who has illegally entered the U.S. after December 21, 2000 has no legal means of seeking LPR status though an immigrant petition here in the U.S. There may be other legal means of obtaining temporary or permanent status in the U.S., but illegal presence coupled with a criminal conviction severely limit the alien's possibility of future legal residence.

### D. Other Temporary Legal Status

Aliens may also have some type of temporary or semi-permanent legal status. For instance, individuals who had asserted a credible fear of return to their home countries, may have been granted a form of refuge or aslyee status.[98] Aliens can lawfully enter with refugee documents[99] or seek protection in the form of asylum[100] after entering the U.S. in any status. Individuals may also be granted Temporary Protected Status (TPS) due to unsafe or uncertain country conditions.[101] Aliens with these types of legal statuses must clearly understand that certain criminal convictions will prevent the continuation of this discretionally protected status. For instance, aliens with TPS will have their protected status revoked after a felony conviction or after any three or more misdemeanor convictions.[102] Aliens granted asylum or refugee status can forfeit this protected status with certain criminal convictions, and aliens must reapply and demonstrate compelling reasons why some form of protected status should be maintained.[103]

An alien may also be paroled into the U.S.[104] Parole is granted for a limited time and purpose, and is not considered an admission, as the alien has not been determined to be admissible.[105] Therefore, an alien who was paroled into the U.S. is subject to removal proceeding as an inadmissible alien under Section 212.[106] Individuals who are permitted to enter in a parole status may already be in removal proceedings, which were initiated

---

97. *See id.*

98. *See supra* notes 21–22 and accompanying text.

99. *See* INA § 207, 8 U.S.C. § 1157 (2011) (setting annual admission of refugees and admission of emergency situation refugees).

100. *See* INA § 208, 8 U.S.C. § 1158 (2011).

101. INA § 244, 8 U.S.C. § 1254a (2011).

102. 8 C.F.R. § 245a.2 (u)(1)(iii) (2011).

103. *See* INA § 208(c)–(d), 8 U.S.C. § 1158(c)–(d) (2011).

104. *See* 8 C.F.R. § 212.5 (2011).

105. *See* 8 C.F.R. § 212.5(e)(2)(i) (2011) ("[U]pon accomplishment of the purpose for which parole was authorized . . . parole shall be terminated . . . and he or she shall be restored to the status that he or she had at the time of parole.").

106. *See In re* M-B-, 8 I. & N. Dec. 406, 407 (B.I.A. 1959).

at the same time the parole was granted.[107]

It is important to note that relief from removal options will vary significantly based on an alien's immigrant status. However, all aliens, no matter what their immigration status or criminal convictions, have other forms of mandatory relief that can still be sought. If an alien can demonstrate by a clear probability that his or her life or freedom would be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion or that the alien would be tortured, pursuant to the terms of the Convention Against Torture (CAT)[108] the alien will be permitted to remain in the U.S. in a protected status, or be removed to a safe third country.[109] There is however, no guarantee that ICE will release a dangerous criminal, rather only that the alien will not be removed to the persecuting country until the country conditions have changed.[110]

## III. Implications of a Conviction for Immigration Purposes

Prior to an alien entering into an agreement for a criminal disposition or facing a conviction after a crime, it is critical that he or she understands that a conviction and sentence for immigration purposes may significantly differ from what is generally considered a conviction in the criminal law context. Congress codified said definitions pursuant to the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA).[111]

### A. Conviction for Immigration Purposes

What constitutes a conviction for immigration purposes has been a matter of significant legal debate. An alien is convicted for immigration purposes when a court makes a final adjudication of guilt, or, if adjudication is withheld, when the alien has been found guilty or has pled guilty or nolo contendere, and has received some form of punishment by the court.[112] In general, a juvenile or youth offender disposition is not a conviction for immigration purposes.[113] State statutes with youthful offender dispositions comparable to the Federal Juvenile Delinquency Act

---

107. *See* 8 C.F.R. § 212.5(e)(2)(i) (2011).

108. INA § 241(b)(3), 8 U.S.C. § 1231(b)(3) (2011); *see also* I.N.S. v. Stevic, 467 U.S. 407, 409–11 (1984). *See generally* 8 C.F.R. § 1208.16 (2011); 8 C.F.R. part 208 (2011).

109. 8 C.F.R. § 1208.16 (2011); *see also In re* J-E, 23 I. & N. Dec. 291, 292 (B.I.A. 2002).

110. *See* 8 C.F.R. § 1208.17(b)(1)(ii) (2011); INA § 241(b)(3), 8 U.S.C. § 1231(b)(3) (2011).

111. Pub. L. No. 104-208, 110 Stat. 3009. The immigration definition for a conviction is found at INA § 101(a)(48)(A), 8 U.S.C. § 1101(a)(48)(A) (2011). The immigration definition for term of imprisonment is set forth in INA § 101(a)(48)(B), 8 U.S.C. § 1101(a)(48)(B) (2011).

112. INA § 101(a)(48)(A), 8 U.S.C. § 1101(a)(48)(A) (2011).

113. *In re* Ramirez-Rivero, 18 I. & N. Dec. 135, 137 (B.I.A. 1981).

(FJDA) are also not deemed a conviction for immigration purposes. [114]

Immigration consequences attach as a result of a penalty in the criminal sentencing context. For instance, the imposition of cost and surcharges will constitute a punishment or penalty for immigration purposes.[115] Rehabilitative statutes, expungements and deferred adjudications, which erase a determination of guilt, do not necessarily protect the alien from immigration consequences.[116] An alien remains convicted for immigration purposes even if the alien is not considered convicted under state law.[117] For instance, offenses that qualify as expunged under state statute analogues to the Federal First Offender Act (FFOA) constitute a "conviction" within the meaning of the INA.[118] At the same time, this decision has not been uniformity followed in the past, as in the case of the Ninth Circuit.[119] A presidential or gubernatorial pardon only waives certain grounds of removal and may not waive grounds of inadmissibility.[120]

The BIA has also reviewed convictions that have been vacated because of post conviction events, such as immigration hardship. In *Matter of Pickering*, the Board of Immigration Appeals (BIA) held that if a court vacates a conviction, for reasons unrelated to the merits of the underlying criminal proceedings, the alien will continue to have a conviction for immigration purposes.[121] The *Padilla* decision's impact on cases like *Pickering* has yet to be determined. However, it is likely that *Pickering* is no longer relevant, since cases under *Padilla* are being vacated for a direct constitutional violation.[122]

Even if counsel is careful when recommending that a client plea to a certain charge that may not look removable, evidence outside of the conviction may also be considered to determine whether the conviction makes the alien subject to removal proceedings. The Attorney General recently ruled in *Silva-Trevino,* that the Immigration Court may look beyond the record of conviction and evaluate the facts of the case to determine whether a crime involving moral turpitude (CIMT) has been committed when the record of conviction documents were ambiguous.[123]

---

114. *In re* Devison-Charles, 22 I. & N. Dec. 1362, 1375–77 (B.I.A. 2000).

115. *In re* Cabrera, 24 I. & N. Dec. 459 (B.I.A. 2008).

116. *See, e.g.*, *In re* Luviano-Rodriguez, 23 I. & N. Dec. 718, 720 (B.I.A. 2005); *In re* Salazar, 23 I. & N. Dec. 223, 233–34 (B.I.A. 2002).

117. *In re* Roldan-Santoyo, 22 I. & N. Dec. 512, 521 (B.I.A. 1999); *see also Salazar*, 23 I. & N. Dec. at 235.

118. *See Salazar*, 23 I. & N. at 233.

Lujan-Armendariz v. INS, 222 F.3d 728, 735–36 (9th Cir. 2000) *overruled* by *Nunez-Reyes v. Holder*, 646 F.3d 684 (9th Cir. 2011) (applying the decision prospectively only.)

120. *See In re* Suh, 23 I. & N. Dec. 626, 627 (B.I.A. 2003).

121. *In re* Pickering 23 I. & N. Dec. 621, 625 (B.I.A. 2003).

122. *See, e.g.*, *In re* Adamiak, 23 I. & N. Dec. 878, 881 (B.I.A. 2006).

123. *In re* Silva-Trevino, 24 I. & N. Dec. 687, 709 (B.I.A. 2008). The AG set the following standard:

"[T]o determine whether an alien's prior conviction triggers application of the

Evidence generally viewed to determine the nature of a conviction may include the indictment, the judgment of conviction, a signed guilty plea, and the plea transcript.[124] The BIA recently clarified the *Silva-Trevino* decision in *Ahortalejo-Guzman*, by holding that Immigration Judges may not look beyond the record of conviction when the record of conviction provides conclusive evidence.[125]

B. Term of Imprisonment

The term of imprisonment ordered is another important factor in any plea consideration or trial outcome. Specifically, "the period of incarceration or confinement ordered by a court of law regardless of any suspension of the imposition or execution of that imprisonment or sentence in whole or in part,"[126] is what matters for immigration purposes. Therefore, the actual length of confinement ordered by the court is the determining factor, not the time actually served.[127] As such, even if the execution of a sentence is suspended and the defendant does not serve any actual time in jail, the time is counted for immigration purposes.[128] Probation does not constitute a period of imprisonment, yet jail time imposed with probation, or with a violation of probation, does constitute a sentence.[129]

Consecutive sentences must also be examined when evaluating possible removal consequences. For instance, an aggravated felony offense requiring a minimum one-year sentence of imprisonment is not obtained by combining a consecutive sentence.[130] Consequently, consecutive sentences are irrelevant to this category of offenses. However, aliens whose consecutive (or separate) sentences add up to five years or more are ineligible for relief from withholding of removal[131] and are inadmissible.[132]

---

> Act's moral turpitude provisions, adjudicators should: (1) look first to the statute of conviction . . . (2) if the categorical inquiry does not resolve the question, look to the alien's record of conviction . . . and (3) if the record of conviction does not resolve the inquiry, consider any additional evidence the adjudicator determines is necessary or appropriate to resolve accurately the moral turpitude question."

*Id.* at 704.

124. *See id.* at 704.

125. *In re* Ahortalejo-Guzman, 25 I. & N. Dec. 465, 467–68 (B.I.A. 2011).

126. INA § 101(a)(48)(B), 8 U.S.C. § 1101(a)(48)(B) (2011).

127. *See, e.g., In re* Esposito, 21 I. & N. Dec. 1, 6 (B.I.A. 1995).

128. *See, e.g., id.*

129. *See In re* Perez-Ramirez, 25 I. & N. Dec. 203, 205 (B.I.A. 2010).

130. INA § 101(a)(43)(F), 8 U.S.C. § 1101(a)(43)(F) (2011).

131. *See, e.g.*, INA § 241(b)(3)(B), 8 U.S.C. § 1231(b)(3)(B) (2011) (sentencing an alien to an aggregate term of imprisonment of five years or more constitutes "a particularly serious crime" which precludes relief from removal that would otherwise be available on the grounds that the alien's life or freedom would be threatened if removed to their home country).

132. INA § 212(a)(2)(B), 8 U.S.C. § 1182(a)(2)(B) (2011) (making an alien inadmissible if convicted of two or more offenses for which the aggregate sentence of imprisonment is five years or longer).

Unlike the conviction modification in *Matter of Pickering*, the BIA held in the *Matter of Cota-Vargas*, that if only an alien's criminal sentence was modified, as opposed to the entire plea, the modified or reduced sentence was recognized for immigration purposes, even if the sole reason for the modification was to eliminate the immigration consequences of the conviction.[133]

## IV. Crimes Making an Alien Removable

Many criminal convictions make an alien subject to being removed from the U.S. An alien who has been lawfully admitted as a LPR or a nonimmigrant is subject to being deported pursuant to grounds articulated in INA § 237(a)(2). Aliens seeking admission or permission to lawfully remain in the U.S. who have criminal convictions and are generally considered ineligible to receive visas are barred for admission for criminal acts pursuant to INA § 212(a)(2). Significant post-conviction relief options to seek a sentence modification may be limited based on the jurisdiction.[134]

Removal proceedings may differ based on the alien's residence status, the crime committed, and the court in which a criminal proceeding is initiated. Criminal aliens seeking to enter the U.S. at the border are subject to being detained and denied entry to the U.S.[135] Not all classifications of aliens are entitled to a hearing, such as an alien who was previously removed from the U.S.,[136] crewmembers,[137] and stowaways.[138] There are three general classifications in which a criminal alien, who is physically present in the U.S., can be subject to removal.

First, the U.S. District Court has jurisdiction to enter a judicial order of deportation at the time of a criminal sentence if such a request has been made by the U.S. Attorney's Office, and in concurrence with ICE, pursuant to authority in INA § 238(c)(1). The deportation order can be appealed by either party.[139] The denial by a U.S. District Court Judge to issue a deportation order does not prevent ICE from initiating removal proceeding pursuant to INA § 240.[140] Consequently, neither the U.S.

---

133. *In re* Cota-Vargas, 23 I. & N. Dec. 849, 852–53 (B.I.A. 2005); *see also In re* Song, 23 I. & N. Dec. 173 (B.I.A. 2001).

134. *See, e.g.*, People v. Carrera, 940 N.E.2d 1111, 1121–22 (Ill. 2010) (holding that the defendant was ineligible to attain post-conviction relief because he was not imprisoned in the penitentiary at the time he filed his petition—as required by the applicable statute).

135. *See* INA § 235, 8 U.S.C. § 1225 (2011) (giving immigration officers authority to inspect, detain, and remove inadmissible aliens applying for admission); INA § 212(a)(2), 8 U.S.C. 1182 (a)(2) (2011) (including applicant aliens convicted of certain crimes as inadmissible).

136. INA § 241(a)(5), 8 U.S.C. § 1231(a)(5) (2011); *see also* 8 C.F.R. § 241.8 (2011).

137. INA 252(b), 8 U.S.C. § 1282(b) (2011) (denying application of the removal procedures of INA § 240 to such cases); *see also* 8 C.F.R. § 252.2 (2011).

138. INA § 235(a)(2), 8 U.S.C. § 1225(a)(2) (2011) (denying application of the removal procedures of INA § 240 to such cases); *see also* 8 C.F.R. § 241.11.

139. INA § 238(c)(3), 8 U.S.C. § 1228(c)(3) (2011).

140. INA § 238(c)(4), 8 U.S.C. § 1228(c)(4) (2011).

Attorney's Office nor the U.S. District Judge have jurisdiction to prevent ICE from initiating removal proceedings. At the same time, the alien defendant can also stipulate to an order of deportation as part of the plea agreement.[141] A stipulated order of removal can significantly benefit an alien when there are no possible relief options, as the alien's in-custody time may be significantly reduced by having a final order of removal prior to entering ICE custody.

Second, an expedited removal order can be obtained when an alien is not an LPR[142] and has a conviction for an aggravated felony offense.[143] An alien is served by ICE with a Notice of Intent to Expedite Removal and the alien has "10 calendar days from service . . . or 13 calendar days if service is by mail, to file a response to the Notice of Intent".[144] Aliens in expedited removal are ineligible to seek discretionary relief from the Attorney General.[145] The only relief from removal an alien can seek is protection from harm if the alien can demonstrates a credible fear that the alien's life or freedom would be threatened if removed to the alien's country of citizenship.[146] If a credible fear is demonstrated, the alien's relief application will be removed to the Immigration court for a hearing to determine whether the alien is eligible for any forms of mandatory relief. In demonstrating such a threat, the alien carries the burden of proof.[147]

Third, all other alien removal cases are held in the Immigration courts pursuant to INA § 240. An alien may stipulate to removal and skip the removal proceeding in front of an Immigration Judge which may facilitate a faster return and/or release.[148] An alien may seek any and all relief options available to them during removal proceedings.[149] General applications for relief from removal include adjustment of status, cancellation of removal, and protection from harm if removed, as previously discussed.[150]

There are several categories of crimes that directly affect criminal aliens. The common categories of crimes include CIMTs, controlled substances, and aggravated felonies.[151] It is important to note that even multiple minor criminal convictions can trigger removal proceedings.[152] In

141. INA § 238(c)(5), 8 U.S.C. § 1228(c)(5) (2011).

142. *See* INA § 238(b)(2), 8 U.S.C. § 1228(b)(2) (2011) (includes a permanent resident who was admitted on a conditional basis pursuant to INA § 216).

143. *See id.*; INA § 101(a)(43), 8 U.S.C. § 1101(a)(43) (2011).

144. *See* INA § 238(b)(3), 8 U.S.C. § 1228(b)(3) (2011); 8 C.F.R. 238.1(c)(1) (2011).

145. INA § 238(b)(5), 8 U.S.C. § 1228(b)(5) (2011).

146. INA § 241(b)(3)(A), 8 U.S.C. § 1231(b)(3)(A) (2011); 8 C.F.R. § 238.1(f)(3) (2011), 8 C.F.R. § 208.31 (2011).

147. INA § 241(b)(3)(C), 8 U.S.C. § 1231(b)(3)(C) (2011).

148. INA § 240(d), 8 U.S.C. § 1229a(d) (2011); *see also* 8 C.F.R. § 1003.25(b).

149. *See* 8 C.F.R. § 1240.11 (2011).

150. *See supra* notes 19–22 and accompanying text.

151. *See supra* notes 13–15 and accompanying text.

152. *See supra* notes 130–132 and accompanying text; *see also* INA § 237(a)(2)(A)(ii), 8 U.S.C. §

some cases, a serious act alone, subject to criminal prosecution or not, will subject the alien to removal proceeding.[153] A single conviction may also result in multiple removal charges under different provisions of the INA.[154]

A. Crimes Involving Moral Turpitude (CIMT)

The term "moral turpitude" has been part of U.S. Immigration law for over 100 years,[155] and its interpretation continues to evolve even in recent BIA cases. The Supreme Court has held that the term "crime involving moral turpitude" is not unconstitutionally vague.[156] The federal courts and the BIA continue to clarify which state and federal laws fall within this "nebulous concept."[157] Determining which crimes qualify as CIMTs is not an easy determination, as similar crimes may have different statutory definitions that may or may not make the crime a CIMT.[158] Even rather minor offenses can be found to be removable CIMT offenses.[159]

The concept of moral turpitude commonly refers to conduct that is "inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general."[160] When trying to determine whether a particular crime involves moral turpitude, it is essential to look at the statutory definition of the crime of which the alien was convicted and not the specific conduct that resulted in the conviction.[161] The BIA has held that a requisite element for a CIMT is an "evil intent."[162] Identifying the commission of a CIMT does not take into consideration the seriousness of the offense nor the severity of the sentence, but rather focuses on "the offender's evil intent or corruption of the mind."[163] For immigration purposes, a CIMT offense includes both convictions for conspiracy to commit an offense that would be a CIMT and an attempt to commit a crime that would be a CIMT.[164]

---

1227(a)(2)(A)(ii) (2011).

153. *See, e.g.*, INA § 237(a)(3)–(4), 8 U.S.C. § 1227(a)(3)–(4) (2011) (listing numerous grounds for removal that do not require a criminal conviction).

154. For instance, there is significant overlap between CIMTs and aggravated felonies. *Compare infra* Part IV.A. *with* Part IV.C.

155. *See* Jordan v. De George, 341 U.S. 223, 230 n. 14 (1951) (noting that "[t]he term 'moral turpitude' first appeared in . . . 1891").

156. *Jordan*, 341 U.S. at 232.

157. *See* Franklin v. INS, 72 F.3d 571, 573 (8th Cir. 1995) (denying appellant's petition for review of the BIA's decision in *In re* Franklin, 20 I. & N. Dec. 867 (B.I.A. 1994)).

158. Justice Alito notes that: "determining whether a particular crime is . . . a 'crime involving moral turpitude [(CIMT)] is not an easy task." Padilla v. Kentucky, 130 S. Ct. 1473, 1488 (2010) (Alito, J., concurring).

159. *See Padilla*, 130 S. Ct. at 1489 (Alito, J., concurring).

160. *In re* Torres-Varela, 23 I. & N. Dec. 78, 82–83 (B.I.A. 2001).

161. *Id.* at 84. *See also In re* Short, 20 I. & N. Dec. 136, 137 (B.I.A. 1989) (noting that in order to determine whether the offense involved moral turpitude, the court must look to the controlling statute).

162. *In re* Khourn, 21 I. & N. Dec. 1041, 1046 (B.I.A. 1997).

163. *In re* Serna, 20 I. & N. Dec. 579, 581–82 (B.I.A. 1992).

164. INA § 212(a)(2)(A)(i)(I), 8 U.S.C. 1182(a)(2)(A)(i)(I) (2011). *See also, e.g., In re* Bader, 17

When a criminal statute contains multiple violations, some of which are CIMTs and some that are not CIMTs, the full record of conviction must be examined.[165] Evidence presented to determine the nature of a conviction may include the indictment, the judgment of conviction, a signed guilty plea, and the plea transcript.[166] When conviction documents are ambiguous, the Immigration Court may evaluate the facts in the case to make a determination as to whether a CIMT has been committed.[167] The BIA recently clarified this point by stating that Immigration Judges may not look beyond the record of conviction when the record of conviction provides conclusive evidence.[168]

Every state and federal criminal statute must be researched by counsel to determine whether the statute constitutes a CIMT under the BIA or circuit court's current analysis. Most theft or fraud related charges are CIMTs, however there are numerous exceptions.[169] The determination of which criminal statute constitutes a CIMT is heavily litigated. The following statutes, recently reviewed by the BIA and determined to be CIMT offenses, demonstrate that a CIMT analysis is not a simple task: trafficking in counterfeit goods or services in violation of 18 U.S.C. § 2320;[170] money laundering in violation of N.Y. PENAL LAW § 470.10(1);[171] retail theft in violation of 18 PA. CONS. STAT. § 3929(a)(1);[172] unsworn falsification to authorities in violation of 18 PA. CONS. STAT. § 4904(a);[173] misprision of a felony in violation of 18 U.S.C. § 4;[174] and a conviction for burglary of an occupied dwelling in violation of FLA. STAT. § 810.02(3)(a).[175]

Crimes involving violence are also a large category that may constitute a valid CIMT charge.[176] Generally, a conviction for simple assault and battery is not a CIMT.[177] However, the BIA found that a charge of third degree assault under N.Y. PENAL LAW § 120.00(1) constituted a CIMT offense because the statute required both specific intent and physical injury.[178] On the other hand, the BIA has also ruled that the offense of

---

I. & N. Dec. 525, 529 (B.I.A. 1980) (holding that conspiracy to defraud constitutes a CIMT); *In re* Vo, 25 I. & N. Dec. 426, 430 (B.I.A. 2011) (holding that attempted grand theft constitutes a CIMT).

165. *See, e.g.*, *In re* Esfandiary, 16 I. & N. Dec. 659, 660 (B.I.A. 1979).

166. *See In re* Silva-Trevino, 24 I. & N. Dec. 687, 704 (B.I.A. 2008).

167. *See id.*

168. *In re* Ahortalejo-Guzman, 25 I. & N. Dec. 465, 468–69 (B.I.A. 2011).

169. *See, e.g.*, *In re* Garcia, 11 I. & N. Dec. 521, 523 (B.I.A. 1966); Jordan v. De George, 341 U. S. 223, 227–31 (1951).

170. *In re* Kochlani, 24 I. & N. Dec. 128, 132 (B.I.A. 2007).

171. *In re* Tejwani, 24 I. & N. Dec. 97, 99 (B.I.A. 2007).

172. *In re* Jurado-Delgado, 24 I. & N. Dec. 29, 33–34 (B.I.A. 2006).

173. *Id.* at 34–35.

174. *In re* Robles-Urrea, 24 I. & N. Dec. 22, 28 (B.I.A. 2006).

175. *In re* Louissaint, 24 I. & N. Dec. 754, 760 (B.I.A. 2009).

176. *See, e.g.*, *In re* Tran, 21 I. & N. Dec. 291, 294 (B.I.A. 1996).

177. *See, e.g.*, *In re* Sejas, 24 I. & N. Dec. 236, 237–38 (B.I.A. 2007).

178. *In re* Solon, 24 I. & N. Dec. 239, 246 (B.I.A. 2007).

assault and battery against a family or household member in violation of VA. CODE ANN. §18.2-57.2 is not categorically a CIMT offense because the statute does not require the infliction of actual injury.[179]

For statutes addressing driving under the influence (DUI) situations, a simple DUI is not likely to be a CIMT.[180] A DUI conviction with two or more prior DUI convictions is also not necessarily a CIMT.[181] However, the BIA has determined that the offense of aggravated driving under the influence as defined in ARIZ. REV. STAT. ANN. §§ 28-697(A)(1) and 28-1383(A)(1) is a CIMT.[182] For a DWI offense to constitute a CIMT, these statutes require the driver to know that he or she is prohibited from driving under any circumstances.[183]

Sex related crimes are another category of crime for which a CIMT finding is likely and in which case law is still very much evolving. For instance, statutory rape, which, in California, is the intentional sexual conduct by an adult with a child under the age of 16 in violation of CAL. PENAL CODE § 261.5(d), can be a CIMT.[184] In 2007, the U.S. Court of Appeals for the Ninth Circuit used a categorical approach and determined that this charge was not a crime involving moral turpitude.[185] In response to a split in the circuits, the Attorney General, pursuant to his legal authority to make determinations concerning questions of immigration law, put forth a two part categorical analysis to address which crimes involved moral turpitude.[186] Applying the Attorney General's decision, the BIA rejected the Ninth Circuit's prior reasoning.[187] The BIA justified its ruling in this case by stating: "since the Ninth Circuit has . . . acknowledged that the phrase 'crime involving moral turpitude' is quintessentially ambiguous, the Attorney General's interpretation of the term must take precedence over that of the Ninth Circuit."[188] Also under California Law, the BIA has ruled

179. *Sejas*, 24 I. & N. Dec. at 238 ("conviction for assault and battery in Virginia does not require the actual infliction of physical injury and may include any touching, however slight"). *Id. See also* Adams v. Commonwealth, 534 S.E.2d 347, 351 (Va. App. 2000).

180. *In re* Lopez-Meza, 22 I. & N. Dec. 1188, 1194 (B.I.A. 1999).

181. *See, e.g., In re* Torres-Varela, 23 I. & N. Dec. 78, 85–86 (B.I.A. 2001).

182. *Lopez-Meza*, 22 I. & N. Dec. at 1195 ("[T]he serious misconduct described in either of these statutes involves a baseness so contrary to accepted moral standards that it rises to the level of a crime involving moral turpitude.").

183. *See id.* at 1189–91.

184. *See In re* Guevara Alfaro, 25 I. & N. Dec. 417, 424 (B.I.A. 2011) (holding that statutory rape is not *categorically* a CIMT, but remanding the case to determine whether the accused had knowledge of his victim's age). *See also In re* Silva-Trevino, 24 I. & N. Dec. 687, 706 (A.G. 2008) ("[W]hether the perpetrator knew or should have known the victim's age is a critical factor in determining whether his or her crime involved moral turpitude for immigration purposes.").

185. *Id.*

186. INA §103(a), 8 U.S.C. § 1103(a) (2011); Silva-Trevino, 24 I. & N. Dec. at 698-99.

187. Quintero-Salazar v. Keisler, 506 F.3d 688, 694–95 (9th Cir. 2007) (holding that the conviction under the California statute "does not qualify as a crime involving moral turpitude").

188. *In re* Guevara Alfaro, 25 I. & N. Dec. at 420.

that the willful failure to register by a sex offender in violation of CAL. PENAL CODE § 290(g)(1) is a CIMT.[189]

After determining that the possible conviction in question is a CIMT for immigration purposes, the next step is to evaluate whether a criminal conviction would be a removable CIMT for this particular alien. This step of the process requires knowledge of the alien's immigrant status and last lawful entry date. Under INA § 240 removal proceedings, the alien receives a Notice to Appear (NTA) stating the immigration charges against the alien.[190] The immigration charges on the NTA will contain either a Section 212 charge or a Section 237 charge, but not both.[191] Removal from the U.S. based on a CIMT charge is significantly different depending on whether the CIMT charge is under Section 212 or 237.[192]

1. Aliens Seeking Admission and Aliens Unlawfully Present

All aliens seeking admission and all aliens found illegally present in the U.S. will be charged as seeking admission under INA§ 212. Separate from any criminal charges, all aliens including LPRs, visa holders, and EWI's, must seek permission to lawfully enter.[193] A criminal charge may have no present effect on an alien's ability to lawfully remain in the U.S. All aliens subject to Section 212 charges have the burden to demonstrate admissibility.[194] For example, EWI's are automatically subject to a Section 212 removal charge for being unlawfully present in the U.S. Therefore, it is relevant to understand that all aliens seeking lawful status bear the burden of proof to establish eligibility to lawfully enter. A criminal conviction is only one of many hurdles that must be evaluated to determine admissibility.

The CIMT charge under INA § 212(a)(2)(A)(i) states, "any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of . . . (I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime . . . is inadmissible."[195] There are two exceptions to this CIMT provision for a single crime: an offense committed when the alien was under the age of eighteen or a petty crime.[196] The petty crime exception requires that the maximum penalty possible for the crime

189. *In re* Tobar-Lobo, 24 I. & N. Dec. 143, 144–46 (B.I.A. 2007).

190. INA § 239(a), 8 U.S.C. § 1229(a) (2011); Form I-862.

191. *See id.*; INA § 240(a)(2), 8 U.S.C. § 1229a(a)(2) (2011).

192. *Compare* INA § 212, 8 U.S.C. § 1182 (2011) (regarding inadmissibility), *with* INA § 237, 8 U.S.C. § 1227 (2011) (regarding deportability); *see also supra* note 87 and accompanying text.

193. Aliens lawfully in the U.S. will only be charged under section 212 if they depart the U.S. and attempt to lawfully reenter. *Compare* INA § 212 (listing the grounds upon which aliens are "ineligible to be admitted to the United States"), *with* INA § 237 (applying only to aliens "in and admitted to the United States").

194. INA § 240(c)(2)(A), 8 U.S.C. § 1229a(c)(2)(A) (2011).

195. INA § 212(a)(2)(A)(i), 8 U.S.C. § 1182(a)(2)(A)(i) (2011).

196. INA § 212(a)(2)(A)(ii)(II), 8 U.S.C. § 1182(a)(2)(A)(ii)(II) (2011).

convicted was one year of imprisonment and the alien was not sentenced to a term of more than six months.[197] This amounts to a one-time petty offense exception, but only under Section 212.

With or without a CIMT conviction, an unlawfully present alien is automatically subject to removal proceedings unless the alien can demonstrate admissibility.[198] Counsel should not make any assurances to an alien that the alien would not face potential removal proceedings based on the illegal presence. Although the alien may be eligible to seek discretionary or mandatory relief from removal, the alien is still in the U.S. unlawfully and could even face potential prosecution for this illegal entry.[199]

2. Aliens Lawfully Admitted

Aliens who lawfully entered but are now subject to removal are charged under Section 237.[200] A conviction for a CIMT will result in removal charges under Section 237 unless the crime falls within an exception.[201] It is important to recognize that lawful admission does not necessarily result in continued lawful status. For instance, an alien who lawfully entered on a tourist visa but unlawfully overstayed may have legally entered, but would no longer have permission to remain in the U.S.[202] In order to evaluate possible relief options for an alien, it is imperative that counsel understand the alien's current legal status and last lawful entry.

Unlike Section 212 cases,[203] there is not an exception for committing only one CIMT in Section 237 cases. However, a single conviction for a CIMT will only facilitate removal proceedings if the possible sentence, not the actual sentence, for the crime could have been one year or longer:

> (i) Crimes of moral turpitude. Any alien who—
> (I) is convicted of a crime involving moral turpitude committed within five years (or 10 years in the case of an alien provided lawful permanent resident status under section 245(j)) after the date of admission, and
> (II) is convicted of a crime for which a sentence of one year or longer may be imposed, is deportable.

197. INA § 212(a)(2)(A)(i)(I) (A)(ii) (2011), 8 U.S.C. § 1182(a)(2)(A)(i)(I) (A)(ii) (2011).

198. INA § 237(a)(1)(A) (2011), 8 U.S.C. § 1227(a)(1)(A) (2011).

199. *See, e.g.*, INA § 275, 8 U.S.C. § 1325 (2011).

200. INA § 237(a), 8 U.S.C. § 1227(a) (2011).

201. *See, e.g.*, INA § 237(a)(2)(A)(vi), 8 U.S.C. § 1227(a)(2)(A)(vi) (2011) (providing a waiver to aliens who have been granted a pardon by the President of the United States or by the Governor of any of the several states).

202. Overstay violators are charged under INA§ 237(a)(1)(C), 8 U.S.C. § 1227(a)(1)(C) (2011).

203. *See* INA § 237(a)(2)(A)(i); 8 U.S.C. § 1227(a)(2)(A)(i).

