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ARTICLES

NOTE

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WHEN RELIANCE IS DETRIMENTAL: ECONOMIC, MORAL, AND POLICY ARGUMENTS FOR EXPECTATION DAMAGES IN CONTRACTS TERMINATED FOR THE CONVENIENCE OF THE GOVERNMENT

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The law does not allow one party to be bound while the other party remains free to negotiate.[1]

—Professor Joe Tucker

No backsies.[2]

—Frances the Badger

I. INTRODUCTION

Some, like Professor Tucker, make the point elegantly; others, like Frances, are more direct. Each articulates what we all—lawyer and layperson alike—understand implicitly: in every contract, the allocation of risk occurs exclusively and finally during the bargaining process. Though the scope and tenor of the risk allocation process may vary dramatically from contract to contract,[3] one thing is true of all bilateral negotiations: when they have ended for one party, they have ended for both.[4]

Seen in this light, all questions of individual contract interpretation are variations on one theme: How were risks allocated when risk allocation was complete? While virtually every contract dispute involves at least one party's wishing, in light of later discovered facts, that he had allocated risks differently, neither the common law nor the Uniform Commercial Code allows one party unilaterally to re-allocate risk once negotiations are over and performance has begun.[5]

This rule is so foundational to American contract law that it comes as a shock to many students in an introductory Federal Procurement Law course to learn that the United States, when entering into contracts, does not follow it as regards the most basic of all risk allocations: the risk that at some point a party will wish it were not

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[1] Author's recollection of my 1L Contracts professor's attempt to help his students distill and synthesize the law of offer and acceptance.

[2] RUSSELL C. HOBAN, A BARGAIN FOR FRANCES 30 (1970). In this children's book, the protagonist and her friend learn a hard lesson about the consequences of entering into a contract rashly.

[3] Perhaps the greatest variance among contracts is how explicitly contract terms are established. Risk allocation may be express, through the adoption of specific contractual terms, or implied, by passive acceptance of the default rules imposed by the law of the jurisdiction in which the contract is made. Ian Ayres and Robert Gerner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 87-88 (1989).

[4] Of course, the bargaining process may be re-opened at any point. This is not an exception to the rule, but an expression thereof, inasmuch as one party may only renegotiate with the other if the other is willing to renegotiate with the one.

[5] RESTATEMENT (SECOND) OF CONTRACTS § 89 cmt. b, illus. 5 (1981); U.C.C. § 2-209 (1998) (requiring an "agreement" for modification of a contract).

contractually bound at all. Instead, court-made law and federal regulations together guarantee that the federal government may, for almost any reason whatsoever, unilaterally terminate all or any part of virtually any contract into which it has entered, after the negotiations are complete and without affording the same prerogative to its contractors. Though the government may recover its reprocurement costs should the contractor cease to work without good cause,[6] a contractor's remedy when the government terminates contracts for reasons other than contractor default is generally limited to his costs thus far incurred, plus a reasonable profit on the work he has already performed.[7] "Anticipatory profits . . . shall not be allowed."[8] The occasional criticism notwithstanding, this liberal "Termination for Convenience" (hereinafter T4C) privilege has become one of the most settled doctrines of federal procurement law,[9] employed often in situations far beyond the classic excess war materiel scenarios out of which the doctrine first grew and to which its proponents originally looked for its justification.[10]

This article contends that the government's almost unfettered right to terminate a contract for its convenience is normatively unsound. While the nature of government contracting is sufficiently unique to justify a limited government T4C prerogative, multiple arguments support significant delimitations not currently in place. Part II of this article traces the development of the law of government contract terminations, reviewing relevant court decisions, statutes, and regulatory controls. Part III analyzes the economic efficiency of the current T4C regime, demonstrating how that regime drives unnecessarily high government procurement costs. Part IV evaluates the moral implications of the government's reserving to itself the right to terminate contracts without affording the same right to its contractors, concluding that morality would be better served by a default rule awarding contractors expectation damages. Part V examines policy arguments for and against the current T4C regime, arguing that neither the doctrine of sovereign immunity nor the proposition that one government should not be permitted to bind a subsequent government justifies the status quo. Part VI offers some concluding thoughts and

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[6] GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. 49.402-2(e) (Jul. 2007) [hereinafter FAR].

[7] FAR 49.201(a) governs fixed-price contracts, stating that, "[a] settlement should compensate the contractor fairly for the work done and the preparations made for the terminated portions of the contract, including a reasonable allowance for profit." FAR 52.249-6(h), which governs cost-reimbursement contracts, is analogous, providing for costs expended in contract performance plus settlement negotiations; the contractor receives a percentage of any award or fixed fee equal to the percentage of work completed at the time of contract termination.

[8] FAR 49.202(a).

[9] *See infra* notes 50-52 and accompanying text.

[10] *See infra* note 16 and accompanying text.

proposes a more limited T4C regime that would safeguard national[11] interests while increasing the economic efficiency and moral soundness of the federal government's procurement system.

II. HISTORICAL DEVELOPMENT OF THE MODERN TERMINATION FOR CONVENIENCE REGIME

A. Termination for Convenience as a Means to Limit Post-Wartime Waste

In the years following the American Civil War, the federal government found itself under contract for goods and services it no longer needed. The then-Secretary of the Navy accordingly terminated a contract with the Corliss Steam Engine Company before Corliss had fully performed or been fully paid.[12] Corliss's representative proposed settlement terms, to which the Secretary agreed.[13] Hindsight was apparently twenty-twenty, though, and Corliss brought suit, alleging the Secretary did not have the authority to settle the contract.[14] At the end of a remarkably brief opinion, and without rendering any specific holdings regarding when or how the government could terminate its contracts (or what damages the law required), the Supreme Court concluded:

> But aside from [the] general authority [he had as] Secretary of the Navy, under the orders of the President, [the Secretary] was, during the rebellion, specially authorized and required by acts of Congress, either in direct terms or by specific appropriations for that purpose, to construct, arm, equip, and employ such vessels of war as might be needed for the efficient prosecution of the war. In the discharge of this duty, he made the original contracts with the claimant. The completion of the machinery contracted for having

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[11] My arguments in this article presuppose that the only legitimate government interests are those of its citizens. It is thus neither here nor there whether a contract is cheaper or otherwise more advantageous "to the government," common industry parlance notwithstanding. Rather, the question, as I see it, is whether the law of government contracts generally, and each government contract in particular, improve, even if only marginally, the well being of Americans. *See, e.g.*, STATEMENT OF THE BERKSHIRE COUNTY, MASSACHUSETTS, REPRESENTATIVES (Nov. 17, 1778) *reprinted in* THE FOUNDERS' CONSTITUTION (Philip B. Kurland & Ralph Lerner eds., 1987) ("In a word nothing is more certain than that Government in the general nature of it is a Trust in behalf of the people.").

[12] United States v. Corliss Steam-Engine Co., 91 U.S. 321, 321 (1876).

[13] *Id*.

[14] *Id*.

> become unnecessary from the termination of the war, the secretary, in the exercise of his judgment, under the advice of a board of naval officers, suspended the work. Under these circumstances, we are of opinion that he was authorized to agree with the claimant upon the compensation for the partial performance, and that the settlement thus made is binding upon the government.[15]

The Court did not state what "the[] circumstances" on which it based its opinion were. If subsequent congressional action is a fair guide, though, support for the government's T4C prerogative, at least in the nineteenth century, was grounded on the understanding that major shifts in national policy—such as the cessation of wide-scale military operations—would sometimes render particular contracts unnecessary and wasteful to complete.[16]

The Court would revisit this issue when another government contractor was told his services were no longer needed after the First World War had ended. In 1917, Congress gave the President statutory authority "to modify, suspend, cancel, or requisition any existing or future contract for the building, production, or purchase of ships or material."[17] Per the statutory language, should "the United States" exercise this Presidential prerogative, "it" was to "make just compensation therefor as determined by the President."[18] While the

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[15] *Id*. at 324.

[16] This is the view held by the leading commentators in the field of government contract law. "The concept of termination for convenience of the government was developed principally as a means to end the massive procurement efforts that accompanied major wars." JOHN CIBINIC, JR ET AL., ADMINISTRATION OF GOVERNMENT CONTRACTS 1049 (4th ed. 2006).

[17] Appropriations, Urgent Deficiencies, Pub. L. No. 65-23, ch. 29, 40 Stat. 182 (1917) (hereinafter "Act of June 15, 1917," the term the Court used). The Act "ma[de] appropriations to supply urgent deficiencies in appropriations for the Military and Naval Establishments on account of war expenses for the fiscal year ending June thirtieth, nineteen hundred and seventeen, and for other purposes." *Id*.

[18] *Id*. It is not clear from the language of the statute why it was "the President" who was to establish just compensation, but it was "the United States" who, Congress anticipated, would actually exercise the power by modifying or terminating a contract. The Supreme Court appears to have resolved this question in *Russell Motor Car Co. v. United States*, 261 U.S. 514 (1923), by explicitly endorsing the President's authority to delegate authority, even if only by implication, to executive agents. "Executive power, in the main, must of necessity be exercised by the President through the various departments. These departments constitute his peculiar and intimate agencies and in devolving authority upon them meticulous precision of language is neither expected nor required." Russell, 261 U.S. at 523. Though a full analysis of the question is beyond the scope of this article, I am not as confident as was the Court that Congress's intent was simply to authorize any agent of the Chief Executive to fix compensation in the case of contracts terminated for the convenience of the government. One meaningful safeguard against the government's too casually cancelling contracts would be to require high-level approval, in certain circumstances up to and including the President's, for a damages

statute did not specify what constituted "just compensation," the Supreme Court, in *Russell Motor Car Co. v. United States*, found that, "In fixing just compensation [a] court must consider the value of the contract at the time of its cancellation, not what it would have produced by way of profits for the Car Company if it had been fully performed."[19] In justifying its holding, the Court said that Russell's contention that it was owed anticipatory profits on the cancelled portion of its contract with the United States "confuses the measure of damages for breach of contract with the rule of just compensation for the lawful taking of property by the power of eminent domain."[20] The Court, in what would prove to be a recurring theme, stated:

> The contract, we must assume, was entered into with the prospect of its cancellation in view, since the statute was binding and must be read into the contract. The possible loss of profits, therefore, must be regarded as within the contemplation of the parties. The lower court was right in refusing to allow anticipated profits and, there being nothing in the findings to justify the contrary, we must accept the amount fixed on the basis of just compensation as adequate.[21]

Eight years later, the Court would deny anticipatory profits to a manufacturer whose contracts with another private party, some of which were made prior to the passage of the Act of June 15, 1917, had been requisitioned by the government and, subsequent to the Armistice, cancelled. In *De Laval Steam Turbine Co. v. United States*,[22] the Court affirmed the Court of Claims's judgment denying De Laval anticipatory profits of over $300,000, holding that the $8500 awarded beyond actual costs incurred adequately reflected the value De Laval would have received by assigning its rights under the contract to another private

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award. Though this extreme would undoubtedly be cumbersome and inefficient, the alternative extreme, set forth in the current Federal Acquisitions Regulations, is to allow any warranted contracting officer to decide both whether to terminate and how much to pay. FAR 49.115. It is at least possible that Congress wanted to prevent widespread termination that could result from excessive decentralization of control.

[19] Russell, 261 U.S. at 523.

[20] *Id*.

[21] *Id*. at 524. The Court takes for granted that the right to pay less than expectation damages necessarily follows the right to terminate. This is not true. Contract law may and often does "separat[e] . . . the sensibility of the self-help remedy of cancelling a contractual relationship and the distinct issue of whether [author: or how much] to compensate the cancelled party. . . . [R]emedial unbundling occurs all the time . . . ." Charles Tiefer, *Forfeiture by Cancellation or Termination*, 54 MERCER L. REV. 1031, 1057 (2003).

[22] De Laval Steam Turbine Co. v. United States, 284 U.S. 61 (1931).

party, "considering all the circumstances—uncertainties of the war and the rest."[23]

While the Act of June 15, 1917, may have been unprecedented in its reach, it was not the first time the government had taken steps to ensure it would not be bound to fully perform contracts made unnecessary by dramatically changed circumstances. In 1863, the Army was required by regulation to include a termination provision in contracts for subsistence stores.[24] While some government agencies followed suit in promulgating regulations requiring T4C clauses in certain contracts, through the end of the Second World War most terminations of government contracts occurred under statutory authority, including the Dent Act of 1919 and the Contract Settlement Act of 1944.[25] It was not until the second half of the twentieth century that the focus in the law of T4C shifted from statutory authority to regulatory requirements.

> The 1950 edition of the Armed Services Procurement Regulation contained mandatory Termination for Convenience clauses to be used in the majority of DoD contracts over $1,000. In 1964 the first edition of the Federal Procurement Regulations (FPR) contained optional termination for convenience clauses to be used "whenever an agency considered it necessary or desirable . . . ." In June 1967, the FPR was revised to make the Termination for Convenience clauses mandatory, with limited exceptions, in fixed-price supply contracts over $2500 and fixed-price construction contracts over $100,000. [Federal Acquisition Regulation] 49.502 continues to require broad use of Termination for Convenience clauses, with the result that the broad rights developed for war contracts have come to be applied to all types of

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[23] *Id*. at 72 (quoting Brooks-Scanlon Corp. v. United States, 265 U.S. 106).

[24] United States v. Speed, 75 U.S. 77, 82-83 (1969). The Court noted that Rule 1179 of the Army Regulations of 1863

> ha[d] reference to contracts for the regular and continuous supply of subsistence stores, and not to contracts for services or labor; and it is required because the post or force to be supplied may be suddenly removed or greatly diminished. It has no application to a contract for a certain amount of supplies, neither more nor less, or to do a specific job of work requiring skilled labor.

Id.

[25] CIBINIC ET AL., *supra* note 16, at 1050.