> (ii) Multiple criminal convictions. Any alien who at any time after admission is convicted of two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefore and regardless of whether the convictions were in a single trial, is deportable.[204]

In addition to examining the actual crime that would result in a conviction for the alien defendant, it is imperative to focus on the alien's last lawful entry into the U.S. to determine whether the CIMT would make the alien removable. In *Matter of Alyazji,* the BIA found that "the most natural reading of Section 237(a)(2)(A)(i) is that the phrase 'the date of admission' refers to the date of the admission by virtue of which the alien was present in the United States when he committed his crime."[205]

The analysis to find the correct date—the day from which the five years of entry commence—can be rather complicated, and is far from the "succinct, clear, and explicit" nature that the Supreme Court attributes to the immigration statutes.[206] If the alien is an LPR, the last relevant date of admission is when the alien lawfully entered the country originally as an LPR or as a nonimmigrant in possession of a valid visa and then became an LPR during that admission, even if the alien had violated the terms of the visa as an overstay.[207] If an alien is not an LPR, then the relevant date would be the last date of lawful entry.[208] Complications may arise in attempting to analyze the likely implications of whether a CIMT makes an alien removable if the alien is not aware of the date on which a consideration must be made.[209]

This examination is further complicated by the fact that a CIMT conviction may not trigger removal proceedings under Section 273, but will trigger a ground of inadmissibility if the alien seeks to reenter the U.S. at a later date. For instance, an LPR who previously lawfully entered over five years prior to the conviction can plead guilty to a CIMT if the maximum time possible under the statute is less than one year. Under this sentence,

---

204. INA § 237(a)(2)(A)(i)–(ii), 8 U.S.C. § 1227(a)(2)(A)(i)–(ii) (2011).

205. *In re* Alyazji, 25 I. & N. Dec. 397, 406 (B.I.A. 2011). This decision overruled the B.I.A.'s previous findings in *In re Shanu*, 23 I. & N. Dec. 754 (B.I.A. 2005), that "an alien's conviction for a crime involving moral turpitude supported removal under that section so long as the crime was committed within 5 years after the date of *any* admission made by the alien." *Alyazji*, 25 I. & N. Dec. at 397–98.

206. Padilla v. Kentucky, 130 S. Ct. 1473, 1483 (2010).

207. INA § 101(a)(13)(A); 8 U.S.C. § 1101(a)(13)(A) (2011) (defining the term "admission). *See also* INA § 212(a)(9)(B); 8 U.S.C. § 1182(a)(9)(B) (2011) (stating that unlawful presence, including a visa overstay, potentially creates a future bar for an individual prevent any return to the United States for a set number of years).

208. *In re* Alyazji, 25 I. & N. Dec. at 407–408. ("first 'date of admission' is irrelevant because the alien was not in the United States pursuant to that first admission when he committed his crime").

209. *See* INA § 237(a)(2)(A)(i)(I); 8 U.S.C. § 1227(a)(2)(A)(i)(I) (2011) (determining an aliens date of entry can significantly affect whether the conviction of a crime of moral turpitude may potentially cause an alien to be found deportable).

the LPR would not be removable under Section 237.[210] However, after a brief departure from the U.S., the LPR must seek admission and would be inadmissible under Section 212.[211] The LPR may or may not be eligible to apply for a discretionary waiver, depending on whether the LPR has the required residential time, qualifying relative, and/or demonstrated hardship.[212]

Section 237 must also be examined when an alien's actions, subject to the same or unrelated criminal proceedings, will result in two unrelated CIMT convictions.[213] Under the multiple criminal conviction section, the alien's date of entry is not a factor, nor is the length of the actual or potential sentence a factor in the determination.[214] When the alien has a previous conviction, there is generally no dispute as to whether the convictions are related. The complicated analysis in this provision involves what constitutes the concept of the "single scheme," when an alien is facing possible convictions on multiple CIMT counts.[215] Further complicating this analysis is a split between the BIA's decisions and the decisions of the Second, Third, and Ninth Circuit Courts.[216]

In immigration proceedings, the concept of what constitutes a "single scheme" is often litigated. The initial burden of proof is on the government.[217] In general, a determination can be made by the court based on the facts as set forth in conviction related documents.[218] Most often, a "single scheme" is not found when there are different victims with events occurring on different days.[219] The best outcome for an alien in this type of case is to negotiate a criminal plea to only one CIMT with a sentence of less than a year to cover all the criminal acts associated with the multiple criminal acts.

Finally, even if the CIMT offense does trigger a removal, an LPR may seek discretionary relief to have the removal order cancelled.[220] Prior

---

210. *See* INA § 237 (a)(2)(A)(i), 8 U.S.C. § 1227(a)(2)(A)(i) (2011).

211. *See* INA § 212(a)(2)(A), 8 U.S.C. § 1182(a)(2)(A) (2011) (making inadmissible an alien that admits to committing a CIMT). However, the alien may still fall into a relevant exception. *See supra* notes 196–199 and accompanying text.

212. *See* INA § 212(h), 8 U.S.C. § 1182(h) (2011).

213. *See, e.g.*, *In re* Adetiba, 20 I. & N. Dec. 506, 506, 512 (B.I.A. 1992); Pacheco v. INS, 546 F.2d 448, 452 (1st Cir. 1976).

214. INA § 237(a)(2)(A)(ii), 8 U.S.C. § 1227(a)(2)(A)(ii) (2011).

215. *See, e.g.*, *Adetiba*, 20 I. & N. Dec. at 506, 512; *Pacheco*, 546 F.2d at 452.

216. *Compare supra* note 209, *with* Nason v. INS, 394 F.2d 223, 226 (2d Cir. 1968), Sawkow v. INS, 314 F.2d 34, 37–38 (3d Cir. 1963), *and* Gonzalez-Sandoval v. INS, 910 F.2d 614, 616–17 (9th Cir. 1990).

217. Nason v. INS, 394 F.2d 223, 226 (2d Cir. 1968) ("[I]t is a part of the Government's burden to establish that the convictions did not arise out of a single scheme of criminal misconduct.").

218. *See, e.g.*, *id.* at 226 (noting that the record of conviction "itself supports a strong inference" that the criminal acts were separate).

219. *See, e.g.*, *In re* S--, 9 I. & N. Dec. 613, 621 (B.I.A. 1962); *In re* McLean, 12 I. & N. Dec. 551, 553–54 (B.I.A. 1967); *In re* Vosganian, 12 I&N Dec. 1, 6–7 (B.I.A. 1966); *In re* Z--, 6 I. & N. Dec. 167, 170–71 (B.I.A. 1954).

220. *See generally* INA § 240A, 8 U.S.C. § 1229b (2011).

to seeking this relief, a criminal conviction will nonetheless effectively terminate an LPR's continuous physical presence time clock,[221] as a required seven year element is necessary for an application for Cancellation of Removal.[222] In *Matter of Garcia*, the BIA clarified this "stop time" rule.[223] A conviction for a CIMT offense that qualifies as a petty offense under Section 212 does not trigger the "stop time" rule, even if the CIMT renders the alien deportable under Section 237.[224] Once the clock has been stopped based on a conviction, continuous residence is not restarted simply because an alien departed and returned to the U.S.[225]

As illustrated by this section, the determination of whether an offense is a CIMT and whether possible relief options exist from a conviction or multiple convictions requires significant knowledge of the INA and immigration proceedings. The Court's reasoning in *Padilla* that in some cases, counsel "specify what the removal *consequences* of a conviction would be" is a potentially difficult task when counsel must also examine possible relief options which would mitigate such consequences.[226]

B. Controlled Substance Offenses

Unlike the vague nature of the CIMT offenses, the INA clearly states that the commission of a controlled-substance offense will result in immigration consequences.[227] An alien is both inadmissible and deportable for "a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)) . . . ."[228] There is only one exception for a single offense involving the possession of thirty grams or less of marijuana for personal use.[229] The possession of or use of drug paraphernalia also constitutes a controlled substance violation,[230] as does the possession or transportation of a "simulated controlled substance"[231] and a counterfeit

221. INA § 240A(d)(1), 8 U.S.C. § 1229b(d)(1) (2011) (stating that a continuous physical presence or residence will be deemed to end when the alien has committed an offense referred to in INA § 212(a)(2)).

222. INA § 240A(a)(2), 8 U.S.C. § 1229b(a)(2) (2011) (stating that eligibility for cancellation of removal requires seven years of continuous legal residence).

223. *In re* Garcia, 25 I. & N. Dec. 332, 334–36 (B.I.A. 2010).

224. *Id.* at 335–36.

225. *In re* Nelson, 25 I. & N. Dec. 410, 415–16 (B.I.A. 2010).

226. Padilla v. Kentucky, 130 S. Ct. 1473, 1488 (2010) (Alito, J. concurring).

227. INA § 212(a)(2)(A)(i)(II), 8 U.S.C. § 1182(a)(2)(A)(i)(II) (2011); INA § 237(a)(2)(B)(i), 8 U.S.C. § 1227(a)(2)(B)(i) (2011).

228. *Id.*

229. INA § 212(h)(1), 8 U.S.C. § 1182(h)(1) (2011); INA § 237(a)(2)(B)(i), 8 U.S.C. § 1227(a)(2)(B)(i) (2011).

230. *In re* Martinez Espinoza, 25 I. & N. Dec. 118, 118–19 (B.I.A. 2009).

231. *In re* Sanchez-Cornejo, 25 I. & N. Dec. 273, 275–76 (B.I.A. 2010) (delivery of a simulated controlled substance is a violation of a law relating to a controlled substance).

substance.[232]

An alien who lawfully entered will not face removal proceedings for the first personal use marijuana possession offense under Section 237 provided the amount of marijuana is clear on the conviction records, as the exception is written into the statute.[233] However, an alien who seeks admission with the same marijuana offense must seek a waiver and may need to demonstrate extreme hardship to a qualifying relative.[234] An alien who departs the U.S. and seeks to reenter will be considered to be seeking admission.[235] Therefore, a lawfully admitted alien with a qualifying personal use marijuana conviction should be advised that departing the U.S. and attempting to reenter could result in the alien being detained, placed in immigration proceedings, and potentially removed permanently from the U.S.[236]

It should be made clear to all non-citizen defendants, in any legal or illegal status, that a conviction for any other controlled-substance violation defined in Section 102 of the Controlled Substances Act will result in immigration consequences.[237] Prior to April 1, 1997, aliens placed in removal proceedings had additional relief options available with which to seek relief from removal.[238] Current law dictates that only an LPR can request that a qualifying controlled substance conviction be cancelled for immigration purposes.[239] The LPR must also meet the required qualifications for cancellation: having five years as a LPR; demonstrating continuous residence in the U.S. for seven years after having been lawfully admitted; and not having an aggravated felony conviction.[240] An alien who does not have the required status and qualifications will be barred from seeking certain discretionary relief to remain in the U.S., although mandatory relief is always a possible option.[241]

---

232. *Id.*

233. *See* INA § 237(a)(2)(B)(i), 8 U.S.C. § 1227(a)(2)(B)(i) (2011).

234. INA § 212(h)(1), 8 U.S.C. § 1182 (h)(1) (2011).

235. *See supra* note 193 and accompanying text.

236. Aliens seeking admission with criminal convictions are generally not released from ICE custody until the termination of the immigration proceedings or the alien is removed from the U.S. *See* INA § 236(c)(1)(A), 8 U.S.C. § 12265a(c)(1)(A) (2011).

237. *See supra* note 227–232 and accompanying text.

238. *See* former INA § 212(c) (1995), 8 .U.S.C. § 1182(c) (1995). Repeal of subsection (c) by Sec. 304(b) of the ILLEGAL IMMIGRATION REFORM AND IMMIGRANT RESPONSIBILITY ACT of 1996 (IIRIRA); *see also* INS v. St. Cyr, 533 U.S. 289, 307–08 (2001). *See also* 8 C.F.R. § 1212.3 (2011) (application for the exercise of discretion under former section 212(c)).

239. INA § 240A(a), 8 U.S.C. § 1229b(a) (2011). Non-permanent residents who are convicted of offenses under INA § 212(a)(2)) are precluded from seeking relief. INA § 240A(b)(1)(C), 8 U.S.C. § 1229b(b)(1)(C) (2011). A waiver of inadmissibility under INA § 212(h) may separately be available for aliens seeking admission. 8 U.S.C. § 1182(h) (2011).

240. INA § 240A(a), 8 U.S.C. § 1229b(a) (2011). The "stop time" rule will apply for controlled substance violations. *See* INA § 240A(d)(1), 8 U.S.C. § 1229b(d)(1) (2011) (continuous physical presence or residence will be deemed to end when the alien has committed an offense referred to in INA § 212(a)(2)).

241. *See, e.g., supra* notes 19–22 and accompanying text.

C. Aggravated Felony Offenses

Aliens with aggravated felony convictions have very limited relief options in Immigration Court, so it is critical that aliens facing potential aggravated felony charges understand the consequences of any plea disposition or conviction after trial. Justice Alito's concurrence notes that determining whether a particular crime constitutes an aggravated felony offense is not "easily ascertained"[242] especially since the crime does not even have to constitute an actual felony under the jurisdiction in which the conviction is obtained.[243] To aid counsel in making a determination as to whether a crime constitutes an aggravated felony offense, professional reference materials are made available by the government and private sources to aid in making a legal analysis as to whether a crime has the necessary elements.[244]

An aggravated felony conviction is only a deportable offense under Section 237,[245] and not a ground of inadmissibility under Section 212. That does not mean that an alien, who would normally be charged under Section 212, cannot be removed as an aggravated felon.

A non-LPR alien with an aggravated felony conviction, an alien who entered lawfully or unlawfully, is subject to expedited removal proceeding pursuant to INA § 238.[246] The statute contains a presumption of deportability: "An alien convicted of an aggravated felony shall be conclusively presumed to be deportable from the United States."[247] As such, an alien's right to contest the proceedings and seek relief is extremely limited once placed in expedited removal.[248]

In Section 240 removal proceedings, an alien convicted of an aggravated felony offense who was lawfully admitted—as an LPR or either a nonimmigrant—is subject to a ground of deportability.[249] However, only LPRs and conditional LPRs with aggravated felony convictions are guaranteed the right to their removal in Section 240 proceedings.[250] Aggravated felony offenses are defined in INA § 101(a)(43) and apply to federal, state, and foreign convictions.[251] A conviction for an attempt or a

242. Padilla v. Kentucky, 130 S. Ct. 1473, 1489 (2010) (Alito, J., concurring).

243. *See, e.g.*, *In re* Martin, 23 I. & N. Dec. 491, 491–92, 499 (B.I.A. 2002).

244. *See, e.g.*, JUDGE BERTHA A. ZUNIGA, AGGRAVATED FELONY CASE SUMMARY (2010), *available at* http://www.justice.gov/eoir/vll/benchbook/resources/Aggravated_Felony_Outline.pdf.

245. INA § 237(a)(2)(A)(iii), 8 U.S.C. §1227(a)(2)(A)(iii) (2011).

246. INA § 238(b), 8 U.S.C. § 1228(b) (2011). Non LPR aggravated felons may also be placed in section 240 removal proceedings.

247. INA § 238(c), 8 U.S.C. § 1228(c) (2011).

248. *See* INA § 238(b)(3), 8 U.S.C. § 1228(b)(3) (2011) (stating that removal can occur fourteen days after service of the expedited removal order if the alien does not properly challenge the order by applying for judicial review).

249. *See* INA § 240(a)(2), 8 U.S.C. § 1229a(a)(2) (2011).

250. INA § 240(c)(3)(B), 8 U.S.C. § 1229a(c)(3)(B) (2011); 8 C.F.R. 1240.10 (2011).

251. INA § 101(a)(43), 8 U.S.C. § 1101(a)(43) (2011).

conspiracy to commit a crime described as an aggravated felony offense also makes the alien removable.[252]

> INA § 101(a)(43) defines the term 'aggravated felony' means—
> **(A)** murder, rape, or sexual abuse of a minor;
> **(B)** illicit trafficking in a controlled substance (as defined in section 802 of title 21)), including a drug trafficking crime (as defined in section 924(c) of title 18);
> **(C)** illicit trafficking in firearms or destructive devices (as defined in section 921 of title 18) or in explosive materials (as defined in section 841(c) of that title);
> **(D)** an offense described in section 1956 of title 18 (relating to laundering of monetary instruments) or section 1957 of that title (relating to engaging in monetary transactions in property derived from specific unlawful activity) if the amount of the funds exceeded $10,000;
> **(E)** an offense described in—
> **(i)** section 842(h) or (i) of title 18 or section 844(d), (e), (f), (g), (h), or (i) of that title (relating to explosive materials offenses);
> **(ii)** section 922 (g)(1), (2), (3), (4), or (5), (j), (n), (o), (p), or (r) or 924 (b) or (h) of title 18 (relating to firearms offenses); or
> **(iii)** section 5861 of Title 26 (relating to firearms offenses);
> **(F)** a crime of violence (as defined in section 16 of title 18, but not including a purely political offense) for which the term of imprisonment [is] at least one year;
> **(G)** a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment [is] at least one year;
> **(H)** an offense described in section 875, 876, 877, or 1202 of title 18 (relating to the demand for or receipt of ransom);
> **(I)** an offense described in section 2251, 2251A, or 2252 of title 18 (relating to child pornography);
> **(J)** an offense described in section 1962 of title 18 (relating to racketeer influenced corrupt organizations), or an offense described in section 1084 (if it is a second or subsequent offense) or 1955 of that title (relating to gambling offenses), for which a sentence of one year imprisonment or more may be imposed;
> **(K)** an offense that—
> **(i)** relates to the owning, controlling, managing, or supervising of a prostitution business;
> **(ii)** is described in section 2421, 2422, or 2423 of title 18 (relating to transportation for the purpose of prostitution) if committed for commercial advantage; or
> **(iii)** is described in any of sections 1581–1585 or 1588–1591 of

252. INA § 101(a)(43)(U), 8 U.S.C. § 1101(a)(43)(U) (2011). *See also In re* Richardson, 25 I. & N. Dec. 226, 230 (B.I.A. 2010).

title 18 (relating to peonage, slavery, involuntary servitude, and trafficking in persons);

**(L)** an offense described in—

**(i)** section 793 (relating to gathering or transmitting national defense information), 798 (relating to disclosure of classified information), 2153 (relating to sabotage) or 2381 or 2382 (relating to treason) of title 18;

**(ii)** section 421 of title 50 (relating to protecting the identity of undercover intelligence agents); or

**(iii)** section 421 of title 50 (relating to protecting the identity of undercover agents);

**(M)** an offense that—

**(i)** involves fraud or deceit in which the loss to the victim or victims exceeds $10,000; or

**(ii)** is described in section 7201 of title 26 (relating to tax evasion) in which the revenue loss to the Government exceeds $10,000;

**(N)** an offense described in paragraph (1)(A) or (2) of section 1324(a) of this title (relating to alien smuggling), except in the case of a first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien's spouse, child, or parent (and no other individual) to violate a provision of this chapter[;]

**(O)** an offense described in section 1325(a) or 1326 of this title committed by an alien who was previously deported on the basis of a conviction for an offense described in another subparagraph of this paragraph;

**(P)** an offense (i) which either is falsely making, forging, counterfeiting, mutilating, or altering a passport or instrument in violation of section 1543 of title 18 or is described in section 1546(a) of such title (relating to document fraud) and (ii) for which the term of imprisonment is at least 12 months, except in the case of a first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien's spouse, child, or parent (and no other individual) to violate a provision of this chapter;

**(Q)** an offense relating to a failure to appear by a defendant for service of sentence if the underlying offense is punishable by imprisonment for a term of 5 years or more;

**(R)** an offense relating to commercial bribery, counterfeiting, forgery, or trafficking in vehicles the identification numbers of which have been altered for which the term of imprisonment is at least one year;

**(S)** an offense relating to obstruction of justice, perjury or subornation of perjury, or bribery of a witness, for which the term of imprisonment is at least one year;

**(T)** an offense relating to a failure to appear before a court pursuant to a court order to answer to or dispose of a charge of a

> felony for which a sentence of 2 years' imprisonment or more may be imposed; and
> **(U)** an attempt or conspiracy to commit an offense described in this paragraph.
> The term applies to an offense described in this paragraph whether in violation of Federal or State law and applies to such an offense in violation of the law of a foreign country for which the term of imprisonment was completed within the previous 15 years. Notwithstanding any other provision of law (including any effective date), the term applies regardless of whether the conviction was entered before, on, or after September 30, 1996.[253]

An offense which is defined as an aggravated felony offense may also constitute an additional ground of inadmissibility[254] or deportability.[255] At the same time, a crime that may not be defined as an aggravated felony may very well still constitute a separate charge of removal.[256] Whether a particular statute constitutes an aggravated felony offense is not straight forward and may often be the subject of litigation.[257] An example of the challenge is demonstrated in examining crimes of violence[258] and illicit trafficking in controlled substances.[259]

First, the term "crime of violence" requires an intricate analysis of how the term is applied to the statute in question. The term "crime of violence" is defined as:

> (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
> (b) any other offense that is a felony and that, by its nature,

---

253. INA § 101(a)(43), 8 U.S.C. § 1101(a)(43) (2011).

254. *See* INA § 212(a)(9)(A), 8 U.S.C. § 1182(a)(9)(A) (2011); *see also* Hing Sum v. Holder, 602 F.3d 1092, 1093 (9th Cir. 2010) (holding an alien ineligible for an INA § 212(h) waiver because he committed an aggravated felony after fraudulent admission to the United States).

255. *See* INA § 237(a)(2)(A)(iii), 8 U.S.C. § 1227(a)(2)(A)(iii) (2011); *see also* Lettman v. Reno, 207 F.3d 1368, 1369–70 (11th Cir. 2000) (upholding BIA's decision finding alien deportable for commission of an aggravated felony after his entry).

256. INA § 237(a)(2)(A), 8 U.S.C. § 1227(a)(2)(A) (2011); *see also* Mehboob v. Attorney General, 549 F.3d 272, 274 (3d Cir. 2008) (holding that misdemeanor indecent assault is a crime of moral turpitude, making an alien eligible for deportation under 8 U.S.C. § 1227(a)(2)(A)(i)).

257. *See supra* notes 237–239 and accompanying text. E.g., Ghanzi v. Holder, 624 F.3d 23, 25–26 (2d Cir. 2010) (holding that a sexual misconduct conviction qualifies as "sexual abuse of a minor," an aggravated felony).

258. *Compare* Garcia v. INS, 237 F.3d 1216, 1222–23 (10th Cir. 2001) (holding that a DUI offense constitutes a crime of violence and therefore an aggravated felony), *with* Jobson v. Ashcroft, 326 F.3d 367, 375–76 (2d Cir. 2003) (holding that second-degree manslaughter is not a crime of violence, and is therefore not an aggravated felony).

259. *See, e.g.*, Rendon v. Mukasey, 520 F.3d 967, 975–77 (9th Cir. 2008) (holding that possession of marijuana with intent to sell contains a trafficking element and therefore qualifies as an aggravated felony).

> involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.[260]

The applicability of any state, federal, or foreign criminal statute must be examined under both Sections 16(a) and 16(b).[261] Under Section 16(a), a crime may be a felony or a misdemeanor.[262] However, under Section 16(b), the crime must constitute a felony under federal law.[263]

The BIA's recent analysis in *Matter of Velasquez* concluded that violent physical force is a required element of Section 16(a) and that the force is "capable of causing physical pain or injury to another person."[264] The court explained "[t]he key inquiry is not the alien's intent for purposes of assault, but rather whether battery, in all cases, requires the intentional use of 'violent force.'"[265] Therefore, an offense must include "the actual, attempted, or threatened use of violent force that is capable of causing pain or injury."[266] The BIA concluded that Virginia's assault and battery statute is not an aggravated felony offense because the statute does not require the actual use, attempted use, or threatened use of violent physical force for a conviction in all cases.[267] Under a similar analysis, the BIA found that a conviction with a one year sentence for third degree assault, a misdemeanor under CONN. GEN. STAT. § 53a-61(a)(1), constituted an aggravated felony offense because the statute involved the intentional infliction of physical injury.[268]

For an analysis under Section 16(b), the overall determining factor is whether an offense "by its nature," involves a substantial risk of the use of physical force.[269] For example, first degree manslaughter under N.Y. PENAL LAW § 125.20(1) or § 125.20(2) is an aggravated felony conviction because the statute requires proof of intent to cause serious injury or death, and there is a substantial risk that intentional force will be used.[270] Even if there is a substantial risk of causing serious bodily injury, such as in the

---

260. 18 U.S.C. § 16 (2011).

261. *See* Leocal v. Ashcroft, 543 U.S. 1, 8–11 (2004) (analyzing a Florida DUI statute under both Section 16 (a) and (b)).

262. *See* Chrzanoski v. Ashcroft, 327 F.3d 188, 196–97 (2d Cir. 2003) ("[O]ur interpretation of § 16(a) honors Congress' intent to expand the list of crimes that constitute aggravated felonies by defining as crimes of violence only those misdemeanors that include as an element the use of force.").

263. *In re* Martin, 23 I. & N. Dec. 491, 493 (B.I.A. 2002) (explaining that § 16(b) "is confined to felony offenses by its terms").

264. *In re* Velasquez, 25 I. & N. Dec. 278, 283 (B.I.A. 2010).

265. *Id.*

266. *Id.*

267. *Id.*

268. *Martin*, 23 I. & N. Dec. at 499. *But see* Chrzanoski v. Ashcroft, 327 F.3d 188, 197 (2d Cir. 2003) (holding that "third degree intentional assault under Connecticut law is not a crime of violence under § 16(a)" because force is not an element of the crime).

269. *E.g. In re* Vargas-Sarmiento, 23 I. & N. Dec. 651, 652 (B.I.A. 2004).

270. *Id.* at 653–54.

case of an impaired driver, DUI statutes that do not have a mens rea component or a showing of negligence are not aggravated felony offenses.[271]

Second, crimes related to the illicit trafficking of a controlled substance[272] may also require significant analysis. A state misdemeanor or a felony offense may qualify as a removable offense. Regardless of whether the offense is a misdemeanor or a felony under state law, the conduct must be punishable as a felony under the Controlled Substances Act.[273] Possession of a small amount for personal use is not a felony under the CSA[274] and neither is assisting another to possess a controlled substance—even if a felony under state law.[275] At the same time, a state misdemeanor offense for the conspiracy to distribute marijuana can qualify as an aggravated felony.[276] Determining whether a state drug offense qualifies as an aggravated felony, especially in cases of a recidivist, is determined by the Supreme Court and the controlling Federal Circuit Court of Appeals.[277] Complicating matters further, an aggravated felony conviction involving unlawful trafficking will presumptively constitute a "particularly serious crime" and therefore bar the alien from almost all possible relief options.[278]

D. Other Removable Offenses

In addition to the grounds of removal stated above, there are numerous other criminal offenses and acts not criminally prosecuted that

---

271. Leocal v. Ashcroft, 543 U.S. 1, 11 (2004) (holding that § 16(b) requires "a higher *mens rea* than the merely accidental or negligent conduct involved in a DUI offense").

272. INA § 101(a)(43)(B), 8 U.S.C. §1101(a)(43)(B) (2011).

273. *See* Lopez v. Gonzales, 549 U.S. 47, 50 (2006).

274. 21 U.S.C. § 844(a) (2011); *see also* Carachuri-Rosendo v. Holder, 130 S. Ct. 2577, 2580, 2589 (2010); *Lopez*, 549 U.S. at 52, 61; *In re* Thomas, 24 I. & N. Dec. 416 (B.I.A. 2007).

275. *Lopez*, 549 U.S. at 53–54; 21 U.S.C. § 846 (2011) ("Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy"). As such, all those who assist in an attempt or conspiracy to possess a small amount of controlled substance are charged at an equal to or lower than criminal or civil violation prescribed by the federal law.

276. *In re* Aruna, 24 I. & N. Dec. 452, 453, 458 (B.I.A. 2008) (holding a conspiracy to distribute a controlled dangerous substance—marijuana—qualified as an aggravated felony).

277. *See In re* Carachuri-Rosendo, 24 I. & N. Dec. 382, 393–94 (B.I.A. 2007) (holding that controlling precedent of the United States Court of Appeals for the Fifth Circuit dictates an alien's state conviction for simple possession of a controlled substance will not be considered an aggravated felony conviction on the basis of recidivism). *See also In re* Sanchez-Cornejo, 25 I. & N. Dec. 273 (B.I.A. 2010) (holding that delivery of a simulated controlled substance in violation of Texas law is not an aggravated felony).

278. INA § 241(b)(3)(B)(iii) (2011), 8 U.S.C. § 1231(b)(3)(B)(iii) (2011); *see also In re* Y-L-, 23 I. & N. Dec. 270, 274 (B.I.A. 2002) ("[I]t is my considered judgment that aggravated felonies involving unlawful trafficking in controlled substances presumptively constitute 'particularly serious crimes' within the meaning of section 241(b)(3)(B)(ii)."); *see also* INA § 241(b)(3)(B)(ii), 8 U.S.C. § 1231(b)(3)(B)(ii) (2011) (limiting relief to aliens who the Attorney General decides have been convicted "of a particularly serious crime" and are dangerous).

facilitate grounds of inadmissibility or removability. In some instances, certain offenses may only be a ground of deportability under Section 237 and not under Section 212. For example, deportable offenses include: crimes of domestic violence, stalking, violation of a protection order, crimes against children,[279] high speed flight,[280] firearm offenses,[281] espionage, treason,[282] and certain criminal immigration related offenses.[283] Although the above offenses may not be grounds for inadmissibility directly, an alien's actions can still fall into other categories such as a CIMT offense or an aggravated felony.[284] Additionally, there is nothing barring an otherwise admissible alien from being admitted under Section 212 and then placing the alien in removal proceeding pursuant to a Section 237 charge.[285] Other important grounds of removal not requiring a criminal conviction include document fraud;[286] a false claim to U.S. citizenship;[287] security;[288] and terrorist activities.[289]

The complicated task of seeking to determine whether a statute constitutes a removable offense can amount to "a maze of hyper-technical statutes and regulations that engender waste, delay, and confusion."[290] As such, significant efforts may need to be devoted to understand the complicated nature of the removal process.

## V. Aliens and the Criminal Justice System

The Court's ruling in *Padilla* states very clearly and distinctly that defense counsel must inform a client concerning whether a criminal plea carries a risk of deportation.[291] The American Bar Association (ABA) Criminal Justice Advisory Standards also articulates the duty counsel has in

279. INA § 237(a)(2)(E), 8 U.S.C. 1227(a)(2)(E) (2011). *See e.g. In re* Strydom, 25 I. & N. Dec. 507, 511 (B.I.A. 2011); *In re* Soram, 25 I. & N. Dec. 378, 385–86 (B.I.A. 2010); *In re* Velazquez-Herrera, 24 I. & N. Dec. 503, 517 (B.I.A. 2008).

280. INA § 237(a)(2)(A)(iv), 8 U.S.C. § 1227(a)(2)(A)(iv) (2011).

281. INA § 237(a)(2)(C), 8 U.S.C. § 1227(a)(2)(C) (2011).

282. INA § 237(a)(2)(D)(i), 8 U.S.C. § 1227(a)(2)(D)(i) (2011).

283. *See, e.g.*, INA § 237(a)(1)(E), 8 U.S.C. § 1227(a)(1)(E) (2011); INA § 237(a)(2)(D)(iv), 8 U.S.C. § 1227(a)(2)(D)(iv) (2011). *See also In re* Martinez-Serrano, 25 I. & N. Dec. 151, 155 (B.I.A. 2009).

284. *See supra* Parts IV.A.1, IV.C.

285. *See* INA § 237(a), 8 U.S.C. § 1227(a) (2011) (listing grounds for removal applying to *any* alien in and admitted to the United States).

286. INA § 212(a)(6)(C)(i), 8 U.S.C. § 1182(a)(6)(C)(i) (2011); INA § 237(a)(3)(C), 8 U.S.C. § 1227(a)(3)(C) (2011).

287. INA § 212(a)(6)(C)(ii), 8 U.S.C. § 1182(a)(6)(C)(ii) (2011); INA § 237(a)(3)(D), 8 U.S.C. §1227(a)(3)(D) (2011). *See also In re* Barcenas-Barrera, 25 I. & N. Dec. 40, 44 (B.I.A. 2009).

288. INA § 212(a)(3)(A), 8 U.S.C. § 1182(a)(3)(A) (2011); INA § 237(a)(4)(A), 8 U.S.C. § 1227(a)(4)(A) (2011).

289. INA § 212(a)(3)(B), 8 U.S.C. § 1182(a)(3)(B) (2011); INA § 237(a)(4)(B), 8 U.S.C. § 1227(a)(4)(B) (2011).

290. Drax v. Reno, 338 F.3d 98, 99 (2d Cir. 2003).

291. Padilla v. Kentucky, 130 S. Ct. 1473, 1486–87 (2010).

advising a client facing criminal charges.[292] In addition to providing advice concerning possible immigration risks, it is now clear that "affirmative misadvice regarding the removal consequences of a conviction may constitute ineffective assistance."[293] The complicated legal analysis required to adequately determine which criminal statutes make an alien removable will only fuel a new wave of alien appeals asserting misadvice—thereby allowing aliens a new avenue to avoid the immigration consequence of committing a crime.