> contracts, civilian as well as military, in times of both peace and war.[26]

B. The *Christian* Era

One thing remained constant throughout the slow but steady increase in the government's willingness to assert its T4C prerogative over the century following the Civil War: government contractors were always on notice of their being liable to be terminated for the convenience of the government. Statutes or, in certain cases, express contractual provisions, made it clear to all government contractors that the government could terminate certain (by 1950, most) of its contracts at will, with only reliance damages available to the contractor as a remedy. Absent such provisions in law or individual contracts, government contracts were understood to be governed by the same default rules as private contracts, with the government liable for anticipatory profits if it failed to perform any of its contractual obligations.[27]

All this changed dramatically in 1963, when the United States Court of Claims ruled, in *G.L. Christian & Assoc. v. United States*,[28] that, despite the absence of a T4C clause in a government contract, courts "are not, and should not be, slow to find the standard termination article incorporated, as a matter of law, into [the] contract if [applicable federal procurement] Regulations can fairly be read as permitting that interpretation."[29]

Christian arose when the Department of the Army deactivated Fort Polk, Louisiana, in 1958.[30] Pursuant to the Capehart Act of 1955, the Army Corps of Engineers had, in August 1957, contracted with the plaintiff to build approximately 2000 on-post houses over a period of

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[26] *Id*.
[27] Nolan Bros., Inc. v. United States, 186 Ct. Cl. 602, 609 (1969).
[28] G.L. Christian & Assoc. v. United States, 160 Ct. Cl. 1 (1963).
[29] *Id*. at 15. *Christian* did not completely vitiate the right of contractors to receive expectation damages.

> [I]f the Government terminates a contract without justification, such termination is a breach of the contract and the Government becomes liable for all the damages resulting from the wrongful act. The damages will include not only the injured party's expenditures and losses in partially performing the contract, but also, if properly proved, the profits that such party would have realized if he had been permitted to complete the contract. The objective is to put the injured party in as good a position pecuniarily as he would have been in if the contract had been completely performed.

Id. at 11 (citations omitted).
[30] *Id*. at 4.

eighteen months, for a total contract price of almost $33,000,000.[31] The Corps terminated the contract in January 1958.[32] At this point, the work was barely more than two percent complete and was "substantially behind schedule."[33] Many claims resulting from the termination were settled administratively, but Christian sued for over $5,000,000 in anticipated profits.[34]

This case, like many others sounding in contract, could have been avoided had the contract been better drafted. Section 8.703 of the Armed Services Procurement Regulations clearly required that contracts of this type and size include a clause giving the government the right to terminate the contract "whenever the Contracting Officer shall determine that such termination is in the best interest of the Government," with the contractor being awarded costs not to include anticipated profits.[35] The contract omitted such language, leaving the government to argue the required clause should be read in by force of law.[36] The Court of Claims accepted the government's argument, citing three bases for its opinion. First, "[a]s the Armed Services Procurement Regulations were issued under statutory authority, those regulations, including Section 8.703, had the force and effect of law."[37] As such, "there was a legal requirement that the plaintiff's contract contain the standard termination clause and the contract must be read as if it did."[38] Second, the "limitation [on profit to work already performed and the prohibition on anticipatory profits] is a deeply ingrained strand of public procurement policy."[39] Noting that "[l]iterally thousands of defense contracts and subcontracts have been settled" by termination for the convenience of the government,[40] the court found that

> [r]egularly since World War I, it has been a major government principle, in times of stress or increased military procurement, to provide for the cancellation of

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[31] *Id*. at 4, 10.
[32] In one of history's ironies, Fort Polk reopened in 1961. Fort Polk History: Welcome to Fort Polk, http://www.jrtc-polk.army.mil/JRTC-Polk_NEW/sites/about/history.asp (last visited Feb 1, 2008). As of early 2008, it was home to over 8300 soldiers and their more than 15,700 family members. Joint Readiness Training Center and Fort Polk Public Affairs Office Fact Sheet (1st Qtr 08), http://www.jrtc-polk.army.mil/JRTC-polk_NEW/sites/about/FactSheet.pdf. A government contractor is now engaged in an eleven-year project to build or renovate 3821 homes. Fort Polk Family Housing, http://www.polkpicerne.com/index.php?pid=105 (last visited Feb. 1, 2008).
[33] *Christian*, 160 Ct. Cl. at 10.
[34] *Id*.
[35] *Id*. at 11-12 (quoting 32 C.F.R. § 8.703 (1954)).
[36] *Id*. at 11.
[37] *Id*.
[38] *Id*.
[39] *Id.*
[40] *Id*. at 16.

> defense contracts when they are no longer needed, as well as for the reimbursement of costs actually incurred before cancellation, plus a reasonable profit on that work—but not to allow anticipated profits.[41]

"History," the court stated,

> shows . . . that the Defense Department and the Congress would be loath to sanction a large contract which did not provide for power to terminate and at the same time proscribe anticipated profits if termination did occur. Particularly in the field of military housing, tied as it is to changes and uncertainties in installations, would it be necessary to take account of a possible termination in advance of completion, and to guard against a common law measure of recovery which had been disallowed for so many years in military procurement.[42]

The court used this history to introduce the third reason for its holding. "The experienced contractor . . . could not have been wholly unaware that there might be a termination for the convenience of the Government, which the defendant would not deem a breach."[43] Besides historical precedent, the fact that the contract, despite omitting the standard termination clause, contained, along with "accompanying agreements," "at least four references" to a "'termination of the Housing Contract for the convenience of the Government' and to the Government's assumption of certain obligations in that event" made the court "think it probable . . . that [plaintiff's assignees] knew of that general policy."[44]

Christian accomplished two distinct but related things. First, it established the precedent that "a contract will be read to include a required clause even though it is not physically incorporated into the document,"[45] when the clause "is of such importance as to reflect a deeply ingrained strand of, or a legislative intent for, public procurement policy, or a major government principle."[46] Second, it was effectively the last step in a policy revolution. Where once the common law of

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[41] *Id*. at 15.
[42] *Id*. at 16.
[43] *Id*.
[44] *Id*. at 16-17.
[45] Lockheed Martin Librascope Corp., ASBCA No. 50508, 199-1 B.C.A. ¶ 30,635.
[46] *Id*. at 32. *See also* General Eng'g & Mach. Works v. O'Keefe, 991 F.2d 775, 780 (C.A.F.C. 1993) ("[T]he Christian Doctrine has also been employed to incorporate less fundamental or significant mandatory procurement contract clauses if not written to benefit or protect the party seeking incorporation.").

damages was displaced sparingly when applied to government contracts, with large defense contracts comprising the bulk of those benefiting from statutory protection or containing express T4C provisions, in *Christian*, the court added its voice to the increasingly prevalent notion that the government must generally have "the right to terminate a contract without cause at any time after award."[47]

Seen one way, *Christian* was but an incremental change. It did not purport to enlarge the universe of circumstances in which the government should ensure its T4C prerogative, but rather only to recognize that in the appropriate circumstances this prerogative is secure independent of contract drafters' actions or even intent; as such, *Christian* probably did not directly and immediately result in significantly more terminations of government contracts for convenience. Seen from a different perspective, though, *Christian* was a watershed moment in the development of government procurement law. *Christian* removed the possibility that contractors could negotiate expectation damages as a term of a contract, even when government officials see good reason to accept these terms.[48]

Neither *Christian* nor the liberal T4C regime it has come to symbolize has been without its critics.[49] However, since forty-five years

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[47] Graeme S. Henderson, *Termination for Convenience and the Termination Costs Clause*, 53 A.F.L. REV. 103, 104 (2002). *See also* Stephen N. Young, Note, *Limiting the Government's Ability to Terminate for its Convenience following* Torncello, 52 GEO. WASH. L. REV. 892, 892-93 (1984).

> The termination-for-convenience-of-the-government clause appears in virtually all government contracts. . . . In addition to invoking the clause directly to terminate a contract, the government has greatly expanded its ability to invoke the clause constructively, after the breach has occurred. The constructive use of the clause has become so broad that the government is able to exculpate itself from its own prior material breaches on the contract, thereby avoiding payment of anticipated profits—a result that is unique in the field of contracts.

Id.

[48] The *Christian* court apparently accepted the notion that a government agent might omit a T4C clause, but may have assumed that such omission could only be ill-motivated. On rehearing, the court stated that "[i]t was important [at the time earlier government procurement regulations were promulgated], and it is important now, that procurement policies set by higher authority not be avoided or evaded (deliberately or negligently) by lesser officials, or by a concert of contractor and contracting officer." *Christian*, 160 Ct. Cl. at 66-67. I propose that government agents might, for the reasons articulated in this article, think it wise and beneficial to all parties to a contract to negotiate away the government's T4C rights.

[49] *See, e.g.*, Marc A. Pederson, *Rethinking the Termination for Convenience Clause in Federal Contracts*, 31 Pub. Cont. L.J. 83 (2001); s*ee also* Joel P. Shedd, *The Christian Doctrine, Force and Effect of Law, and Effect of Illegality on Government Contracts*, 9 PUB. CONT. L.J. 1, 21 (1977).

have passed without meaningful change to either the governing regulatory provisions[50] or case law interpreting the government's right to terminate for convenience,[51] it appears that Congress and federal regulators agree with at least one commentator who is satisfied that, even if "one might question the logic of the *Christian* decision, the result certainly appears fair. Manifestly, the court should not have permitted the contractor to recover a multimillion dollar windfall after completing only two percent of the contract."[52]

I contend that *Christian* was a case of hard facts making bad law. It is not, I believe, so "manifest" that *Christian* reached the right result, at least not insofar as *Christian*'s holding has been applied to less egregious fact patterns that have arisen since *Christian*. While it is true that the government should take steps to avoid paying millions of dollars in "unearned" profits after cancelling a large contract shortly after its inception, it does not necessarily follow that if the government does not take those steps, it should benefit all the same. Instead, all three branches of government should recognize the significant benefits to be gained by liberalizing the contract negotiations process to allow

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> When a procurement regulation states that a particular clause shall be inserted in a particular type of contract, can it be said that the real purpose and intent of the drafters of the regulation is that the specified clause shall be a part of the contract regardless of whether it is inserted therein?

Id.

[50] *See, e.g.,* FAR 49.502.

[51] The closest courts have come to overhauling *Christian* was *Torncello v. United States*, 231 Ct. Cl. 20 (1982). There, the court wrestled with the tension between government as sovereign and government as contracting entity. *Id*. at 30. Observing that any contracting party, even the government, "may not reserve to itself a method of unlimited exculpation without rendering its promises illusory and the contract void," *id*. at 26, the *Torrncello* court ultimately refused to sanction the Navy's "termination" of one part of a broad indefinite-quantity, indefinite-delivery pest control contract, when the Navy knew at the time it signed the contract that it planned only to place certain (inexpensive) pest control orders with Torncello while using other contractors for services for which Torncello charged more than his competition. *Id*. at 53. Absent "changes [in] circumstances" after contract formation, the unfettered right to terminate for convenience would vitiate the consideration requirement. *Id*. This "changed circumstances" doctrine did not bring about the sea change some hoped it would, though. In *Krygoski Constr. Co. v. United States*, the Federal Circuit "revisited the dicta in the Torncello plurality opinion," stating that it had "rejected the reasoning of the Torncello plurality." Krygoski Constr. Co. v. United States, 94 F.3d 1537, 1544 (Fed. Cir. 1996). Quoting its previous decision in *Salsbury Industries v. United States*, 905 F.2d 1518, 1521 (Fed. Cir. 1990), the *Krygoski* court held that *Torncello* "stands for the unremarkable proposition that when the government contracts with a party knowing full well that it will not honor the contract, it cannot avoid a breach claim by adverting to the convenience termination clause." *Krygoski*, 94 F.3d at 1543-44.

[52] Stanton G. Kunzi, *Losing Sight of Christian Values: The Evolution and (Disturbing) Implications of the Christian Doctrine*, 1992 ARMY LAW. 11.

negotiating damage remedies. Among these benefits, the most tangible are economic.

III. ECONOMIC EFFICIENCY ARGUMENTS FAVOR MOVING AWAY FROM *CHRISTIAN*

Though courts have sometimes employed economic terminology in finding that the government should not be held liable for anticipatory profits on contracts it terminates—both *Russell* and *Christian* make clear that government contractors are expected to factor the likelihood of contract termination into their bids[53]—no court has explicitly dealt with the issue of whether broad government termination rights are, on the whole, economically efficient. This part of the article presents economic arguments advocating a limited T4C regime, more in keeping with its original limited scope of application.

A. Going-In Positions

Though Part IV of this article will explain why economic concerns alone are insufficient grounds from which to draw normative conclusions, I begin my analysis here with the proposition that, all else being equal, a more economically sound government procurement regime is to be preferred over one that is less so.[54] From this it follows that a shift to a more economically sound damages regime in government contracts is, if possible, desirable.[55] Generally speaking, this economic soundness is best measured by "Kaldor-Hicks efficiency," which describes any transaction in which, measured from the ex ante perspective, no party thereto is made worse off, at least one party is made better off, and any third party losers are fully compensated for losses they incur as a result of the parties' transaction.[56] Finally, I

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[53] *See also* United States v. Speed, 75 U.S. 77, 83 (1869) ("While the commissary might have insisted on a [termination or partial termination for convenience clause], for which he might in that event have been charged a higher price, he did not do so, and cannot have the benefit of it as though he had.").

[54] That is, I agree with the tenet of economic analysis of law that holds that "contract law ought to promote 'efficiency,'" Lewis A. Kornhauser, *An Introduction to the Economic Analysis of Contract Remedies*, 57 U. COLO. L. REV. 683, 686 (1986), without joining those who see this promotion as necessitating that the law "reject the view of contract as promise." *Id. See also* STEVEN SHAVELL, ECONOMIC ANALYSIS OF LAW 62 (2004) ("It will generally be assumed that the goal of tribunals is to maximize social welfare.").

[55] *Cf.* David W. Barnes, The Meaning of Value in Contract Damages and Contract Theory, 46 AM. U.L. REV. 1, 36-37 (1996) (proposing Restatement language giving a non-breaching party "surplus," rather than value-based damages, in an attempt to better incentivize contract performance and increase social wealth).

[56] RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 13 (7th ed. 2007). These third-party impacts are called "externalities." STEVEN SHAVELL, ECONOMIC ANALYSIS OF LAW 13 (2004). An efficient bargain is achieved when no party can be made better off by

posit that the government should not pay more than is necessary for the goods or services it procures.[57]

B. Price Analysis of Government Contracts

While price is a starting point for economic analysis, and while unexpectedly high costs may generally indicate that closer analysis is necessary, price alone cannot determine efficiency. Just as wealth is created when a child who values candy at $1.00 pays $.75 to a storekeeper who values the candy at $.50,[58] so wealth is created when an airline buys a fleet of modern passenger jets from a manufacturer for a price less than the absolute maximum it is willing to pay, but more than the absolute minimum the manufacturer would have been willing to accept. Each contract is Kaldor-Hicks efficient. The question the economist asks about any given contract, then, is not whether the goods to be exchanged are cheap or expensive in the abstract, but instead whether the exchange increases social wealth to the maximum extent possible. Put differently, the question is whether one party could be made better off without another party's being made worse off. In government contracts, the answer is yes.

That government contracts, on average, cost more than similar private contracts is probably beyond fair dispute. But this is true not, as the cynic would posit, simply because of the potential for (or actual)

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changing the terms of the bargain without another party's being made worse off. Kornhauser, *supra* note 54, at 689. As will be demonstrated, *infra*, at Part III.C., government contracts under *Christian*'s T4C regime are inefficient in that one party can be made better off (the government, through cheaper procurement of goods) without another's being made worse off (in that contractors would achieve, even absent *Christian*, the same total profits).

[57] It is, of course, in defining "necessary" that this relatively non-controversial statement generates debate. The remainder of this part attempts to prove that *Christian*'s liberal T4C regime results in the government's paying more than it could for most goods and services, without gaining additional benefit commensurate to that added cost. In a sense, this proposition—that the government should not pay more for its contracts than necessary—is an application of the Kaldor-Hicks efficiency model, inasmuch as when the government pays more than is required, taxpayers are not fully compensated for the costs, i.e., there are uncompensated externalities attendant to the procurement process.

[58] Before the transaction, total social wealth was $1.25: the child had money worth $.75 to him, and the shopkeeper had candy worth $.50 to him. After the transaction, the storekeeper had the child's money (still worth $.75) but the candy's value to its owner had increased to $1.00. Aggregate wealth after the transaction was thus $1.75. *See* Robert L. Birmingham, *Damage Measures and Economic Rationality: The Geometry of Contract Law*, 1969 DUKE L.J. 49, 53 (1969) (explaining how the exchange of goods between two parties can increase the welfare of each individual). Kaldor-Hicks efficiency analysis gives lie to the fallacy that "if two people engage in a transaction and one of them is seen to gain thereby, it must follow that the other has lost." D. PAARLBERG, GREAT MYTHS OF ECONOMICS 27 (1968). Critical to economic analysis of the law is the understanding that social wealth is not a zero-sum game.

corruption or ineptitude within the ranks of public employees engaged in the government procurement process.[59] Rather, even in the absolute absence of any mismanagement, and even assuming the government's ability to reduce its transactions costs to the level of those of the private sector,[60] the government's broad right to terminate its contracts for its convenience guarantees the government will pay more for the goods and services it procures, all else being equal. This is a simple function of the increased risk a government contractor assumes. Reduced risk is, itself, a valuable element of consideration.[61] The price the contractor assigns to the risk allocated to him will determine the ultimate efficiency of the contract—if the government could achieve the same value at a lower

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[59] One thinks of the infamous "$400 hammer" the Pentagon was criticized for buying in the mid-1980s. *See* James Barron, *High Cost of Military Parts*, N.Y. TIMES, Sept. 1, 1983, at D1.

[60] Besides being an almost impossible goal, such reduction would be undesirable. Because public contracts lack the check on corruption inherent in private contracts, particularly those made by individuals or closely-held companies—a personal financial stake in the efficiency and profitability of the deal—rational (that is, economically prudent) decision making must be otherwise guaranteed, or at least effectively incentivized. Though the potential for adverse personnel actions and civil or criminal penalties such as those provided for in, for example, 18 U.S.C. § 371 (2000) (criminalizing conspiracy to defraud the United States) increases individual accountability somewhat, it is the open competition regime established by the Competition in Contracting Act of 1984, Pub. L. No. 98-369, § 2701, 98 Stat. 1175 and implemented by the Federal Acquisition Regulation that best constrains the likelihood of corrupt (and thus economically inefficient) government contract practices. While some may consider the strictures required to effect this regime unjustifiably cumbersome and costly, any replacement regime that similarly protected against corruption would necessarily cost more than that which occurs naturally in the private sector.

[61] *See* Charles J. Goetz and Robert E. Scott, *Liquidated Damages, Penalties and the Just Compensation Principle: Some Notes on an Enforcement Model and a Theory of Efficient Breach*, 77 COLUM. L. REV. 554, 562 (1977) ("[A] promisee has a recognizable utility in certain *in terrorem* provisions and this utility is frequently reflected in willingness to pay a price for such clauses."); s*ee also* Pederson, *supra* note 49, at 94-95 (citing several 1920s cases in which courts explicitly acknowledged that the government pays a premium for the right to terminate a contract without being in breach).

> [W]hat many view as a power of the Government to terminate its contracts for convenience is, in essence, a right that it must pay for whenever a Termination for Convenience clause is included in a government contract, or when the clause is subject to being read in to the contract by courts under the *Christian* Doctrine. Once one has recognized that the Government's universal inclusion of the Termination for Convenience clause represents a cost, the question that must next be considered is whether that cost is justified by adequate benefits.

Id. at 95. Pederson concludes that these costs are not so justified, but are rather "perhaps a wasteful luxury." *Id.* at 100. This article attempts to demonstrate that there is no "perhaps" about it—the universal application of Termination for Convenience powers is, to a mathematical certainty, not worth the money the government spends for them.

price without putting the contractor in a worse position, the allocation of risk to the contractor is inefficient. A close examination of the risk allocation under the modern T4C regime demonstrates that this is exactly the case.

Suppose a contractor provides goods or services in identical form both to a major retailer and to the United States. Suppose further that the retailer's financial situation is sufficiently strong to make the likelihood of its defaulting on the contract close to zero. The contractor's profits are legally guaranteed the moment he secures the retailer's acceptance of the contract.[62] His profits are only potential, however, when he contracts with the government; he does not realize them during the executory stage of the contract.[63] Because he must presumably earn a certain minimum profit regardless of the entity or entities with whom he contracts, he must increase the price he offers the government proportionate to the likelihood of government default.

To put numbers to this claim, consider a truck manufacturer who is asked to make four custom vehicles for a commercial entity and four identical vehicles for the federal government.[64] Assume that each truck costs $18,000 to manufacture, and that the manufacturer needs to receive at least $80,000 in exchange for every four trucks he sells in order for his business to stay afloat.[65] If the contractor knows, to a statistically acceptable likelihood, that the government will ultimately purchase only 75% of vehicles of this sort for which it contracts, he must charge the government at least $20,666.67 per truck, even though he would agree to sell the four trucks to the commercial entity for $20,000 apiece. This is because he must insure against the likelihood of

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[62] U.C.C. § 2-708 (1998); RESTATEMENT (SECOND) OF CONTRACTS § 347 (1981).

[63] FAR 49.202(a) (stating that in contracts terminated for the convenience of the government, "anticipatory profits . . . shall not be allowed").

[64] It does not matter, for purposes of this argument, whether the vehicles are custom made or commonly commercially available. I choose custom vehicles to avoid the situation of a contractor who, when faced with his promisor's default, will, by virtue of easy mitigation of damages by sale in the (unchanged) spot market, recover 100% of his anticipated profits elsewhere.

[65] For our purposes, then, the manufacturer's "profit" on each group of trucks needs to total $8000. That is, if he is the sole owner of his business, he will receive $8000 for his efforts—both entrepreneurial and labor—and if, instead, his business is publicly held, shareholders will share $8000 amongst themselves. This is how the FAR determines profit, as the difference between allowable costs and the contract price. FAR 15.404-4. In true economic terms, though, "profit" is simply another cost in a contract—the cost of a sole proprietor's time and entrepreneurial risk or the cost of the benefit of the capital investment provided by shareholders. POSNER, *supra* note 56, at 122. Though the latter understanding could form the basis for an argument that expectation damages (anticipatory profits) are no different than any other cost and should no more be awarded in the event of breach than should specific performance be granted, the law has never taken this approach, but has instead treated profits as different in kind than costs associated with, e.g., labor, material, overhead, fees, and other business costs, etc. For the remainder of this article, I refer to "profits" in this conventionally accepted sense.

losing $2000 profit on one out of the four trucks he makes for the government.[66]

C. Efficiency Analysis

The layperson's concern with this pricing disparity is that the government has paid "too much" for what it received. That is, a taxpayer may take umbrage at the fact that the government received vehicles identical to those procured by a commercial entity, but paid more for each one. In economic terms, though, this is not really true—the government and commercial entity did not receive the same things at all. Unlike the commercial buyer, the government did not just contract for four trucks—it also bought the right to pay for only three (or two, or no) trucks without paying a penalty, i.e., without increasing the unit cost of the truck(s) it ultimately purchased. So long as that prerogative was worth the additional price, the contract was efficient: it allocated resources to those that valued them more highly, and any improvement to one party's position (e.g., the manufacturer's securing the right to expectation damages in the event of termination) could come only at the expense of the other party (e.g., the government's losing the bargained-for security of being able to pay only reliance damages should the need to terminate arise).

If, however, the right to pay for fewer than all of the trucks were not worth what the government paid for it, the contract would be economically inefficient. At least three inter-related economic realities demonstrate that this is precisely the case in our hypothetical contract: the government is the best insurer against default, the government has the most information regarding the likelihood of default, and the government is in the best position to prevent default.[67]

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[66] This price depends on the manufacturer's being guaranteed, whether by contract term or operation of law, compensation for actual costs he incurs in performance (leaving aside, for the present purposes, opportunity cost), should the government elect not to purchase one or more trucks. Should he not be guaranteed to recover his out-of-pocket expenses, his price will be higher still, as he must now insure not only his profits from the contract, but also against the possibility that his investment in performance will be made worthless by the government's subsequent choice not to perform. *Cf.* STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW, 297-99 (2004) (explaining the unworkable nature of contracts not enforced by adequate legal remedies).

[67] By the term "default," I mean simply the termination of a contract for a reason other than in response to the other party's unjustified failure to perform. That is, for purposes of this argument, government default includes anything that would constitute common law breach, even if the government's actual T4C prerogative (however derived) negates liability.

1. *Unnecessary Insurance Expenses*

In light of the government's enforceable T4C right, our hypothetical contract does not guarantee (absolutely) the manufacturer any profits at all. We observed above that in order to guarantee (statistically) his required total profit of $8000, the manufacturer must price trucks he sells to the government at no less than his unit cost ($18,000) plus required unit profit ($2000) plus one-third of that required unit profit ($666.67).[68] That is, he must do his best to insure his expected profit based on "probabilistic averages."[69] However, while there is no rational reason for him to price his bid lower than $20,666.67 per truck, or $82,666.67 for the contract,[70] there is good reason for him to price his bid higher than this amount, as I shall explain below. Extrapolated over the universe of government contractors, this means that while a few contractors may (perhaps foolishly) price their bids below those indicated by probabilistic averages, the lion's share will price theirs at or above these averages.[71] This is proved by mathematics and the phenomenon of risk aversion.

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[68] The notion of "unit profit" in our example depends on the manufacturer's actually being able to sell his four trucks in the commercial sector, rather than only to the government. Though I assumed this in our example, this is, of course, by no means guaranteed in the real world. Were the government the only prospective buyer, the government's bargaining power would be much stronger—this is just another way of saying the seller would value the government's actually offered business more than the unguaranteed prospect of commercial business—and the manufacturer's price would come down. He would still, under our assumptions, lose his business; his goal in selling to the government would simply be to mitigate or delay his losses. Under this circumstance, no conclusions could be drawn regarding the efficiency of *Christian*'s T4C regime. Still, to the extent that there exist contractors who actually do have to decide whether to deal with the government or the private sector (and these contractors do exist—builders, for instance, often work for both private and public clients), the analysis in this part holds.

[69] Kornhauser, *supra* note 54, at 688 n.21.

[70] Of course, there could be reasons extrinsic to a contract that would prompt a contractor to accept a loss on the contract, future business being perhaps the most plausible. For purposes of this analysis, I presume there are none. Even if there were, however, these could in turn be priced (potential future profits discounted by the likelihood of realizing those profits) and factored into the contract price; such price adjustment would not affect the efficiency issue at hand, i.e., whether the additional money spent by the government based on *Christian*'s T4C regime ultimately returns an equivalent value.

[71] While people are generally risk averse, risk propensity is determined in part by individuals' subjective predilections. Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2507-09 (2004). As such, there will always be those who ignore statistical probability, hoping they will be among the few who "beat the odds." While the existence of these individuals accounts for the continued existence of roulette tables, the fact that an event's statistical probability will, given sufficient repetition of the event, become a historical fact with implications for those who gamble, means that competition in the free market will weed all but a very few odds-defying contractors from the ranks of the solvent.

Consider the five possible results for our truck manufacturer: the government may ultimately purchase all four of the trucks for which it contracted, or it may purchase three, two, one, or none.[72] The likelihood of the first is 81/256, while the likelihoods of the others are 108/256, 54/256, 12/256, and 1/256, respectively.[73] The first possibility—an 81/256 chance of earning $2666.67 more than is necessary for solvency—is obviously worth something to the manufacturer, as he does not even have this chance when contracting with the commercial entity. Reduced to dollars, this chance is worth $843.75.[74] By the same token, the chances of lost profits may be said to be worth -$843.75.[75] However, it is reasonable to expect that the manufacturer will assign different subjective values to the chance of excess profit and an equal chance of losing the same profit, since the consequences of the latter (loss of his business, per the presuppositions of our hypothetical) are, to him, greater than any marginal benefit gained from more profit than he needs to remain solvent.[76]

A first step, then, in eliminating inefficiency in government contracts is to induce government contractors to risk-neutrality. This is done most commonly through insurance.[77] If a contractor can predict with relative certainty the likelihood of a negative event's occurrence—that is, if he can accurately value the cost of risk (here, the failure of the government to purchase all four trucks)[78]—and if this risk can be shared

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[72] In this sense, contracting with the government is like electing to throw a forward pass in a football game: "three things can happen, and two of them are bad." Tom Sorenson, *It's Time to Give 110 Percent, Take One Cliché at a Time*, CHARLOTTE (N.C.) OBSERVER, Aug. 27, 2000, at 2H.