In *Strickland v. Washington,* the Supreme Court established a two-part test to determine whether a criminal defendant has established a claim for ineffective assistance of counsel: (1) whether the attorney's representation to the client "fell below an objective standard of reasonableness,"[294] and (2) whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[295] Since guilty pleas can be invalidated when counsel's deficient performance undermines the voluntariness of the defendant's decision to plead guilty, prosecutors should take affirmative steps on the record to insure compliance with *Padilla's* requirements so that already limited judicial resources are not overwhelmed by future appeal claims. The Court has "long recognized that the negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel."[296] Prosecutors must use this critical phase properly and assure that cases are not overturned on appeal when defense counsel provides incorrect advice or makes assurances to an alien in the plea bargaining process.

Many jurisdictions already have a process in place to advise criminal defendants of possible immigration consequences.[297] The process

---

292. *Pleas of Guilty, Standard 14-3.2(f)*, AM. BAR ASS'N, http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_guiltypleas_blk.html (last visited Jan. 5, 2012) ("To the extent possible, defense counsel should determine and advise the defendant, sufficiently in advance of the entry of any plea, as to the possible collateral consequences that might ensue from entry of the contemplated plea."). *See also*, Kokabani v. United States, No. 5:08-CV-177-FL, 2010 U.S. Dist. LEXIS 110724, at *8 (E.D.N.C. Jul. 30, 2010) (holding that "simply referring clients to an immigration attorney is not—in most cases—objectively reasonably representation").

293. *Padilla*, 130 S. Ct. at 1492 (Alito, J., concurring).

294. Strickland v. Washington, 466 U.S. 668, 688 (1984).

295. *Id.* at 698.

296. *Padilla*, 130 S. Ct. at 1486.

297. *Id.* at 1491 (Alito, J., concurring) ("28 states and the District of Columbia have *already* adopted rules, plea forms, or statutes requiring courts to advise criminal defendants of the possible immigration consequences of their pleas."). The following statutes were current as of 2010: Alaska R. Crim. P. 11(c)(3); Ariz. R. Crim. P. 17.2(f); CAL. PENAL CODE § 1016.5 (West 2008); CONN. GEN. STAT. ANN. § 54-1J (West 2009); D.C. CODE. § 16-713 (2001); Fla. R. Crim. P. 3.172(c)(8); GA. CODE ANN. § 17-7-93(c) (1997); HAW. REV. STAT. ANN. § 802E-2 (LexisNexis 2007); Idaho Crim. R. 11; Ill. Code. Crim. P. 725 ILCS 5/113-8; Iowa R. Crim. P. 2.8(2)(b)(3), (5); Me. R. Crim. P. 11(h); Md. Rule 4-242(e); MASS. GEN. LAWS ANN. ch. 278, § 29D (West 2009); Minn. R. Crim. P. 15.01; MONT. CODE ANN. § 46-12-210 (2009); NEB. REV. STAT. ANN. § 29-1819.02 (LexisNexis 2010); N.M. Dist. Ct. R. Cr. P. 5-303(F)(5); N.Y. CRIM. PROC. LAW §220.50(7) (McKinney 2009); N.C. GEN. STAT. ANN. § 15A-

in certain jurisdictions specifies that the defendant is not required to disclose the defendant's legal status in the United States to a court.[298] However, this does not prevent the prosecutor from insisting on obtaining this information in exchange for negotiating a favorable plea. This was clearly the intent of the Court: "informed consideration of possible deportation can only benefit both the State and noncitizen defendants during the plea-bargaining process. By bringing deportation consequences into this process, the defense and prosecution may well be able to reach agreements that better satisfy the interests of both parties."[299]

The Immigrant Defense Project (IDP), a legal resource and training center for criminal defense attorneys, recommends that judges "should refrain from asking about [a] defendant citizenship/immigration status."[300] However, the courts have an obligation: "under the Constitution to ensure that no criminal defendant—whether a citizen or not—is left to the 'mercies of incompetent counsel.'"[301] As such, the court should permit the prosecution to put plea negotiations, which include an evaluation of defendant's immigration status, on the record. In any event, the court would not need to have the defendant's exact immigration status as articulated under the INA. Rather, the court would only need to understand if the defendant's legal status may be compromised by the proposed plea and, as such, insure that the defendant understands that the plea may result in detention and deportation by immigration officials.[302]

In general, there are only a few different categories in which an alien defendant's legal immigration status would be affected. The first basic premise is whether the alien is in the country legally or illegally. Second, whether the alien may have possible relief options still available after a conviction for the proposed plea. The question that needs to be addressed is what options will the alien have to remain legally in the U.S. after taking the proposed plea. These general categories need to be broken down into five distinct parts: (1) the alien has legal status and may have relief available for removable offenses (including a legal attack on whether the offense actually makes the alien removable); (2) the alien has legal status and will not have any relief options; (3) the alien does not have legal status, but seeks to remain legally in the U.S. and may be eligible to seek discretionary or mandatory relief from removal; (4) the alien does not have

---

1022(A)(7) (West 2007); OHIO REV. CODE ANN. § 2943.031 (West 2006); OR. REV. STAT. § 135.385(2)(D) (2007); P.R. LAWS ANN. tit. 34, App. II, Rule 70; R.I. GEN. LAWS § 12-12-22 (2008); TEX. CODE CRIM. PROC. ANN. art. 26.13(a)(4) (West 2009); VT. STAT. ANN. tit. 13, § 6565(c) (2009); WASH. REV. CODE § 10.40.200 (2008); and WIS. STAT. § 971.08(1)(C) (2006).

298. *See, e.g.*, Ariz. R. Crim. P. 17.2(f).

299. *Padilla*, 130 S. Ct. at 1486.

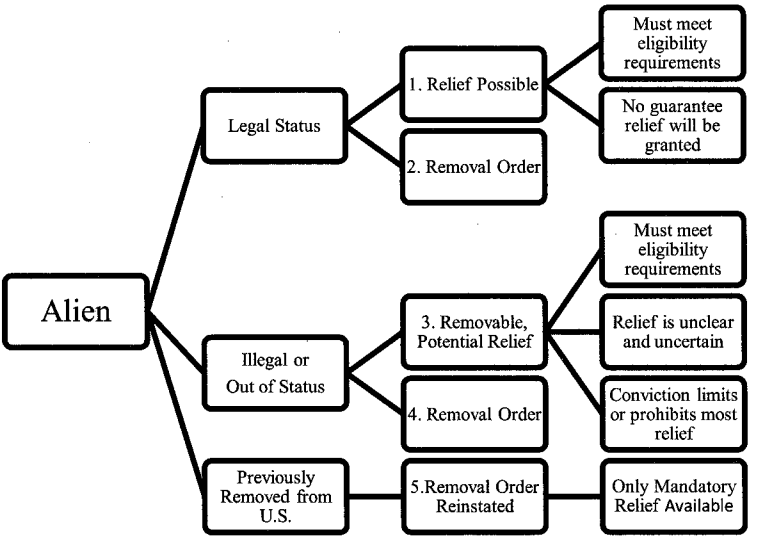
300. NIKKI REISCH & SARA ROSELL, IMMIGRANT DEFENSE PROJECT, ENSURING COMPLIANCE WITH PADILLA V. KENTUCKY WITHOUT COMPROMISING JUDICIAL OBLIGATIONS 1 (2010), *available at* http://www.immigrantdefenseproject.org/docs/2011/IDP_Judicial_Inquiry_Into_Status_Nov2010[1].pdf.

301. *Padilla*, 130 S. Ct. at 1486.

302. *See, e.g.*, *Padilla*, 130 S. Ct. at 1486.

legal status and has no options of legally remaining or reentering the U.S.; and (5) the alien was previously removed from the U.S.

Figure 1: Assessing the Alien's Legal Status and Possible Immigration Options




In addressing these categories, the best approach may be to view them in reverse order. An alien without legal status cannot presume to have any legal right to remain in the U.S. legally, nor does the INA provide one.[303] Starting with Category 5, an alien previously removed from the U.S., who illegally reentered, is subject to reinstatement of the original order of removal.[304] The only form of relief eligible to reentering illegal aliens is if the alien's life or freedom would be threatened or if they would be tortured if returned.[305] Since a Category 5 alien is already subject to automatic removal, any criminal conviction received by the alien will not directly affect the alien's immigration status or removal eligibility.[306] It is

303. *See supra* Part II.C.

304. INA § 241(a)(5), 8 U.S.C. § 1231(a)(5) (2011).

305. 8 C.F.R. § 1208.16–.17 (2011); INA § 241(b)(3)(A), 8 U.S.C. § 1231(b)(3)(A) (2011).

306. There is one important note concerning guilty pleas for individuals who have a genuine fear of returning to their home countries: individuals who have committed a "particularly serious" crime or an aggravated felony offense may not be eligible for withholding of removal under 8 C.F.R. § 1208.16 and may be only eligible for deferral of removal under the Convention Against Torture pursuant to 8 C.F.R. § 1208.17. *See* INA § 241(b)(3)(B), 8 U.S.C. § 1231(b)(3)(B) (2011). Deferral of removal requires the alien demonstrate that it is more likely than not that the alien would be tortured if returned. *See* 8 C.F.R. § 1208.17 (2011).

unlikely an alien in this category will prevail on a *Padilla* claim.[307]

In Category 3 and 4 cases, the INA already provides for the alien's removal based on a failure to obtain or maintain a legal status.[308] The Court in *Padilla* stated: "when the deportation consequence is truly clear . . . the duty to give correct advice is equally clear."[309] As such, an alien not in legal status is subject to removal for that unlawful status. Therefore, counsel's only obligation is to inform the alien that there is no guarantee that an alien may be permitted to legally reside in the U.S., with or without a criminal conviction. Advising an alien of possible relief options was not addressed in the *Padill*a decision. This is a crucial factor in future *Padilla* claims: if one does not have legal status, then there is no future consequence of losing a legal status that the alien did not have a right to in the first place.

In cases involving a Category 4 alien, counsel's role should be focused on getting the best possible criminal disposition, while notifying the alien that immigration will likely detain and remove the alien in due course. Counsel should also notify the client that illegal reentry into the U.S. will subject the alien to federal criminal charges and the possibility of a lengthy prison sentence depending on the nature of the client's present and prior convictions.

Category 3 alien cases are often far more complicated and should be broken down further into two separate categories: (a) the alien has an immediately available immigrant petition or the alien may have valid fear of returning to the alien's country of citizenship; and (b) the alien has U.S. citizen or LPR relatives and may be eligible for an immigrant petition in the future. An unlawful alien, or a member of the alien's family, may have already spent a significant amount of money on legal fees and spent years waiting to permit the alien to seek lawful status. However, all Category 3 aliens will have speculative relief, options that are unclear or uncertain without a clear understanding of alien's full circumstances and immigration law. As such, "a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences,"[310] such as failure to obtain lawful status in the future, while reminding the alien they are already subject to removal for the illegal presence. A criminal or unlawful act, even one that does not automatically render the alien inadmissible or deportable, has potential consequences such as in the case of an alien who wishes to seek non-LPR cancellation of removal.[311]

---

307. *See* United States v. Bacchus, No. 93-0835, 2010 U.S. Dist. LEXIS 139583, at *3–*6 (D.R.I. Dec. 8, 2010) (discussing how the *Padilla* rule does not apply retroactively).

308. *Id.* at 1483.

309. *Padilla,* 130 S. Ct. at 1483.

310. *Id.*

311. *See* INA § 240A(b)(1)(B) (2011), 8 U.S.C. § 1229b(b)(1)(B) (2011); INA § 101(f) (2011), 8 U.S.C. § 1101(f) (2011) (listing a class of individuals who do not have good moral character).

Counsel may also recommend that the unlawful alien engage the services of an immigration attorney to properly evaluate and recommend the best possible means of preserving the alien's future ability to seek lawful status in the U.S. prior to removal, especially aliens in the 3(a) category. Even if an alien is eligible for a waiver or has a genuine fear of return, there is still a large difference between the eligibility to file a relief application and the standard for being granted that application. Counsel may also advise the alien that even if a future application may be possible, once removed from the U.S., it is possible the alien will not be permitted to return. If deported under a Section 240 proceeding, an alien is inadmissible for at least ten years from the date of removal; this period is extended to twenty years for an aggravated felony offense.[312] In addition to this ground of inadmissibility, impediments for reentry also include a ten-year bar to reentry for aliens who have been unlawfully present in the U.S for over one year.[313] And the actual criminal conviction may require a hardship waiver which will be very difficult to demonstrate if the alien is already barred for at least ten years.

The decision in *Padilla* appears primarily directed at safeguarding aliens in Categories 1 and 2 from receiving defective immigration advice concerning the alien's continued lawful status in the U.S. Aliens in a lawful status, such as Padilla,[314] have the most to lose as any removal charges will be based on the criminal conviction, alone or in conjunction with prior convictions.[315] Even with lawful status, aliens in Categories 1 and 2 may or may not be eligible for relief from removal.[316] Together, these factors give Category 1 and 2 defendants the most reason to seek post conviction relief on the grounds of ineffective assistance of counsel. When the facts and circumstances were evaluated by counsel prior to the plea, Padilla should have been advised that he would have been in Category 2 by agreeing to plead guilty to transporting a large amount of marijuana in his tractor trailer. Although a long term LPR with potentially significant equity and mitigating factors, a conviction for trafficking in a controlled substance would have labeled him an aggravated felon without any possible relief options.[317] Based on these facts, Padilla's only options were to take the aggravated felony conviction and receive a reduced sentence or go to trial.

Padilla's success at trial appeared dim. His truck was stopped for failing to display a weight and distance tax identification sticker.[318] After Padilla consented to a search of the truck, police officers found over 1,000

312. *See* § 212(a)(9)(A)(ii), 8 U.S.C. 1182(a)(()(A)(ii) (2011).

313. INA § 212(a)(9)(B)(i)(II), 8 U.S.C. § 1182(a)(9)(B)(i)(II) (2011).

314. *Padilla*, 130 S. Ct. at 1477.

315. *See supra* Part II.A.

316. *See supra* notes 56–58 and accompanying text.

317. *See Padilla,* 130 S. Ct. at 1477. Padilla was a citizen of Honduras. The record does not indicate that Padilla had any fear of being returned to Honduras.

318. Brief for the United States as Amicus Curiae Supporting Affirmance, Padilla v. Kentucky, 130 S. Ct. 1473 (2010) (No. 08-651), 2009 WL 2509223, at *2.

pounds of marijuana.[319] Padilla's counsel made a motion to suppress the search, but the trial court upheld the validity of the consensual search.[320] Over 1,000 pounds of marijuana is clearly in excess of the personal use exception and indicative of a trafficking offense.[321] Since the prosecution had a strong case and had already won a pretrial hearing, the offer to plea to a trafficking offense with a five year sentence was really the best criminal option Padilla had.

Even if the prosecution generously offered a plea to possession of a controlled substance, Padilla would still be in Category 1. Padilla would be subject to removal and the likelihood that his relief application would be granted would still be very "unclear or uncertain."[322] During a cancellation-of-removal hearing, Padilla would still have to be granted relief as a matter of discretion, and relief is never certain.[323] The facts and circumstances of the arrest could be examined in light of any mitigating favorable factors. Padilla could not hide the facts of the arrest: transporting a very large amount of a controlled substance.

The IDP is encouraging defense counsel to leave the "record of conviction vague as to what was the underlying crime intended" and to "keep out of [the] record of conviction [the] identification of the controlled substance involved."[324] Informing a client of the potential consequences of a criminal plea is very different from subverting the true nature of the crime committed. Prosecutors should not be agreeing to hide the true nature of an alien's crime. Criminal cases involving aliens should be handled and recorded in the normal course. Criminal acts and convictions are public records. If U.S. citizens with similar convictions records have the nature of their crime in the record, then so should aliens.

ICE has prepared a "Tool Kit for Prosecutors" to assist prosecutors in understanding the potential consequences of a criminal conviction in the immigration process.[325] The document addresses situations in which witnesses, victims, or defendants may be facing removal based on their legal or illegal residence status in the U.S.[326] Unlike the IDP, ICE encourages prosecutors to include the factual information concerning the

319. *Id.* at *2–*3.

320. *Id.*

321. *Id.*

322. Padilla v. Kentucky, 130 S. Ct. 1473, 1483 (2010).

323. *See supra* notes 57–59 and accompanying text.

324. IMMIGRANT DEFENSE PROJECT, APPENDIX A: QUICK REFERENCE CHART FOR DETERMINING IMMIGRATION CONSEQUENCES OF COMMON NEW YORK OFFENSES A-29, A-53 (2006), *available at* http://www.immigrantdefenseproject.org/docs/06_QuickReferenceChartforNewYorkStateOffenses.pdf. *See also In re* Ahortalejo-Guzman, 25 I. & N. Dec. 465, 468 (B.I.A. 2011) (holding that the Immigration Judge was not permitted to examine evidence outside of the record of conviction in that case).

325. *See* ICE, PROTECTING THE HOMELAND: TOOL KIT FOR PROSECUTORS (2011), *available at* http://www.ice.gov/doclib/about/offices/osltc/pdf/tool-kit-for-prosecutors.pdf.

326. *Id.* at 2.

crime in the record of conviction.[327] For example, aliens are removable for crimes of domestic violence, and as such, "[i]nclusion of information such as the victim-perpetrator relationship may need to be present in the record of conviction to render an alien removable."[328] However, as in many domestic violence cases, prosecutors who work with victims may recognize that compliance from the victim may be significantly limited if the crime makes the defendant removable. Consequently, inclusion of this information in the record can and should be used in the negotiation process to achieve the best form of justice for all.

## VI. Clarifying Potential Immigration Consequences

Even at the most basic as these five categories appear, the reality is that the justice system needs some form of uniformity in its instructions to limit future claims resulting from the *Padilla* decision. Jurisdictions may wish to consider modifying or adding new instructions which should be read to every defendant prior to a criminal plea, unless the defendant asserts a claim to U.S. citizenship. Notifying an alien that there may be possible immigration consequences for a guilty plea may no longer simply be adequate.[329]

Based on the Court's recent decision and various jurisdictions current required language, instructions should be updated to include the following minimum requirements:

> If you are not an U.S. citizen, there may be potentially severe immigration consequences. Immigration consequences may include, but are not limited to:
>
> - removal from the U.S.;
> - mandatory detention during the immigration proceedings;
> - a limited ability to seek discretionary relief to remain in the U.S;
> - a limitation on your ability to travel outside of the U.S.;
> - a permanent bar to reentering the U.S. legally;
> - enhanced criminal penalties for illegally reentering the U.S.; and
> - a limitation on your ability to naturalize as a U.S. citizen.
>
> Furthermore, legal counsel in immigration proceeding is not provided for free by the government. Your criminal attorney is required to explain the possible immigration consequences of your

327. *Id.* at 30–31.

328. *Id.*

329. *See* Padilla v. Kentucky, 130 S. Ct. 1473, 1483 (2010) ("[W]hen the deportation consequence is truly clear . . . the duty to give correct advice is equally clear.").

> plea, specifically whether this plea may alter your immigration status. However, immigration law is complicated and you may need to consult an immigration attorney at your own expense to fully discuss any possible options you may have to remain lawfully in the U.S.

The defendant needs to acknowledge these potential consequences on the record and be given an adjournment if necessary so that the general immigration consequences of any plea are known to the defendant prior to acceptance of the plea.

Even if jurisdictions do not update this language, defense attorneys should review all these possible points with their clients to preempt future appeals seeking ineffective assistance of counsel for failure to warn of these consequences. Prosecutors should also consider adding similar language to written and oral plea agreements to ensure alien defendants are on notice of all the possible immigration consequences. Aliens will face a much greater burden in seeking to withdraw pleas if these consequences are on the record at the time of the plea.

## VII. Conclusion

Until the courts have further clarified the full range of obligations under *Padilla,* affirmative steps must be taken to limit future alien appeals. The *Padilla* decision may also need to be reviewed and limited in that providing free immigration advice by government-appointed counsel is contrary to Congress' intention of not providing immigration services to aliens at tax payers' expense.[330] Immigration law is a specialty of its own and even many qualified immigration attorneys may have a hard time deciphering which crimes make an alien removable. The implications of this decision are clearly far-reaching beyond what the Supreme Court had contemplated as is born out in recent lower court decision. The Court's requirement that a criminal defense attorney competently interpret the relevant immigration law is akin to asking an immigration attorney (or any other non-tax attorney) to decipher the tax code. As for the tax code, the best advice a non-tax attorney should provide to a client is clear common sense: accurately file and pay taxes due on time. As for aliens, the best advice a criminal attorney can give a client arrested for a crime is to be prepared for potentially severe adverse immigration consequences—consequences that may be significantly more harsh than a criminal sentence.

330. *See* INA § 292, 8 U.S.C. § 1362 (2011).

# ARTICLE

## A Survey of Federal and State Standards for the Admission of Expert Testimony on the Reliability of Eyewitnesses

George Vallas*

> At the mouth of two witnesses, or three witnesses, shall he that is worthy of death be put to death; but at the mouth of one witness he shall not be put to death.[1]
>
> [T]here is almost nothing more convincing than a live human being who takes the stand, points a finger at the defendant, and says "*That's* the one!"[2]



---

* J.D., The University of Texas School of Law, 2011; B.A., Manhattanville College, 2007. I would like to thank Dr. Larry Laudan for his assistance and feedback in writing this article, and the hardworking editorial staff at the American Journal of Criminal Law. I would also like to thank Amita Patel for her constant support and encouragement.

1. *Deuteronomy* 17:6 (King James).

2. Watkins v. Sowders, 449 U.S. 341, 352 (1981) (Brennan, J., dissenting) (emphasis added) (internal citation omitted).

## I. Introduction

Eyewitness testimony is indispensible to the proper functioning of the criminal justice system. However, as Justice Frankfurter famously observed: "The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification."[3] Social scientists, legal commentators, and even courts have long been skeptical of eyewitness testimony.[4] Developments in forensic testing have established beyond any doubt that eyewitness testimony has the potential to be dangerously unreliable, and eyewitness misidentification remains the leading cause of false convictions in the United States.

---

3. United States v. Wade, 388 U.S. 218, 228 (1967).

4. *See* HUGO MÜNSTERBERG, ON THE WITNESS STAND: ESSAYS ON PSYCHOLOGY AND CRIME 43 (1908). Other legal commentators and social scientists throughout the twentieth century identified eyewitness testimony as the leading cause of false convictions. *See, e.g.*, EDWIN BORCHARD, CONVICTING THE INNOCENT 367 (1932) ("Perhaps the major source of these tragic errors [false convictions] is an identification of the accused by the victim of a crime of violence."); Gary L. Wells et al., *Eyewitness Evidence: Improving Its Probative Value*, 7 PSYCHOL. SCI. PUB. INTEREST 48 (2006) (citing BORCHARD, *supra*, and two other studies conducted in 1957 and 1986 respectively, all of which attributed the majority of wrongful convictions to eyewitness misidentification).

The use of psychological and behavioral science experts during trials would alleviate this danger to some degree. Expert eyewitness testimony serves two principle goals: it should both inform jurors that eyewitnesses are significantly less reliable than common sense suggests, and also should educate jurors about the nature of human memory and specific variables that affect the accuracy of identifications.[5] Ideally, such testimony will allow jurors to continue relying on eyewitness testimony when appropriate, while at the same time evaluating its reliability more effectively.

Courts, however, have historically been reluctant to permit the use of eyewitness experts. Although the trend over the past several decades has been toward a greater reliance on experts, standards still vary among state and federal jurisdictions. This Article will attempt to provide a comprehensive survey of the standards for the admission of eyewitness expert testimony in federal and state courts. It will proceed in five parts: Part II will discuss the role of eyewitness testimony in false convictions; Part III will evaluate the specific factors that contribute to the inaccuracy of eyewitness identifications; Part IV will provide a brief overview of the general standards governing the admission of expert testimony in state and federal courts; Part V will determine how these standards are applied to eyewitness experts in particular; and, finally, Part VI will evaluate the various judicial approaches and provide normative suggestions for the proper use of expert eyewitness testimony.

## II. The Role of Eyewitness Testimony in Producing False Convictions

In 1981, an eleven-year-old girl and her twelve-year-old male friend were attacked while walking home through a park in Cleveland.[6] The assailant drew a gun, assaulted the twelve-year-old, and forced him to lie on the ground while he sexually assaulted the young girl.[7] Police compiled a composite sketch of the suspect with the assistance of the victims and, three weeks later, Raymond Towler was arrested during a routine traffic stop after the officer noticed his resemblance to the sketch.[8] Both victims and another witness who saw the assailant in the park with the

5. Michael R. Leippe & Donna Eisenstadt, *The Influence of Eyewitness Expert Testimony on Jurors' Beliefs and Judgments*, *in* EXPERT TESTIMONY ON THE PSYCHOLOGY OF EYEWITNESS IDENTIFICATION 175 (Brian L. Cutler ed., 2009).

6. *Know the Cases: Raymond Towler*, INNOCENCE PROJECT, http://www.innocenceproject.org/Content/Raymond_Towler.php (last visited Feb. 6, 2012).

7. *Id.*

8. *Id.*

children selected Towler from a photo array.[9] Based on these identifications, Towler was arrested and charged with rape, assault, and kidnapping.[10] The eyewitnesses testified at the trial, and, despite Towler's alibi[11] and the lack of any meaningful physical evidence, he was convicted and sentenced to life in prison.[12]

Over twenty years after Towler's conviction, Ohio passed a law allowing for the post-conviction testing of DNA evidence.[13] With the help of the Ohio Innocence Project, Towler petitioned to have the biological evidence in his case tested, and tests on the young girl's clothing eventually excluded him as the assailant.[14] In May 2010, after twenty-eight years of incarceration, Towler was released from prison.

Unfortunately, such cases are unsurprising to anyone familiar with the extensive research on eyewitness reliability. Social scientists have long recognized the questionable reliability of eyewitness testimony. As early as 1908, the psychologist Hugo Müsterberg wrote: "[I]n a thousand courts at a thousand places all over the world, witnesses every day affirm by oath . . . mixtures of truth and untruth, combinations of memory and of illusion, of knowledge and of suggestion, of experience and wrong conclusions."[15] The wave of exonerations following the advent of DNA testing has reinforced these conclusions. Today, it is generally acknowledged that eyewitness misidentification is the leading cause of false convictions in the United States.[16]

---

9. *Id.* A fourth eyewitness who claimed to have seen Towler in the park at the time of the incident without the children also testified at trial. *Id.*

10. *Id.*

11. *See id.* (noting that Towler presented several witnesses who testified that he was at home at the time of the assault).

12. *Id.* Towler moved to suppress the eyewitness identifications before the trial. State v. Towler, No. 44437, 1982 WL 5969, at *3 (Ohio Ct. App. Oct. 21, 1982). The Ohio Court of Appeals found no error in the trial court's decision to admit the identifications, in part because the witnesses "had ample time to view the assailant, and exhibited a high degree of certainty during both the display and the trial. Such circumstances suggest the reliability of an identification." *Id.* The flawed assumptions underlying this reasoning will be discussed in depth in Part III, *infra.*

13. *See* OHIO REV. CODE ANN. §§ 2953.71–83 (LexisNexis 2006 & Supp. 2009).

14. *Know the Cases*, *supra* note 6.

15. *See* MÜNSTERBERG, *supra* note 4.

16. *See, e.g.*, ROB WORDEN, HOW MISTAKEN AND PERJURED EYEWITNESS IDENTIFICATION TESTIMONY PUT 46 INNOCENT AMERICANS ON DEATH ROW 1 (2001), *available at* www.deathpenaltyinfo.org/StudyCWC2001.pdf ("Erroneous eyewitness testimony—whether offered in good faith or perjured—no doubt is the single greatest cause of wrongful convictions in the U.S. criminal justice system."); Jennifer Devenport et al., *Eyewitness Identification Evidence: Evaluating Commonsense Evaluations*, 3 PSYCHOL., PUB. POL'Y & L. 338, 338 (1997) ("[M]istaken identifications appear to be the most frequent source of erroneous convictions."); Wells et al., *supra* note 4, at 48 (noting that "[e]yewitness testimony was at the heart of the evidence used to convict the vast majority" of those exonerated by the Innocence Project).

According to the Innocence Project, eyewitness testimony played a role in a surprising 75% of the convictions that have been overturned as a result of DNA evidence.[17] In 50% of those cases, eyewitness testimony was the central cause of conviction.[18] Although common sense might suggest that multiple eyewitness identifications would be exceedingly reliable, the data proves otherwise. In 25% of the first 175 exonerations that involved eyewitness testimony, the defendant was misidentified by two eyewitnesses. Three or more witnesses made an inaccurate identification in a further 13% of those cases.[19] Another study of 340 exonerations concluded that eyewitness testimony was involved in 64% of the overall number of wrongful convictions[20] and in as many as 84% of wrongful rape convictions.[21] In fact, according to the Third Circuit, "mistaken eyewitness identifications are responsible for more wrongful convictions than all other causes combined."[22]

DNA testing is an effective tool for both accurately exculpating the innocent and inculpating the guilty. It has therefore been a powerful force for good in the criminal justice system. However, it is important to recognize that DNA testing has not eliminated the potential for false convictions. Only 5%–10% of criminal cases involve testable biological evidence.[23] Many individuals today suspected of committing crimes that involve biological evidence who are not currently indicted or brought to trial as a result of DNA testing would have been indicted prior to its availability.[24] The factors that contribute to such mistakes—most

---

17. *Eyewitness Misidentification*, INNOCENCE PROJECT, http://www.innocenceproject.org/understand/Eyewitness-Misidentification.php (last visited Feb. 6, 2012).

18. *Id.* (noting that other cases also involved such factors as improper forensic science, false confessions, and informant testimony).

19. *Id.* These figures "illustrate[] the fallacy of assuming that inter-witness agreement is necessarily strong evidence of accuracy," Wells et al., *supra* note 4, at 48, which had such tragic consequences in Raymond Towler's case.

20. Richard A. Wise et al., *A Tripartite Solution to Eyewitness Error*, 97 J. CRIM. L. & CRIMINOLOGY 807, 811 (2007) (citing Samuel R. Gross et al., *Exonerations in the United States 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 524 (2005)).

21. Desiree Evans, *Texas Justice: Where Wrongful Convictions are the Norm*, INST. FOR S. STUD. (Sept. 1, 2009, 10:23 AM), http://www.southernstudies.org/2009/09/texas-justice-where-wrongful-convictions-are-the-norm.html (noting that 84% of false convictions in Texas involve eyewitness testimony).

22. United States v. Brownlee, 454 F.3d 131, 142 (3d Cir. 2006) (quoting A. Daniel Yarmey, *Expert Testimony: Does Eyewitness Memory Research Have Probative Value for the Courts?*, 42 CAN. PSYCHOL. 92, 93 (2001)).

23. *Unvalidated or Improper Forensic Science*, INNOCENCE PROJECT, http://www.innocenceproject.org/understand/Unreliable-Limited-Science.php (last visited Feb. 6, 2012).

24. *See* Wise et al., *supra* note 20, at 809–10 (noting that, in a survey of forensic laboratories in the United States, the suspect was exonerated in 27% of the 21,621 cases in which DNA was tested, and speculating that charges are brought in similar cases with no testable biological evidence).

prominently eyewitness misidentification—continue to produce false indictments and convictions in cases without testable biological evidence.[25]

## III. Factors Contributing to the Unreliability of Eyewitness Testimony

Before concluding that expert testimony can alleviate the danger posed by inaccurate eyewitness testimony, it is important to understand precisely why eyewitnesses are so often incorrect. A considerable body of literature has arisen around the specific causes of eyewitness fallibility. These studies cite several factors that contribute to the unreliability of eyewitness identifications, including: own-race bias; stress and weapon focus; exposure duration and retention interval; the lack of correlation between eyewitness confidence and accurate identifications; and problematic post-event information, such as suggestive identification procedures. This part will briefly examine each of these factors in turn and then discuss the extent to which jurors are aware of them.

### A. Own-Race Bias

Own-race bias, also known as the cross-race effect, refers to the fact that individuals have less difficulty identifying and remembering faces of their own race than those of a different, less familiar race.[26] This phenomenon is particularly well-established.[27] In a 2001 survey of experts, for instance, sixty of the sixty-three experts polled characterized the existence of the phenomenon as at least somewhat reliable, while twenty-five considered it to be very reliable.[28]

Research has also demonstrated the magnitude of the effect. A 2001 literature review determined that the chance of mistaken identification is 1.56 times greater in a cross-race than in an own-race identification.[29] Additionally, witnesses were 1.4 times more likely to correctly identify a previously viewed face from their race than from another race.[30] It is not entirely clear what causes the effect. Lack of familiarity is an intuitive

---

25. *See infra* Part III.

26. John P. Rutledge, *They All Look Alike: The Inaccuracy of Cross-Racial Identification*, 28 AM. J. CRIM. L. 207, 211 (2001).