[73] The likelihood of an event's occurring four times in a row, when the event is each time 3/4 likely to occur is $(3/4)^4$; the respective likelihoods of the event's occurring three of four, two of four, one of four, and zero of four times are $(3/4)^3(1/4)$, $(3/4)^2(1/4)^2$, $(3/4)(1/4)^3$, and $(1/4)^4$.

[74] 81/256 multiplied by $2666.67 is $845.75, rounded to the nearest cent.

[75] (54/256)($2666.67) + (12/256)($2666.67 * 2) + (1/256)($2666.67 * 3) = (81/256)($2666.67).

[76] *See* POSNER, *supra* note 56, at 105-06 (explaining why a risk averse person will weigh more heavily "a one percent probability of a fire that will cause $10,000 damage [than] a certain loss of . . . $100, even though the two are "actuarial[ly] equivalent"); *see also id.* at 12 ("Risk aversion is a corollary of the principle of diminishing marginal utility of money, which just means that the more money you have, the less additional happiness you would get from another dollar.").

[77] There are, of course, methods to reduce inefficiency (even to zero) in certain contracts independent of any T4C rules. Risk neutral contractors will make their offers at, rather than above, the price dictated by probabilistic averages. Sometimes the effects of risk aversion can be completely eliminated through incorporation. POSNER, *supra* note 56, at 11. However, *Christian* remains an independent cause of inefficiency in at least some contracts, and short of undoing the liberal T4C regime it has spawned, eliminating inefficiency in the government procurement system as a whole will remain impossible.

[78] I have thus far assumed *arguendo* that this likelihood could accurately be predicted. This is, in fact, quite unlikely, as the variables that affect government contract performance are manifold and intrinsically unpredictable. Actuarial tables are largely

by enough similarly situated parties, the subjective value the contractor assigns to the risk will equal its objective value.[79] In our example, then, the truck manufacturer would have no incentive to price his trucks above $20,666.67.[80] The contract will only be Kaldor-Hicks efficient, however, if the chosen means of insurance is the cheapest, assuming equal effectiveness of each means considered. Otherwise, the party purchasing the insurance could be made better off (by buying cheaper, but equally effective insurance), while the other would be no worse off (he would still get his bargained-for performance). There are three possible sources for insurance in any bilateral contract: each of the contracting parties and the private insurance market. The cheapest will be the one with the lowest combination of measurement costs (the costs of evaluating risk) and transactions costs (the costs incurred in assigning the risk via the chosen mechanism).[81] In most government contracts, this will be the government.

The government's measurement costs are cheaper because it is in possession not only of all information freely available to non-government entities (including government contractors and private insurance companies) but also information not freely available to these entities. The cost of a contractor's acquiring this second category of information, even if very small, will be returned to the government in the form of a higher contract price. For the government to pay any measurement costs is therefore inefficient.[82]

Transactions costs should also be cheaper when risk of expectation loss is borne by the government. That the savings from not having to draft an insurance contract exceed the cost differential

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backward-looking, predicting future events like death or fire based on past frequencies that are unlikely to change dramatically. The human and political dimensions to government contracts would likely confound even the most astute actuary. *Cf.* Gillian Hadfield, *Of Sovereignty and Contract: Damages for Breach of Contract by Government*, 8 S. CAL. INTERDIS. L.J. 467 (1999) (asserting that the need for government to change direction justifies denying government contractors expectation damages). In Part III.C.2, *infra*, I will argue that economic analysis of the unpredictability and unquantifiable nature of these variables points toward expectation damages as the proper means of minimizing the unnecessary costs associated with risk of the government's need to terminate contract performance.

[79] POSNER, *supra* note 56, at 106. That is, the risk of the government's default will not "cost" the contractor more than the value of the potential benefit of the government's overperforming relative to its historical trend by ultimately buying all four trucks.

[80] If he priced his trucks any higher, he would lose the contract to a lower-bidding competitor.

[81] POSNER, *supra* note 56, at 107.

[82] Should the government elect market insurance, there would likewise be a cost in transferring the information to the insurer. While it could conceivably cost the government more to transfer the information amongst its agencies (i.e. from the generating office to the government contracting officer) than to the insurer, it seems reasonable to assume that on the whole it will be cheaper to move the information within the government than to an outside entity.

between an in-house adjudication and payment function and a private one is far from certain; the fact that the government outsources so many functions to the private sector is a concession to the fact that the private sector realizes savings through process efficiencies. However, in the particular case of claims adjudication, the government already demonstrates competence to perform the process in-house. Rather than purchasing commercial insurance for tort liability, the government self-insures.[83] Having seen fit to retain this large adjudication process in-house, it seems, *a fortiori*, that the government should be able to adjudicate contract claims more cheaply and efficiently than a private insurer.

However, even if a private insurer were able to charge the government less in premiums than the government would otherwise pay to settle claims for expectation damages,—if, that is, a private insurer were somehow better able to distribute risk than even the government, for example, by broadening the universe of risk to include other governments' contracts—as between the government as insurer and government contractor as insurer, the government should always be able to protect against loss more cheaply. The government is but one customer for an insurance company, and one the size of which makes the work of an actuary much easier.[84] Were every government contractor to have to purchase private insurance, the insurance company or companies providing this insurance would have to calculate risk and issue policies frequently, which would in turn increase overall transactions costs, perhaps significantly.

In sum, when risk is distributed over the universe of government contracts, rather than calculated on a contract-by-contract basis (whether through private insurance or through increased contract pricing), the total cost of that risk is lower. But there is yet another reason the government can more cheaply bear the risk. This is because the government is better able to predict the likelihood of a termination's occurring at all.

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[83] 28 U.S.C. § 2672 (2000) (authorizing federal agencies to settle tort claims and establishing procedures for so doing). As part of the mechanism by which the federal government pays claims and judgments, 31 U.S.C. § 1304 (2000) establishes a judgment fund "to pay final judgments, awards, compromise settlements, and interest and costs specified in the judgments or otherwise authorized by law."

[84] This is because the more instances of a given probabilistic event's occurring, the more likely that the event will occur at or very near the number of times it is statistically predicted to occur. For instance, the risk that a coin will land "heads" significantly more or less than fifty percent of the time is much higher when the coin is tossed only twice than when it is tossed fifty times, even though the likelihood of any given toss's coming up heads remains fifty percent. ROBERT V. HOGG & ELLIOT A. TANIS, PROBABILITY AND STATISTICAL INFERENCE 3 (2d ed. 1983).

2. *Government as Best Predictor of Default*

As explained earlier, the government should always be the possessor of greater information relative to the likelihood of default. Were this information put to proper use, the government could better calculate the actual likelihood of default. The greater the confidence in the calculated likelihood, the more risk could be borne.[85] This is because the risk of miscalculation is, itself, a risk that must be insured against one way or another. As before, the options are self-insurance, increased contract price, and private insurance. (And, for the same reasons as before, self-insurance should be the cheapest of the three options.) In the case of property insurance, for example, if a building owner needed not only to protect against a one percent chance of $10,000 damage, but also the fifty percent chance that the one percent were really two percent, he would not only likely be willing to pay more than $100 for insurance—the risk of $10,000 loss is (to each individual at risk) more costly than a certain $100 expense[86]—but he would be willing to pay more than $150, the total actuarial value of his risk.

Each individual contractor is like the insured in the above scenario, not knowing the likelihood of default to a certainty. And while termination of government contracts is almost surely not as susceptible to statistical predictions as is the occurrence of natural disasters, any ability on the government's part to predict termination more accurately—which ability is guaranteed, at least marginally, by the government's possessing superior information—reduces the cost of risk.[87]

3. *Government as Best Preventer of Default*

Even if the government were not better able to predict the likelihood of default, the government is the only contracting party able to affect the likelihood of default. A reliance damages regime under-

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[85] Robert A. Hillman, *Court Adjustment of Long-Term Contracts: An Analysis Under Modern Contract Law*, 1987 DUKE L.J. 1, 30 ("The superior risk bearer is the party who is better able to insure against the risk and who has greater information, knowledge, and experience in the particular area.").

[86] *See supra* note 76.

[87] If, for instance, a contractor knew with fifty percent confidence that there was a ten percent chance of termination resulting in $1000 in unrealized profits, and also knew with one hundred percent confidence that there was no more than a twenty percent chance of termination on a given contract—such confidence is obviously fantastic, but the numbers serve the purposes of this example—he must include in his contract price up to $200 in cost of risk. (All else being equal, the contractor who wins the bidding competition will likely price that risk closer to $150.) If the government, on the other hand, could accurately predict with one hundred percent confidence that the risk of termination was only eighteen percent, with the same fifty percent confidence in a ten percent prediction, the numbers drop to $180 and $140.

incentivizes performance, with the result being that government contracting officers are able, with relative economic impunity, to enter unwise contracts or unwisely to terminate contracts.[88] In economic terms, reliance damages incentivize inefficient breach.[89] While I do not suggest that imprudent government contract actions occur as a matter of course, human nature being what it is, results will generally follow incentives.[90] A default expectation damages regime, with the ability to negotiate reliance damages when the government gains a discrete advantage therefrom, provides the proper incentive to ensure efficiency in government contracting.

4. *Summary of Efficiency Analysis*

"[A]n important function of contracts is to assign risks to superior risk bearers."[91] In the case of government contracts, the

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[88] By "unwise," I do not mean arbitrary or manifestly foolish. Rather, I mean economically inefficient. Just as a "no questions asked" return policy on consumer goods gives a shopper the freedom to purchase what he might, in the absence of the ability to rescind the deal, do without (though the higher price he will pay for this return policy might correspondingly disincentivize the purchase), so the ability to terminate a contract without paying expectation damages allows a contracting officer to enter into contracts without properly valuing the goods or services to be obtained thereby. If one enters into a contract knowing he can escape his obligations by paying only reliance damages, he is less likely to secure the best value among all available offers for his contracted price, as he can simply re-contract with another party who subsequently offers him a better deal. If this occurs early in the performance phase and reliance damages are low, those damages constitute the inefficiency, since no value was obtained for them. If, on the other hand, the better deal is offered so late in performance that the new price plus reliance damages exceeds the value to the buyer of the goods or services, the inefficiency is the difference between the first and second (lost) contract prices.

[89] W. David Slawson, *The Role of Reliance in Contract Damages*, 76 CORNELL L. REV. 197, 226 (1990). Inefficient breach is any breach in which social wealth is not increased to the level it would have been had the contract been performed. *Cf.* POSNER, *supra* note 56, at 120-21.

[90] F.H. Buckley offers a sociological example. Marriage, he contends, is weakened—"it is less than a contract"—by what is effectively a non-waivable termination for convenience right. F.H. BUCKLEY, JUST EXCHANGE: A THEORY OF CONTRACT, 42 (2005).

> Since the passage of no-fault laws, people have been less willing to get married and, once married, to have children. These trends might be reversed were the marriage contract more strongly enforced. Giving the parties the right upon marriage to waive no-fault divorce rights would make the exit option costlier for parties who exercised that option. . . . As fault becomes costlier, there will be less of it. . . . An expansion of free bargaining rights, in which no-fault divorce waivers are made enforceable and marriage vows are made more credible, would therefore protect marriage.

Id. The same argument can be made of government contracts made post-*Christian* and governed by modern FAR termination rules.

[91] POSNER, *supra* note 56, at 120.

government is ordinarily the superior risk bearer. This superiority may be very small, and it may be unquantifiable, but the government should seldom, if ever, be an inferior risk bearer relative to its contractors. But defaulting to reliance damages skews this risk allocation. That serious academic attempts to move the law toward a reliance damages regime[92] have never gained traction in the commercial realm is good evidence that the common law of damages works, i.e., that it is efficient. The idea that the government should not be made to pay enormous damages, while true in some cases, is an insufficient reason to depart wholesale from the common law. A more nuanced approach is necessary.

IV. MORAL ANALYSIS OF THE TERMINATION FOR CONVENIENCE REGIME

Thus far, I have argued that a general rule of common law damages in government contracts, with allowances made for the government actually to negotiate a T4C right in appropriate contracts, would be more economically efficient than the status quo. That is, a default rule providing expectation damages for early termination would create more wealth for society as a whole than the current liberal T4C regime. To the extent, then, that greater social wealth is good, a change in the current damages rules would be normatively preferable to the status quo. However, wealth creation, while generally a good thing,[93] is not the chief end of man,[94] nor should it always be the main concern of government.[95]

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[92] *See, e.g.,* L.L. Fuller & Sonny Purdue, *The Reliance Interest in Contract Damages*, 46 YALE L.J. 52 (1936-37).

[93] SAMUEL GREGG, ECONOMIC THINKING FOR THE THEOLOGICALLY MINDED 6 (2001).

> [J]ustice in the area of material goods involves increasing opportunity for creative participation in the productive sector by expanding the possibilities for employment, wealth creation, and property ownership. These are important not simply because they provide more space for people to acquire material goods but also because the very acts associated with the emergence, growth, and maintenance of these phenomena allow people to cultivate virtues such as prudence, courage, and industriousness.

Id.

[94] *Matthew* 16:26 ("For what will it profit a man if he gains the whole world and forfeits his life?"). *See also Luke* 12:15 ("[F]or one's life does not consist in the abundance of his possessions.").

[95] *See, e.g.*, Abraham Lincoln, Proclamation of Thanksgiving, Address (Oct. 3, 1863) (noting the recent "[n]eedful diversions of wealth from the fields of peaceful industry to the national defense . . . ."). *Contra* RICHARD A. POSNER, THE ECONOMICS OF JUSTICE 115 (1981) ("*[T]he criterion* for judging whether acts and institutions are just or good is whether they maximize the wealth of society." (emphasis added)).

Recent scholarly work in the field of law and economics has acknowledged this limit on the normative value of economic efficiency analysis.[96] One concern with laws designed exclusively to maximize efficiency is that they operate well from a macro standpoint, but can have harsh effects at the individual level. Some believe the solution is to view "efficiency and distribution [as] equally essential elements of justice, which is seen as a goal of a different order than either of its constitutive elements."[97] These observers note that while Kaldor-Hicks efficiency may be achieved whether all members of society eat once a day, or half eat twice each day while the other half starve, virtually no one, layman or economist, would say a legal regime producing this distributive pattern was ideal.[98]

This discussion, while important, is yet unsatisfactory in addressing a more basic question. Even assuming government contract law achieved an "ideal" result vis-à-vis efficiency and "distributive justice," what are the moral implications of the government's reserving to itself the right, unilaterally and without any meaningful constraint, to renounce its contractual obligations in a way its citizens cannot?[99] I

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[96] Francesco Parisi, *Positive, Normative, and Functional Schools in Law and Economics*, *in* THE ELGAR COMPANION TO LAW AND ECONOMICS 58, 60-70 (Jürgen Backhaus ed. 2005).