27. *See* Christian A. Meissner & John C. Brigham, *Thirty Years of Investigating the Own-Race Bias in Memory for Faces: A Meta-Analytic Review*, 7 PSYCHOL. PUB. POL'Y & L. 3, 4 (2001) (noting that literature reviews on own-race bias have all discussed "the robustness of the phenomenon") (internal citation omitted).

28. Saul M. Kassin et al., *On the "General Acceptance" of Eyewitness Testimony: A New Survey of the Experts*, 56 AM. PSYCHOL. 405, 411 tbl.3 (2001).

29. Wells et al., *supra* note 4, at 52.

30. *Id.* (citing Meissner & Brigham, *supra* note 27).

explanation, but studies have suggested that familiarity does not have a significant effect on the accuracy of cross-racial identifications.[31] Own-race bias also does not differ significantly among age groups.[32] Interestingly, the phenomenon may not be present to the same degree in all races.[33] However, regardless of the cause, own-race bias is well-established and is of considerable importance in evaluating the reliability of eyewitness identifications.

B. Violence, Stress, and Weapon Focus

Violence, stress, and the presence of a weapon at the time of a crime all may have detrimental effects on the ability of a witness to make an accurate identification. As researchers obviously cannot precisely replicate a violent crime, it is somewhat difficult to directly measure the effect of stress and violence on identification accuracy. Nevertheless, several experiments suggest that high levels of stress will have negative effects on the ability of a witness to make a correct identification[34] and on the ability of a witness to recall specific details of the crime.[35]

Similarly, witnesses to violent crimes may be less likely to accurately identify and remember the face of the perpetrator than witnesses to non-violent crimes. For instance, experiments involving videotaped reenactments of crimes suggest that increases in the level of violence adversely affect both the accuracy of identifications and witness recall.[36] However, this finding is not universal.[37]

"Weapon focus" refers to the proposition that the presence of a weapon during the course of a crime will distract a witness and significantly

---

31. *See id.* (noting that cross-race contact "played only a small role in [own-race bias], accounting for just 2% of variability across participants").

32. *See id.* (citing a study of cross-race impairment in kindergarten children, third graders, and young adults).

33. *See* Rutledge, *supra* note 26, at 211 (noting that the own-race bias is most pronounced when white witnesses attempt to identify black subjects, and that four separate studies have found that black witnesses do not experience any cross-racial impairment). *But see* BRIAN L. CUTLER & STEVEN D. PENROD, MISTAKEN IDENTIFICATION: THE EYEWITNESS, PSYCHOLOGY, AND THE LAW 104 (1995) (citing a field study in which white, black, and Mexican-American convenience store clerks were asked to identify white, black and Mexican customers, and noting that own-race bias appeared in all three groups).

34. *See* Wells et al., *supra* note 4, at 53 (noting that the effect of stress is especially pronounced in lineups in which the perpetrator is present, implying that stress had a larger effect on correct identification rates than misidentification rates).

35. *Id.*

36. CUTLER & PENROD, *supra* note 33, at 103.

37. *Id.*; Wells et al., *supra* note 4, at 53.

impact the accuracy of subsequent identifications.[38] In one study, for instance, only 26% of witnesses who viewed the videotape of a simulated robbery with a visible weapon were able to make a correct identification, as opposed to 46% of witnesses who viewed a tape where the weapon was hidden in the pocket of the robber.[39]

The results of studies attempting to detect the effects of weapon focus in the field are somewhat mixed. Some are consistent with findings in controlled experiments, while others do not find any statistically significant effect.[40] Although this may be a result of the artificial environment of the laboratory, some psychologists have proposed that the discrepancy may be the result of a selection effect.[41] According to this theory, witnesses who recognize that they may not have a strong memory of the event will often not attend lineups or attempt to assist investigators.[42]

If the selection effect is true, it would mitigate concern over this factor, at least as it relates to the accuracy of eyewitness testimony at trial. However, Wells, Memon, and Penrod advance another explanation: "[I]t is conceivable that more intensive police investigations of weapon-present cases produce a higher proportion of perpetrator-present lineups for weapon-present witnesses . . . ."[43] As witness performance is generally higher in lineups where the perpetrator is present,[44] weapons-present witnesses would still perform better than average witnesses despite an impaired memory. If all investigations were as intense and produced as many target-present lineups as those involving a weapon, a weapon-focus effect might then emerge more clearly in the field.[45]

### C. Exposure Duration and Retention Interval

Research has also demonstrated the commonsense notion that the accuracy of identifications is associated with the length of time one has to

---

38. Wells et al., *supra* note 4, at 53.

39. CUTLER & PENROD, *supra* note 33, at 103.

40. Wells et al., *supra* note 4, at 53.

41. *Id.*

42. *Id.*

43. *Id.*

44. *See id.* at 50–51 (noting that, when the actual perpetrator is not in the lineup, the rates of "filler identification," i.e. misidentification, increase).

45. *Id.* at 53. Wells, Memon, and Penrod also advance another, more pernicious, explanation: "One might also imagine that the police are more motivated to 'help' weapon-present witnesses identify perpetrators who use weapons . . . . [in] the form of suggestive instructions to witnesses and suggestive lineups." *Id.* Of course, this would eliminate the appearance of the weapon-focus effect without any increase in the accuracy of identifications. For a discussion of the effect of post-event information, such as suggestive lineups and the wording of questions, see Part III.D, *infra*.

view the perpetrator of a crime.[46] However, the precise nature of the relationship is unclear. For instance, some studies suggest that exposure duration has a linear relationship to the accuracy of face recognition; while others suggest that exposure time increases the accuracy of identification only to a point and then improvements become smaller as the duration of time increases.[47] However, although there is some improvement, misidentifications in target-absent lineups (those in which the true "perpetrator" is not present) remain high even with longer periods of exposure.[48]

Another variable supported by research is the deterioration of memories over time.[49] Studies have shown that longer delays between the crime and the identification procedure lead to both fewer correct identifications and more incorrect identifications.[50] In one study, for instance, convenience store clerks were asked to identify customers from a photo array after periods of either two or twenty-four hours.[51] The attempts after twenty-four hours led to substantially more false identifications than those that occurred after two hours.[52]

D. Post-Event Information

A variety of post-event factors may also influence the accuracy of eyewitness identification, the most prominent of which include mugshot-induced bias, suggestive instructions to eyewitnesses, and suggestive lineup procedures.

Mugshot searches occur when police ask a witness to browse through a book of mugshots to determine whether they recognize the perpetrator of an offense.[53] Exposure to mugshots on its own does not appear to adversely impact the accuracy of identifications.[54] However, research has shown that non-target individuals who first appear in a photo

---

46. CUTLER & PENROD, *supra* note 33, at 105.

47. *Id.* at 103.

48. Wells et al., *supra* note 4, at 53–54 (noting that in one study, an increase in exposure time from twelve to forty-five seconds improved correct identifications in target present lineups and correct rejections in target-absent lineups, but that misidentifications in target absent lineups remained high).

49. *See generally* CUTLER & PENROD, *supra* note 33, at 101, 106.

50. *Id.* at 106. (noting that, when studies which manipulated retention intervals are grouped into long versus short time delays, there is a relationship between longer delays and both false and correct identifications; but that in a survey of all studies—including those that did not manipulate the retention interval—there was a statistically significant relationship only with correct identifications).

51. *Id.*

52. *Id.* (noting that there was a smaller decrease in the percentage of correct identifications) (citing another source).

53. *Id.*

54. *Id.*

array and then in a lineup are identified during the lineup at nearly the same rate at which the target is identified accurately.[55] The research suggests that the identifications made after viewing a photo array are probably not independent recollections of the suspect, but are rather based, at least in part, on having previously seen the suspect in a mugshot.[56]

The composition and structure of a lineup also has significant effects on the accuracy of eyewitness identification. A typical lineup in the United States is composed of five or six people (a suspect and four or five fillers).[57] If the suspect matches the description of the actual perpetrator and the fillers do not, the innocent suspect is likely to be misidentified.[58] The precise wording of the instructions or comments to the witness during the lineup procedure also have a significant effect on the accuracy of identifications.[59] In 1999, the Justice Department released a set of guidelines to help law enforcement conduct lineups in the most objective manner possible.[60] However, there is evidence that suggestive procedures remain a problem.[61]

E. Witness Confidence

Witness confidence is slightly different than the factors discussed above, as it does not directly contribute to the inaccuracy of eyewitness testimony but rather has to do with how that testimony is perceived. Nevertheless, the degree to which a witness's confidence in an identification is associated with its accuracy is of considerable importance, as jurors will likely credit confident eyewitness far more than those who seem uncertain.[62] Witness confidence may also affect pre-trial decisions,

---

55. *Id.* at 107.

56. *Id.* at 110.

57. Wells et al., *supra* note 4, at 62.

58. *Id.* at 62.

59. CUTLER & PENROD, *supra* note 33, at 115 (noting that suggestive instructions can convey that a suspect is in fact present in a lineup or photo array, which "increase[s] the likelihood that the eyewitness will make a positive—though not necessarily correct—identification").

60. U.S. DEP'T OF JUSTICE, EYEWITNESS EVIDENCE: A GUIDE FOR LAW ENFORCEMENT (1999), *available at* http://www.ncjrs.gov/pdffiles1/nij/178240.pdf.

61. *See* Gary L. Wells & Deah S. Quinlivan, *Suggestive Eyewitness Identifications Procedures and the Supreme Court's Reliability Test in Light of Eyewitness Science: 30 Years Later*, 33 L. & HUM. BEHAV. 1, 8 (2009) (noting that courts are aware of problems related to the types of fillers used in lineups, but expressing uncertainty about whether "the legal system appreciates the ways that lineup administrators influence the results or fully appreciate the import of proper pre-lineup instructions.").

62. Richard S. Schmechel et al., *Beyond the Ken? Testing Jurors Understanding of Eyewitness Reliability Evidence*, 46 JURIMETRICS 177, 199 (2006) (summarizing studies which suggest that jurors are unaware of the low-correlation between accuracy and confidence and tend to credit a confident eyewitness much more than one who is less certain).

such as whether to continue to investigate or bring charges against a particular suspect.[63]

A substantial body of research has demonstrated that there is a low correlation between eyewitness confidence and the accuracy of the identification.[64] Highly confident eyewitnesses are only slightly more likely to make an accurate identification than eyewitnesses who are more uncertain.[65] This phenomenon is not difficult to explain. Whereas the actual accuracy of an identification is based on a complex series of factors, the confidence of a witness "is a product of personality and social factors of which accuracy of observation is only a minor part."[66] For instance, the confidence of an eyewitness can be dramatically affected by post-event information that has no relationship to the accuracy of the identification, such as confirming feedback.[67]

### F. Juror Reliance on Eyewitness Testimony

Perhaps the primary reason eyewitness testimony is so often involved in false convictions is that jurors are unable to properly evaluate its reliability. Despite the considerable body of literature that has arisen over the past several decades, the general population is still unjustifiably trusting of eyewitness testimony. This situation is aggravated by the fact that, at least until the wave of exonerations following the advent of DNA testing in the 1990s, the legal community has historically ignored the mounting evidence critiquing eyewitness identification in favor of the uncritical acceptance typified by the general population.[68]

---

63. *See* CUTLER & PENROD, *supra* note 33, at 90 ("Throughout an investigation, eyewitnesses are interviewed numerous times: at the scene of the crime by uniformed officers, later by detectives (sometimes several times by the same or different detectives), by attorneys in deposition and again, in court, during examination and cross-examination."). It is reasonable to deduce that witness statements at each time period may affect pre-trial decisions.

64. *See id.* at 95 ("In short, confidence in one's ability to make a correct identification is a poor predictor of identification accuracy.").

65. Jennifer L. Overbeck, Note, *Beyond Admissibility: A Practical Look at the Use of Eyewitness Expert Testimony in Federal Courts*, 80 N.Y.U. L. REV. 1895, 1900–01 (2005); *see also* Wells et al., *supra* note 4, at 65 (noting that most research demonstrates a low correlation between confidence and accuracy).

66. Schmechel et al., *supra* note 62, at 199.

67. *Id.*; *see also* Amy L. Bradfield et al., *The Damaging Effect of Confirming Feedback on the Relation Between Eyewitness Certainty and Identification Accuracy*, 87 J. APPLIED PSYCHOL. 112, 112 (2002) (stating that confirming feedback will inflate the retrospective confidence of inaccurate eyewitnesses, although also noting that a similar inflation does not seem to occur with accurate eyewitnesses).

68. The judiciary in the United States, including the Supreme Court, has long recognized the potential unreliability of eyewitness testimony. *See infra* notes 117–120 and accompanying text. However, the criminal justice system did little in response to the growing body of research that

As one commentator has noted, average jurors are not sensitive to the malleability of human memory, but rather consider it to be similar to a video recording, which can be replayed with near perfect accuracy.[69] Because jurors think of eyewitness testimony as similar to simply "play[ing] back the appropriate tape," they "appear to regard eyewitness evidence as one of the most persuasive kinds of evidence that can be presented."[70] Jurors seem to give more credit to eyewitness testimony than to other major forms of evidence, such as the analysis of fingerprints.[71] As the quote from Justice Brennan presented at the outset of this Article indicates, for many jurors "there is almost nothing more convincing than a live human being who takes the stand, points a finger at the defendant, and says '*That's* the one!'"[72]

Given that jurors generally over-credit eyewitness testimony, it is perhaps unsurprising that they are not familiar with the specific factors that contribute to its unreliability. One survey found that nonexpert participants disagreed with experts on eight out of twenty-one statements of factors that contribute to the accuracy of eyewitness identification.[73] For example, whereas 87% of experts agreed with the statement, "an eyewitness's confidence is not a good predictor of his or her identification accuracy," only 50% of the nonexperts surveyed agreed.[74] In the same study, only 60% of nonexperts agreed with the now generally accepted statement, "the presence of a weapon impairs an eyewitness's ability to accurately identify the perpetrator's face."[75] Finally, a mere 39% of nonexperts agreed with

---

identified specific factors that contributed to eyewitness unreliability. *See* Wells et al., *supra* note 15, at 48 ("Throughout the 1970s and 1980s, eyewitness research was largely ignored by the criminal justice system"). Many judges have also excluded expert testimony on the reliability of eyewitnesses on the grounds that it would not be of assistance to the jury, as the general unreliability of eyewitness testimony is already common knowledge among jurors. *See infra* Part V.C.

69. Wise et al., *supra* note 21, at 812.

70. *Id.* (quoting John C. Brinham & Robert K. Bothwell, *The Ability of Prospective Jurors to Estimate the Accuracy of Eyewitness Identifications*, 7 LAW & HUM. BEHAV. 19, 19 (1983)).

71. Overbeck, *supra* note 65, at 1898 (citing ELIZABETH F. LOFTUS & JAMES M. DOYLE, EYEWITNESS TESTIMONY: CIVIL AND CRIMINAL § 1.05 (2d ed. 1996)).

72. Watkins v. Sowders, 449 U.S. 341, 352 (1981) (Brennan, J., dissenting) (emphasis added) (internal citation omitted).

73. Gary L. Wells & Lisa Hasel, *Eyewitness Identification: Issues in Common Knowledge and Generalization*, *in* BEYOND COMMON SENSE: PSYCHOLOGICAL SCIENCE IN THE COURTROOM 165 (Eugene Borgida & Susan T. Fiske eds., 2008) (citing Saul M. Kassin & Kimberly A. Barndollar, *The Psychology of Eyewitness Testimony: A Comparison of Experts and Prospective Jurors*, 22 J. APPLIED PSYCHOL. 1241 (1992)).

74. Wells & Hasel, *supra* note 73, at 165 (citing Kassin & Barndollar, *supra* note 73).

75. *Id.* at 167. In the 1992 survey, the experts were actually split on this question, with 57% agreeing with the statement and 43% disagreeing. *Id.* (citing Kassin & Barndollar, *supra* note 73). However, by 2001, 87% of experts surveyed agreed with the statement. *Id.* (citing Kassin, *supra* note 28). It is unlikely that the opinion of nonexperts has changed drastically since the 1992 survey. Especially given the lack of an education effort by experts, it is difficult to see how the evolution of

the widely accepted statement, "the more the members of a lineup resemble the suspect, the higher the likelihood that identification of the suspect is accurate."[76]

Jurors may be better at recognizing certain factors. For instance, potential jurors are most likely aware that exposure time adversely affects the accuracy of identifications.[77] It also seems to be common knowledge that the wording of questions in identification procedures will influence the reliability of the identification.[78] However, as Wells and Hasel note: "Even though potential jurors may be able hypothetically to reason that certain events might influence an eyewitness's description of a crime, when presented with a particular instance of the event, they might not realize that the hypothetical situation applies to the specific instance."[79]

Jurors are also not particularly good at identifying accurate eyewitness testimony. In one experiment, 201 mock jurors were asked to evaluate the accuracy of forty-two eyewitnesses, twenty-four of whom made accurate identifications and eighteen of whom made inaccurate identifications.[80] The questions on the cross-examination of half of the eyewitnesses were leading while those for the other half were non-leading.[81] Among the mock jurors who were exposed to non-leading cross-examination, 76% were able to correctly identify the accurate eyewitness, but only 14% were able to identify the inaccurate witness. The jurors exposed to leading cross-examination fared better; 84% were able to

---

scientific opinion on this question could have been transmitted to the general public. *See id.* ("[T]here is no reason that nonexperts during this same time period would have increased their knowledge about this effect.").

76. Wells & Hasel, *supra* note 73, at 165–66 (citing Kassin & Barndollar, *supra* note73).

77. *See* Harmon M. Hosch et al., *Expert Psychology Testimony on Eyewitness Identification: Consensus Among Experts*, *in* EXPERT TESTIMONY ON THE PSYCHOLOGY OF EYEWITNESS IDENTIFICATION 143, 149 (Brian Cutler ed. 2009) (noting that "the only eyewitness factor that reached consensus among the polled experts as being commonsense to jurors was the notion that exposure time could affect memory").

78. Wells & Hasel, *supra* note 73, at 166.

79. *Id.*; *see also* J. Don Read & Sarah L. Desmarais, *Expert Psychology Testimony Identification: A Matter of Common Sense*, *in* EXPERT TESTIMONY ON THE PSYCHOLOGY OF EYEWITNESS IDENTIFICATION 115, 135 (Brian Cutler ed., 2009) (summarizing studies that suggest jurors are not effective in incorporating their knowledge of factors that contribute to eyewitness reliability into their decision-making). Of course, the fact that jurors may not apply their knowledge of eyewitness fallibility to their decisions has implications for the usefulness of expert testimony. *See infra* Part VI.B.3

80. Devenport et al., *supra* note 16, at 348.

81. *Id.* The reliance on leading cross-examination as a safeguard against eyewitness misidentification is common in cases that exclude expert testimony. *See infra* Part VI.A.3. There is evidence that exposing inconsistencies in an eyewitness's testimony—the most common form of cross-examination—leads to a lower conviction rate. *See* Garrett L. Berman & Brian L. Cutler, *Effects of Inconsistencies on Mock-Juror Decision Making*, 81 J. APPLIED PSYCHOL. 170, 174 (1996). However, it is not clear that this actually leads to a more accurate conviction rate, as the consistency of eyewitness testimony does not seem to be a particularly powerful predictor of identification accuracy. *Id.* at 175.

correctly identify the accurate eyewitness, although only 27% were able to identify the inaccurate eyewitness.[82] The rate at which mock jurors identify accurate witnesses is not problematic, but the numbers for inaccurate witnesses—even given effective cross-examination—are alarming, as "they suggest that nearly three out of four mistaken identifications may be believed."[83] Other experiments confirm this result; in one study of mock trials, jurors were four times more likely to convict in cases that involved eyewitness testimony, and conviction rates remained high even when jurors were exposed to cross-examination.[84]

## IV. Standards for the Admissibility of Expert Testimony

Before discussing the use of expert testimony on the reliability of eyewitnesses, it is necessary to provide first a brief overview of the standards for the admissibility of expert testimony in general. The admission of expert testimony in federal court is governed by the Federal Rules of Evidence and by the Supreme Court's decision in *Daubert v. Merell-Dow Pharmaceuticals*.[85] The majority of states also employ some form of the standard established in *Daubert*.[86] However, at least fourteen states and the District of Columbia still use a version of the common law rule articulated in *Frye v. United States*,[87] and four states use neither.[88]

### A. Federal Courts and the *Daubert* Standard

The common law standard for the admission of expert testimony was articulated by the District of Columbia in *Frye v. United States*. In excluding scientific testimony on the use of lie detectors, the court stated that for expert testimony to be admissible in court, the "well-recognized scientific principle or discovery" from which the expert witness makes deductions must be "sufficiently established to have gained general acceptance in the particular field in which it belongs."[89] The court's decision in *Frye* was based on "the realization that the expert witnesses is a hired gun."[90] It is therefore designed to exclude "evidence of specious and

82. Devenport et al., *supra* note 16, at 348.

83. *Id.*

84. Overbeck, *supra* note 65, at 1897.

85. 509 U.S. 579 (1993).

86. *See infra* Appendix B.

87. 293 F. 1013 (D.C. Cir. 1923).

88. *See infra* Appendix B.

89. *Frye*, 293 F. 1013 at 1014.

90. Henry F. Fradella et al., *The Impact of* Daubert *on the Admissibility of Behavioral Science Testimony*, 30 PEPP. L. REV. 403, 406 (2003) (quoting Paul C. Giannelli, *The Admissibility of Novel*

unfounded scientific principles or conclusions based upon . . . principles" that are not accepted by the scientific community at large.[91] Although the *Frye* "general acceptance" test has the advantage of providing a bright-line rule, it also suffers from significant ambiguities. Chief among these is the determination of what constitutes "general acceptance" in the relevant community.[92] Consequently, an application of the *Frye* test "often results in excluding relevant, probative evidence, and thereby impedes the truth-seeking function of litigation."[93]

The Federal Rules of Evidence did not incorporate the *Frye* test, but rather established a more liberal approach.[94] According to Rule 702, "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."[95] Rule 703 provides that the evidence presented by the expert must be "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject."[96]

In 1993, the Supreme Court decided that the Federal Rules of Evidence supplanted *Frye* and created a new standard for the admission of expert testimony.[97] According to *Daubert*: "Faced with a proffer of expert scientific testimony . . . the trial judge must determine at the outset . . . whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue."[98] The application of this test "entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue."[99] In making this determination, the Court outlined several factors a judge should consider, including: whether the theory can be (and has been) tested; whether the theory or technique has been subjected to peer review and publication; the known or potential rate of error of a particular scientific technique; and, finally, the general acceptance

---

*Scientific Evidence:* Frye v. United States, *A Half-Century Later*, 80 COLUM. L. REV. 1197, 1224 (1980)).

91. *Id.*

92. *Id.*

93. *Id.* at 407 (quoting N. Kathleen Strickland & Leah S. Elkins, *A Current Assessment of* Frye *in Toxic Tort Litigation*, 446 PLI/Lit. 321, 349–50 (1992)).

94. *Id.*

95. FED. R. EVID. 702.

96. FED. R. EVID. 703.

97. *See* Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579, 588–89 (1993).

98. *Id.*

99. *Id.* at 592.

of the theory.[100]

The Supreme Court clarified *Daubert* in two subsequent decisions. In *Kuhmo Tire Co. v. Carmichael*,[101] the Court held that the *Daubert* factors are not intended to be exclusive, and may or may not be relevant depending on the type of expert testimony at issue.[102] The *Kumho* Court also noted that the *Daubert* reliability standard is not confined to scientific testimony, but rather applies to all expert witnesses.[103] In *Gen. Elec. Co. v. Joiner*,[104] the Court found that the highly deferential abuse of discretion standard is appropriate in appellate review of trial court decisions to admit expert testimony.[105] However, as this Article will discuss, appellate courts have construed the abuse of discretion standard in very different ways.[106]

One of the most important consequences of *Daubert* is the development of a relevance requirement for the admission of expert testimony, designed to ensure that it will "assist the trier of fact."[107] As one court has explained, this element requires "a valid scientific connection to the pertinent inquiry as a precondition to admissibility. This helpfulness requirement—which [some courts] call[] 'fit'—is, in the end, the ultimate touchstone of admissibility."[108] The "fit" requirement is the focus of most decisions on expert testimony concerning eyewitness reliability.[109]

It is also important to note the differences between the *Daubert* and *Frye* tests. Although *Daubert* is often said to be more "liberal" than the *Frye* standard, it can sometimes present higher hurdles to admissibility. As one commentator has noted: "The *Frye* test may be the more rigorous one when the type of knowledge is particularly novel; when there has been longstanding acceptance of a discipline but new research calls into question its validity, it is the *Daubert* standard that may raise the barrier to

---

100. *Id.* at 592–94. The last factor is of course equivalent to the *Frye* standard, but the Court emphasizes that general acceptance is not a requirement: "A reliability assessment does not require, although it does permit, explicit identification of a relevant scientific community and an express determination of a particular degree of acceptance within that community." *Id.* at 594 (internal citation and quotation marks omitted).

101. 526 U.S. 137 (1999).

102. *See id.* at 150 ("Daubert makes clear that the factors it mentions do not constitute a 'definitive checklist or test.' . . . [T]he gatekeeping inquiry must be 'tied to the facts' of a particular 'case.'" (internal citations omitted)).

103. *Id.* at 147.

104. 522 U.S. 136 (1997).

105. *Id.* at 141–142.

106. *See infra*, Part IV.A.

107. FED. R. EVID. 702.

108. Jules Epstein, *Expert Testimony: Legal Standards for Admissibility*, *in* EXPERT TESTIMONY ON THE PSYCHOLOGY OF EYEWITNESS IDENTIFICATION 69, 76 (Brian Cutler ed., 2009) (quoting Perry v. Novartis Pharm. Corp., 564 F. Supp. 2d 452, 459 (E.D. Penn. 2009)).

109. *Id.*

admission."[110]

The *Daubert* test has also been criticized for requiring the judiciary to evaluate the merits of scientific theories or practices, a task for which it is not properly qualified.[111] Whatever its merits, however, *Daubert* now requires federal courts deciding whether to admit expert eyewitness testimony to determine both whether it will be of assistance to the jury and also whether it represents valid scientific knowledge.

B. Expert Testimony in State Courts

As of 2011, thirty-one states have adopted some version of the *Daubert* standard and fourteen states and the District of Columbia continue to apply some version of *Frye*.[112] Four states—Georgia, Utah, Wisconsin, and Virginia—use neither *Frye* nor *Daubert* but have instead developed unique tests for the admission of expert testimony.[113]

In Georgia, a trial court must determine whether the procedure or theory in question "has reached a scientific stage of verifiable certainty, or . . . whether the procedure 'rests upon the laws of nature.'"[114] In *State v. Rimmasch*,[115] the Supreme Court of Utah adopted a more stringent version of the *Daubert* test. In Virginia, trial courts must make a threshold finding of reliability; in making this finding, the court is instructed to rely on expert testimony.[116] Finally, Wisconsin has developed a three-pronged test that is wholly independent of witness reliability: the court must first determine whether the evidence is relevant; second, whether the witness is qualified as an expert; and third, whether the evidence will assist the trier of fact.[117]

---

110. *Id.*

111. Fradella et al., *supra* note 90, at 410. Indeed, on remand, the Ninth Circuit indicated in *Daubert* the difficulties posed by the new test: "[T]hough we are largely untrained in science and certainly no match for any of the witnesses whose testimony we are reviewing, it is our responsibility to determine whether those experts' proposed testimony amounts to 'scientific knowledge,' constitutes 'good science,' and was derived by the 'scientific method.'" *Id.* (quoting Daubert v. Merrell Dow Pharmaceuticals, 43 F.3d 1311, 1315–16 (9th Cir. 1995)).

112. *See infra* Appendix B.

113. *See infra* Appendix B.

114. Potter v. State, 687 S.E.2d 653, 658 (Ga. Ct. App. 2009) (quoting Harper v. State, 292 S.E.2d 389, 395 (Ga. 1982)). This determination is made based upon the evidence available to the trial court "rather than by simply calculating the consensus in the scientific community." Mann v. State, 645 S.E.2d 573, 576 (Ga. Ct. App. 2007).

115. 775 P.2d 388 (Utah 1989). Trial courts in Utah must first determine whether a scientific procedure or technique is "inherently reliable," then decide whether the technique or procedure in question was properly applied by the experts to the facts of the case, and finally weigh the probative value of expert testimony against the prejudice to the opposing party. *Id.* at 398.

116. Spencer v. Commonwealth, 393 S.E.2d 609, 621 (Va. 1990).

117. State v. Peters, 534 N.W.2d 867, 872 (Wis. Ct. App. 1995).

## V. The Use of Expert Testimony on the Reliability of Eyewitnesses

As noted above, the judiciary in the United States has long recognized the problematic nature of eyewitness testimony. [118] In 1967, Justice Frankfurter famously observed that "[t]he vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification."[119] In response to this uncertainty, the Supreme Court decided a series of cases that restrict the way eyewitness identifications are made and the uses to which they may be put.[120] Courts also employ other safeguards, such as the use of jury instructions on the reliability of eyewitness testimony.[121]

However, despite acknowledgements of the fallibility of eyewitnesses, courts have historically been reluctant to embrace the use of expert testimony as a safeguard. As Magistrate Judge Robert Murrian notes: "Expert testimony from behavioral scientists regarding eyewitness identification has been met with considerable caution and skepticism in the courts."[122] Until the 1990s, courts routinely excluded such evidence for a variety of reasons, such as because the subject-matter of expert testimony was within the general knowledge of the jurors or impinged upon the proper function of the jury;[123] because cross-examination could be trusted to unveil

---

118. *See supra* note 68 and accompanying text.

119. United States v. Wade, 388 U.S. 218, 228 (1967).

120. *See, e.g.*, *Wade*, 388 U.S. at 237–38 (holding that a defendant has a right to counsel during a post-indictment lineup); Gilbert v. California, 388 U.S. 263, 272–73 (1967) (holding that eyewitness testimony that directly results from an illegal post-indictment lineup must be excluded and that the state is not entitled to show that it could be substantiated); Stovall v. Deno, 388 U.S. 293, 302 (1967) (holding that courts must consider "the totality of the circumstances" in deciding whether a suggestive identification procedure violates due process). However, the Supreme Court recently decided 8-1 that the Due Process Clause does not require an inquiry into the reliability of eyewitness identifications that were not procured under unnecessarily suggestive circumstances that resulted from official misconduct. Perry v. New Hampshire, 132 S.Ct. 716 730 (2012). After outlining the vast body of scientific research establishing specific factors that contribute to eyewitness unreliability, Justice Sotomayor, the lone dissenter, lamented the fact that "[t]he majority today nevertheless adopts an artificially narrow conception of the dangers of suggestive identifications at a time when our concerns should have deepened." *Id.* at 739 (Sotomayor, J., dissenting).

121. *See infra*, Part VI.B. The New Jersey Supreme Court has also recently issued a sweeping and important opinion holding that when a defendant produces evidence that an eyewitness identification may have been influenced by certain factors that might undermine its reliability, the Court must hold a hearing and, if it decides to admit the evidence, also issue extensive instructions to the jury about the possibility the eyewitness was exposed to influences that might make misidentification more likely. *See* State v. Henderson, 27 A.3d 872 (N.J. 2011).

122. Robert P. Murrian, *The Admissibility of Expert Eyewitness Testimony Under the Federal Rules*, 29 CUMB. L. REV. 379, 379 (1999).

123. *See* Robert J. Hallisey, *Experts on Eyewitness Testimony—A Historical Perspective,* 39 HOW. L.J. 237, 282 (1995) (noting that "some courts continue to take a hostile approach to expert eyewitness testimony, rejecting it entirely as invading the province of the jury or outweighed by prejudicial effect, or consumption of time").

weaknesses in identifications;[124] or because the expert testimony was not considered reliable under either *Daubert* or *Frye*.

Recently, however, there has been a trend in both federal and state courts toward the acceptance of expert eyewitness testimony.[125] One court has observed that "as the body of evidence has grown showing the unreliability of some eyewitness testimony, courts have gradually recognized the potential value of expert testimony on this subject."[126] The Third Circuit, for instance, after examining the methodology of an expert on eyewitness reliability, "welcom[ed]" such testimony,[127] while the Fifth Circuit has stated that, under the correct circumstances, the use of such testimony "may be encouraged."[128]

Judicial attitudes toward eyewitness testimony can be classified according to four types.[129] A few jurisdictions maintain a blanket prohibition, according to which expert testimony on eyewitnesses is never admissible.[130] In contrast to this, the majority of jurisdictions analyze the trial court's decision whether to admit expert testimony under a true abuse of discretion standard, under which the decision is rarely, if ever, disturbed.[131]

Several jurisdictions limit the discretion of trial courts, either in their ability to admit[132] or to exclude[133] expert testimony. These jurisdictions almost universally employ the abuse of discretion terminology.[134] However, as opposed to the general standards of discretionary jurisdictions, these courts also employ reasoning or presumptions specific to eyewitness testimony. For instance, a common method of limiting a trial court's discretion to exclude expert eyewitness testimony is the presumption that such testimony is helpful to the jury in

---

124. *See, e.g.*, United States v. Stevens, 935 F.2d 1380, 1400 (3d Cir. 1991) (finding that an expert's statement about the suggestiveness of certain identifications procedures was "rather pedestrian. It is, we believe, susceptible of elucidation without specialized scientific knowledge and thus could have been fleshed out adequately by counsel through probing cross-examination").