> The early years of law and economics were characterized by the uneasiness of some traditional legal scholars in the acceptance of the notion of wealth maximization as an ancillary paradigm of justice. . . . [T]wo objections continue to affect the lines of the debate. The first relates to the need for specifying an initial set of entitlements or rights, as a necessary prerequisite for operationalizing wealth maximization. The second springs from the theoretical difficulty of defining the proper role of efficiency as an ingredient of justice, vis-à-vis other social goals.

Id. at 61. In contrast to Judge Posner's "well-known defence of wealth maximization as a guide for judicial action," Guido Calabresi "claims that an increase in wealth cannot constitute social improvement unless it furthers some other goal, such as utility or equality." *Id*.

[97] *Id*. at 70.

[98] *Id*. at 68-69.

[99] Government termination for convenience clauses, coupled with the constructive T4C doctrine (by which the government may, post hoc, justify a termination on any grounds it could have asserted even if it did not, at the time of termination, actually assert these or any other legitimate grounds), make it "almost impossible for a contractor to successfully challenge a convenience termination." David W. Lannetti, *The Confluence of Convenience Terminations and Guaranteed Minimums in Government Contracts: What is the Proper Remedy when the Government Fails to Order the Minimum Quantity Specified in an Indefinite-Delivery, Indefinite-Quantity Contract?*, 13 FED. CIR. B.J. 1, 7, 11 (2003). Virtually the only avenue left open to the contractor is to argue the termination was in bad faith. Yet even here, the contractor is extremely unlikely to prevail, as the government benefits from a presumption of good faith much stronger than the common law presumption applied to government contractors. Frederick W.

believe the weight of the moral arguments favor a more limited, negotiated T4C prerogative, better holding the government to its word and more fairly allocating risk between the two parties in government contracts.

A. Theories of Contract

Abraham Lincoln is said to have had the following exchange with his generals. Lincoln: "If you call a tail a leg, how many legs does a dog have?" Reply: "Five." Lincoln: "No, four. Just because you call a tail a leg does not make it so." In a sense, the question of appropriate damage remedies in contract law—private or government—is of the same sort as Lincoln's. If the term "contract" has some irreducible minimum meaning, and if that meaning implicates a promisee's present interest in future performance of a promise, then the only sensible damages regime is one that presumes expectation damages unless the parties freely negotiate otherwise. Further, if a law must be sensible to be just and moral, then any law not providing for expectation damages at least to this extent would be unjust and immoral.

Of course, the implication of Lincoln's gentle (yet profound) reproof of his generals' response is nowise universally accepted.[100] Nor do I presume or even hope to be able to settle here the matter of intrinsic meaning of the notion of contract. Still, it is helpful at this point to review the arguments set forward in prevalent deontological theories of contract. Comparing these to utilitarian theories, I believe that, while it is not provable absent resort to (inevitably controversial) natural law arguments that contractual obligations are morally weighty based on their nature as promises, it can be shown that breach of contract not compensated by expectation damages *may* be immoral, while breach of

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Claybrook, Jr., *Good Faith in the Termination and Formation of Government Contracts*, 56 MD. L. REV. 555, 569 (1997); *see also* REPORT OF THE ACQUISITION ADVISORY PANEL TO THE OFFICE OF FEDERAL PROCUREMENT POLICY AND THE UNITED STATES CONGRESS 7 (Final Panel Working Draft, Dec. 2006) (recommending that "contractors, as well as the government, enjoy the same legal presumptions, regarding good faith and regularity . . . ."), *available at* http://acquisition.gov/comp/aap/documents/Introduction%20and%20Executive%20Summary.pdf (last viewed Jan. 25, 2008).

[100] *Cf.* Anthony D'Amato, *Counterintuitive Consequences of "Plain Meaning,"* 33 ARIZ. L. REV. 529 (1991). D'Amato is of the "pragmatic indeterminacy" school, which is associated with legal realism and critical legal studies and which has been criticized as being nothing more than nihilism. *Id*. at 530. He contends that, "[a]t bottom, a word does not 'have' a meaning. A word is only a puff of vibrating air, or ink marks on the paper." *Id*. at 534. The upshot of this is a deconstruction of all legal rules. *See* Anthony D'Amato, *The Case of the Under-aged President*, 84 NW. U.L. REV. 250 (1989) (arguing that the Constitution's 35-year age minimum on Presidents is only contextual, not absolute).

contract compensated by expectation damages will never be more so.[101] Measured by the sum of its case-by-case effects, then, a default rule of expectation damages in government contract law is at least morally neutral relative to, and possibly morally preferable to, the current regime.

1. *Contract as Promise*

In his classic book *Contract as Promise*, Professor Charles Fried sets forth a comprehensive theory of contract law based on the postulate that what he termed "the promise principle" is "the moral basis of contract law."[102] He draws support from Hume, citing the latter's belief that "respect for . . . contract [is one of the three] self-evident foundations of law and justice."[103] Fried's theory is decidedly deontological:

> The obligation to keep a promise is grounded not in arguments of utility but in respect for individual autonomy and trust. . . . An individual is bound to keep his promises because he has intentionally invoked a convention whose function it is to give grounds—moral grounds—for another to expect the promised performance. . . . [T]here must exist a ground for mutual confidence deeper than and independent of the social utility it permits.[104]

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[101] The critical limitation to this proposition is that the contract or the law must adequately address the terms under which non-performance is excusable. *See* STEVEN SHAVELL, DISCUSSION PAPER NO. 531: IS BREACH OF CONTRACT IMMORAL? (2005), *available at* http://www.law.harvard.edu/programs/olin_center/papers/pdf/Shavell_531.pdf (last viewed Jan. 25, 2008). Only this limitation prevents the arguably immoral result of the government's spending taxpayers' dollars to compensate a contractor for work he has not performed on a contract terminated because taxpayers no longer need the goods or services promised. If, however, the law imposes those damages that correctly incentivize performance (by neither undercompensating nor overcompensating the non-breaching party, i.e. by providing expectation damages in those circumstances 1) in which the parties explicitly agreed on that remedy; and 2) in which, had the parties, during negotiations, anticipated the particular circumstances in question, they would have agreed on that remedy, unjustified breach (i.e. nonperformance excused neither explicitly nor implicitly) will not occur. This prevents the immoral result of squandered tax dollars. *See id.* at 2, 14.

[102] CHARLES FRIED, CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION 1 (1981).

[103] *Id*.

[104] *Id*. at 16-17. Though Fried's work is couched in secular terms, his conclusions are consistent with the Biblical view of promises as being made at the discretion of the promisor, but once made, being morally and legally binding. *Numbers* 30:2 ("If a man vows a vow to the Lord, or swears an oath to bind himself by a pledge, he shall not break his word. He shall do according to all that proceeds out of his mouth.");

Others have offered alternative deontological theories of contract, finding value in their relational nature[105] or the fairness that adherence to one's promise promotes.[106] But all have in common one fundamental and glaringly obvious (and relevant) theme: no one seriously questions the intrinsic rightness of adhering to one's contractual obligations.[107] Having made a promise, a contracting party "must display fidelity to [his] words."[108] As such, the moral question regarding damage remedies is, Which remedy best promotes contract performance? Here, Fried's work is again helpful.

Fried's argument in support of expectation damages is two-fold. First, he contends, if a contract is a promise, then the non-breaching party has lost not what he invested, but what he stood to receive.[109] In this sense, a contractual promise is like the tail of President Lincoln's dog: it may be called something other than what it is, but that does not make it so. A contract breach is thus not remedied when the non-breaching party is given only reliance damages. Second, Fried argues that stronger remedies will better incentivize performance by making breach more painful.[110] In this he finds fellowship with Steven Shavell and other law and economics scholars who argue that expectation damages are the only damages consistently able (at least potentially—

Ecclesiastes 5:4-5 ("When you vow a vow to God, do not delay paying it, for he has no pleasure in fools. Pay what you vow. It is better that you should not vow than that you should vow and not pay."); *Deuteronomy* 7:12 (recognizing that a treaty between Israel and her enemies would prohibit Israel from obeying God's command to destroy them). God, whose behavior is the standard of morality that His children are to follow, *Leviticus* 11:45, *I Peter* 1:15-16, is a covenant maker and keeper. *See, e.g.*, *Jeremiah* 31:33.

[105] Daniel Markovitz, *Contract and Collaboration*, 113 YALE L.J. 1417 (2004).

[106] JOHN RAWLS, A THEORY OF JUSTICE, 344-48 (1971). "The rule of promising [which Rawls defines simply as the rule that one must do what he has promised to do, *id*. at 344-46] does not give rise to a moral obligation by itself. To account for fiduciary obligations we must take the principle of fairness as a promise." *Id*. at 348.

[107] There are certain contexts that complicate this general rule. For instance, moral philosophers debate whether the breaking of a promise to do something immoral is, itself immoral, such that the violation is but the lesser of two evils, or whether, instead, the violation is itself an affirmative good because the promise was of no moral weight. *Compare Judges* 11:29-40 (the story of Jepthah's fulfilling his rash vow) *with* THE WESTMINSTER CONFESSION OF FAITH XXII.IV ("[An oath] cannot oblige to sin . . . .").

[108] Daniel Markovitz, *Making and Keeping Contracts* 92 VA. L. REV. 1325, 1329 n.6 (2006).

[109] FRIED, *supra* note 102, at 18-21. "The connection between contract and the expectation damages is so palpable that there is reason to doubt that its legal recognition is a relatively recent invention." *Id*. at 21. "Promise and restitution are distinct principles. Neither derives from the other, and so the attempt to dig beneath promise in order to ground contract in restitution (or reliance, for that matter) is misconceived." *Id*. at 26.

[110] *Id*. at 20.

transactions costs almost always fall unjustly on the non-breaching party) to compensate the innocent party for what he has lost.[111]

2. *The Utilitarian View*

In contradistinction to Fried and other deontological contract theorists stand those who see the moral value of contract law as consequential.[112] To these utilitarians, contract law is good not to the extent it corresponds to some metaphysical reality ("keeping one's word is good"), but rather in the way it achieves desirable ends. The best legal rule is that which achieves the greatest good for the greatest number of people. Utilitarian contract theorists differ over how "good" is to be measured: some believe using contract law to redistribute wealth to a particular class or group is a morally worthwhile aim,[113] while others see the good of contract law more universally, in terms of general wealth maximization[114] or overall equity.[115] Obviously, these two subgroups of utilitarian contract theorists will disagree on the morality of many doctrines of government procurement law, perhaps

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[111] SHAVELL, *supra* note 101, at 15-16. *But see* Gil Lahav, *A Principle of Justified Promise-Breaking and its Application to Contract Law* 57 N.Y.U. ANN. SURV. AM. L. 163, 177-78 (2000) (arguing that, on Fried's autonomy theory, specific performance or punitive damages are preferable to expectation damages, as these remedies better incentivize performance).

[112] There is a third, smaller group of contract theorists: the post-modernists. I include critical contract theorists in this group, as critical legal studies, like postmodernism generally, question the very question of normativity, focusing instead on law as result. *See* Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997, 1113 (1985) ("The stories told by contract doctrine are human stories of power and knowledge.") There is less post-modern contract theory literature than deontological or utilitarian (particularly given the extensive law and economics scholarship, most of which fits into the latter category), *but see* Peter Goodrich, *Sleeping With the Enemy: An Essay on the Politics of Critical Legal Studies in America*, 68 N.Y.U.L. REV. 389, 416-19 (1993). Because of this, and because by their very nature post-modern theories of law are something of "non-theories," *see* BUCKLEY, *supra* note 90, at 22 ("To persuade, a theory of contracts must do three things: it must recognize that promising is an institution; it must account for the promisor's fidelity duties; and it must explain the basic rules of contract law."), I do not address them in detail here. This omission should not, however, compromise the moral analysis in this section, inasmuch as all but the most thoroughgoing post-modernist theories of contract (or anything), which reject normative conclusions entirely, rest their normative conclusions on utilitarian bases.

[113] This view has gained traction in positive law, as federal law and regulations sometimes require the government to accept potentially higher costs for goods and services when the goods and services can be provided by, e.g., women who own small businesses. 15 U.S.C. § 644(g) (2000); FAR 19.201.

[114] BUCKLEY, *supra* note 90, at 22 ("It has generally been recognized that law-and-economics provides a compelling account of contract law; what is less recognized is that only it does so, and that rival theories of contract law must be rejected.").

[115] *See, e.g.*, Robert Cooter and Melvin Aron Eisenberg, *Damages for Breach of Contract*, 73 CAL. L. REV. 1432, 1461 (1985) ("The damage rules that courts apply to fill in contracts should be both fair and efficient.").

chief among them the laws giving preference to higher bidders who are members of a certain legally favored class. Both groups should, though, be able to agree on the moral benefit (or at least not perceive any moral detriment) of switching from a T4C/reliance damages regime to a default rule of expectation damages, with exception by explicit negotiation only. The economic analysis in Part III, above, explains why this is so: maximizing efficiency will, in turn, maximize utility.

The redistributionists, on the other hand, should prefer (or at least not object to) expectation damages as the default rule on the basis that if more wealth is available generally, more will fall to members of favored classes, even if only marginally. This is because (1) a switch to expectation damages has no causal relationship to the awarding of government contracts to one bidder or another and will thus cost members of favored classes no contracts; and (2) on average, each government contractor in the favored class will receive no less in toto from the government, inasmuch as the lower prices she receives for each contract will be offset by the expectation damages she will be awarded when any contract is cancelled.

Those utilitarians who do not see any individual's wealth increase as more desirable than another's (or who believe it wrong to ensure one person, or a group, receives legal favor) will likewise be satisfied by a default rule of expectation damages. As I have argued above, this switch would make more wealth available, and available to all contractors on an equal basis.