125. *See* Schmechel et al., *supra* note 62, at 181 (noting that the judiciary has become "somewhat more receptive to expert testimony and the use of social science in trials").

126. United States v. Smith, 621 F. Supp. 2d 1207, 1210 (M.D. Ala. 2009).

127. United States v. Mathis, 264 F.3d 321, 339–40 (3d Cir. 2001).

128. United States v. Moore, 786 F.2d 1308, 1313 (5th Cir. 1986).

129. The Florida Supreme Court first classified different approaches to expert testimony into three categories: discretionary, limited admissibility, and per se exclusion. *See* McMullen v. State, 714 So.2d 368, 370–71 (Fla. 1997); *see also infra* note 149 and accompanying text.

130. *See infra* Part V.

131. *See infra* Part V.

132. *See infra* Part V.

133. *See infra* Part V.

134. This is especially true in federal court, where the abuse of discretion standard is mandated by the Supreme Court. *See supra* note 101 and accompanying text.

cases that do not involve corroborating evidence.[135]

Jurisdictions this Article classifies as favoring the exclusion of expert testimony are slightly different. For a variety of reasons, trial court decisions to admit expert testimony will not be subject to the same level of appellate review as decisions to exclude such testimony.[136] This Article therefore classifies a jurisdiction as favoring the exclusion of expert testimony if, in upholding the trial court's exercise of discretion to exclude such testimony, it relies upon reasoning that is specific to the reliability of eyewitnesses and that is designed to discourage the admission of expert testimony under certain circumstances. This classification is admittedly imprecise and subjective. However, a discussion of standards would be incomplete without identifying those appellate decisions that strongly encourage trial courts to exclude expert testimony.

### A. Unlimited Discretion

The vast majority of state and federal jurisdictions consider the admission of expert eyewitness testimony to be entirely within the discretion of the trial court.[137] Jurisdictions that adopt this approach often do so based on concerns that the utility of expert eyewitness testimony is too fact-specific to be subject to either per se exclusions or presumptions that such testimony is helpful or unhelpful under certain circumstances.[138] Cases that take this position typically note that a trial judge is in a better position than an appellate court to determine the extent to which expert testimony will aid the jury,[139] and are reluctant to limit the ability of the trial judge to reject testimony that might be irrelevant or even prejudicial.

*McMullen v. State*[140] is one of the leading decisions to take the discretionary position. In that case, the defendant was charged with grabbing a woman outside of the store she owned with her husband and shooting at her husband when he came to his wife's aid.[141] McMullen was of a different race than the victims and was not included in the initial list of

---

135. *See infra* Appendix B.

136. For instance, acquittals are generally not appealed because retrial is prohibited under the Supreme Court's interpretation of the Double Jeopardy Clause. The decision to admit expert testimony in a case that results in an acquittal will therefore not be subject to appellate review.

137. *See* Bomas v. State, 987 A.2d 98, 106–07 (Md. 2010) ("The discretionary approach grants the trial court discretion as to whether to admit such testimony and appears to be the majority view on both the federal and state levels that have considered the question."). As of 2011, twenty-three state high courts, two state lower courts, and seven federal circuits have adopted the discretionary approach.

138. *See, e.g., id.* at 112–13.

139. *See* McMullen v. State, 714 So.2d 368, 373 (Fla. 1997).

140. *Id.*

141. *Id.* at 369.

suspects.[142] The wife also told the police she had never seen the assailant before.[143] However, two months after the attack, the victims' son called the police and told them that his mother had seen the assailant at the drive-through window of the store.[144] The woman then identified McMullen in a photo array.[145] She also revised her previous assertion that she had never seen the assailant before, now stating that she recognized him as an occasional customer of the store.[146]

McMullen had an eyewitness expert who proposed to testify at trial about six issues: (1) eyewitness identifications are incorrect more often than most people recognize; (2) there is a low correlation between the accuracy of an identification and the confidence of the eyewitness; (3) cross-racial identifications are more prone to error; (4) the phenomenon of "unconscious transference," according to which it is easier for a person to remember a face than remember the context in which she saw the face; (5) the effect of stress on accuracy; and (6) the phenomenon of interval duration.[147] Both parties agreed that, according to Florida precedent, the decision whether to admit the testimony was within the discretion of the trial judge.[148] In this case, the trial court excluded the testimony on the grounds that it did not address issues that required special knowledge for a jury to reach a decision.[149]

The Florida Supreme Court began by reviewing the approaches other jurisdictions had taken to the admission of expert testimony. It grouped leading cases into three categories: pure discretion, limited admissibility, and per se exclusion.[150] It then noted that Florida, along with the majority of jurisdictions, follows the discretionary approach.[151] The

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.* at 369–70.

148. *Id.* at 370.

149. *Id.* (citing Johnson v. State, 438 So.2d 774 (Fla. 1983)).

150. *Id.* at 370–71. The *McMullen* court did not include the fourth category—limited discretion to admit—included in this paper. The court also differed somewhat in its classification decisions.

151. *Id.* at 371. The court also noted that its previous decision in *Johnson* could be interpreted as a per se bar, and therefore took this opportunity to clarify its position. *See id.* at 372 ("*Johnson* could be interpreted as a per se rule of inadmissibility of [expert eyewitness] testimony . . . ."). The *Johnson* court determined that jurors are capable of assessing the credibility of witnesses without the aid of expert testimony. *See Johnson*, 438 So.2d at 777 ("[A] jury is fully capable of assessing a witness' ability to perceive and remember, given the assistance of cross-examination and cautionary instructions, without the aid of expert testimony"). The *McMullen* court did not clearly address this point by holding that expert testimony could be helpful. As Florida Supreme Court Justice Anstead noted in his opinion concurring in part and dissenting in part from the *McMullen* majority, "if jurors will never need or be aided by such evidence . . . how can it be said that a court has 'discretion' to admit it?" *McMullen*, 714

court declined to adopt the "modern trend" of presuming that such testimony is helpful to a jury and affirmed the lower court decision, as the "trial court was in a far superior position to that of an appellate court to consider whether the testimony would have aided the jury in reaching its decision."[152]

The Georgia Supreme Court likewise took this position in *Johnson v. State*.[153] The defendant in that case was accused of attacking an elderly woman at an ATM. The evidence against him included the testimony of the victim and another eyewitness, along with still photos taken by the ATM surveillance camera.[154] Johnson proffered expert opinion on the general science underlying research into the accuracy of eyewitness identifications, including facts that the court considered not to be "well within the knowledge of an average jury," such as weapon focus, the effect of stress, own-race bias, and the low correlation between confidence and accuracy.[155] The court determined that none of these factors directly applied to Johnson's case, and that, although the testimony "might have been helpful to some degree," the decision to exclude it was within the trial court's discretion.[156]

A number of other jurisdictions have followed this approach. In 2002, for instance, the Supreme Court of Kentucky overturned its per se bar and held that the admission of expert testimony is in the discretion of the trial judge.[157] However, although the discretionary approach has been adopted by the majority of courts,[158] questions remain about the application of this standard in particular jurisdictions. For instance, certain jurisdictions may be willing to adopt a limited discretion approach in cases involving no corroborating evidence but simply have not considered the question. Also, decisions adopting a nominally discretionary standard may in fact operate as a de facto bar when applied in practice. Nevertheless, it remains the case that in the majority of jurisdictions, a trial court's decision to admit or exclude expert eyewitness evidence will rarely be overturned on appeal.

---

So.2d at 373 (Anstead, J., concurring in part and dissenting in part).

152. *Id.* at 372–74.

153. 526 S.E.2d 549 (Ga. 2000).

154. *Id.* at 553.

155. *Id.* at 554.

156. *Id.* at 555.

157. Commonwealth v. Christie, 98 S.W.3d 485, 489 (Ken. 2002).

158. *McMullen*, 714 So.2d at 371.

B. Jurisdictions that Favor Admission

In a discretionary jurisdiction, a trial court's decision may be overruled if it represents an "abuse of discretion."[159] However, certain jurisdictions, although they employ this terminology, in fact create rules that increase the likelihood that expert testimony will be admitted. This usually takes the form of a presumption that, under certain circumstances, expert eyewitness testimony is helpful to the jury.[160] This approach—sometimes referred to as the "modern trend"—generally holds that it is an abuse of discretion to exclude eyewitness experts if eyewitness testimony is uncorroborated and is central to the prosecution's case.[161] The most significant early cases to take this position came from the Third Circuit and the highest courts of Arizona and California.[162]

The Supreme Court of Arizona first adopted this approach in *State v. Chapple*.[163] The defendant in that case was convicted of three counts of first-degree murder. No forensic evidence connected him to the crime; the sole evidence against him was the testimony of two eyewitnesses.[164] The witnesses had observed the perpetrator—a man they had never met and who had been introduced to them only as "Dee"—commit the murders during the course of a drug transaction.[165] They identified Chapple during two sessions with law enforcement that happened a year apart from one another.[166] During the first session, which took place a few days after the crime, one of the witnesses tentatively identified a different man from a series of photographs, despite the fact that Chapple's photograph was in the display.[167] Over a year later, the same witness was shown another display that contained a photograph of Chapple but not of the man previously

159. The principle difference between the abuse of discretion and limited discretion approaches is the fact that the standard for what constitutes an abuse of discretion generally applies to all types of expert testimony. *See, e.g.*, Commonwealth v. Christie, 98 S.W.3d 485 (Ky. 2002) (noting that the failure to create an adequate record by holding a hearing on the admission of expert eyewitness testimony would constitute an abuse of discretion). Jurisdictions that limit the discretion of a trial judge to exclude eyewitness experts, on the other hand, do so on grounds that are specific to evidence regarding the accuracy of eyewitness testimony.

160. *See McMullen*, 714 So. 2d at 370.

161. *See* Johnson v. State, 526 S.E.2d 549, 551–52 (Ga. 2000).

162. *Id.* at 551. Another early decision to adopt this approach was United States v. Smith, 736 F.2d 1103 (6th Cir. 1984). In that case, the Sixth Circuit found that expert eyewitness testimony qualified as "helpful" under Federal Rule of Evidence 702, although it found the error to have been harmless. *Id.* at 1108.

163. 660 P.2d 1208 (Ariz. 1983).

164. *Id.* at 1217.

165. *Id.*

166. *Id.*

167. *Id.*

identified.[168] The witness named Chapple and, when he was shown a photograph of the first suspect, claimed he had no recollection of having seen it before.[169] The second eyewitness, who was not present during the first session, also identified Chapple at the second session.[170]

Chapple sought to introduce an expert who would testify on the reliability of these identifications.[171] The trial court excluded the expert on the grounds that the unreliability of eyewitnesses was common knowledge among jurors, that the testimony invaded the province of the jury, and that any issues of reliability should properly be resolved during cross-examination.[172]

In reversing the trial court, the Arizona Supreme Court found that the variables covered by the proffered testimony—including the effects of stress, the fact that memories do not deteriorate at a uniform rate, and the lack of correlation between confidence and accuracy—were not only not part of a juror's common sense, but in fact some of them directly contradicted common sense.[173]

Although the court recognized that the decision whether to admit expert testimony is committed to the discretion of the trial court, it defined the phrase "within the discretion" as meaning not "that the court is free to reach any conclusion it wishes," but rather "that where there are opposing equitable or factual considerations, we will not substitute our judgment for that of the trial court."[174] Under the unusual circumstances of the case, however, where eyewitness testimony was the sole evidence connecting Chapple to the crime and where there were several specific factors that contributed to the unreliability of the identifications, the trial court abused its discretion by excluding the expert testimony.[175]

In *People v. McDonald*,[176] the California Supreme Court followed *Chapple* in limiting the trial court's discretion to exclude eyewitness testimony. The defendant in that case was convicted of murder on the strength of several eyewitness identifications of varying degrees of

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.* at 1218.

172. *Id.*

173. *See id.* at 1223 (noting that "experimental data provides evidentiary support to arguments which might otherwise be unpersuasive because they seem contrary to common 'wisdom'").

174. *Id.*

175. *Id.* at 1224. In a lengthy footnote, the court lamented the negative connotations of the term "abuse"—which normally implies a corrupt or deceitful practice—and suggested it is inapt in a legal context. *Id.* at 1224 n.18.

176. 690 P.2d 709 (Cal. 1984) (en banc), *overruled on other grounds by* People v. Mendoza, 4 P.3d 265 (Cal. 2000).

certainty.[177] The trial court excluded the defendant's expert psychological witness on the grounds that "none of the witnesses had mental defects" and therefore testimony concerning the reliability of eyewitnesses "would be invading the province of the jury[,] . . . . maybe would have a tendency to cause confusion in the jurors' minds," and because the proffered testimony was not "scientific."[178]

Applying the California standard for the admission of expert testimony,[179] the California Supreme Court held that the proffered testimony was both scientific[180] and sufficiently helpful to the jury to be admissible.[181] Furthermore, it held that the testimony would not "invade the province of the jury" as it would not be directed at the credibility of any particular witness.[182] Instead, such testimony would merely inform the jury of factors that contribute to eyewitness unreliability.[183] To the extent it touched on the actual circumstances of the identifications before the jury, it would be "limited to explaining the potential effects of those circumstances on the powers of observation and recollection of a typical eyewitness."[184]

Although trial judges are entitled to deference in deciding whether to admit expert testimony, the court noted that such discretion is not absolute.[185] While deference to the trial judge's determination would remain the norm, the court stated, "deference does not mean abdication."[186] Citing *Chapple*, it instead held that:

> When an eyewitness identification of the defendant is a key element of the prosecution's case but is not substantially corroborated by evidence giving it independent reliability, and the defendant offers qualified expert testimony on specific psychological factors shown by the record that could have affected the accuracy of the identification but are not likely to be fully known to or understood by the jury, it will ordinarily be

177. *See id.* at 711 (noting that the prosecution presented seven eyewitnesses, six of whom identified the defendant and one of whom stated that the defendant was *not* the perpetrator, while the defense presented six alibi witnesses who testified that the defendant was out of state at the time of the incident).

178. *Id.* at 717 (internal citations and quotation marks omitted).

179. California continues to adopt a modified version of the *Frye* test which, in addition to *Frye*'s "general acceptance" test, includes a requirement that the proponent show that the correct scientific procedures were followed in the case before the court. *See infra* Appendix B.

180. *McDonald*, 690 P.2d at 717–18.

181. *Id.* at 720–21.

182. *Id.* at 721.

183. *Id.* at 722.

184. *Id.*

185. *Id.* at 724.

186. *Id.* at 727.

error to exclude that testimony.[187]

Two years after *McDonald*, the Third Circuit decided *United States v. Downing*,[188] which established a similar set of guidelines that limit the trial court's discretion to exclude expert eyewitness testimony. The defendant in *Downing* was convicted of wire and mail fraud on the basis of the testimony of twelve eyewitnesses.[189] The district court denied the defendant's motion to introduce expert testimony about the reliability of the witnesses on the grounds that it would not be "helpful" to the jury under Federal Rule of Evidence 702, and because it "is a function of the jury to deal with the credibility of the witness[es]."[190]

Although the Third Circuit conducted its analysis under the *Frye* standard, "[i]n a remarkably prescient opinion, the court outlined procedures for admitting expert evidence which would later be adopted by the Supreme Court in *Daubert*."[191] Citing *Chapple* and *McDonald*, the court first determined that the district court erred as a matter of law in finding that the testimony would not assist a jury in reaching a correct verdict, as "[i]t appears from the professional literature . . . that [certain] factors bearing on eyewitness identifications may be known only to some jurors, or may be imperfectly understood by many, or may be contrary to the intuitive beliefs of most."[192]

The court then established standards to guide the discretion of district courts in deciding whether to admit expert eyewitness testimony. According to the court, the admission of such testimony "is not automatic but conditional." The proffered testimony must first be subject to the scrutiny of the trial judge during a pre-trial hearing "centering on two factors: (1) the reliability of the scientific principles upon which the expert testimony rests . . . and (2) the likelihood that introduction of the testimony may in some way overwhelm or mislead the jury."[193] The court must then determine whether the evidence "fits" the circumstances of the case.[194] This requires a proffer from the defendant identifying specific factors that may have contributed to the unreliability of the identification and the relationship the expert testimony would have to those factors.[195]

---

187. *Id.*
188. 753 F.2d 1224 (3d Cir. 1985).
189. *Downing*, 753 F.2d at 1227.
190. *Id.* at 1228 (alteration in original).
191. Murrian, *supra* note 122, at 389.
192. *Downing*, 753 F.2d at 1231 (quoting *McDonald*, 690 P.2d at 720).
193. *Id.* at 1241.
194. *Id.* at 1242.
195. *Id.* at 1243 (noting that the lack of such a proffer is grounds for exclusion of the expert

Although the trial court is required to consider the expert testimony, the *Downing* court went on to state that it remained a valid exercise of discretion to exclude the testimony after conducting such a hearing.[196] In fact, the district court in *Downing* again excluded the expert testimony on remand,[197] and that ruling was affirmed without a written opinion.[198] However, the Third Circuit has found in subsequent decisions that the exclusion of expert testimony constitutes an abuse of discretion under certain circumstances.[199]

It appears that the Supreme Courts of California and Arizona did not intend for their rulings to have far-reaching implications; indeed, they were specifically crafted to avoid "opening the gates" to a flood of expert testimony.[200] Nevertheless, the framework crafted by these cases continues to influence the development of the law in a number of jurisdictions. Three circuits,[201] together with twelve states and the District of Columbia[202] follow some version of the approach adopted in *Chapple*, *McDonald*, and *Downing*.

The New York Court of Appeals, for instance, recently held:

> [W]here the case turns on the accuracy of eyewitness identifications and there is little or no corroborating evidence connecting the defendant to the crime, it is an abuse of discretion for a trial court to exclude expert testimony on the reliability of eyewitness identifications if that testimony is (1) relevant to the witness's identification of defendant, (2) based on principles that are generally accepted within the relevant scientific community, (3) proffered by a qualified expert and (4) on a topic beyond the ken of the average juror.[203]

---

testimony).

196. *Id.*

197. United States v. Downing, 609 F. Supp. 784, 790–92 (E.D. Pa. 1985).

198. United States v. Downing, 780 F.2d 1017 (table) (3d Cir. 1985).

199. *See, e.g.*, United States v. Brownlee, 454 F.3d 131, 144 (3d Cir. 2006).

200. *See* People v. McDonald, 690 P.2d 709 (Cal. 1984) (en banc) ("[L]ike the court in *Chapple*, 'we do not intend to 'open the gates' to a flood of expert evidence on the subject.'" (quoting State v. Chapple, 660 P.2d 1208, 1224 (Ariz. 1983))). The Arizona Supreme Court has also commented on the limited applicability of *Chapple*. *See* State v. McCutcheon, 781 P.2d 31, 34–35 (Ariz. 1989).

201. The Third, Fourth, and Sixth Circuits follow this approach. *See infra* Appendix A.

202. Together with the District of Columbia, the high courts in Alaska, Arizona, California, Delaware, Indiana, Kentucky, Massachusetts, Montana, New York, Ohio, South Carolina, and Utah have adopted this limited discretion approach. Although the Idaho Supreme Court has not ruled on the issue, the Court of Appeals of Idaho has also taken this position. *See infra* Appendix B.

203. People v. LeGrand, 867 N.E.2d 374, 375–76 (N.Y. 2006); *see also* People v. Abney, 918 N.E.2d 486, 495 (N.Y. 2010) (reaffirming *LeGrand*).

The Court of Appeals of Idaho also noted the continuing influence of this line of cases when it recently adopted a limited discretion approach.[204]

C. Per Se Exclusion

There are relatively few jurisdictions in which expert testimony will be excluded under all circumstances. As of 2011, only five states—Kansas, Louisiana, Nebraska, Oregon, and Pennsylvania—still maintain a rule of complete exclusion.[205] The Eleventh Circuit also appears to maintain a complete bar.[206] However, the continued viability of that rule is in doubt.[207]

The Supreme Court of Louisiana bucked the overwhelming national trend toward the admission of expert eyewitness testimony in its recent decision maintaining a blanket prohibition. The court in *State v. Young*[208] overruled the trial judge's admission of expert testimony as an abuse of discretion.[209] Although acknowledging that it was "cognizant of the ongoing legal debate over the admissibility of expert psychological testimony on the validity of eyewitness identification[,]" the court reiterated its "compelling concern that a potentially persuasive expert testifying as to the generalities of the inaccuracies and unreliability of eyewitness observations, that are already within a juror's common knowledge and experience, will greatly influence the jury more than the evidence presented at trial."[210] The court furthermore found that such testimony would be more prejudicial than probative to the extent it "focuses on the things that produce error without reference to those factors that improve the accuracy of identifications."[211] The court finally held that issues of credibility are more properly explored through effective cross-examination and jury instructions.[212]

Other courts with total bans highlight similar concerns. For

204. *See* State v. Wright, 206 P.3d 856, 864 (Idaho Ct. App. 2009) (citing *McDonald* and *Chapple* with approval in adopting a limited discretion standard).

205. The Oregon Supreme Court has not addressed the issue, but the Oregon Court of Appeals has adopted the blanket exclusion. *See infra* Appendix B.

206. *See* United States v. Smith, 122 F.3d 1355, 1357–59 (11th Cir. 1997).

207. *See infra* 208–222 and accompanying text.

208. 35 So.3d 1042, 1046–50 (La. 2010).

209. As noted above, court decisions finding the admission of expert testimony to be an abuse of discretion are rare. *See supra* note 135 and accompanying text. This is in part a function of the one sided nature of criminal appeals in the United States. The decision in *Young*, however, was the result of an interlocutory appeal by the prosecution after the trial court decided the eyewitness expert would be allowed to testify at trial. 35 So.3d at 1043.

210. *Young*, 35 So.3d at 1050.

211. *Id.*

212. *Id.*

instance, in maintaining its rule of blanket exclusion, the Supreme Court of Kansas noted that "expert testimony on the subject of reliability of eyewitness testimony is not the answer to the problems surrounding eyewitness identification," and therefore "expert testimony regarding eyewitness identification should not be admitted into trial."[213] The Supreme Court of Pennsylvania likewise reasoned that expert eyewitness testimony would give "an unwarranted appearance of authority as to the subject of credibility, a subject which an ordinary juror can assess," and that cross-examination and closing arguments are a more appropriate place to attack the reliability of an eyewitness.[214]

However, such cases are typically at least a decade old. Despite the Louisiana Supreme Court's recent decision in *Young*, the national trend in both state and federal courts is moving decisively against the per se exclusion of expert eyewitness testimony. For instance, Tennessee was until recently among the states that disallowed expert testimony under all circumstances.[215] In 2007, the Tennessee Supreme Court overruled its previous cases establishing the blanket exclusion.[216] After citing a series of academic studies, the court concluded: "Considered as a whole, the studies of juror knowledge and decision making indicate that expert psychological testimony can serve as a safeguard against mistaken identification."[217]

The Eleventh Circuit is the only federal jurisdiction to maintain a total bar, but the continued viability of this rule is also in doubt. The Eleventh Circuit has not addressed the question in over a decade,[218] and a federal district court in Alabama recently admitted eyewitness testimony on the grounds that such testimony may be "helpful, and even essential" to the jury in assessing witness credibility.[219] The Eleventh Circuit affirmed the district court's decision without commenting on the admission of the expert.[220]

### D. Jurisdictions that Favor Exclusion

As mentioned above, this Article considers jurisdictions that have included specific language discouraging the admission of expert

213. State v. Gaines, 926 P.2d 641, 649 (Kan. 1996) (quoting State v. Wheaton, 729 P.2d 1183, 1236 (1986)).

214. Commonwealth v. Simmons, 662 A.2d 621, 631 (Pa. 1995).

215. State v. Copeland, 226 S.W.3d 287, 298 (Tenn. 2007).

216. *Id.* at 300–01.

217. *Id.* (quoting STEVEN D. PENROD & BRIAN L. CUTLER, *Preventing Mistaken Identification in Eyewitness Identification Trials,* PSYCHOLOGY & LAW: THE STATE OF THE DISCIPLINE 89, 114 (1999)).

218. *See* United States v. Smith, 122 F.3d 1355, 1357–59 (11th Cir. 1997).

219. *See* United States v. Smith, 621 F. Supp. 2d 1207, 1220 (M.D. Ala. 2009).

220. United States v. Smith, 370 F. App'x 29 (11th Cir. 2010).

testimony—generally or under certain circumstances—as favoring its exclusion. For instance, although appellate courts may stress that the decision to admit or reject expert testimony is within the discretion of the trial court, they may also state that testimony about certain variables, such as own-race bias, will not be helpful to the jury.

Missouri is one such jurisdiction. In *State v. Lawhorn*, the Supreme Court of Missouri reiterated its discretionary approach to expert eyewitness testimony.[221] The defendant in that case was accused of burglarizing a fraternity house based on the account of one of the members of the fraternity who had a chance both to observe and converse with the burglar and to record his license plate number.[222] Lawhorn attempted to introduce expert eyewitness testimony on own-race bias, the lack of a correlation between accuracy and confidence, and the potentially adverse effects of post-event information, but was rebuffed by the trial court.[223]

The Supreme Court of Missouri, sitting en banc, affirmed the lower court decision on the basis that the factors Lawhorn's expert would testify to were "within the general realm of common experience of members of a jury and can be evaluated with an expert's assistance."[224] The court also expressed concern that such testimony improperly relates to the credibility of eyewitnesses and noted that procedural safeguards—such as cross-examination and jury instructions—provide adequate protection against false identifications.[225] The court, again sitting en banc, reaffirmed *Lawhorn* the following year, and lower courts have routinely relied on these decisions in upholding the exclusion of expert eyewitness testimony.[226]

Likewise, New Jersey does not allow expert testimony on cross-race identifications. The defendant in *State v. Cromedy* was convicted of rape on the strength of the testimony of a victim who identified him eight months after the attack.[227] Cromedy attempted to introduce expert testimony on the reliability of a cross-racial identification.[228] The New Jersey Supreme Court upheld the trial court's decision to exclude this testimony, reasoning that "[b]ecause of the widely held commonsense view that members of one race have greater difficulty in accurately identifying

221. 762 S.W.2d 820 (Mo. 1988) (en banc).

222. *Id.* at 821.

223. *Id.* at 822.

224. *Id.* at 823.

225. State v. Whitmill, 780 S.W.2d 45, 46–47 (Mo. 1989) (en banc).

226. *See, e.g.*, State v. Donnell, 862 S.W.2d 445, 450 (Mo. Ct. App. 1993) (citing *Lawhorn* reasoning that eyewitness reliability is within the general knowledge of jurors in concluding that "there was no error, plain or otherwise" in the trial court's decision to exclude the defendant's proffered expert).

227. 727 A.2d 457, 467 (N.J. 1999).

228. *Id.*

members of a different race, . . . expert testimony on this issue would not assist a jury . . . and for that reason would be inadmissible."[229] The court went so far as to note that "some courtroom observers have commented that the ordinary person's difficulty of cross-racial recognition is so commonplace as to be the subject of both cliché and joke: 'they all look alike.'"[230] Although the court did permit the use of a jury instruction on cross-racial identifications under some circumstances,[231] expert testimony on the issue remains inadmissible in New Jersey.

The Supreme Court of Connecticut recently issued an extensive opinion addressing its own approach to expert eyewitness testimony. Two leading cases from Connecticut have established a framework that favors the exclusion of such testimony to such a degree that it operates almost as a de facto prohibition.[232] In *State v. Kemp*,[233] the Connecticut Supreme Court held that the lower court properly excluded expert testimony insofar as it concerned issues within the knowledge of jurors and because procedural safeguards were adequate to protect the defendant.[234] The court reaffirmed this decision nearly a decade later in *State v. McClendon*,[235] holding:

> Obviously there are aspects of [the] general principles [regarding the reliability of eyewitnesses] on which experts might make some contribution in particular cases. However, juries are not without a general understanding of these principles and, as the trial of this case demonstrates, they see the possible application of these principles in concrete circumstances. The jury [must] have the opportunity to assess the witnesses' credibility on the basis of what is presented at trial and not solely on general principles.[236]

The Connecticut Supreme Court recently had occasion to reconsider this approach. The defendant in *State v. Outing* was convicted of murder on the strength of eyewitness testimony.[237] Outing attempted to

---

229. *Id.* at 467–68 (citations omitted) (internal quotations omitted).

230. *Id.* at 467 (citation omitted) (internal quotations omitted).

231. *See id.* (holding that "a cross-racial instruction should be given only when . . . identification is a critical issue in the case, and an eyewitness's cross-racial identification is not corroborated by other evidence giving it independent reliability").

232. *See* State v. Outing, 3 A.3d 1, 41 (Conn. 2010) (Palmer, J., concurring) (noting that, while neither *Kemp* nor *McClendon* purport to erect a per se bar, lower courts routinely rely on their reasoning to exclude expert eyewitness testimony).

233. 507 A.2d 1387 (Conn. 1986).

234. *Id.* at 1389–90.

235. 730 A.2d 1107 (Conn. 1998).

236. *Id.* at 1116 (internal citations and quotation marks omitted).

237. 3 A.3d 1 (Conn. 2010).

suppress the identification before trial on the grounds that the lineup procedure was suggestive and offered to introduce expert testimony in support of this motion.[238] The trial court denied the motion after declining to hear the testimony, and Outing made no attempt to introduce the expert testimony at trial.[239] The Connecticut Supreme Court, over a vigorous and thoroughly researched concurring opinion by Justice Palmer,[240] refused to overrule *Kemp* and *McClendon*. The court reasoned that, because the lower court found that the identification procedure was not suggestive, Outing's case did not present an appropriate vehicle to revisit the issue of expert eyewitness testimony.[241] However, the court cast significant doubt on the holdings of *Kemp* and *McClendon*, noting:

> [The] serious concerns [about the reliability of eyewitnesses] may need to be considered when determining whether the expert testimony on this issue properly can be presented to the court in a suppression hearing. Therefore, while we are open to reconsidering *Kemp* and *McClendon* in an appropriate case, the present case, in which the legal question is purely academic to the outcome and arises in a different context than those cases, is not such a case.[242]

The continued viability of Connecticut's framework for the admission of expert witnesses is therefore questionable, and *Kemp* and *McClendon* seem ripe for challenge.

## VI. Suggested Standards for the Admission of Expert Eyewitness Testimony

This review of the general categories of judicial attitudes to expert testimony reveals three important features. First, most jurisdictions adopt a highly deferential standard of review, according to which the decisions of trial courts will rarely be disturbed. Second, both trial and appellate courts routinely rely on several of the same justifications in excluding expert testimony. Most prominent among these are the fact that jurors are already aware of the inaccuracy of eyewitnesses and the sufficiency of procedural safeguards, such as cross-examination and jury instructions. Finally, the existence or nonexistence of corroborating evidence is central to, and

238. *Id.* at 8.
239. *Id.* at 9.
240. *Id.* at 36 (Palmer, J., concurring).
241. *Id.* at 17–18 (majority opinion).
242. *Id.* at 21.

sometimes dispositive of, the trial court's decision to admit or exclude expert testimony. This part will therefore begin by briefly analyzing the flaws in the traditional grounds for excluding expert eyewitness testimony, examine some additional limitations on such testimony, and conclude with suggested standards for its admission.

A. Problems with the Traditional Grounds for Exclusion

Courts have historically offered several justifications for the exclusion of expert eyewitnesses. The most prominent of these include the propositions that expert eyewitness testimony fails either the *Daubert* or *Frye* tests for the admission of expert testimony; the subject-matter of expert eyewitness testimony is already common knowledge and therefore would not assist a jury; and more traditional procedural safeguards, such as cross-examination or cautionary jury instructions, are sufficient to protect a criminal defendant from misidentification. This part will discuss each of these justifications in turn.