B. Is Termination for Convenience the Moral Equivalent of Breach?

Of course, at the literal and legal levels, the government's terminating a contract is not a breach at all. Rather, in terminating a contract the government simply avails itself of a right specifically provided for by the terms of the contract. Seen this way, the government's terminating a contract for its convenience is no more or less morally significant than the government's declining to exercise a contract option: the fact that a contractor wished to be able to receive increased consideration in exchange for performance he had hoped would be required of him is immaterial unless he benefits from a binding pledge on the government's part to require and to pay for such performance.[116] If contractual obligations have moral weight because they are promises, that moral weight is limited commensurate to the scope of the promises.

The *Christian* court fundamentally changed this dynamic. It is true, today, that a termination of a government contract is not a breach

[116] *Cf.* FRIED, *supra* note 102, at 23 (explaining how express contractual limitations on consequential damages are generally upheld).

of a promise in the strictest sense. By virtue of the *Christian* doctrine, all government contract promises are constructively caveated to the point that, technically, they cannot be broken. But that is not to say a termination for convenience bears no moral likeness to a breach of promise. In fact, it is because of *Christian*, specifically its reach, that terminations are, sometimes, morally suspect.

When contracting against the backdrop of an absolute (legal) right to exculpate oneself *independent of* any intention to secure or preserve that right, the morality of breaking the promise must be evaluated independent of that exculpation right. An analogy is helpful here. Suppose a bright, morally aware fifteen-year-old makes a contract to purchase a book, payment to be made and property to be delivered one week hence. Suppose she is unaware that the law will not enforce this contract due to her infancy.[117] The day after she makes the contract, she regrets her decision. The day after that, she discovers her exculpation right and informs the seller that she is cancelling the contract. The law is paternalistic in this area, perhaps justifiably so, because children—if not all, then enough to justify the rule—lack the mental capacity to be trusted to contract. But this does not mean every child lacks the *moral* capacity to be bound to her word. Rather, this is an area where the law chooses not to reach as far as morality. The child's sin is against God and her fellow man; she has not transgressed human law.[118]

On the other hand, what if the child had explicitly negotiated with the seller for a right to rescind the contract prior to delivery? Independent of her knowing of the law's unwillingness to enforce her contract, her election to rescind cannot fairly be said to be immoral. In the first example, she broke a promise. In the second, she never made one.[119]

Likewise, consider the adult business executive who negotiates a labor contract in light of bankruptcy laws that allow him, given the right circumstances, to scrap the agreement. If he subsequently acts in perfect accord with the law and violates the agreement, can he be said not to have violated his moral obligation?[120] Perhaps in the situation where to do otherwise would do greater harm to the promisee (the labor

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[117] RESTATEMENT (SECOND) OF CONTRACTS § 14 (1981).

[118] It is possible, and I believe correct, that the government acts morally in refusing to enforce some moral obligations of some individuals. This is because government's jurisdiction is naturally limited. For the government to go beyond its province would, itself, be an immoral act. *See* Craig A. Stern, *Things Not Nice: An Essay on Civil Government*, 8 REGENT U.L. REV. 1 (1997).

[119] *See* McNealy v. Caterpillar, Inc., 139 F.3d 1113, 1119 (7th Cir. 1998) ("[T]he sine qua non of contract law [is] that parties are not bound by obligations unless they agreed to the obligations.").

[120] *See* George Will, Op-Ed., *An Airline that Isn't Bankrupt*, WASH. POST, Jan. 25, 2007, at A25.

union and its members), but only on the theory that the promise implicitly did not reach that far (as the promisee would not have demanded performance in such a situation[121]), not on the theory that an unwaivable legal exculpation right vitiates all moral accountability.

Though the analogy is not perfect in every case, the moral analysis is much the same with government contracts in light of *Christian*. Pre-*Christian*, the government's right to terminate was a part of some (most, if the governing regulations were followed) contracts. The government thus contracted like the child in our second example who explicitly negotiated a rescission right. In *Christian*, the parties' negotiation (constructive though it was—contract law operates on the legal fiction that the language contained in the four corners of a document, even though boilerplate, reflects the intent of the parties[122]) was thwarted by the court, and the government's promise was broken. In contracts drafted after *Christian*, the government stands incapable of effectively promising.

Because of the shadow *Christian* casts, conventional moral analysis of the government's promise making is, in many instances, a non-sequitur. When government actors, as in *Christian*, forget to include, or choose in violation of governing regulations not to include, a T4C clause in the contract, their subsequent T4C is just like the examples above of the child or CEO taking advantage of favorable legal treatment to break a promise with legal impunity. But even when the T4C right, guaranteed by *Christian*, is made explicit in the contract, the government's hands are not completely clean in its T4Cs. Negotiations against the backdrop of an unwaivable right are not of the same moral character as true arms-length transactions—if the government will maintain its prerogative in any event, can it really be said to have negotiated for it in the first place? This *fait accompli* bargaining scenario taints, even if only marginally, the morality of the government's electing not to do what it contracted to do. Though perhaps not as morally problematic as breaking a promise without the benefit of any recognized right to do so—whether court-made or contractually negotiated—government T4Cs cannot, in light of *Christian*, be said to be the moral equivalent of the mere exercise of a contract right.

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[121] SHAVELL, *supra* note 101, at 13.

[122] Standardized contract language is ubiquitous, and, with the exception of those few contracts found to be unconscionable, standardized contracts not in violation of a governing law or regulation are routinely enforced. RICK BIGWOOD, EXPLOITATIVE CONTRACTS 275 (2003). "[S]tandardized contracts are mostly to be endured as beneficial in complex (hence impersonal) free market economies. Accepted as a necessary feature of the modern commercial age, standardized contracts are largely tolerated for their utility, convenience, and efficiency in business." *Id.* at 274.

C. The Government as Teacher and Exemplar

It bears brief mention that the government owes its citizens a duty of moral behavior that is beyond reproach. The law is a tutor,[123] demonstrating minimum standards below which we should not go, but compliance with the law's minimum requirements is not the aspirational standard for either citizen or government actor. There are multiple methods by which the government can procure goods and services: civil servants may be hired, and servicemembers may even be conscripted. Termination of efforts begun by these individuals would raise no moral concerns, as directing them to commence a project, ultimately abandoned, implicates no promise. By instead electing to enter into a contract, the government voluntarily takes on itself not only the legal, but also the moral, burdens that accompany the institution of contract. Paying damages that correctly reflect what has occurred—the breaking of a promise—would establish the government as a moral leader in its contracts, rather than merely an entity that complies with its legal obligations.

D. Summary: Synthesizing the Moral and Economic Calculi

Morality is a type of meta-economics.[124] It is no coincidence that there is a significant overlap in the times that fulfilling a contract is economically efficient and morally right; likewise, efficient breach is not necessarily an immoral action in every case.[125] Moral rightness is, itself, a commodity quantifiable in dollars. Its value may be extremely high, or it may be infinite. (It is not hard to think of otherwise economically advantageous contracts that should be, and are, rejected for no reason but the immorality of performance.) But whatever the amount is, it will be accounted for—we can't avoid so doing.[126] The

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[123] Robert P. George, *What's Sex Got to do with it? Marriage, Morality, and Rationality*, 48 AM. J. JURIS. 63, 84 (2004); Stephen J. Morse, *Excusing and the New Excuse Defenses*, 23 CRIME & JUST. 329, 334 (1998) ("The law is a teacher that sets moral and social standards for conduct."); Jeffrey L. Harrison, *Order, Efficiency, and the State: A Commentary*, 82 CORNELL L. REV. 980, 991 (1997) ("[T]he law is a teacher about right and wrong . . . .").

[124] *See* John D. Mueller, *How Does Fiscal Policy Affect the American Worker?* 20 NOTRE DAME J.L. ETHICS & PUB. POL'Y 563, 565 (2006).

[125] Lahav, *supra* note 111, at 176. Lahav's "Principle of Justified Promise Keeping" is his attempt to "ground the concept of efficient breach within a larger moral theory by showing how the practice of efficient breach could be made compatible with utilitarian and even deontological ethics." *Id*. at 165.

[126] *But see* Robert L. Birmingham, *Breach of Contract, Damage Measures, and Economic Efficiency*, 24 RUTGERS L. REV. 273, 278 (1969-70) (taking exception to Adam Smith's belief in the affirmative morality of laissez faire in stating that "economists, aspiring to standards of objectivity set in the natural sciences, have been

trick is not to undervalue morality as a commodity. The current T4C regime, unfortunately, does exactly that. Its moral cost may be, in the view of some, slight. It is not, however, zero. And even if it were the case that adequate economic efficiency could somehow counterbalance this cost, this article has demonstrated that the current T4C regime is not efficient. Together, morality and economics demonstrate the flawed nature of the regime.

Public policy should, and often does, flow from sound moral and economic analysis. While these bases need not be explicitly set forth in the law, lawmakers ignore them at our peril. This is the case in current T4C law. The black letter law of T4C makes virtually no reference to the economic wisdom or moral soundness of the regime. Likewise, arguments offered in favor of the current regime are often grounded primarily, if not exclusively, on political notions. Accordingly, Part V of this article briefly evaluates the most common policy arguments set forth in support of the current T4C regime, on their own merits and independent of the foregoing economic and moral analysis.

V. POLICY ARGUMENTS FAVOR A RETREAT FROM *CHRISTIAN* AND PRESUMPTIVE RELIANCE DAMAGES

Despite frequent court dicta that appear to indicate that the government is bound by the same rules that bind the private parties with which it contracts,[127] as explained in Part II, above, the law has always

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able to condemn violation of the conditions of competitive equilibrium as inefficient with only minimal appeal to moral precepts").

[127] *See, e.g.*, United States v. Blair, 321 U.S. 730, 738 (1944) (Frankfurter, J., dissenting in part).

> Those dealing with the Government must no doubt turn square corners. While agents for private principals may waive or modify provisions in contracts which circumstances have rendered harsh, provisions in government contracts cannot be so alleviated. But in order to enforce the terms of a government contract courts must first construe them. And there is neither law nor policy that requires that courts in construing the terms of a government contract should turn squarer corners than if the same terms were contained in a contract between private parties. "A Government contract should be interpreted as are contracts between individuals, with a view to ascertaining the intention of the parties and to give it effect accordingly, if that can be done consistently with the terms of the instrument."

Id. (quoting Hollerbach v. United States, 223 U.S. 165, 171-172 (1914)). *See also* Lynch v. United States, 292 U.S. 571, 579 (1934) ("When the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals."); Sinking-Fund Cases, 99 U.S. 700,

accepted that the government may need to terminate some of its contracts during their performance period. At issue has been the remedy available to the contractor.[128] Though the common law prescribed anticipatory profits as the remedy for termination not based on the other party's having breached the material terms of the contract, the law has moved steadily over the years toward recognizing reliance damages as a contractor's exclusive remedy when the government terminates his contract. Courts and commentators have justified this rule on the basis that the government must be free to change its course in response to changed circumstances, and often invoke the doctrine of sovereign immunity in support of their arguments. To require expectation damages—the remedial equivalent of full performance, per Holmes's famous dictum[129]—is seen as a limitation on the government's ability to function as sovereign.[130] Thus, while the Tucker Act grants jurisdiction to the Court of Claims over "any claim against the United States founded . . . upon any express or implied contract," [131] sovereign immunity ensures that the Act's jurisdictional grant is construed strictly,[132] and courts have never seriously questioned the government's prerogative to limit its damages to those provided by the FAR.[133]

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719 (1879) ("The United States are as much bound by their contracts as are individuals. If they repudiate their obligations, it is as much repudiation, with all the wrong and reproach that term implies, as it would be if the repudiator had been a State or a municipality or a citizen.").

[128] CIBINIC ET AL., supra note 16, at 1049.

[129] Oliver Wendell Holmes, *The Path of the Law,* 10 HARV. L. REV. 457, 462 (1897) ('The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it, - and nothing else.'').

[130] G.L. Christian & Assoc. v. United States, 160 Ct. Cl. 1, 30 (1983). The Court explained:

> [T]he Defense Department and the Congress would be loath to sanction a large contract which did not provide for power to terminate and at the same time proscribe anticipated profits if termination did occur. Particularly in the field of military housing, tied as it is to changes and uncertainties in installations, would it be necessary to take account of a possible termination in advance of completion, and to guard against a common law measure of recovery which had been disallowed for so many years in military procurement.

Id. Gillian Hadfield argues forcefully that though the government may be bound by its contractual obligations, only the prerogative to terminate for convenience and pay mere reliance damages reconciles the "important tensions between the role of government as contractor and the role of government as legislator." Hadfield, *supra* note 78, at 469.

[131] 28 U.S.C. § 1491 (2000). The Contract Disputes Act of 1978, 41 U.S.C. §§ 601-03 (2000) established Boards of Contract Appeals as alternative administrative fora for contractors bringing claims against the government.

[132] Valley View Enters. v. United States, 35 Fed. Cl. 378, 385 (1996). *Contra* Pan-Am Tobacco Corp. v. Dept. of Corr., 471 So. 2d 4, 5 (Fla. 1984) (finding legislation empowering State to enter contract constituted waiver of sovereign immunity, despite

These two primary policy arguments against expectation damages are unpersuasive and should be rejected. First, invoking sovereign immunity so as to protect the government from liability for anticipatory profits is, while legal, inappropriate. Second, the United States government binds successor governments all the time, in ways more powerful than contract.

A. Sovereign Immunity

The belief that government is inherently immune from suits sounding in contract precedes this nation's founding. Sir William Blackstone, whose *Commentaries* have been called "the bible of [early] American lawyers,"[134] wrote of suits against the crown for breach of contract, "[T]he end of such action is not to *compel* the prince to observe the contract, but to *persuade* him."[135] Years later, Alexander Hamilton was equally forceful:

> It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*. . . . The contracts between a nation and individuals are only binding on the conscience of the sovereign, and have no pretensions to a compulsive force. They confer no right of action independent of the sovereign will.[136]

That this doctrine still holds is beyond dispute.[137] Neither is it disputable that there could come a time when the government would legitimately need to withdraw its consent to be sued, whether generally or in the case of a particular contract. Though the current T4C regime makes this highly unlikely, it is at least conceivable that a situation could arise wherein the government of the United States could be liable for damages it simply was unwilling to pay. However, the historical

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fact that State had explicitly waived sovereign immunity for actions sounding in tort with no analogous waiver for contract claims).

[133] *See, e.g.*, Ellett Constr. Co. v. United States, 93 F.3d 1537, 1546 (Fed. Cir. 1996) (recognizing that while some common law claims exist under the federal procurement regulation system, anticipatory damages are not to be had). *But see* United States v. Winstar Corp., 518 U.S. 839, 910 (1996) (finding government regulatory action to constitute a breach of contract, rather than a constructive termination for convenience).

[134] DANIEL BOORSTIN, THE MYSTERIOUS SCIENCE OF THE LAW 4 (1941). "In the first century of American Independence, the *Commentaries* were not merely an approach to the study of the law; for most lawyers they constituted all there was of the law. The influence of Blackstone's ideas on the Framers of the Federal Constitution is well known." *Id*. at 3.

[135] WILLIAM BLACKSTONE, 1 COMMENTARIES *236.

[136] THE FEDERALIST NO. 81 (Alexander Hamilton).

[137] ERWIN CHEMERINSKY, FEDERAL JURISDICTION 589-593 (3rd ed. 1999).

trend toward waivers of sovereign immunity seems incongruous with the corresponding expansion of the government's reservation of the right to terminate contracts for convenience. The purpose of sovereign immunity is to allow the government freedom of action without financial consequence. Tort is a classic example. The law does not allow military members to prevail in suits against the federal government for damages they suffer in the course of their military duties,[138] on the theory that military commanders must not have their tactical or strategic decision making constrained by concerns of civil liability. But when the government action at issue *is* financial dealing, the government's protection from adverse financial consequences should come from the deal itself, rather than post hoc. I have explained earlier why the government's termination for convenience prerogative costs more than it is worth. The same arguments apply, and the same result obtains, when the government generally resorts to sovereign immunity as a defense to contract actions.

B. Government as Sovereign vs. Government as Contracting Party

The more substantive policy argument against binding the government to expectation damages is that to so bind it would effectively allow one government to bind the next. That is, one government could establish a contract so large and politically inexpedient to breach that subsequent governments would feel compelled to complete the contract, even if they believed it not in the national interest to do so.[139] In effect, the argument goes, one government could, in its contracting role, bind a successor government's ability to exercise its role as sovereign lawmaker.[140]

The simple rejoinder to this concern is that a contract—no matter how large—by one government no more binds successor governments than does any other sovereign act. Tax policy, military engagements, social programs, and interest rates on loans and bonds are all established by the government with the implicit understanding that to change them down the road will have a cost. Though the cost to change these may be "only" political, while the cost to terminate contracts is financial (and sometimes political as well), can the latter really be said

[138] *Feres v. U.S.*, 340 U.S. 135 (1950).

[139] A similar problem arises when legislation or regulations have the ancillary effect of negating the government's contractual obligations. This was the case in *U.S. v. Winstar*, 518 U.S. 839 (1996) (plurality opinion), in which the government unsuccessfully defended against Winstar's contention that the passage of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA) did not justify the government's failure to uphold its duties under a pre-existing contract.

[140] *See* Horowitz v. United States, 267 U.S. 458, 461 (1925) ("[T]he United States when sued as a contractor cannot be held liable for an obstruction to the performance of the particular contract resulting from its public and general acts as a sovereign.").

to exceed the former? The government has the legal authority to abolish Medicare and Social Security tomorrow without paying a penny. On the other hand, were the government to cancel a major weapons system development, it would, under an expectation damages regime, pay potentially millions or even billions of dollars. Is there any real doubt that, even in the face of liability for expectation damages, the weapons system procurement is more likely to be terminated than the benefits program?

The distinction between government-as-contractor and government-as-sovereign is ephemeral and cannot fairly be established by courts analyzing contracts post hoc.[141] The better rule is that when the sovereign government enters the commercial marketplace, it voluntarily submits itself to the same rules as other corporate or individual contracting entities. Just as these private parties may negotiate for termination rights on whatever terms they see fit,[142] so may the government. Only in this manner can the two roles be reconciled.

VI. CONCLUSION

> *The government does not stand on a special pedestal when it enters the marketplace. It stands on the level of the citizens with whom it contracts. . . .*[143]

In a liberal democracy, government exists for the benefit of its people, not itself.[144] The current T4C regime turns this on its head. The government of the United States pays more for the goods and services it needs, and it reserves to itself the right to violate its pledge in a technically legal, but morally suspect, way. The only benefit obtained in return is the assurance that the government will never pay, in any individual contract, for goods or services it ultimately does not need or

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[141] *Winstar*, 518 U.S. at 894 ("[W]e have already expressed our doubt that a workable line can be drawn between the Government's 'regulatory' and 'nonregulatory' capacities.").

[142] James R. Walsh and Hugh Alexander, *At Your Convenience: Courts are Generally Enforcing Termination for Convenience Clauses in Private Sector Contracts That are Well Drafted and Prudently Invoked*, 21 LOS ANGELES LAW. 42 (1998). *But see* Pan-Am Tobacco Corp. v. Dept. of Corr., 471 So. 2d 4, 5 (Fla. 1984) ("It is basic hornbook law that a contract which is not mutually enforceable is an illusory contract. Where one party retains to itself the option of fulfilling or declining to fulfill its obligations under the contract, there is no valid contract and neither side may be bound." (citations omitted)).

[143] Claybrook, *supra* note 99, at 581.

[144] THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) ("Whenever any Form of Government becomes destructive of these ends [of securing its citizens' rights], it is the Right of the People to alter or to abolish it, and to institute new Government . . . in such form, as to them shall seem most likely to effect their Safety and Happiness."); s*ee also supra* note 11.

receive. As the ultimate measure of value in these transactions is benefit to the people as a whole, I submit the cost is not worth the benefit.

The solution, however, is not a wholesale retreat to common law rules. There will be specific actions the government wishes to take without committing itself to pay potentially significant expectation damages should it subsequently need to change course. Though it is tempting to attempt to define these circumstances by category—commentators have proposed, for instance "limit[ing] terminations for convenience to contracts for weapons systems, wartime requirements, or other uniquely governmental needs"[145]—such categorical distinctions are likely unworkable. After all, *Christian* itself dealt with a need that can fairly be called "governmental" (the housing to be constructed was all on post) from one perspective, but "commercial" from another (the houses being built were presumably no different than others off post).

Instead, the optimum T4C regime would establish dollar limits as the criterion for reliance versus expectation damages. There would be a certain dollar amount for each type of contract (construction, routine services, weapons system production, etc.) below which the presumption would be against a government T4C prerogative, i.e., in which common law damages would be due upon the government's ending the contract for reasons other than the contractor's breach. The higher these dollar limits were, the more efficient the system would be. Because of this, contracting officers should have some discretion to negotiate away even the legally presumed T4C prerogative for contracts above the respective dollar limits. (Conversely, if there were a good reason to secure a T4C right in particular contracts below the threshold—as explained in Part III, the government will always be more likely to know when this is the case than a contractor—the government should retain that right, as well.) To safeguard against significant cost to the taxpayers based on gross human misjudgment, there could be a system of increasing authority to negotiate away a T4C prerogative at higher levels of supervision. That is, even if a unit-level contracting officer did not have the authority to risk expectation damages for contracts over, say, $5,000,000, his functional supervisor at a higher headquarters level could authorize this risk for all contracts up to, say, $15,000,000, and so forth.

Christian should be overruled and the FAR should be rewritten to establish the (high) dollar thresholds, below which government contracts will be presumed not to include a government T4C right. Additionally, the FAR should include provisions authorizing contracting

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[145] Joseph J. Petrillo & William E. Conner, *From* Torncello *to* Krygoski*: 25 Years of the Government's Termination for Convenience Power*, 7 FED. CIR. B.J. 337, 371 (1997).

officers to waive those limits when they deem it in the government's interest to do so.[146]

This new regime of substantially limited government T4C rights would be economically efficient, costing the government less without compromising the quality or availability of necessary goods or services. It would be morally right, ensuring that the government does not break its promises. And it would be politically sound, properly balancing the government's need for flexibility with its citizens' right to have their government deal forthrightly and fairly. Economics, morality, and political theory all answer this risk allocation question the same way: expectation damages in contracts terminated for the convenience of the government.

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[146] In discussing my proposals with government employees experienced in government contracting, the standard response I receive is an expressed concern over the amount of money the government stands to lose if I am wrong, i.e., if an expectation damages regime were not more efficient. (Perhaps not surprisingly, those private practitioners with whom I talk seem much more receptive to my ideas.) To put the total risk in perspective, consider the following. Though total annual federal contracting expenditures have risen dramatically post-9/11, and particularly since the 2003 invasion of Iraq, let us assume the $350 billion figure listed by the Office of Management and Budget's Office of Federal Procurement, http://www.whitehouse.gov/omb/procurement/index.html (last visited Jan. 25, 2008), is accurate and is likely to remain fairly constant for the foreseeable future. Assume further that every contractor's anticipated profits were ten percent of each respective contract price. (This number is probably impossible to ascertain correctly. Some analysts place this number at seven percent, Transcript of *Examining Halliburton's "Sweetheart" Deal in Iraq: Experts Say Lucrative Contracts Yield Razor-Thin Profit Margins* (NPR's All Things Considered radio broadcast, Dec. 22, 2003), *available at* http://www.npr.org/templates/story/story.php?storyId=1559574 (last viewed Jan. 25, 2008); the FAR caps profit margins on cost-plus-fixed-fee contracts at fifteen percent for research and development contracts, six percent for architect-engineer projects, and ten percent for all others, FAR 14.404-(c)(4).) Finally, assume the government cancelled one in every ten contracts (a figure that is probably fantastically high) in such a way as to receive nothing of value that could lessen the impact of paying expectation damages. On these figures (designed to establish an absolute worst-case scenario), the government would stand to lose a total of $3.5 billion per year in "wasted" expectation damage payments, assuming there were absolutely no efficiencies gained through reduced prices in completed contracts. This amount is less than one-fourteenth of the smallest annual *increase* in the size of the federal budget over the last decade, and represents approximately one-seventh of one percent of the 2005 federal budget. The Budget for Fiscal Year 2008, Historical Tables, *available at* www.whitehouse.gov/omb/budget/fy2008/pdf/hist.pdf (last visited Jan. 25, 2008). While $3.5 billion is "real money," even in terms of government spending, it is not, relatively speaking, enough to justify dismissing arguments for attempted systemic improvements on the grounds that the results of failure would be simply too great to risk.

DEFINING THE OBVIOUS: ADDRESSING THE USE AND SCOPE OF PLAIN ERROR

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To turn a criminal trial into a quest for error no more promotes the ends of justice than to acquiesce in low standards of criminal prosecution.[1]

I. INTRODUCTION

Master Sergeant (MSG) William Birdsall was the father of two boys, ages five and six.[2] At his court-martial, both boys testified that they had been molested by their father, with the older boy claiming to have been anally sodomized about fifty times.[3] Master Sergeant Birdsall took the stand and unequivocally denied the charged sexual abuse, alleging that his wife or mother-in-law had coached the boys.[4] Despite the fact that appellant's older son weighed only forty-five pounds, compared to his father's 215 pound frame, there was no evidence of physical trauma to the boy.[5] The case was a pure contest of credibility between the boys and their father, carried out in the greater context of an apparently contentious divorce proceeding.[6]

To bolster its case, the government called an expert in psychology and child abuse.[7] The expert asserted that she was qualified to distinguish between "founded" and "unfounded" cases of child sexual abuse.[8] She testified that she could discern no indication that the boys' testimony had been coached.[9] Using her expertise in the area, she determined that their allegations were founded.[10] She definitively stated that, in her professional opinion, the boys were victims of incest by their father, MSG Birdsall.[11] The defense counsel lodged no objection to this

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[1] Johnson v. United States, 318 U.S. 189, 202 (1943) (Frankfurter, J., concurring).
[2] United States v. Birdsall, 47 M.J. 404, 406 (1998).
[3] *Id.*
[4] *Id.* at 410. The case began when appellant's wife noticed that the older boy was acting and speaking in "sexually inappropriate ways." *Id.* at 406. When appellant questioned his sons, the boy told him that the sexual knowledge and behavior came from his gym teacher. *Id.*
[5] *Id.* at 410.
[6] *Id.* Master Sergeant Birdsall and his wife had divorced, but reconciled at the time the allegations first arose. *Id.* at 406. At trial, he accused his wife or her mother of coaching the boys in their accusatory testimony. *Id.* at 410.
[7] *Id.* at 407. The government called another expert in pediatrics who testified, over defense objection, that in his opinion the children were victims of "child sexual abuse." *Id.* The defense objected that the testimony went to "the ultimate issue." *Id.* The trial counsel responded that the ultimate issue was "who did it and what was done to them." The military judge "allow[ed] the question." *Id.*
[8] *Id.*
[9] *Id.* at 407-408.
[10] *Id.* at 408.
[11] *Id.*

testimony[12] and appellant was convicted of committing sodomy, indecent acts, and taking indecent liberties with his children.[13] He was sentenced to a bad-conduct discharge, confinement for ten years, forfeiture of all pay and allowances, and reduction to the grade of E-1.[14]

Over four years after his original trial, the Court of Appeals for the Armed Forces reviewed MSG Birdsall's case.[15] The court stated that "[i]f anything is established in the area of expert testimony in child abuse cases, it is that the expert in child abuse may not act as a human lie detector for the court-martial."[16] It ruled that the expert's testimony "clearly violated [this] proscription."[17] In spite of this conclusion, the error could have been deemed forfeited because of the failure of the defense counsel to object.[18] This would have meant no relief for MSG Birdsall despite the obvious and significant error.[19] However, the court granted relief, despite the defense counsel's failure to object, because the testimony constituted "plain error" necessitating reversal.[20]

The *Birdsall* case represents the epitome of tension in the appellate review process – balancing the competing interests of finality and justice. "One of the law's very objects is the finality of its judgments. Neither innocence nor just punishment can be vindicated until the final judgment is known. Without finality, the criminal law is deprived of much of its deterrent effect."[21] Appellate review obviously impedes this goal, as it often delays the "final" judgment for years. However, as the opinion in *Birdsall* demonstrates, appellate review is necessary to ensure the correctness and fairness of the original trial proceeding. "Review . . . has come to be seen as the final guarantor of the fairness of the criminal process. . . . Reversal on appeal is the quality control mechanism of the criminal justice system."[22]