1. Expert Testimony on Eyewitnesses is Reliable

Courts have historically been willing to exclude expert eyewitness testimony either because it was not "generally accepted" according to the requirements of *Frye* or because it was not "reliable" as required by *Daubert*. However, given the current advanced state of research in the subject, it is no longer possible to make a credible argument that expert eyewitness testimony should be excluded under either test. As several practitioners have noted:

> In short, eyewitness reliability research today is an established body of knowledge. It uses well-accepted methodologies. It is part of the research agenda at major universities throughout the world. It is a subject of thousands of peer-reviewed publications. It has existed for decades. There is nearly unanimous consensus among researches about the field's core findings, and the conclusions of eyewitness reliability research provide an empirical basis for deciding some of the most difficult and pressing questions in this nation's courts.[243]

Virtually all courts have accepted these conclusions. Nearly twenty-five years ago, the Fifth Circuit determined: "The scientific validity of the studies confirming the many weaknesses of eyewitness identification

243. Schmechel et al., *supra* note 62, at 180.

cannot be seriously questioned at this point."[244] More recently, the Sixth Circuit remarked upon the "current, near-universal, acceptance of the reliability of expert testimony regarding eyewitness identification."[245] Research on trial court decisions confirm these observations.[246]

2. Reliability of Eyewitnesses is Not Common Knowledge

A more common justification for the exclusion of expert eyewitness testimony is that jurors are already aware of the unreliability of eyewitnesses, and such testimony will therefore not assist the jury. The Supreme Court of Missouri, for instance, affirmed a decision to exclude eyewitness testimony on the grounds that the effects the expert would testify to "are within the general realm of common experience of members of a jury and can be evaluated without an expert's assistance."[247]

However, as noted above,[248] this proposition does not withstand scrutiny. Although jurors may understand the way certain variables influence the reliability of eyewitness identifications, research has demonstrated that jurors do not have a general understanding of many significant factors. Several courts have recognized the limitations of this basis for exclusion. The Sixth Circuit, for instance, noted: "Today, there is no question that many aspects of perception and memory are not within the common experience of most jurors, and in fact, many factors that affect memory are counter-intuitive."[249]

3. The Reliance on Cross-Examination and Jury Instructions

The availability of cross-examination is perhaps the most frequent basis for the exclusion of expert witness testimony. Courts reason that, because defense counsel can effectively expose unreliable eyewitnesses through cross-examination, it is unnecessary to introduce expert witnesses to comment generally on eyewitness accuracy. As noted above, however, this assumption is also not well-grounded.[250] Research does suggest that

244. United States v. Moore, 786 F.2d 1308, 1312 (5th Cir. 1986).

245. Ferensic v. Birkett, 501 F.3d 469, 478 (6th Cir. 2007).

246. Jennifer Groscup & Steven Penrod, *Appellate Review and Eyewitness Experts*, *in* EXPERT TESTIMONY ON THE PSYCHOLOGY OF EYEWITNESS IDENTIFICATION 110 (Brian Cutler ed., 2009) (noting that, in a review of appellate court opinions, "judges only specifically said the eyewitness expert testimony was not reliable in 5.8% of cases, and that determination was not significantly related to exclusion").

247. 762 S.W.2d 820, 823 (Mo. 1988) (en banc).

248. *See supra* Part III.F.

249. United States v. Smithers, 212 F.3d 306, 316 (6th Cir. 2000).

250. *See supra* notes 84–88 and accompanying text.

cross-examination that reveals inconsistences may make jurors more skeptical of eyewitness testimony.[251] However, consistency is not a reliable indicator of the accuracy of an identification.[252] A reliance on cross-examination may therefore lower the number of convictions overall but will not increase the frequency of accurate verdicts. Furthermore, simply asking witnesses whether their identification was affected by a certain variable is not an effective way of determining whether it actually was. As some commentators have noted:

> [S]ocial psychologists have long known that people do not have the kind of introspective access that would permit reliance on their response to such questions. People often report that a variable did not influence them when it actually did, as well as reporting that a variable influenced them when it actually did not.[253]

Another common ground for the exclusion of expert eyewitness testimony is the availability of cautionary jury instructions. The most widely employed instructions in the United States are the so-called *Telfaire* instructions.[254] In the eponymous case, *United States v. Telfaire*,[255] the District of Columbia Circuit determined that, in cases involving a single witness and no corroborating evidence, the trial court usually must give the jury special instructions enumerating factors that contribute to eyewitness inaccuracy.[256]

However, such instructions standing alone are probably not an effective way to influence the decisions of juries. Studies have shown that jury instructions only modestly increase jurors' knowledge of variables that influence eyewitness accuracy.[257] Jurors may have difficulty understanding the instructions, especially to the extent the instructions conflict with preconceptions about the reliability of eyewitness testimony.[258] Finally, jury instructions lack the "flexibility and specificity of expert testimony," especially given the cautious approach most judges take toward changing

---

251. *See supra* note 81.

252. *See* Berman & Cutler, *supra* note 81, at 175.

253. Wells & Hasel, *supra* note 73, at 170.

254. Wise et al., *supra* note 20, at 830.

255. 469 F.2d 552 (1972).

256. *Id.* at 558. The D.C. Circuit held that a model jury instruction should include specific mention of various factors, including the effect of post-event information, exposure duration, lighting, and the possibility of unconscious transference. *Id.*

257. Wise et al., *supra* note 20, at 832.

258. *Id.*

jury charges.[259]

Recent research indicates a possible solution: Jury instructions should function not as an alternative to expert eyewitness testimony but rather as a useful supplement. One study has found that the effect of expert testimony was negligible unless the significance of the testimony was reiterated in an instruction to the jury.[260] Also, rather than simply parroting the position of a party's expert, commentators have suggested that these instructions should be based on generally accepted research.[261]

B. Limits of Expert Testimony

Although the traditional grounds for excluding expert testimony are flawed in various ways, there are nevertheless significant limitations on the effective use of expert eyewitness testimony. Chief among these is the relevance of expert testimony to a particular case. If none of the factors that normally contribute to the inaccuracy of an identification—such as a cross-racial identification, weapon focus, or significant stress or violence—are present, the utility of testimony on the general unreliability of eyewitnesses is questionable. Courts have routinely and properly excluded such generalized testimony as lacking the required "fit" to the facts of a particular case.[262]

The utility of expert testimony is also limited by the extent to which jurors will incorporate the specialized knowledge they hear during trial into their decision-making. Effective expert testimony both increases juror skepticism and improves the sensitivity of jurors to the variables contributing to the inaccuracy of eyewitness identifications.[263] Several studies find that expert testimony has precisely these effects.[264] Others, however, have suggested that expert testimony under certain circumstances produces *neither* effect.[265] Circumstances surrounding the presentation of expert testimony in a particular case—including the strength of the prosecution's case, the timing of the expert testimony, the level of specificity of the testimony, and the inclusion of a reinforcing jury

259. *Id.* at 833.

260. *See* Overbeck, *supra* note 65, at 1916 (citing Michael R. Leippe et al., *Timing of Eyewitness Expert Testimony, Jurors' Need for Cognition, and Case Strength as Determinants of Trial Verdicts*, 89 J. APPLIED PSYCHOL. 524, 537 (2004)).

261. *Id.*

262. *See, e.g.*, Johnson v. State, 526 S.E.2d 549 (Ga. 2000).

263. *See, e.g.*, Devenport et al., *supra* note 16, at 354.

264. *See id.* at 354–57 (collecting studies analyzing the effect of expert testimony).

265. *See* Overbeck, *supra* note 65, at 1914 (citing Jennifer L. Devenport & Brian L. Cutler, *Impact of Defense-Only and Opposing Eyewitness Experts on Juror Judgments*, 28 L. & HUM. BEHAV. 569 (2004)).

instruction—seem to be responsible for this anomaly.[266]

Expert testimony may not always have the desired effect on jurors; however, it remains useful if presented under the right circumstances. Devenport, Penrod, and Cutler analogize expert eyewitness testimony to objective information about the reliability of used cars:

> Aggregate scientific knowledge can, in principle, help jurors and car buyers predict whether a particular eyewitness's identification is more or less likely to be accurate and whether a particular car is more or less likely to be a lemon, but, as with all predictions, it does not provide any guarantee that this particular prediction is accurate. Nevertheless, the fact remains the aggregate information can help car buyers and jurors minimize the risk of error.[267]

The final limitation of expert eyewitness testimony relates to the emphasis placed on corroborating testimony. As noted above, many courts, especially those that follow an approach that limits the discretion of a trial court to exclude testimony, place significant emphasis on the lack of corroborating evidence. Several courts, for instance, have held that it is an abuse of discretion to exclude expert eyewitness testimony if the identification is not corroborated.[268]

The central problem with the corroboration element is somewhat different from the issues confronted thus far; rather than endangering innocent defendants, such requirements have the potential to harm society by making it more difficult to convict guilty defendants. The costs of a false acquittal—although certainly not as severe as those of a false conviction—are nevertheless not trivial. Such costs are aggravated when an individual guilty of committing a violent crime is falsely acquitted. Ironically, however, these are precisely the defendants most likely to be acquitted if eyewitness testimony is undermined by experts. The presence of a weapon, along with the existence of stress and violence, all adversely affect the accuracy of identifications. Yet crimes in which these variables are present are also those for which a false acquittal imposes the greatest risk of societal cost.

The format of criminal trials, including the placement of a heavy burden of proof on the prosecution, are designed to distribute errors in such

---

266. Michael R. Leippe et al., *Timing of Eyewitness Expert Testimony, Jurors' Need for Cognition, and Case Strength as Determinants of Trial Verdicts*, 89 J. APPLIED PSYCHOL. 524, 525–27 (2004).

267. *See, e.g.*, Devenport et al., *supra* note 16, at 354.

268. *See supra* Part V.B.

a way that false acquittals are much more likely than false convictions. One commentator suggests that requiring corroboration of eyewitness testimony would "greatly enhance this effect, probably more than any other single rule we now enforce."[269] Professor Crump was referring to a proposed rule according to which a trial would automatically result in an acquittal if eyewitness testimony implicating a defendant was uncorroborated.[270] However, the effect would be similar if eyewitness testimony is routinely undermined by expert witnesses in cases with no corroboration.

### C. Suggestions for the Proper Use of Expert Testimony

If the foregoing discussion has not already made this clear, I believe expert eyewitness testimony is underused in our criminal justice system. However, it is certainly true that expert testimony cannot be admitted in every case. The cost of admitting expert testimony, measured both by expert fees and the cost associated with extending trials, will often outweigh the marginal benefits such testimony will have in assisting the jury to reach a correct verdict.

The central problem surrounding the admission of expert eyewitness testimony is a lack of clear guidance and standards. Such guidance that exists is generally based on flawed assumptions about either the effectiveness of procedural safeguards or the knowledge of jurors. Furthermore, the highly deferential standard employed by most courts results in a lack of meaningful appellate review, which produces confusion and makes it difficult for courts to keep abreast with scientific developments.

Appellate courts must therefore articulate clearer standards concerning the appropriate use of expert eyewitness testimony. The traditional bases for excluding expert testimony should be abandoned; the focus should instead be directed to the relevance of the testimony to the particular facts of the case. Such a review would allow appellate courts to more effectively monitor the interpretation of the science underlying eyewitness reliability, as the appellate court would be directly concerned with the applicability of the methods to the facts rather than the extent to which the facts fit some predetermined and largely irrelevant criteria.

Finally, the corroboration requirement should be maintained in a weak form.[271] If eyewitness testimony is central to the prosecution's case

---

269. David Crump, *Eyewitness Corroboration Requirements as Protections Against Wrongful Conviction: The Hidden Questions*, 7 OHIO ST. J. CRIM. L. 361, 366 (2009).

270. *See id.* at 361.

271. For an example of a weak form of the corroboration requirement, see United States v. Downing, 753 F.2d 1224 (3d Cir. 1985); *see also supra* notes 185–195 and accompanying text.

and is uncorroborated, trial judges should be required to conduct hearings on the admission of expert testimony. The dangers of misidentification are of course most acute in such cases; however, the admission of expert testimony has the potential to place the prosecution at a significant disadvantage and therefore to result in increased numbers of false acquittals. This dilemma can only be resolved by resorting to value judgments involving the relative costs of false acquittals and convictions that courts are not in an ideal position to make. Broad standards are therefore inappropriate. Ensuring that trial courts seriously consider the potential for misidentification while allowing them to continue to make fact-specific judgments is the most effective approach short of legislative action.

## VII. Conclusion

The importance of eyewitness testimony to the criminal justice system is indisputable. However, as the Supreme Court of Tennessee has stated: "If eyewitness identification is a cornerstone of the criminal justice system, the jury is its foundation."[272] The critical role eyewitness testimony played in the many false convictions exposed by DNA testing demonstrates the importance of providing jurors with sufficient information to properly evaluate such testimony. Expert testimony is admittedly a flawed solution to this problem, but it remains necessary to ensure the fairness and accuracy of verdicts, especially in those cases in which eyewitness testimony is central to the case against the defendant.

A review of judicial responses to expert eyewitness testimony, at both the state and federal level, reveals the frequent and unfortunate reliance on outmoded assumptions about the state of research in the field, the common knowledge possessed by jurors, and the effectiveness of normal procedural safeguards in protecting criminal defendants from misidentifications. Courts must retain a significant measure of discretion in deciding whether to admit expert testimony. However, it is essential to the integrity of our criminal justice system that such discretion be cabined and guided by principles that are supported by scientific research rather than dated and inaccurate conventions.

---

272. State v. Copeland, 226 S.W.3d 287, 298–300 (Tenn. 2007).

Appendix A: Expert Witness Testimony on Eyewitness Reliability in Federal Courts

| Circuit | Standard | Relevant Cases |
|---|---|---|
| First | Discretionary | United States v. Rodriguez–Berrios, 573 F.3d 55, 71–72 (1st Cir. 2006) |
| Second | Discretionary | United States v. Lumpkin, 192 F.3d 280, 288–89 (2d Cir. 1999) |
| Third | Favor admission: expert testimony should be admitted when there is no corroborating evidence | United States v. Downing, 753 F.2d 1224 (3d Cir. 1985) (error to exclude without a hearing); United States v. Brownlee, 454 F.3d 131, 141–42 (3d Cir. 2006) |
| Fourth | Favor admission: expert testimony should be admitted when there is no corroborating evidence | United States v. Harris, 995 F.2d 532, 534–35 (4th Cir. 1993); United States v. Bellamy, 26 F. App'x 250, 257–58 (4th Cir. 2002) |
| Fifth | Discretionary | United States v. Alexander, 816 F.2d 164, 167 (5th. Cir. 1987); United States v. McGinnis, 201 F. App'x 246 (5th Cir. 2006). |
| Sixth | Favor admission: expert testimony should be admitted when there is no corroborating evidence | United States v. Smithers, 212 F.3d 306, 317 (6th Cir. 2000) (error to exclude testimony without a *Daubert* hearing) |
| Seventh | Discretionary | United States v. Hall, 165 F.3d 1095, 1104–1106 (7th Cir. 1999) |
| Eighth | Discretionary | United States v. Martin, 391 F.3d 949, 954 (8th Cir. 2004) |

Appendix A: Expert Witness Testimony on Eyewitness Reliability in Federal Courts (con't)

| Circuit | Standard | Relevant Cases |
|---|---|---|
| Ninth | Discretionary | United States v. Rincon, 28 F.3d 921, 926 (9th Cir. 1994) |
| Tenth | Discretionary | United States v. Smith, 156 F.3d 1046, 1052–54 (10th Cir. 1998) |
| Eleventh | Per se exclusion[273] | United States v. Smith, 122 F.3d 1355, 1357–59 (11th Cir. 1997) |

273. It is unclear whether the Eleventh Circuit's blanket prohibition is still viable. The Eleventh Circuit has not addressed this question in over a decade. However, a federal district court in Alabama has recently admitted eyewitness testimony on the grounds that such testimony may be "helpful and even essential" to the jury in assessing witness credibility. United States v. Smith, 621 F. Supp. 2d 1207, 1220 (M.D. Ala. 2009). The district court argued that *Smith* in fact represented a move away from the per se exclusionary rule to a discretionary approach. *Id.* at 1210. The district court's decision was subsequently affirmed by the Eleventh Circuit without specific comment on the expert testimony. United States v. Smith, 370 F. App'x. 29 (11th Cir. 2010).

Appendix B: Expert Witness Testimony on Eyewitness Credibility in State Courts

| State | Expert Testimony Standard | Eyewitness Standard | Relevant Case Law |
|---|---|---|---|
| Alabama | Modified *Frye* (*Perry*/ *Frye*)[274] | Discretionary | *Ex parte* Williams, 594 So.2d 1225, 1226–27 (Ala. 1992) |
| Alaska | *Daubert* | Favor admission: required to admit when eyewitness testimony is the sole evidence | Skamarocius v. State, 731 P.2d 63, 65–67 (Alaska Ct. App. 1987) |
| Arizona | *Frye* | Favor admission: should be admitted where there is no corroborating evidence | State v. Chapple, 660 P.2d 1208, 1223–23 (Ariz. 1983) (en banc); State v. McCutcheon, 162 Ariz. 54, 56–58 (Ariz. 1989) (en banc) |
| Arkansas | *Frye* | Discretionary | Jones v. State, 862 S.W.2d 242, 244 (Ark. 1993) |
| California | Modified *Frye* (*Kelly*/ *Frye*)[275] | Favor admission: error to exclude when eyewitness testimony is a key element of the case and there is a lack of corroborating evidence | People v. McDonald, 690 P.2d 709, 727 (Cal. 1984), *overruled on other grounds by* People v. Mendoza, 4 P.3d 265 (Cal. 2000); People v. Jones, 70 P.3d 359, 374–75 (Cal. 2003) |
| Colorado | *Daubert* | Discretionary | Campbell v. People, 814 P.2d 1 (Colo. 1991) (en banc)[276] |

274. *See* Perry v. State, 586 So.2d 242, 250 (Ala. 1991) (adopting, in addition to the *Frye* general acceptance test, a required showing that there was no error in the interpretation or performance of a scientific technique in a particular case).

275. *See* People v. Kelly, 549 P.2d 1240, 1244 (Cal. 1976) (adopting, in addition to *Frye*, a requirement that the proponent show that the correct scientific procedures were followed in the case before the court).

276. The *Frye* test for the admission of expert testimony articulated in *Campbell* was later abrogated by the Colorado Supreme Court. People v. Shreck, 22 P.3d 68 (Colo. 2001). However, this does not appear to have affected *Campbell*'s continued viability. *See* Golob v. People, 180 P.3d 1006, 1012 (Colo. 2009) (en banc) (citing *Campbell* for the proposition that the decision whether to admit expert testimony must be made on a case-by-case basis).

Appendix B: Expert Witness Testimony on Eyewitness Credibility in State Courts (con't)

| State | Expert Testimony Standard | Eyewitness Standard | Relevant Case Law |
|---|---|---|---|
| Connecticut | *Daubert* | Favor exclusion: reliability of eyewitness identification is within the common knowledge of jurors | State v. Kemp, 507 A.2d 1387, 1389–90 (Conn. 1986); State v. McClendon, 730 A.2d 1107, 1114–17 (Conn. 1998)[277] |
| Delaware | *Daubert* | Favor admission: if the expertise of an expert witness has been established and she is permitted to testify on certain eyewitness factors, it may be an abuse of discretion to exclude testimony on other factors | Garden v. Delaware, 815 A.2d 327, 338–39 (Del. 2003), *superseded by statute on other grounds, as stated in* Porter v. Turner, 954 A.2d 308 (Del. 2008) |
| District of Columbia | *Frye* | Favor admission: testimony should be admitted if there is no corroborating evidence | Hager v. United States, 856 A.2d 1143, 1149–50 (D.C. 2004); Benn v. United States, 978 A.2d 1257, 1278 (D.C. 2009) |
| Florida | *Frye* | Discretionary | McMullen v. State, 714 So.2d 368, 370–72 (Fla. 1998) |

277. The Connecticut Supreme Court has recently called *Kemp* and *McClendon* into question based on the mounting evidence of the unreliability of expert testimony. State v. Outing, 3 A.3d 1, 20–21 (Conn. 2010). It declined, however, to overrule them, stating that, "while we are open to reconsidering *Kemp* and *McClendon* in an appropriate case, the present case, in which the legal question is purely academic to the outcome and arises in a different context than those cases, is not such a case." *Id.* at 21.

Appendix B: Expert Witness Testimony on Eyewitness Credibility in State Courts (con't)

| State | Expert Testimony Standard | Eyewitness Standard | Relevant Case Law |
|---|---|---|---|
| Georgia | Neither[278] | Discretionary | Johnson v. State, 526 S.E.2d 549, 552–53 (Ga. 2000) |
| Hawaii | *Daubert* | [Not addressed by appellate courts] | [Not addressed by appellate courts] |
| Idaho | *Daubert* | Favor admission: error to exclude when eyewitness is a key element of the case and there is a lack of corroborating evidence | State v. Wright, 206 P.3d 856, 861–64 (Idaho 2009) |
| Illinois | *Frye* | Discretionary | People v. Enis, 564 N.E.2d 1155, 1161–63 (Ill. 1990) |
| Indiana | *Daubert* | Favor admission: should be admitted under certain circumstances, such as where there is a single eyewitness and identification is the primary issue at trial | Cook v. State, 734 N.E.2d 563, 570–71 (Ind. 2000) |
| Iowa | *Daubert* | Discretionary | State v. Schutz, 579 N.W.2d 317, 320 (Iowa 1998) |
| Kansas | *Frye* | Per se exclusion | State v. Gaines, 926 P.2d 641, 646–49 (Kan. 1996) |

278. In Georgia, a trial court must determine whether the scientific procedure or theory in question "has reached a scientific stage of verifiable certainty, or whether the procedure rests upon the laws of nature." Potter v. State, 687 S.E.2d 653, 658 (Ga. Ct. App. 2009). This determination is made based upon the evidence available to the trial court rather than "by simply calculating consensus in the scientific community." Mann v. State, 645 S.E.2d 573, 576 (Ga. Ct. App. 2007).

Appendix B: Expert Witness Testimony on Eyewitness Credibility in State Courts (con't)

| State | Expert Testimony Standard | Eyewitness Standard | Relevant Case Law |
|---|---|---|---|
| Kentucky | *Daubert* | Discretionary | Commonwealth v. Christie, 98 S.W.3d 485, 488 (Ky. 2002) |
| Louisiana | *Daubert* | Per se exclusion | State v. Young, 35 So.3d 1042, 1046–50 (La. 2010) |
| Maine | *Daubert* | Discretionary | State v. Rich, 549 A.2d 742, 743–44 (Me. 1988) |
| Maryland | *Frye* | Discretionary | Bomas v. State, 987 A.2d 98, 108 (Md. 2010) |
| Massachusetts | *Daubert* | Favor admission: expert testimony is favored in cases where the State has no other corroborating evidence | Commonwealth v. Santoli, 680 N.E.2d 1116, 1118–21 (Mass. 1997) |
| Michigan | Modified *Frye* (*Davis-Frye*)[279] | Discretionary | [No Supreme Court decision]; People v. Hill, 269 N.W.2d 492, 494–95 (Mich. Ct. App. 1978) |
| Minnesota | *Frye* | Discretionary | State v. Barlow, 541 N.W.2d 309, 313 (Minn. 1995) |
| Mississippi | *Daubert* | [Not addressed by appellate courts] | [Not addressed by appellate courts] |

279. Although Michigan did not explicitly adopt the *Frye* test, it does establish a similar standard, known as the *Davis-Frye* test, that relies on "general acceptance" within the scientific community. People v. Davis, 72 N.W.2d 269, 282 (Mich. 1955).

Appendix B: Expert Witness Testimony on Eyewitness Credibility in State Courts (con't)

| State | Expert Testimony Standard | Eyewitness Standard | Relevant Case Law |
|---|---|---|---|
| Missouri | *Daubert* | Favor exclusion: admissible only in limited circumstances, such as when eyewitness testimony is key to the prosecution's case and there is no corroborating evidence of guilt | State v. Lawhorn, 762 S.W.2d 820, 822–23 (Mo. 1988), *overruled sub silentio on other grounds, as recognized by* Carlyle v. Mo. Dep't. of Corr., 184 S.W.3d 76, 79 (Mo. Ct. App. 2005) |
| Montana | *Daubert* | Favor admission: it is an abuse of discretion to exclude when there is no corroborating evidence | State v. DuBray, 77 P.3d 247, 254–56 (Mont. 2003) |
| Nebraska | *Daubert* | Per se exclusion | State v. George, 645 N.W.2d 777, 790 (Neb. 2002) |
| Nevada | *Daubert* | Discretionary | White v. State, 926 P.2d 291, 292 (Nev. 1996) |
| New Hampshire | *Daubert* | [Not addressed by appellate courts] | [Not addressed by appellate courts] |
| New Jersey | *Frye* | Favor exclusion: expert testimony on cross-race effects would not assist a jury | State v. Gunter, 554 A.2d 1356 (N.J. Super. Ct. App. Div. 1989); *see also* State v. Cromedy, 727 A.2d 457, 467 (N.J. 1999) *abrogated by* State v. Henderson, 208 N.J. 208 (2011) |
| New Mexico | *Daubert* | [Not addressed by appellate courts] | [Not addressed by appellate courts] |

Appendix B: Expert Witness Testimony on Eyewitness Credibility in State Courts (con't)

| State | Expert Testimony Standard | Eyewitness Standard | Relevant Case Law |
|---|---|---|---|
| New York | *Frye* | Favor admission: must be admitted in cases where the identification is central to the case and there is no corroborating evidence | State v. LeGrand, 867 N.E.2d 374, 375–76 (N.Y. 2007); State v. Abney, 889 N.Y.S.2d 890, 898–900 (N.Y. 2009) |
| North Carolina | *Daubert* | Discretionary | [No Supreme Court opinion]; State v. Knox, 337 S.E.2d 154, 156–57 (N.C. Ct. App. 1985) |
| North Dakota | *Frye* | Discretionary | State v. Fontaine, 382 N.W.2d 374, 378 (N.D. 1986) |
| Ohio | *Daubert* | Favor admission: should be admitted when eyewitness identification is the only evidence connecting the defendant to the crime | State v. Buell, 489 N.E.2d 795, 801–02 (Ohio 1986) |
| Oklahoma | *Daubert* | Discretionary | Bristol v. State, 764 P.2d 887, 890 (Okla. Crim. App. 1988) |
| Oregon | *Daubert* | Per se exclusion | [No Supreme Court opinion]; State v. Goldsby, 650 P.2d 952, 954 (Or. Ct. App. 1982) |
| Pennsylvania | *Frye* | Per se exclusion | Commonwealth v. Simmons, 662 A.2d 621, 630–31 (Pa. 1995) |
| Rhode Island | *Daubert* | Discretionary | State v. Sabetta, 680 A.2d 927, 932–33 (R.I. 1996) |

Appendix B: Expert Witness Testimony on Eyewitness Credibility in State Courts (con't)

| State | Expert Testimony Standard | Eyewitness Standard | Relevant Case Law |
|---|---|---|---|
| South Carolina | *Daubert* | Favor admission: admissible when the eyewitness is suffering from mental defects or when the eyewitness identification is central to the case and there is no significant corroborating evidence | State v. Whaley, 406 S.E.2d 369, 371–72 (S.C. 1991) |
| South Dakota | *Daubert* | Discretionary | State v. Hill, 463 N.W.2d 674, 676–77 (S.D. 1990) |
| Tennessee | *Daubert* | Discretionary | State v. Copeland, 226 S.W.3d 287, 298–300 (Tenn. 2007) |
| Texas | *Daubert* | Discretionary | Jordan v. State, 928 S.W.2d 550, 555–56 (Tex. Crim. App. 1996); Weatherred v. State, 15 S.W.3d 540, 542–43 (Tex. Crim. App. 2000) |

Appendix B: Expert Witness Testimony on Eyewitness Credibility in State Courts (con't)

| State | Expert Testimony Standard | Eyewitness Standard | Relevant Case Law |
|---|---|---|---|
| Utah | Neither[280] | Favor admission: in cases where an eyewitness is identifying a stranger and in which various factors that can affect accuracy are present, eyewitness expert testimony is helpful to the jury and thus admissible | State v. Clopten, 223 P.3d 1103, 1112–17 (Utah 2009) (eyewitness testimony should be admitted unless it does not comport with rules of evidence) |
| Vermont | *Daubert* | Discretionary | State v. Percy, 595 A.2d 248, 252–53 (Vt. 1990) |
| Virginia | Neither[281] | Discretionary | [No Supreme Court opinion]; Rodriguez v. Commonwealth, 455 S.E.2d 724, 726–28 (Va. 1995) |
| Washington | *Frye* | Discretionary | State v. Hernandez, 794 P.2d 1327, 1331–33 (Wash. 1990), *disapproved of on other grounds*, State v. Kjorsvik, 812 P.2d 86 (Wash. 1991); State v. Cheatam, 81 P.3d 830 (Wash. 2003) (en banc) |

280. Trial courts in Utah must first determine whether a scientific procedure or technique is "inherently reliable," then decide whether the technique or procedure in question was properly applied by the expert to the facts of the case, and finally must weigh the probative value of expert testimony against the prejudice to the opposing party. State v. Rimmasch, 775 P.2d 388, 398 (Utah 1989).

281. Trial courts in Virginia must make a threshold finding of reliability based on expert testimony. Spencer v. Commonwealth, 393 S.E.2d 609, 621 (Va. 1990).

Appendix B: Expert Witness Testimony on Eyewitness Credibility in State Courts (con't)

| State | Expert Testimony Standard | Eyewitness Standard | Relevant Case Law |
|---|---|---|---|
| West Virginia | *Daubert* | Discretionary[282] | State v. Taylor, 490 S.E.2d 748 (W. Va. 1997) |
| Wisconsin | Neither[283] | Discretionary | State v. Shomberg, 709 N.W.2d 370, 377 (Wis. 2006) |
| Wyoming | *Daubert* | Discretionary | Engberg v. Meyer, 820 P.2d 70 (Wyo. 1991) |

282. *Taylor* does not directly address the standards for the admission of expert testimony but rather has to do with the denial of public funds for an expert witness. State v. Taylor, 490 S.E.2d 748, 753 (W. Va. 1997). However, the implication appears to be that the admission of expert testimony is at the discretion of the trial court. *See id.* at 753–54.

283. Wisconsin has developed a three-prong test wholly unrelated to reliability: first, the court determines whether the evidence is relevant; second, whether the witness qualifies as an expert; and third, whether the evidence will assist the trier of fact. State v. Peters, 192 Wis. 2d 674, 687–88 (Wis. Ct. App. 1995).

# NOTE

## Qualified Support: Death Qualification, Equal Protection, and Race

Alec T. Swafford*



---

* J.D. Candidate, The University of Texas School of Law, 2012; B.A., 2009, Rice University. Law Clerk to the Honorable Phyllis Kravitch, United States Court of Appeals for the Eleventh Circuit, 2012–2013 term. The author would like to thank Professor Cary Franklin for her advice, guidance, and critiques. Also, the author would like to thank Clinical Professors Rob Owen, Maurie Levin, and Jim Marcus for being constant sources of inspiration in their representation of inmates on Texas's death row.

## I. Introduction

The trial of Mumia Abu-Jamal, an African-American, for murder demonstrates how pernicious death qualification can be for minority prospective jurors.[1] In Philadelphia, which at that time had a population that was forty-four percent African-American, the prosecutor was successful in striking twenty African-Americans from the venire using death qualification.[2] The prosecutor then used his peremptory challenges to strike another eleven African-American prospective jurors who had not expressed any opposition to the death penalty, resulting in a jury that did not have any African-American members.[3] Prosecutors in general have been known to utilize the death qualification process to produce a jury they believe is more favorable to the state.[4]

Death qualification has been described as an ethnic cleansing of the jury pool in capital cases due to its disproportionate effect on minority populations.[5] Jurors must be "death qualified" in order to sit on a capital jury.[6] During death qualification, prospective jurors are questioned concerning their attitudes on the death penalty.[7] Prospective jurors may not be challenged for cause based on their views on capital punishment unless those views would prevent or substantially impair the performance of their duties as jurors in accordance with their instructions and their oath.[8]

Death qualification has a significant racial dimension. Much of the academic literature and litigation concerning death qualification has focused on its tendency to create juries that are more "guilt prone."[9] The racial effects of death qualification are just as dangerous. I will argue that death qualification should be ruled unconstitutional under the Equal Protection Clause of the Fourteenth Amendment. I will also argue that the Equal

---

1. *See* David Lindorff, *The Death Penalty's Other Victims: When Prosecutors Eliminate Jurors Opposed to Capital Punishment, They Also Weed Out Women and Minorities and Stack the Deck Against Defendants*, SALON.COM (Jan. 2, 2001), http://dir.salon.com/news/feature/2001/01/02/death_penalty/index.html.

2. *Id.*

3. *Id.*

4. *See* Susan D. Rozelle, *The Principled Executioner: Capital Juries' Bias and the Benefits of True Bifurcation*, 38 ARIZ. ST. L.J. 769, 786–87 (2006) (describing the Andrea Yates case, where prosecutors unexpectedly sought the death penalty, probably to reap the benefits of having a death-qualified jury); *see also* Lindorff, *supra* note 1 (describing a tape made by a former Assistant District Attorney in Philadelphia urging prosecutors to seek the death penalty in as many cases as possible in order to get death-qualified juries).

5. Lindorff, *supra* note 1.

6. Susan D. Rozelle, *The Utility of* Witt*: Understanding the Language of Death Qualification*, 54 BAYLOR L. REV. 677, 677 (2002).

7. *Id.*

8. Wainwright v. Witt, 469 U.S. 412, 420, 424 (1985).

9. *See infra* note 96 and accompanying text.

Protection Clause, as interpreted in *Batson v. Kentucky,*[10] could be applied to racially discriminatory applications of death qualification in particular trials.

In Part II, I will show how current Supreme Court jurisprudence on death qualification has created a system that accords too much discretion to the actors at the trial level, allowing room for racial discrimination to flourish. In Part III, I will explore the historical and sociological evidence behind the public support of capital punishment and the opposition to it. Support for capital punishment, which is directly related to the likelihood that a juror will be struck for cause under death qualification, continues to be heavily influenced by general racial attitudes and by past and present racism in the implementation of capital punishment. I will then explore the damaging effects death qualification has on the criminal justice system in Part IV. In Part V, I will discuss the most important challenge to death qualification to date, *Lockhart v. McCree.*[11] Finally, in Part VI, I will apply Equal Protection analysis to death qualification.

## II. The Overly-Discretionary Nature of Modern Death Qualification

Inherent in the death qualification process is the question of what the threshold level of opposition to the death penalty must be in order for a prospective juror to be considered unfit for service. *Witherspoon v. Illinois* was the first landmark case that attempted to articulate what constitutes sufficient opposition to the death penalty to allow a juror to be excused.[12] At the petitioner's trial, the prosecution eliminated nearly half of the members of the venire by challenging any prospective juror who had qualms about imposing a death sentence.[13]

The Supreme Court reversed the petitioner's conviction and held that a death sentence "cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction."[14] A prospective juror could not be struck for cause unless the prospective juror "states *unambiguously* that he would automatically vote against the imposition of capital punishment no matter what the trial might reveal . . ."[15]

The Court thought Illinois's statute would only leave a small minority of jurors who were "uncommonly willing to condemn a man to

---

10. Batson v. Kentucky, 476 U.S. 79 (1986) (applying the Equal Protection Clause of the Fourteenth Amendment to forbid prosecutors from using their peremptory strikes to strike prospective jurors solely on account of their race).

11. 476 U.S. 162 (1986).

12. 391 U.S. 510 (1968).

13. *Id.* at 513.

14. *Id.* at 522–23.

15. *Id.* at 515 n.9 (emphasis added).

die" to decide a capital case.[16] At a time when half of Americans opposed the death penalty, having such a "distinct and dwindling minority" control the fate of those charged with capital crimes produced an inherently one-sided "tribunal 'organized to convict.'"[17]

Lower courts generally refused to enforce the decision, and the Supreme Court vacillated between enforcing *Witherspoon* and subtly contracting it over time.[18] After a turbulent re-engineering of the capital punishment system, the Court, in the aftermath of *Furman v. Georgia*,[19] eventually decided *Wainwright v. Witt* in 1985.[20]

The Supreme Court's decision in *Wainwright v. Witt* has become the legal standard for determining whether a prospective juror can be excluded for cause under death qualification.[21] The petitioner challenged the exclusion of veniremember Colby under the *Witherspoon* standard.[22] Colby's opposition to the death penalty seemed tentative, but he also stated that his opposition would probably interfere with his ability to judge the guilt or innocence of the defendant.[23] Under the prevailing interpretation of *Witherspoon*, veniremember Colby would most likely not have been excludable for cause as he did not unambiguously state that he would not impose the death sentence under any circumstances.[24] Yet the Supreme Court reversed the Eleventh Circuit's granting of habeas relief and affirmed the petitioner's conviction.[25]

The Supreme Court adopted a new, comprehensive test to determine whether a prospective juror is "death qualified": a prospective juror may not be challenged for cause based on their views about capital punishment unless those views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.[26] No longer is the state required to prove with "unmistakable clarity" that a juror could not render a death verdict.[27] The Court also made it clear that appellate courts will defer to the trial judge's determination, even if the judge's reasoning and the juror's full views on capital

16. *Id.* at 519–21.

17. *Id.* at 520–21 (quoting Fay v. New York, 332 U.S. 261, 294 (1947)).

18. Stanton D. Krauss, *The* Witherspoon *Doctrine at* Witt's *End: Death-Qualification Reexamined*, 24 AM. CRIM. L. REV. 1, 31–32, 43 (1986); *see also* Wainwright v. Witt, 469 U.S. 412, 419–21 (1985) (describing the Supreme Court's subtle departure from the *Witherspoon* standard over time).

19. Furman v. Georgia, 408 U.S. 238 (1972).

20. *See generally* Krauss, *supra* note 18, at 43–70 (chronicling the evolution of the Supreme Court's death-qualification jurisprudence through Lockett v. Ohio, 438 U.S. 586 (1978) and Adams v. Texas, 448 U.S. 38 (1980)).

21. *See* Uttecht v. Brown, 551 U.S. 1, 9 (2007).

22. *Witt*, 469 U.S. at 415.

23. *See id.* at 415–16 (voir dire transcript).

24. *See supra* 115 and accompanying text.

25. *Witt*, 469 U.S. at 415, 418.

26. *Id.* at 420, 424.

27. *Id.* at 424.

punishment are not clear on the record.[28] *Witt* also accorded extremely high deference to the trial judge due to the Court's characterization of the trial judge's determination that a juror is not death qualified as a question of "fact" instead of a mixed question of both law and fact, which significantly limits a federal court's power to review a state court judgment under habeas corpus law.[29]

The *Witt* standard grants substantial deference to the trial judge in death-qualification strikes. No reasoning was given by the trial judge on the record, yet the Court held that "whatever ambiguity respondent may find in [the] record, . . . the trial court, aided as it undoubtedly was by its assessment of [the juror's] demeanor, was entitled to resolve it in favor of the State."[30] One commenter remarked that "no exclusion of a juror with stated reservations about capital punishment who has been asked if he would obey his oath and follow the law should ever be subject to reversal in the federal courts after *Witt*."[31] The trial judge has little incentive to properly qualify juries due to her nearly limitless power to exclude a prospective juror as long as that juror articulates at least some reservations in imposing the death sentence.[32] The Supreme Court has continued to expand this substantial deference in *Uttecht v. Brown*.[33]

The *Witt* standard also excludes more prospective jurors than the *Witherspoon* standard. *Witherspoon* only permitted the exclusion of prospective jurors who unambiguously stated they would automatically vote against the imposition of the death penalty in every circumstance.[34] *Witherspoon*-excludables are clearly excludable under *Witt*'s standard.[35] Intuitively, the *Witt* standard also permits the exclusion of more prospective jurors than the *Witherspoon* standard.[36] One study found a nearly fifty percent increase in the number of prospective jurors who were subject to exclusion under the new *Witt* standard.[37]

At its core, the *Witt* standard substitutes a subjective standard for an objective one at the trial level, resulting in substantially more deference being accorded to the trial judge and many more prospective jurors being subject to exclusion. With that heightened discretion comes the heightened risk of discrimination. When the statements different jurors make can vary significantly in their severity of opposition to the death penalty and still

---

28. *Id.* at 425–26.

29. *See id.* at 429; Krauss, *supra* note 18, at 78.

30. *Witt*, 469 U.S. at 434; *see also* Krauss, *supra* note 18, at 79–80.

31. Krauss, *supra* note 18, at 80.

32. *See id.* at 81.

33. *See* Uttecht v. Brown, 551 U.S. 1 (2007) (holding that a state appellate court is not required to make particular reference to the excusal of each juror).

34. *See supra* note 15 and accompanying text.

35. *See* Wainwright v. Witt, 469 U.S. 412, 452–53 (1985) (Brennan, J., dissenting).

36. *See id.*

37. Craig Haney et al., *"Modern" Death Qualification: New Data on Its Biasing Effects*, 18 LAW & HUM. BEHAV. 619, 624 (1994).

result in strikes for all of them, a disparate impact on minority groups is not only possible, but it is likely.[38] Relying on the trial judge to evaluate a prospective juror's demeanor places too much trust in the human decision-making process surrounding death qualification, which is so contaminated by past and present racism that even a judge's good-faith effort to avoid discrimination may be fruitless.[39] In creating a more fair system of death qualification, courts must first acknowledge the substantial risk of racial discrimination.

## III. Opinions on the Appropriateness of the Death Penalty Are Inextricably Intertwined With Past and Present Racial Discrimination

### A. The Racial History of Capital Punishment

Capital punishment has a storied racial history. Capital punishment served an integral role in maintaining the institution of slavery: harsh punishments were necessary to prevent increasingly larger slave populations from rebelling.[40] Incarceration was largely ineffective as a deterrent to slaves' defiance because incarceration was not necessarily a worse fate than slavery, and southern whites doubted the notion that African-American criminals could ever be reformed in a penitentiary.[41] The Civil War, and subsequent emancipation, upended slavery and the South's racial caste system. After the withdrawal of federal troops from the Southern states in 1877, lynching became the prominent method of maintaining white hegemony in the absence of slavery.[42]

Between 1890 and 1910, it is estimated that at least 4,743 people were victims of lynching.[43] Seventy-three percent of lynching victims were African-American and ninety-five percent of those were tortured or killed in the former slave states.[44] Lynching was instrumental in perpetuating white supremacy, especially economically.[45] Continually emphasizing the inferiority and wickedness of African-Americans through lynching unified

38. *See infra* Part III (describing how African-Americans are more likely to be excused under death qualification).

39. *See infra* notes 87–97 and accompanying text (implicit bias); *see also infra* Part VI.C (fallibility of for-cause strikes).

40. STUART BANNER, THE DEATH PENALTY: AN AMERICAN HISTORY 142 (2002).

41. *Id.*

42. Timothy V. Kaufman-Osborn, *Capital Punishment as Legal Lynching?*, *in* FROM LYNCH MOBS TO THE KILLING STATE: RACE AND THE DEATH PENALTY IN AMERICA 21, 28 (Charles J. Ogletree, Jr. & Austin Sarat eds., 2006).

43. Stephen B. Bright, *Discrimination, Death, and Denial: The Tolerance of Racial Discrimination in Infliction of the Death Penalty*, *in* FROM LYNCH MOBS TO THE KILLING STATE: RACE AND THE DEATH PENALTY IN AMERICA 211, 215 (Charles J. Ogletree, Jr. & Austin Sarat eds., 2006).

44. James W. Clarke, *Without Fear or Shame: Lynching, Capital Punishment and the Subculture of Violence in the American South*, 28 BRIT. J. POL. SCI. 269, 271 (1998).

45. Stewart E. Tolnay et al., *Vicarious Violence: Spatial Effects on Southern Lynchings, 1890–1919*, 102 AM. J. SOC. 788, 794 (1996).

whites in the South and discouraged a political and economic alliance among poor whites and African-Americans.[46] Lynching was also carefully designed to deter African-Americans' defiance of the racial order through terror.[47] Lynching physically re-inscribed the inferiority of African-Americans when slavery could no longer do so.[48]

In the beginning of the twentieth century, Southerners began to realize that mob violence threatened racial chaos and economic disaster.[49] The South faced growing criticism from other parts of the country, with the possibility of losing economic investment from the North.[50] There was also a growing threat of federal anti-lynching legislation, and African-Americans were leaving the South in response to the lack of economic opportunity and the atmosphere of fear, further crippling the Southern economy by reducing the cheap labor force available for agriculture.[51]

Southern whites turned to capital punishment, among other apparatuses, as a means to limit mob violence.[52] Mob violence was becoming too costly, and many prominent Southerners assured other Southerners of the efficacy of the death penalty in controlling and intimidating African-Americans.[53] The South used "legal lynching" to limit mob violence while maintaining white dominance.[54] They were successful—two thirds of those executed in the 1930s were African-American, roughly the same racial distribution seen in lynching.[55] The numbers of lynchings and executions during this time of transition were inversely related—lynching declined precipitously as executions increased sharply.[56]

Capital punishment continued to be infected with racism in the twentieth century. Southern states up until the mid-twentieth century had many statutes that were subjected to racial manipulation.[57] An African-American defendant accused of raping a white woman was met with almost certain death.[58] A defendant accused of killing an African-American was treated leniently, while African-Americans who killed whites faced near-certain death.[59]

Fear of federal intervention in the 1950s constrained and altered the

---

46. Clarke, *supra* note 44, at 275; Tolnay et al., *supra* note 45, at 794.
47. Clarke, *supra* note 44, at 274; Tolnay et al., *supra* note 45, at 811–12.
48. Kaufman-Osborn, *supra* note 42, at 30.
49. Clarke, *supra* note 44, at 282.
50. *Id.* at 282–83.
51. *Id.* at 283.
52. *Id.* at 284–85.
53. *Id.*
54. *Id.* at 284.
55. Bright, *supra* note 43, at 215; Clarke, *supra* note 44, at 286–87.
56. Clarke, *supra* note 44, at 285.
57. *See id.* at 286.
58. *Id.*
59. *Id.* at 288.

South's overtly racist capital punishment system.[60] Yet the racial divide still exists today. States with the largest African-American populations are more likely to have retained the death penalty today, despite controlling for the amount of violent crime and other factors.[61] Racial disparities in charging, convictions, and death sentences also continue to persist.[62] The link between race and the death penalty remains, even if it is less visible.[63]

B. How History Translates to the Present

Whites and African-Americans are sharply divided in their support for the death penalty today. Capital punishment's racial history continues to affect popular support for the death penalty, with explicit and implicit racial prejudice remaining an important predictor of white support for capital punishment.

A 2007 poll conducted by the Pew Research Center found that sixty-eight percent of whites and forty percent of African-Americans supported the death penalty, while twenty-seven percent of whites and fifty-one percent of African-Americans opposed the death penalty.[64] "Some of the sharpest differences" in the Pew poll were along racial lines.[65] Other studies have also shown race to be strongly correlated with attitudes towards the death penalty.[66] A poll conducted for the Death Penalty Information Center found that while thirty-nine percent of the general population believes they would be disqualified from capital juries due to their opposition to capital punishment, sixty-eight percent of African-Americans believe they would be disqualified.[67] A prospective juror's pre-existing belief that they will be struck from the jury may affect the confidence and assertiveness in their answers, increasing the likelihood that a judge will strike the prospective juror for cause.[68] Consistent with these racial disparities, African-Americans are excused from jury service under death qualification more than other demographic groups.[69] This effect has

60. *Id.* at 289.

61. David Jacobs & Jason T. Carmichael, *The Political Sociology of the Death Penalty: A Pooled Time-Series Analysis*, 67 AM. SOC. REV. 109, 126–28 (2002).

62. Bright, *supra* note 43, at 228–30.

63. Jacobs & Carmichael, *supra* note 61, at 126–28.

64. Robert Ruby & Allison Pond, *An Enduring Majority: Americans Continue to Support the Death Penalty*, THE PEW FORUM (Dec. 19, 2007), http://pewforum.org/Death-Penalty/An-Enduring-Majority-Americans-Continue-to-Support-the-Death-Penalty.aspx.

65. *Id.*

66. Steven F. Messner et al., *Distrust of Government, the Vigilante Tradition, and Support for Capital Punishment*, 40 LAW & SOC'Y REV. 559, 566 (2006).

67. Richard C. Dieter, *A Crisis of Confidence: Americans' Doubts About the Death Penalty*, DEATH PENALTY INFORMATION CENTER, 2 (June 2007), http://www.deathpenaltyinfo.org/CoC.pdf.

68. *See infra* notes 202–09 and accompanying text (finding prospective jurors who were more confident and assertive were less likely to be struck for cause when controlling for other variables).

69. Robert Fitzgerald & Phoebe C. Ellsworth, *Due Process vs. Crime Control: Death Qualification and Jury Attitudes*, 8 LAW & HUM. BEHAV. 31, 46 (1984); *see also* Joseph E. Jacoby & Raymond Paternoster, *Sentencing Disparity and Jury Packing: Further Challenges to the Death*

continued under the looser *Witt* standard.[70]

Support for the death penalty is partially grounded in racial attitudes. Even controlling for a variety of other factors, such as politics, religion, and class, the racial gap in support for capital punishment persists.[71] Variables that measure racial prejudice, including the degree to which whites hold negative stereotypes about African-Americans, have been shown to be important predictors of white support for capital punishment.[72] One study, using a variable largely measuring the extent to which white participants believe African-Americans possess negative character traits, found racial prejudice to be the best predictor of support for capital punishment.[73] However, even when the study controlled for racial prejudice, the racial gap in support for the death penalty still existed.[74] Consistent with previous research, these results suggest unique experiences in African-American history that contribute to African-Americans' higher opposition to the death penalty.[75] A second study found that whites living in states with a history of frequent lynchings are significantly more likely to express support for the death penalty, despite controlling for many other individual and contextual factors.[76] In a third study, when participants were primed with the argument that capital punishment is unfair because of its racially discriminatory effects, support for capital punishment among white participants actually increased, from about sixty-five percent to about seventy-six percent.[77]

A complex array of prejudices affects white support for the death penalty. Overt racism certainly has a role, especially since studies tend to under-record the scope of racial prejudice because survey respondents are less likely to express beliefs that could be interpreted as prejudiced.[78] Some of this data can also be explained by a strong belief in individualism

---

*Penalty*, 73 J. CRIM. L. & CRIMINOLOGY 379, 386 (1982) (finding only about twenty percent of whites were excludable while about fifty-five percent of African-Americans were excludable); James Luginbuhl & Kathi Middendorf, *Death Penalty Beliefs and Jurors' Responses to Aggravating and Mitigating Circumstances in Capital Trials*, 12 LAW & HUM. BEHAV. 263, 269 (1988) (finding that African-Americans were nonsignificantly more opposed to the death penalty than were whites, though another analysis showed a significant race effect regarding opposition to the death penalty); Gary Moran & John C. Comfort, *Neither "Tentative" nor "Fragmentary": Verdict Preference of Impaneled Felony Jurors as a Function of Attitude Toward Capital Punishment*, 71 J. APPLIED PSYCHOL. 146, 152 (1986) (study finding white jurors were significantly more likely to strongly favor capital punishment than were African-Americans).

70. *See* Haney et al., *supra* note 37, at 629–30 (noting difficulty in obtaining minority survey respondents, but still observing a disproportionate effect of death qualification on racial minorities).

71. James D. Unnever & Francis T. Cullen, *The Racial Divide in Support for the Death Penalty: Does White Racism Matter?*, 85 SOC. FORCES 1281, 1281 (2007).

72. Mark Peffley & Jon Hurwitz, *Persuasion and Resistance: Race and the Death Penalty in America*, 51 AM. J. POL. SCI. 996, 999 (2007); Unnever & Cullen, *supra* note 71, at 1291–93.

73. Unnever & Cullen, *supra* note 71, at 1291.

74. *Id.* at 1292.

75. *Id.* at 1292–93.

76. Messner et al., *supra* note 66, at 582.

77. Peffley & Hurwitz, *supra* note 72, at 1001–02.

78. Unnever & Cullen, *supra* note 71, at 1286.

partially emanating from post-Civil Rights Era racial resentment, which has manifested itself in numerous contexts after African-Americans began making gains during the Civil Rights Era.[79] In addition to more easily measured forms of prejudice, hidden racism and implicit bias continue to persist and affect whites' attitudes toward capital punishment.[80] In sum, white support for the death penalty is not race-neutral; racial prejudice is intertwined with public and legislative support for the death penalty.[81]

Death qualification, with its disproportionate effects on African-American prospective jurors, creates a self-reinforcing cycle. One analysis of voir dires in Texas capital cases found two major themes of statements African-American prospective jurors made in response to questions by the prosecution: (1) ambivalence towards the imposition of the death penalty, and (2) personal knowledge of a defendant in another criminal case.[82] Both of these themes are linked to racial prejudice,[83] with some African-American prospective jurors explicitly referencing racial discrimination in capital punishment.[84] Many African-Americans are ambivalent towards the death penalty as a result of racial discrimination, which prompts their removal, which could strengthen African-Americans' beliefs in the existence of racial prejudice in capital punishment.[85] Heightened opposition to capital punishment among African-Americans as a result of their exclusion from capital juries creates a vicious cycle that exacerbates the problem of unrepresentative juries in capital cases.

Even more subtle forms of bias influence the disproportionate exclusion of African-Americans under death qualification. The implicit biases of prosecutors and judges can affect the decision to strike a prospective juror for cause.[86] Many Americans continue to harbor implicit racial bias against African-Americans, which frequently conflicts with self-reported attitudes.[87] This bias is unintentional, but its prejudicial effects are powerful—studies show that implicit racial bias predicts discriminatory decision-making and behavior.[88]

Professor Justin Levinson posits what he calls the "Death Penalty

---

79. Michael K. Brown, *The Death Penalty and the Politics of Racial Resentment in the Post Civil Rights Era*, 58 DEPAUL L. REV. 645, 646–54 (2009).

80. *See infra* notes 87–88 and accompanying text.

81. Messner et al., *supra* note 66, at 582–83; Unnever & Cullen, *supra* note 71, at 1293.

82. *See* Melynda J. Price, *Performing Discretion or Performing Discrimination: Race, Ritual, and Peremptory Challenges in Capital Jury Selection*, 15 MICH. J. RACE & L. 57, 86 (2009).

83. *See id.* at 90.

84. *Id.* at 86.

85. *See id.* at 90 ("[T]he exclusion of African Americans with connections to the criminal justice system also reinforces perceptions of common fate and in turn, increased identification with criminal defendants among African Americans.").

86. Price, *supra* note 82, at 84–90.

87. Justin D. Levinson, *Race, Death, and the Complicitous Mind*, 58 DEPAUL L. REV. 599, 599–603 (2009).

88. *Id.* at 605, 612–13, 631–32.

Priming Hypothesis."[89] His hypothesis is grounded in the priming of racial stereotypes, defined as the "incidental activation of knowledge structures, such as trait concepts and stereotypes, by the current situational context."[90] Levinson hypothesizes that during death qualification, prospective jurors are asked a line of seemingly race-neutral questions concerning their support for the death penalty, which "acts as an indirect prime that triggers stereotypes of African Americans, including criminality, dangerousness, and guilt."[91] Death qualification can indirectly prime racial stereotypes of African-Americans in two ways: (1) by triggering racial associations from the history of the death penalty as a tool of racial control,[92] and (2) by activating media portrayals of crime that embed associations and stereotypes into Americans' subconscious—even race-neutral descriptions of crime activate stereotypes of the aggressive African-American.[93]

Once racial stereotypes are primed, they can significantly affect subsequent decision-making and behavior.[94] Levinson posits that the priming of racial stereotypes during death qualification could affect jury decision-making.[95] This hypothesis could also be extended to include effects on the decision-making by the judge and the lawyers involved in the death qualification process itself. Once racial stereotypes about African-Americans are primed during death qualification, a host of stereotypes about African-Americans are activated, which can also activate a variety of unrelated stereotypes of African-Americans, such as "laziness" or hostility to the criminal justice system.[96] These stereotypes can unconsciously affect the prosecutor's decision to move to strike a juror for cause and the judge's decision to grant the prosecutor's motion.[97]

The history of racial prejudice in the application of the death penalty continues to affect public support for the death penalty. African-

89. *Id.* at 602.

90. *Id.* at 608 (quoting John A. Bargh et al, *Automaticity of Social Behavior: Direct Effects of Trait Construct and Stereotype Activation on Action*, 71 J. PERSONALITY & SOC. PSYCHOL. 230, 230 (1996)).

91. *Id.* at 619.

92. *Id.* at 626–27.

93. William J. Bowers et al., *Death Sentencing in Black and White: An Empirical Analysis of the Role of Jurors' Race and Jury Racial Composition*, 3 U. PA. J. CONST. L. 171, 179–80 (2001); Franklin D. Gilliam, Jr. & Shanto Iyengar, *Prime Suspects: The Influence of Local Television News on the Viewing Public*, 44 AM. J. POL. SCI. 560, 561 (2000) (finding that merely thinking about murder can trigger racial constructs based on stereotypes of African-Americans); Levinson, *supra* note 87, at 627–31.

94. *See supra* note 88 and accompanying text.

95. Levinson, *supra* note 87, at 632.

96. *Id.* at 623–25.

97. *See supra* note 88 and accompanying text (citing research indicating that implicit bias can substantially influence decision-making). Other stereotypes of African-Americans, unrelated to criminal justice, that have been activated as a result of death qualification can also affect the overall desirability of a prospective juror to a prosecutor. For instance, if the prosecutor feels the prospective juror is hostile or lazy, she is probably more likely to endeavor to strike the juror. Likewise, if a judge also feels a prospective juror has more negative traits, she is also more likely to side with the prosecutor on a for-cause challenge.

Americans oppose capital punishment at a much higher rate than whites, which results in the disproportionate exclusion of African-Americans from capital juries due to death qualification.[98]

The large racial gap in support for capital punishment is no accident. For whites, racial prejudice and implicit bias against African-Americans are important factors affecting their support for capital punishment. Strong African-American opposition to capital punishment defies conventional explanations of political, economic, or educational differences. The racial prejudice that infects capital punishment fosters strong opposition to capital punishment among African-Americans. Death qualification not only produces under-representative juries in capital cases, but it also reinforces the causes of that effect. The continuous exclusion of a large number of African-Americans from capital juries validates African-Americans' concern that the criminal justice system is racially biased, with largely white juries deciding the fates of minorities. The implicit biases of judges and lawyers, triggered as a result of death qualification, further add to the discriminatory effects of death qualification. The death qualification process and support for the death penalty are not race neutral.

## IV. The Harms of Death Qualification

Many of the harms of death qualification have been well documented. Death qualification results in juries that are more prone to convict than a jury chosen without using death qualification.[99] The disproportionate exclusion of African-Americans from capital juries also does significant damage to the impartiality of capital juries, especially in cases with African-American defendants, and to the criminal justice system as a whole by enabling racial discrimination in jury deliberations to function largely unabated.

The disproportionate exclusion of African-American jurors from capital juries eliminates a much-needed viewpoint from deliberations. African-American jurors are less likely to convict and impose a death

98. *See supra* note 69 and accompanying text.

99. *See generally* Claudia L. Cowan et al., *The Effects of Death Qualification on Jurors' Predisposition to Convict and on the Quality of Deliberation*, 8 LAW & HUM. BEHAV. 53 (1984) (finding death qualified juries were more "guilt prone" in a simulated jury study); Fitzgerald & Ellsworth, *supra* note 69 (death qualified jurors have more "crime control," versus "due process," attitudes that result in a jury that is more pro-prosecution); Craig Haney, *Examining Death Qualification: Further Analysis of the Process Effect*, 8 LAW & HUM. BEHAV. 133 (1984) (arguing that the process of death qualification itself results in more conviction prone juries); Haney et al., *supra* note 37 (biasing effects of death qualification remain even after changes in public opinion on capital punishment and the new *Witt* standard); Luginbuhl & Middendorf, *supra* note 69 (death qualified jurors are more likely to consider aggravating factors in capital sentencing and less likely to consider mitigating factors); William C. Thompson et al., *Death Penalty Attitudes and Conviction Proneness: The Translation of Attitudes into Verdicts*, 8 LAW & HUM. BEHAV. 95 (1984) (finding attitudinal differences between juries chosen by death qualification and other juries and that the differences result in conviction-prone juries).

sentence.[100] African-American jurors "may be more critical in their interpretation of factual [issues] presented at trial."[101] They are also more likely to discern the existence of, and consider, mitigating evidence in the sentencing decision.[102] African-American jurors are more likely to have lingering doubts about guilt and to consider it in the punishment phase,[103] they are more likely to be attuned to the ways African-American defendants express remorse for their crimes,[104] and they are less likely to believe the defendant poses a risk of being dangerous in the future.[105] The stereotypes many white jurors believe in shape their evaluation of aggravating and mitigating circumstances.[106] White jurors tend to attribute an African-American's good conduct to the circumstances and his or her bad conduct to enduring character traits, making an African-American defendant's sentencing hearing an uphill battle from the start.[107] Whites are more likely to convict and impose a death sentence on an African-American defendant than they are on a white defendant and, in general, are more punitive.[108]

Even the mere presence of one African-American male juror on a capital jury substantially increases the likelihood of a life sentence when the defendant is African-American.[109] According to research conducted by the Capital Jury Project, this effect was more pronounced in cases involving an African-American defendant and a white victim.[110] In such cases, about a quarter of white jurors in racially mixed juries changed their votes from death to life between the first and final punishment votes, the largest change seen in the study, probably due to the effect of African-Americans on the jury.[111] In one case, a white juror explains how an African-American juror affected the deliberations:

> Q: In your own words, can you tell me what the jury did to reach its decision about defendant's punishment? How did the jury get started; what topics did it discuss, in what order; what were the major disagreements, and how were they resolved?
>
> J: I was the final person [to vote for life].
>
> I: What persuaded you?
>
> J: Another black juror.
>
> I: And he/she persuaded you?
>
> J: His manner and charisma, his compassion and his articulation

100. Bowers et al., *supra* note 94, at 187–88.

101. *Id.* at 181.

102. *Id.*

103. *Id.* at 207–08; Price, *supra* note 82, at 64.

104. Price, *supra* note 82, at 64.

105. Bowers et al., *supra* note 94, at 226.

106. Sheri Lynn Johnson, *Race And Capital Punishment*, *in* BEYOND REPAIR?: AMERICA'S DEATH PENALTY 121, 137 (Stephen P. Garvey ed., 2003).

107. *See id.*

108. Bowers et al., *supra* note 94, at 181–83.

109. *Id.* at 193; Price, *supra* note 82, at 64–65.

110. Bowers et al., *supra* note 94, at 202.

111. *Id.* at 202–03.

> did move me so much . . . . Here's a black man who was almost in the same situation [as the defendant] without the atrocities and the abuse and everything but black, poor, lower middle class from the South. [He] lead a very compassionate [life in the] army . . . . Finally, I guess after nothing more than a benefit of the doubt and compassion, I agreed it would be life without parole. (Inaudible). He's a wonderful guy, have you met him? He's wonderful. He's a wonderful, wonderful soul, such a person.[112]

Not only can African-American jurors be advocates for life, but they can also provide a voice to resist the misunderstanding and dehumanization of African-American defendants. One study examining interviews with capital jurors found disturbing patterns of racialized narratives among white jurors.[113] Many white jurors evoked narratives of racial inferiority when describing their decision-making process, ranging from explicit racial contempt to narratives that emphasize the cultural distance between the defendant and the juror.[114] These tales of racial inferiority provide the white juror with a justification for protecting "us" from "them."[115] African-American jurors can, and do, resist these racially discriminatory narratives.[116] Whether through direct confrontation or more subtle tactics, as seen in the story of the compassionate African-American man,[117] African-American jurors can influence the way the discussion unfolds, which can improve jury decision-making by lessening the effect racial bias has on the verdict or sentence.

An analysis of the Capital Jury Project research also shows deep resentment among African-American jurors who felt like they were outsiders on mostly-white juries.[118] One female African-American juror described her frustration with the paucity of African-American jurors on her jury and the white jurors' misunderstanding of the defendant's background:

> And I was frustrated. I felt there had to be more blacks on the jury. Because I think that was a big frustration for me. Because they were looking at this thing from a white middle-class perspective, and you have to put yourself into that black lifestyle this kid came out of. That particular lifestyle where there was not a good home, no supervision, there were no authority figures for this kid. So why waste time on talking about, my god, what time this kid comes in the house! There were a lot of little instances like that. That's why I felt like an outsider at times, because I felt I should have been more forceful at trying to get these people to

---

112. *Id.* at 257.

113. Benjamin Fleury-Steiner, *Narratives of the Death Sentence: Towards a Theory of Legal Narrativity*, 36 LAW & SOC'Y REV. 549 (2002).

114. *Id.* at 572–73.

115. *Id.* at 550–52.

116. *Id.* at 569.

117. *See supra* note 112 and accompanying text.

118. Fleury-Steiner, *supra* note 113, at 571–72.

> understand. We had to look at it like the lifestyle he came out of, the background he came out of. But nobody wanted to listen. They all wanted to talk. I'm not strong-willed. I'm not forceful enough. That's why I felt like an outsider. So, rather, than get into it, I didn't say much. I mean, I deliberated, but I didn't say much about those types of things. So that was a biggie, and it didn't make me happy. And I felt there should have been more blacks on the jury to balance that out.[119]

African-American jurors in capital cases are more likely to feel like outsiders, less likely to be outspoken, and more likely to wish they had done something differently.[120] Death qualification's exclusion of disproportionate numbers of African-American jurors not only deprives capital juries of a much-needed voice to combat pernicious racialized characterizations of the defendant, but it can also weaken the resolve of African-Americans already on the jury who are too afraid to speak out when they would be the only ones doing so.[121]

The disproportionate exclusion of African-Americans due to death qualification is most troubling, especially when racial discrimination in capital punishment remains a serious problem. African-American jurors counteract racial prejudices in the jury room, which can result in the failure to properly weigh mitigating factors unique to African-Americans or the outright discriminatory application of the death sentence. Death qualification retards resistance to racial prejudice in capital juries.

## V. *Lockhart v. McCree*

The Supreme Court considered the most serious challenge to death qualification to date in *Lockhart v. McCree*.[122] The claimant argued that death qualification violated his rights under the Sixth and Fourteenth Amendments to have an impartial jury from a representative cross section of the community because death qualified juries are more conviction prone.[123] The Supreme Court rejected McCree's challenges.[124]

The claimant's argument in *McCree* differs from the argument posited in this Note. This Note argues for the Equal Protection Clause of the Fourteenth Amendment to be applied to death qualification based on its effects on African-Americans—an argument not analyzed by the Court in *McCree*. However, some of the Court's analysis in *McCree* is relevant to the arguments presented here.

---

119. *Id.* at 572.

120. Bowers et al., *supra* note 93, at 230–31.

121. *See* Grutter v. Bollinger, 539 U.S. 306, 318–20, 330–33 (2003) (describing the substantial benefits realized by having a "critical mass" of minorities, including having minorities that do not feel isolated or like spokespersons for their race).

122. 476 U.S. 162 (1986).

123. *Id.* at 167–68.

124. *Id.* at 184.

Justice Rehnquist, in the majority opinion, states "it is hard for us to understand the logic of the argument that a given jury is unconstitutionally partial when it results from a state-ordained process, yet impartial when exactly the same jury results from mere chance."[125] This analysis was a byproduct of McCree's challenge, which only challenged the exclusion of prospective jurors because they were not death-qualified.[126] However, those who oppose the death penalty are not a protected class of persons.[127] This Note, on the other hand, argues that death qualification is untenable because it is a tool to exclude African-Americans. Justice Rehnquist's analysis could be applied to any case of racial discrimination in jury selection, but this analysis has rightfully been rejected because the Court recognizes a heightened scrutiny when the state discriminates on the basis of race.[128]

The Court also makes reference to the state's interest in death qualification,[129] which is analyzed later in this Note.[130]

## VI. The Equal Protection Clause of the Fourteenth Amendment and Death Qualification

### A. The Equal Protection Clause and Its Application to the Capital Punishment Context

In order to understand the vast differences between the capital punishment context and other contexts, how the Equal Protection Clause is applied in non-capital punishment contexts must be examined. The core of an Equal Protection claim is the requirement that the challenged state action must have a racially discriminatory purpose, which "may often be inferred from the totality of the relevant facts,"[131] including the different practical or statistical impact upon differing classifications of persons, the general history concerning the problems which the legislative rule seeks to solve, and the history of the enactment of the legislation.[132] This is not an exhaustive list of what could be presented as evidence to prove intent.[133] A

125. *Id.* at 178.

126. *Id.* at 165.

127. *See id.* at 174–76 (holding that non-death-qualified jurors are not a "distinctive group," unlike African-Americans, women, and Mexican-Americans).

128. *See* Batson v. Kentucky, 476 U.S. 79, 95 (1986) ("[T]he Court has declined to attribute to chance the absence of black citizens on a particular jury array where the selection mechanism is subject to abuse."); *see also* Taylor v. Louisiana, 419 U.S. 522, 526–27 (1975) (citing Smith v. Texas, 311 U.S. 128, 130 (1940)) (noting that a state jury system that resulted in systematic exclusion of African-Americans from juries violated the Equal Protection Clause).

129. *McCree*, 476 U.S. at 167–69, 173, 175–76.

130. *See infra* notes 178–93 and accompanying text.

131. Washington v. Davis, 426 U.S. 229, 239–42 (1976).

132. 3 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONST. L. § 18.4 (4th ed. 2010) (citing Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266–68 (1977)).

133. *See* Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 268 (1977).

racially discriminatory purpose need only be a motivating factor, not the sole motivating factor, of the challenged state action.[134] Once it has been established that the state action discriminates on the basis of race and that a racially discriminatory purpose was a motivating factor, the state action will be ruled constitutional only if it is a narrowly tailored measure that furthers compelling government interests.[135]

The Supreme Court in *McCleskey v. Kemp* raised the burden on petitioners even higher in the capital punishment context.[136] McCleskey argued that the Georgia capital sentencing system was administered in a racially discriminatory manner in violation of the Eighth and Fourteenth Amendments.[137] In support of his claims, McCleskey proffered a sophisticated statistical study, the Baldus study, which found severe racial disparities in the Georgia capital punishment system, especially in cases involving an African-American defendant and a white victim.[138] The Supreme Court rejected McCleskey's two claims.[139]

To prove a violation of the Equal Protection Clause in the capital punishment context, the petitioner must prove that the state acted with purposeful discrimination, the state's action had a discriminatory effect on the petitioner, and that the actors in the petitioner's specific case acted with a discriminatory purpose.[140] The Court defined "discriminatory purpose" as "more than intent as volition or intent as awareness of consequences," which implies that a state legislature had a discriminatory intent when it "selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group."[141] As long as there is a legitimate reason for the state's action, discriminatory purpose will not be inferred.[142]

The Court also made clear that statistical studies like the one proffered by McCleskey will not be enough to prove an Equal Protection claim unless it were "exceptionally clear proof" of discrimination.[143] As justification for this standard, the Court cited reasons why the capital punishment context is different from other contexts where statistical evidence is permitted to help prove an Equal Protection violation: (1) the inference of discrimination cannot be made from statistics because there are more entities and variables involved in a capital case;[144] (2) the state cannot

134. *Id.* at 265–66.

135. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995).

136. McCleskey v. Kemp, 481 U.S. 279, 292–94 (1987).

137. *Id.* at 282–86.

138. *Id.* at 286–87.

139. *Id.* at 313.

140. *Id.* at 292.

141. *Id.* at 298 (quoting Admin. of Massachusetts v. Feeney, 442 U.S. 256, 279 (1979)).

142. *Id.* at 299 n.21 ("[I]t is entirely appropriate to rely on the legislature's legitimate reasons for enacting and maintaining a capital punishment statute to address a challenge to the *legislature's* intent.").

143. *Id.* at 294–97.

144. *Id.* at 294–95.

adequately rebut the inference of discrimination in the capital punishment context because jurors cannot testify as to how they reached their verdict and policy considerations dictate not asking the prosecutor to do so years after their decisions were made;[145] and (3) discretion is a critical component of the criminal justice system, which should not be upset unless there was "exceptionally clear proof" that the discretion had been abused.[146] *McCleskey* established an Equal Protection standard in the capital punishment context that puts a higher burden of proof on the petitioner[147] and restricts what the petitioner may use to prove a claim.[148]

The Court had a different approach in *Batson v. Kentucky*.[149] In *Batson*, the Court held that the Equal Protection Clause forbids a prosecutor from striking prospective jurors through peremptory challenges solely on account of their race.[150] The Court considered peremptory challenges to be a facially neutral system, but the Constitution required the Court to "look beyond the face of the statute defining juror qualifications" to afford protection against prohibited discrimination.[151] The Court found peremptory challenges to be a "selection mechanism . . . subject to abuse" that "permits 'those to discriminate who are of a mind to discriminate.'"[152] The petitioner can prove a prima facie case of discrimination by showing either proof of the systematic exclusion of members of a race from juries in the jurisdiction or from facts in the petitioner's specific case.[153]

After the petitioner has proven a prima facie case of discrimination, a trial court is to determine if the state's peremptory strike was racially motivated by considering the prosecutor's credibility, including assessing the rationality of the prosecutor's proffered race-neutral explanation for the strike.[154] In evaluating the race-neutral explanation, the trial judge may

---

145. *Id.* at 296.

146. *Id.* at 297.

147. *See* J. Thomas Sullivan, *Lethal Discrimination 2: Repairing the Remedies for Racial Discrimination in Capital Sentencing*, 26 HARV. J. ON RACIAL & ETHNIC JUST. 113, 130–31 (2010) (advocating for the use of strict scrutiny in reviewing capital punishment decisions).

148. *See McCleskey*, 481 U.S. at 347–51 (Blackmun, J., dissenting) (accusing the majority of ignoring relevant statistical evidence and evidence related to the prosecutor's motives in seeking the death penalty); Sullivan, *supra* note 147, at 129–31 (noting that the majority in *McClesky* discounted the statistical evidence supporting McClesky's claim that racial prejudice played a role in his sentencing).

149. Batson v. Kentucky, 476 U.S. 79 (1986).

150. *Id.* at 89.

151. *Id.* at 88.

152. *Id.* at 95–96.

153. *Id.* at 93–95 (establishing a three-part test to determine whether the prosecutor's use of peremptory challenges constitute impermissible discrimination subject to the Equal Protection Clause: (1) the petitioner makes out a prima facie showing of purposeful discrimination by showing that the totality of the circumstances give rise to an inference of discriminatory purpose, (2) the burden then shifts to the State to show that it used permissible racially neutral selection criteria, and (3) the Court then weighs the evidence to determine if the State's strike was motivated by purposeful racial discrimination).

154. Snyder v. Louisiana, 552 U.S. 472, 477 (2008); Miller-El v. Cockrell, 537 U.S. 322, 339 (2003) ("Credibility can be measured by, among other factors, the prosecutor's demeanor; by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some

engage in a comparative analysis by comparing the explanation the prosecutor gave to how the same reasoning could be applied to jurors of other races to determine if the proffered explanation was pretextual.[155] While there may be flaws in the *Batson* system,[156] at the very least it would provide more protection against racial discrimination in death qualification than the status quo.

## B. Equal Protection Analysis Applied to Death Qualification

### 1. Scenario 1: State Manipulation

Equal Protection analysis could be applied to death qualification in a situation where the prosecutor manipulates voir dire to encourage African-American prospective jurors to give responses that would result in excusal for cause under death qualification. In this scenario, the statements that the prosecutor would elicit from the minority jurors during death qualification proceedings would be used as a pretext to impermissibly discriminate against African-American prospective jurors.

*Miller-El v. Cockrell*, a case applying the *Batson* test, is an example of how this could occur. The prosecutor questioned members of the venire to determine their attitudes concerning the death penalty.[157] In so doing, over half of the African-American jurors, but only six percent of white jurors, were given a horrific and detailed description of the process by which someone is executed in Texas.[158] Responses that disclosed hesitation in imposing the death penalty were cited as justification for striking prospective jurors for cause or by peremptory challenge.[159] This disparate line of questioning demonstrated that the prosecutor intended to evoke statements of opposition to the death penalty from African-American prospective jurors in order to excuse them from the jury under death qualification, and the Court considered this as evidence of purposeful discrimination in support of the petitioner's *Batson* claim.[160]

---

basis in accepted trial strategy.").

155. *See Snyder*, 552 U.S. at 483–85 (finding the prosecutor's proffered race-neutral explanation was not applied to white jurors in the same manner as it was applied to African-American jurors).

156. *See, e.g.*, Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of* Batson, *and Proposed Solutions*, 4 HARV. L. & POL'Y REV. 149, 161–65 (arguing that implicit bias infects *Batson* proceedings, with biased judges believing biased prosecutors); Antony Page, Batson's *Blind-Spot: Unconscious Stereotyping and the Peremptory Challenge*, 85 B.U. L. REV. 155,156–61, 177–78, 234–36 (arguing that unconscious bias infects the *Batson* system); Sullivan, *supra* note 147, at 123–24 (arguing that judges are too willing to accept a prosecutor's proffered race-neutral reasons for the peremptory strike and that *Batson* creates an unreasonable deference to the finder of fact).

157. Miller-El v. Cockrell, 537 U.S. 322, 331–32 (2003).

158. *Id.* at 332.

159. *Id.* at 331–32.

160. *Id.* at 344–45.

The facts of *Miller-El* should be considered an unconstitutional application of death qualification. The rationale for applying the Equal Protection Clause to manipulations of death qualification is the same rationale as in *Batson*—prohibiting intentional racial discrimination by the prosecutor in jury selection. The primary difference is that *Batson* applies to peremptory challenges, but not to for-cause death qualification challenges.

*Batson*'s rationale also applies to death qualification. The primary evil of peremptory challenges, as per *Batson*, is their overly discretionary nature—they are easily manipulated to discriminate on the basis of race.[161] Death qualification is also a "selection mechanism . . . subject to abuse," susceptible to racial discrimination.[162] While not as discretionary as peremptory challenges, death qualification has become sufficiently discretionary under *Witt* to warrant heightened scrutiny.[163] When the statements that different jurors make can vary significantly in their severity of opposition to the death penalty and still result in death qualification strikes for all of them, a disparate impact can occur.[164] It is conceivable that a juror whose opposition to the death penalty is relatively slight is excused for cause, while a juror whose level of opposition to the death penalty is either the same or greater is not excused for cause. Under *Witt*, this result is permissible, as *Witt* merely outlines when the state *could* excuse a prospective juror for cause, not when the state *must* excuse the prospective juror for cause.[165]

African-American prospective jurors are much more likely to be subject to death qualification strikes.[166] Combined with the high potential for inconsistent outcomes, the risk of racial discrimination is intolerably high in death qualification. When faced with a situation of intentional prosecutorial manipulation of death qualification for a discriminatory purpose, like in *Miller-El*, a court should have no hesitation in applying *Batson* to death qualification.

### 2. Scenario 2: Disparate Death Qualification Strikes Along Racial Lines

Equal Protection analysis should also be applied to situations where death qualification results in disparate strikes along racial lines. This scenario could exist when an African-American prospective juror is excused for cause under death qualification while a white juror is not, even when the white juror's responses in voir dire indicate the same, or a higher,

---

161. *See supra* Part II.

162. Batson v. Kentucky, 476 U.S. 79, 95–96 (1986); *see supra* Part II.

163. *See supra* Part II.

164. *See supra* notes 35–37 and accompanying text.

165. *See* Wainwright v. Witt, 469 U.S. 412, 424 (1985) ("We . . . reaffirm the above-quoted standard from *Adams* as the proper standard for determining when a prospective juror *may* be excluded for cause because of his or views on capital punishment.") (emphasis added).

166. *See supra* Part III.B.

degree of opposition to the death penalty. It could be argued that prosecutors would always attempt to strike a prospective juror who expressed reservations about imposing the death penalty. For various reasons, this is not always the case.[167] Most of these situations would occur on the margins, when both the African-American and white prospective juror did not voice extreme opposition to the death penalty. The prosecutor could consider the white prospective juror to be a valuable member of the jury for other reasons, despite her slight opposition to the death penalty. The disparate strikes could also be attributed to implicit racial bias when determining the desirability of prospective jurors.[168] A petitioner should have the ability to use *Batson*'s comparative analysis[169] to show that the death qualification strike was merely a pretext for purposeful racial discrimination in his or her case.

3. Scenario 3: The Unconstitutionality of Death Qualification

The history of racial discrimination in capital punishment, the high risk of racial discrimination in death qualification today, and the lack of a sufficiently compelling state interest for the *Witt* standard counsels for the finding that death qualification is unconstitutional under the Equal Protection Clause of the Fourteenth Amendment, even without particularized evidence of discrimination.[170]

While the burden on a petitioner in the capital punishment context is onerously high, there are a number of critical distinctions between the claim advanced in this Note and the Equal Protection claim McCleskey advanced in *McCleskey v. Kemp*. Historical and statistical evidence can show that the intent of legislatures in enacting death qualification statutes was, at least in part, a result of a discriminatory purpose. Historical and statistical evidence of racial discrimination in capital punishment have become much more sophisticated since *McCleskey* was decided. The *McCleskey* decision rejected McCleskey's offer of historical evidence for not being "reasonably contemporaneous."[171] Yet, studies of implicit bias and advanced statistical analyses of public opinion have steadily tightened the nexus between historical racial discrimination in capital punishment and modern opinions on the appropriateness of capital punishment.[172] A

167. *See, e.g.*, Reed v. Quarterman, 555 F.3d 364, 378–79 (5th Cir. 2009) (examining the statement of an African-American prospective juror, who was struck on a peremptory strike due to his belief in an unlawfully high burden on the state to prove the defendant's death-worthiness, and finding similar responses made by white prospective jurors who were not struck); Currie v. Adams, 149 F. App'x. 615, 619–20 (9th Cir. 2005).

168. *See supra* notes 87–97 and accompanying text.

169. *See supra* notes 154–55 and accompanying text.

170. *See supra* Parts II–IV (outlining the risks and harms of racial discrimination in death qualification); *see also infra* notes 178–93 (balancing the interests of the state, the defendant, and society in death qualification).

171. McCleskey v. Kemp, 481 U.S. 279, 298 n.20 (1987).

172. Much of the social science linking racial bias to attitudes on the appropriateness of capital

petitioner making an Equal Protection claim under the shadow of *McCleskey* can rely on much improved statistical and historical evidence to show discriminatory intent by demonstrating the continued pervasiveness of race and its effects on legislative acts.

Because a challenge to death qualification is a relatively narrow challenge, there are fewer reasons for a court to depart from conventional Equal Protection analysis.[173] A challenge to death qualification only questions the use of discretion on the part of the prosecutor and the trial judge, affording both actors an opportunity to rebut the inference of discrimination.[174] While the Court went to great lengths in *McCleskey* to emphasize the importance of discretion in the criminal justice system,[175] the Court has also constrained that discretion when a specific process within capital punishment is uncommonly subject to the influence of racial discrimination.[176] The limited scope of a challenge to death qualification counsels for moving towards the Equal Protection analysis used in other contexts, which includes an increased acceptance of the use of statistical evidence as proof of an Equal Protection claim.[177]

*McCleskey*'s analysis of the state's interest in capital punishment poses the most substantial challenge to any petitioner making an Equal Protection claim in a capital case. The Court held that the legislature's legitimate reasons for maintaining a system of capital punishment disproved a racially discriminatory intent.[178] The Court, however, was still implicitly conducting a standard balancing test of the legislature's motivations.[179] The substantial re-working of Georgia's capital punishment system post-

---

punishment, especially research on implicit bias, only developed within the last twenty years. *See* Levinson, *supra* note 87, at 600 ("Since the 1990s, social scientists have demonstrated that many Americans harbor implicit racial biases."); *see also supra* notes 71–81 and accompanying text (studies on racial prejudice's effect on white support for capital punishment).

173. *See* Sheri Lynn Johnson, *Litigating For Racial Fairness After* McCleskey v. Kemp, 39 COLUM. HUM. RTS. L. REV. 178, 178–79 (2007) (finding three lessons from Equal Protection litigation after *McCleskey* – (1) think small, (2) if you can't change how people decide, change who decides, and (3) think small again).

174. *See McCleskey*, 481 U.S. at 296 n.17 ("Requiring a prosecutor to rebut a study that analyzes the past conduct of scores of prosecutors is quite different from requiring a prosecutor to rebut a contemporaneous challenge to his own acts.") (citing *Batson v. Kentucky*, 476 U.S. 79 (1986)).

175. *See supra* note 146 and accompanying text.

176. *See* Batson v. Kentucky, 476 U.S. 79 (1986) (applying the Equal Protection Clause of the Fourteenth Amendment to forbid prosecutors from using their peremptory strikes to strike prospective jurors solely on account of their race); Daniel R. Ortiz, *The Myth of Intent in Equal Protection*, 41 STAN. L. REV. 1105, 1145–46 (1989) ("The Court willingly eradicates discretion along the procedural margins of the criminal process but insists on protecting it within the substantive core.").

177. *See supra* notes 131–33 and accompanying text.

178. *See supra* note 142 and accompanying text.

179. The Court in *McCleskey* indicated that there may be a point where the evidence of discrimination outweighs the evidence of a legitimate purpose. *See McCleskey*, 481 U.S. at 296–97 ("[A]bsent far stronger proof, it is unnecessary to seek such a rebuttal [of discrimination], because a legitimate and unchallenged explanation for the decision is apparent . . . ."). *See also* Ortiz, *supra* note 176, at 1148–49 (arguing that *McCleskey*'s view of intent ultimately serves as a balancing mechanism between individual and state interests).

*Furman* aided the Court in finding that the legislature had reduced the risk of racial discrimination in capital punishment and had crafted a system that solely furthers the state's legitimate interests.[180] The recognition that racial discrimination in capital punishment continues to be a problem in the post-*Furman* world, the pervasiveness of racial discrimination in death qualification,[181] and *Witt* being too harsh a measure to satisfy the state's interest[182] suggest a different result on a challenge of death qualification today.[183]

If a discriminatory legislative intent were found to exist, death qualification would be subject to strict scrutiny analysis.[184] Strict scrutiny demands that when political choices burden fundamental rights, the means employed must be the least restrictive available to achieve the desired end, and the ends themselves must be sufficiently compelling to justify infringement.[185] In *Witt* and *McCree*, the Supreme Court articulated the state's interest in death qualification: having jurors capable of following the law to ensure the administration of the state's capital sentencing scheme.[186]

Balanced against the risk of racial discrimination and the other harms of death qualification, death qualification should not survive strict scrutiny review. As mandatory sentencing schemes—where a death sentence was automatically imposed if the defendant was convicted of a capital crime—have been replaced by discretionary sentencing schemes, the state's interest in death qualification has become less compelling as the risk that non-death qualified jurors will nullify at the guilt phase has been reduced.[187] Capital juries' discretion to sentence the defendant to life has only increased over time to the point where a jury has almost "unconstrained discretion" to not impose death.[188] Even when the evidence for imposing death is overwhelming, the Supreme Court has effectively endorsed a capital juror imposing life for no reason at all. A juror who would vote for life in the vast majority of circumstances would still be able to follow the law because there are no substantive requirements that jurors

---

180. *See McCleskey*, 481 U.S. at 298–99 (citing Gregg v. Georgia, 428 U.S. 153 (1976)).

181. *See supra* Part III.

182. *See infra* notes 187–89 and accompanying text.

183. *See infra* notes 187–93 and accompanying text (balancing the interests of the state, the defendant, and society in death qualification).

184. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995); Susan Bandes, *Taking Some Rights Too Seriously: The State's Right to a Fair Trial*, 60 S. CAL. L. REV. 1019, 1050–51 (1987).

185. Bandes, *supra* note 184, at 1050–51.

186. Lockhart v. McCree, 476 U.S. 162, 175–76 (1986); Wainwright v. Witt, 469 U.S. 412, 423 (1985).

187. Mark Cammack, *In Search of the Post-Positivist Jury*, 70 IND. L.J. 405, 457 (1995).

188. Walton v. Arizona, 497 U.S. 639, 664 (1990) (Scalia, J., concurring). *See also* Abdul-Kabir v. Quarterman, 550 U.S. 233, 246 (2007) (noting that "sentencing juries must be able to give meaningful consideration and effect to all mitigating evidence that might provide a basis for refusing to impose the death penalty on a particular individual"); Penry v. Lynaugh, 492 U.S. 302, 303–04 (1989) (jury must be allowed to consider and give effect to mitigating evidence so they can give a "reasoned moral response" to the defendant's background, character, and crime).

give the reasons for imposing death a certain weight—or any weight at all.[189] Mitigation jurisprudence sheds light on why the *Witt* test vastly overreaches the state interest it is seeking to protect. The state interest in having capital jurors at least be able to consider death as a punishment continues to erode when the Supreme Court adopted, and has expanded on, the view that death need not be considered at all in the sentencing phase.

In *Batson*, the Court also found a strong societal interest in preventing racial discrimination in jury selection because racial discrimination undermines confidence in the criminal justice system.[190] The risk of racial discrimination and the other harms of death qualification are significant interests of both society and the defendant that must be accounted for.[191] While the state interest in obtaining a jury that can follow the law in capital cases may have strength, it is not compelling, especially in light of the defendant's and society's interests at stake.

Even if it were held that the state's interest in death qualification is compelling, modern death qualification is not narrowly tailored. Death qualification provides the trial judge with nearly unlimited discretion and almost no limits on her authority to excuse a prospective juror for cause.[192] The Supreme Court was faced with a similar situation in *Witherspoon* when it limited the scope of death qualification due to its impact on the defendant's right to an impartial jury.[193] The *Witherspoon* rule, or a similar rule meaningfully restricting death qualification, could be an example of a rule narrowly tailored to satisfy the state's interest in death qualification without overly burdening the interests of the defendant or society. The *Witherspoon* rule could exclude jurors who would not consider imposing death in any circumstance, putting death qualification jurisprudence on par with mitigation jurisprudence. Modern death qualification, which is devoid of any meaningful limits or guidelines, cannot be said to be narrowly tailored.

4. Equal Protection Alternatives

While it is possible to challenge death qualification under the *McCleskey* standard, it is an inferior method to remedy the harms of racial discrimination in death qualification. The Court did not consider McCleskey's historical and statistical evidence as proof of discriminatory legislative intent and deferred to other legitimate legislative reasons to reject McCleskey's claim.[194] The Court fundamentally misunderstood the operation of explicit and implicit discrimination in today's colorblind

189. Rozelle, *supra* note 6, at 683–87.

190. Bandes, *supra* note 184, at 1047.

191. *See supra* Part IV.

192. *See supra* Part II.

193. *See supra* notes 12–17 and accompanying text.

194. McCleskey v. Kemp, 481 U.S. 279, 292–99 (1987).

society. Unconscious racism is the dominant form of racial discrimination today, and the Equal Protection Clause, to remain true to its purpose of eliminating state action with racially discriminatory motives, must take into account this form of discrimination.[195] Historical and statistical evidence can better illuminate how this form of prejudice influences why legislators make certain decisions and how legitimate the legislature's reasons really are.[196] The alternative is an abdication of the Court's role in remedying the most prevalent and invidious form of racial discrimination today.

Much time and effort has been spent developing critiques of, and alternatives to, the traditional intent requirement.[197] While articulating an alternative to the intent requirement is beyond the scope of this Note, death qualification can provide another example of why an alternative to the standard intent requirement is preferable. Most importantly, an alternative to the intent requirement should be able to take into account hidden conscious and unconscious racism in determining legislative intent. Death qualification appears race-neutral, but historical and statistical evidence belie that conclusion. The racial meaning of the death penalty mostly exists in the implicit biases of Americans. Such an alternative should also take into account the severity of the risk of racial discrimination in any given state action. Factors could include the racially symbolic nature of the act,[198] whether the system is vulnerable to racial discrimination, and the disparate impact of the state action on a protected racial class.

In certain situations involving discrimination by the prosecutor, the Equal Protection Clause, as interpreted in *Batson*, should be applied to death qualification. The Equal Protection Clause should also be applied to death qualification as a whole to rule it unconstitutional. Death qualification can be challenged generally under the Equal Protection standard in *McCleskey* due to the challenge's relatively limited scope and the advancement of historical and statistical evidence. While it may be possible to challenge death qualification under *McCleskey*'s very strict standard, alternative methods to establish a violation of the Equal Protection Clause should be considered in order to better fit the realities of racial discrimination in modern America.

---

195. Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 323 (1987).

196. *See supra* Part III.

197. *See, e.g.*, Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003 (1986) (advocating an anti-subordination doctrine); Barbara J. Flagg, *"Was Blind, But Now I See": White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 992–93 (1993) (calling for heightened scrutiny of state actions that have racially disparate effects); Lawrence, *supra* note 195, at 324 (advocating a "cultural meaning" test to determine whether government conduct conveys a symbolic message to which the culture attaches racial significance).

198. Lawrence, *supra* note 197, at 356–58.

C. The Hostility to an Examination of "For-Cause" Challenges

In his concurrence in *Batson*, Justice Marshall famously called for the elimination of peremptory challenges altogether as the only viable method of eliminating racial discrimination in jury selection.[199] This claim carries with it an implicit assumption that for-cause challenges are better suited than peremptory challenges in reducing racial discrimination in jury selection. This assumption proves flawed.

Modern death qualification presents many of the same problems seen in peremptory challenges due to the overly-discretionary nature of death qualification and the influence of race.[200] While not the unbridled discretion of peremptory challenges, the discretion afforded in death qualification is substantial enough to allow the operation of racial prejudice, especially due to the unconscious racism Justice Marshall cited in support of his argument that peremptory challenges should be abolished.[201]

One study found that subtle variations in prospective jurors' confidence in their ability to be fair influence the likelihood that a judge will excuse a prospective juror for cause even if that judge originally felt differently based solely on objective facts about the juror.[202] The study constructed vignettes about different prospective jurors, all of which were problematic to some extent, but each juror also stated in more or less confident terms that they could be fair.[203] Participants, which included prosecutors, defense attorneys, and judges, were then given copies of a voir dire transcript for each of the prospective jurors—some responses were confident and others were equivocal.[204] The higher a prospective juror's confidence was in her answers, the more likely it was that the judges thought the prospective juror was impartial, even when the juror was not—based on the objective facts—more impartial.[205] In addition to demonstrating some fallibility in for-cause strikes,[206] this study also has implications for the racial dimensions of death qualification. How people speak can vary by race, class, and gender.[207] People with "less education and lower occupational status" are "more prone to 'powerless language'"

199. Batson v. Kentucky, 476 U.S. 79, 102–03 (1986) (Marshall, J., concurring).

200. *See supra* Parts II–III.

201. *Batson*, 476 U.S. at 106 (Marshall, J., concurring); *see also supra* notes 87–97 and accompanying text.

202. Mary R. Rose & Shari S. Diamond, *Judging Bias: Juror Confidence and Judicial Rulings on Challenges for Cause*, 42 LAW & SOC'Y REV. 513, 514–15 (2008).

203. *Id.* at 519.

204. *Id.* at 519–20, 522–23.

205. *Id.* at 533.

206. The study articulated three reasons why this result shows for-cause challenges are flawed: (1) even if jurors know they are biased, they want to exhibit the desirable characteristic of fairness, (2) people have difficulty producing accurate self-assessments of bias, and (3) the limited availability of information in voir dire further reduces the accuracy of a juror's self-assessment. *See id.* at 515–17.

207. *Id.* at 541.

than others.[208] Not only are for-cause challenges flawed, but the voir dire process itself could unintentionally increase the racially disparate effects of death qualification by placing undue emphasis on a prospective juror's confidence in her ability to be fair.

Courts should look beyond the "for cause" and "peremptory" labels when deciding whether a particular process is susceptible to discrimination. Only a little over forty years ago, the Supreme Court severely limited "for cause" death qualification challenges and recognized that "for cause" challenges are not unimpeachable.[209] "For cause" challenges should not be sacrosanct.

## VII. Conclusion

The Equal Protection Clause should be applied to death qualification, both in its application and more generally. Supreme Court precedent affords the trial judge wide discretion in evaluating a prospective juror's answers and overall credibility, with many limits on the ability of appellate courts to review the trial judge's decision. A disproportionate number of African-Americans are excused from juries in capital cases under death qualification. This effect is not by chance. The potent history of racial discrimination in capital punishment continues to linger in the present, creating a disparate racial gap in support for capital punishment. The disproportionate exclusion of African-Americans from capital juries only exacerbates the effects of racial discrimination in capital sentencing.

The Supreme Court's decision in *McCleskey* poses significant hurdles for a petitioner challenging death qualification generally. However, the small scope of this challenge, improved historical and statistical evidence, and the evolution of capital punishment law post-*Furman* still make it possible to challenge death qualification under *McCleskey*. Also, in specific instances of pretextual prosecutorial discrimination, courts can apply *Batson*'s well-established reasoning and holding to the expansive *Witt* system for death qualification.

This Note has attempted to illuminate how support for capital punishment is not race-neutral, the recognition of which can have effects beyond death qualification.[210] Further efforts should be made to study the

---

208. *Id.*

209. *See* Witherspoon v. Illinois, 391 U.S. 510, 522–23 (1968).

> [A] sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction. No defendant can constitutionally be put to death at the hands of a tribunal so selected.

*Id.*

210. This recognition could affect the extent to which courts consider ambivalence towards the death penalty a proper race-neutral reason for a peremptory strike under *Batson*. *See, e.g.*, Miller-El v. Cockrell, 537 U.S. 322, 343 (2003) (prosecutors citing ambivalence about the death penalty as a justification for their peremptory strikes).

claims made in this Note and the nature of racial discrimination in death qualification in general. Additional efforts should also be made to explore the theoretical bases for a challenge to death qualification.[211]

Some states have enacted legislation that may help ameliorate racial discrimination in capital cases.[212] Those states have recognized the widespread problem of racial discrimination in capital punishment. Perhaps more importantly, they understand that we should be concerned about more than just overt racism. These statutes are a large step forward in attempting to root out discrimination in capital punishment.

Courts should create a death qualification jurisprudence that properly balances the state's interest and the harmful effects of death qualification on the defendant and on the capital punishment system. The modern standard does not properly strike this balance. The risk of racial discrimination is simply too high to justify the modern death qualification system.

211. *See, e.g.*, Laurence H. Tribe, Lawrence v. Texas: *The "Fundamental Right" That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893 (2004) (exploring the connections between Equal Protection and Due Process in *Lawrence v. Texas*).

212. *See, e.g.*, North Carolina Racial Justice Act, N.C. GEN. STAT. §§ 15A-2010 to -2012 (2009) (declaring that "[n]o person . . . shall be executed pursuant to any judgment that was sought or obtained on the basis of race," and that statistical evidence can be used to help prove that race was a significant factor in the decision to impose death); Kentucky Racial Justice Act, KY. REV. STAT. ANN. §§ 532.300-532.309 (LexisNexis 1998) (forbidding the imposition of a death sentence where "race was a significant factor in decisions to seek the sentence of death" and allowing statistical evidence to be used to help demonstrate the influence of race in the petitioner's case).