The friction between the goals of finality and justice is at its maximum where, as in *Birdsall*, a potential issue was not litigated at the trial court but is identified on appeal. Consideration of such issues undermines the certainty and stability of the criminal justice system in several ways. First, "allowing defense counsel to raise errors for the

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[12] *Id.* at 410. The court noted that the defense counsel's "earlier objection to similar testimony from [the other expert] had just been denied by the military judge." *Id.* at 409.
[13] *Id.* at 405.
[14] *Id.*
[15] *Id.* at 404, 405.
[16] *Id.* at 410.
[17] *Id.*
[18] *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 103(a), (2005) [hereinafter MCM].
[19] *Id.*
[20] *Birdsall*, 47 M.J. at 410.
[21] McCleskey v. Zant, 499 U.S. 467, 491 (1991).
[22] David Rossman, *Criminal Law: "Were There No Appeal": The History of Review in American Criminal Courts*, 81 J. CRIM. L. & CRIMINOLOGY 518, 518-19 (1990).

first time on appeal permits careless litigation at trial. In some instances, it even encourages the sloppy handling of issues, as when defense counsel is concerned that the trial judge might be less sympathetic to facts than the appellate court."[23] Moreover, the failure to raise objections at trial deprives the lower court, and the opposing party, of the opportunity to correct errors when corrective action would be most effective.[24] This "means that appeals, which might be unnecessary if the trial court were properly informed of the parties' contentions, will be more likely to occur."[25] To guard against these dangers, an appellate court will generally not review an issue if the defense does not object to it at trial.[26]

On the other hand, a "rigid and undeviating" practice where appellate courts turn a blind eye to all questions that have not been previously raised would be incompatible with fundamental principles of justice.[27] A strict application of this rule may lead to an appellant finding himself with no remedy on appeal, even though "the trial below was riddled with prejudicial error from beginning to end."[28] Accordingly, the doctrine of plain error was created as an exception to the rule of forfeiture to allow the courts sufficient flexibility to balance the interests of finality and justice.[29] This principle allows courts to take notice of particularly egregious errors in extraordinary circumstances, despite the failure of the defense to raise them at the trial level.[30]

This article will trace the history of the doctrine of plain error and its place in appellate review. It will specifically address the application of plain error in the military justice system, particularly in relation to the unique degree of appellate scrutiny a case receives in

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[23] STEPHEN A. SALTZBURG, LEE D. SCHINASI, DAVID A. SCHLUETER, MILITARY RULES OF EVIDENCE MANUAL (Vol. 1) 1-20 – 1-21 (2003).
[24] *Id.*
[25] *Id.*
[26] United States v. Olano, 507 U.S. 725 (1993) (quoting Yakus v. United States, 321 U.S. 414, 444 (1944)).
[27] *Id.* at 732.
[28] Lester B. Orfield, *The Scope of Appeal in Criminal Cases*, 84 U. PA. L. REV. 825, 840-41 (1935-1936).
[29] United States v. Atkinson, 297 U.S. 157, 159 (1936).
[30] *Id.* It has been said that:

> [t]he power of an appellate court to review errors not raised and preserved below has been held, expressly or impliedly, to emanate from: the appellate court's duty not to ratify void proceedings; the duty of all courts to dispense, administer, and promote justice; the duty of the courts to give protections against unlawful deprivation of liberty; or the duty of the appellate courts to supervise the inferior courts.

Joe Ivy Gillespie, *Appellate Review in a Criminal Case of Errors Made Below Not Properly Raised and Reserved*, 23 MISS. L. J. 42, 44 (1951-52).

accordance with the Uniform Code of Military Justice. Additionally, the article will analyze defects in the military application of the doctrine and propose corrective action through the adoption of a Rule for Courts-Martial that defines a uniform application of the doctrine in the military justice system.

II. APPELLATE REVIEW GENERALLY

When faced with an error by either the prosecutor or trial judge, a defense counsel has three options. First, he can make an objection or request a particular action to correct the error. Second, he can take affirmative action to waive the particular rule that confers a right or benefit upon him. Finally, he can do nothing and sit silently, allowing the trial to proceed in due course. This final choice can, of course, be the result of intentional decision or inadvertent omission. The degree of review an alleged error receives on appeal, if any at all, depends largely on the course of action taken by the defense counsel.

If a defense counsel lodges a specific objection to a ruling by a military judge or evidence offered by a prosecutor, the error is said to be "preserved"[31] and can be reviewed on appeal.[32] In such a circumstance, the appellate court will review the record to determine whether the action or decision at trial was actually erroneous.[33] If so, the government must demonstrate that the error was harmless.[34] The standard for demonstrating harmlessness may vary depending upon the type of error being assessed.[35] For instance, a higher standard may be imposed for constitutional errors than for non-constitutional ones.[36]

Waiver occurs when an accused, either personally or through his counsel, makes a knowing choice not to exercise his rights.[37] Thus, waiver requires an "intentional relinquishment of a known right."[38] If affirmative waiver is established, no error can be said to have occurred because the action taken by the court resulted directly from the choice of

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[31] To "preserve" an error requires that "the party excepting to the charge to state distinctly the several matters of law to which he excepts," thereby allowing an appellate court to review the issue. *See Atkinson*, 297 U.S. at 159.
[32] Lieutenant Colonel Patricia Ham, *Making the Appellate Record: A Trial Defense Attorney's Guide to Preserving Objections—the Why and How*, ARMY LAW., Mar. 2003, 10, 11.
[33] *Id.* at 18.
[34] *Id.*
[35] *Id.*
[36] *See infra* notes 97-101 and accompanying text.
[37] United States v. Olano, 507 U.S. 725, 733 (1993).
[38] *Id.*

the accused.[39] Therefore, appellate courts will not review the issue unless an accused can demonstrate extraordinary circumstances.[40]

Where an accused does not affirmatively waive a right or a rule, but instead simply does not object to its alleged violation, appellate review is also unlikely.[41] This situation, known as forfeiture, is defined as "the failure to make a timely assertion of a right."[42] Unlike waiver, forfeiture can result either from tactical decision or simple omission by the defense.[43] While failure to grant relief for such forfeited errors promotes the government's interest in obtaining finality of a conviction, it is troubling when viewed in the context of achieving a just result. As one commentator has explained:

> The significant difference between waiver and forfeiture is that a defendant can forfeit his defenses [or other rights] without ever having made a deliberate informed decision to extinguish them, and without ever having been in a position to make a cost-free decision to

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[39] *Id.* at 732-33.

[40] For example, courts will review the issue in conjunction with a claim of ineffective assistance of counsel to determine if counsel's decision to waive an issue fell below the standard of competence expected of competent attorneys. Strickland v. Washington, 466 U.S. 668, 687 (1984). "A defendant who claims ineffective assistance of counsel must surmount a very high hurdle." United States v. Saintaude, 56 M.J. 888, 892 (Army. Ct. Crim. App. 2002). To prevail on a claim of ineffective assistance, the appellant must satisfy a two-prong test: (1) competency and (2) prejudice. *Strickland*, 466 U.S. at 687. The proper inquiry under the first prong is whether counsel's conduct fell below an objective standard of reasonableness, or was it outside the "wide range of professionally competent assistance." *Id.* at 690. In order to meet the second prong, an appellant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id*. at 694. In such cases, it is the performance of counsel which becomes the issue, rather than the underlying alleged mistake. *Id.*

[41] *Hearing on H.R. 2498 Before the Subcomm. of the H. Armed Services Comm.*, 81st Cong., 1st Sess. (1949).

[42] *Olano*, 507 U.S. at 725.

[43] The Supreme Court has provided the following explanation of the distinction between waiver and forfeiture:

> Deviation from a legal rule is 'error' unless the rule has been waived. . . . Waiver is different than forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the 'intentional relinquishment or abandonment of a known right. . . .' Whether a particular right is waivable; whether the defendant must participate personally in the waiver; whether certain procedures are required for waiver; and whether the defendant's choice must be particularly informed or voluntary, all depend on the right at stake. . . . Mere forfeiture, as opposed to waiver, does not extinguish an 'error' . . . .

Id. at 733.

> assert them. Unlike waiver, forfeiture occurs by operation of law without regard to the defendant's state of mind.[44]

In the fast and fluid nature of a trial, even the most competent counsel can overlook an issue that, in hindsight, appears to be a glaring error, devastating to an accused's interests.[45] Because of this fact, forfeiture does not extinguish an error, in contrast to waiver.[46] The error may still exist, but because the defense relinquished an opportunity to correct it at trial, the defense must surmount a higher hurdle on appeal to obtain relief.[47] The ability of an appellate court to review an error forfeited at trial is known as the doctrine of plain error.[48]

III. THE DOCTRINE OF PLAIN ERROR IN THE FEDERAL SYSTEM

The concept of plain error essentially encompasses two questions.[49] First, when and under what circumstances can an appellate court review an error that was not objected to at trial? Second, when can a court grant relief for such errors? When attempting to discern a standard for application of the rule from either rules of procedure or case law, it is important to understand which question is being discussed.

The federal criminal justice system expressly includes a rule which addresses the issue of plain error. Federal Rule of Criminal Procedure (FED. R. CRIM. P.) 52 provides:

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[44] Peter Westen, *Away From Waiver: A Rationale for the Forfeiture of Constitutional Rights in Criminal Procedure*, 75 MICH. L. REV. 1214, 1214 (1976-1977).

[45] *Cf.* United States v. Grostefon, 12 M.J. 431, 436 (C.M.A. 1982) (recognizing that "even the most conscientious counsel and judges will occasionally overlook an error when dealing with a press of cases").

[46] While the terms "waiver" and "forfeiture" are legally distinct, they are not necessarily treated that way in practice.

> [M]ost cases in military courts continue to use the terms 'forfeiture' and 'waiver' interchangeably, and do not distinguish between the two concepts for purposes of appellate review, including whether an error at trial merits relief under the plain error doctrine. In fact, the Court of Appeals for the Armed Forces (CAAF) [has recognized] that 'waiver,' as used in Rule for Courts-Martial (RCM) 905(e), is 'synonymous with the term 'forfeiture' used by the Supreme Court in *United States v. Olano*.

Ham, *supra* note 32, at 12.

[47] *Olano*, 507 U.S. at 732.

[48] *Id.*

[49] *See* United States v. Young, 470 U.S. 1, 16 n.14 (1985).

> (a) HARMLESS ERROR. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.
> (b) PLAIN ERROR. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.[50]

This rule seems to address both the question of when an error can be noticed (when it is plain and affects substantial rights) and when relief can be granted (when the error is not harmless because it affects substantial rights). However, these answers are superficial at best. In reality, they simply raise more questions; most significantly, what is "plain error" and what does the term "affect substantial rights" mean?

The rule "was drafted as a restatement of the common law."[51] Accordingly, an analysis of case law applying the doctrine of plain error provides the best understanding of its scope and requirements. The Supreme Court recognized the doctrine as early as 1896. In *Wilborg v. United States*, the Court stated that "if a plain error was committed in a matter so absolutely vital to defendants, we feel ourselves at liberty to correct it, even though the defendants in the case had not 'duly excepted' to the error at trial."[52]

Forty years later, in *United States v. Atkinson*,[53] the Court provided the general policy foundation of the doctrine, stating that "[i]n exceptional circumstances, especially in criminal cases, appellate courts, in the public interest, may of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity or public reputation of judicial proceedings."[54] This language addressed the first question of plain error—when an issue not raised at trial can be noticed, i.e.,

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[50] FED. R. CRIM. P. 52. The original Federal Rules of Criminal Procedure were adopted by order of the Supreme Court on December 26, 1944, transmitted to Congress by the Attorney General on January 3, 1949, and became effective October 20, 1949.
[51] Jeffrey L. Lowry, *Plain Error Rule – Clarifying Plain Error Analysis under Rule 52(b) of the Federal Rules of Criminal Procedure*, 84 J. CRIM. L. & CRIMINOLOGY 1065, 1066 (1994) (citing FED. R. CRIM. P. 52(b) advisory committee note).
[52] 163 U.S. 632 (1896).
[53] United States v. Atkinson, 297 U.S. 157 (1936). *Atkinson* was a civil case involving an action on a policy of converted war risk insurance. *Id.* at 158. At trial, the judge instructed the jury that the claimant could recover if the jury found that his loss of hearing was a permanent disability. *Id.* at 159. The judge failed to inform the jury that they should consider the effect of the disability on the claimant's livelihood. *Id.* The government did not object to the instruction and the jury found for the claimant. *Id.* For the first time on appeal, the government asserted that the instruction was incorrect. *Id.* Interestingly, even though *Atkinson* was a civil case, its proclamation regarding plain error has been ingrained in federal and military criminal law and repeated verbatim until the present day.
[54] *Id.* at 160.

reviewed, by an appellate court. The requirements that can be extrapolated from the language in *Atkinson* are that (1) there was error; (2) the error was either obvious or "seriously affect the fairness, integrity or public reputation of judicial proceedings;" and (3) that taking notice of the error would be in the public interest.[55] While the Court stated that the doctrine was to be used "in exceptional circumstances," it did not provide any further guidance or examples of what type of circumstance would qualify as "exceptional."[56]

After FED. R. CRIM. P. 52(b) was enacted, the Court maintained its basic philosophy articulated in *Atkinson* when applying the doctrine of plain error. In *United States v. Frady*,[57] the Court explained:

> Rule 52(b) was intended to afford a means for the prompt redress of miscarriages of justice. By its terms, recourse may be had to the Rule only on appeal from a trial infected with error so 'plain' the trial judge and prosecutor were derelict in countenancing it, even absent the defendant's timely assistance in detecting it. The Rule thus reflects a careful balancing of our need to encourage all trial participants to seek a fair and accurate trial the first time around against our insistence that obvious injustice be promptly redressed.[58]

The Court later expanded on what constituted a "miscarriage of justice" sufficient to allow an appellate court to grant relief for an otherwise forfeited error. In *United States v. Young*,[59] the Court explained that "federal courts have consistently interpreted the plain-error doctrine as requiring an appellate court to find that the claimed error not only seriously affected 'substantial rights,' but that it had an unfair prejudicial impact on the jury's deliberations."[60] The Court decided that the alleged error caused no miscarriage of justice in the trial.[61]

In 1993, the Court published what is probably its most important and expansive case discussing the rule of plain error, *United*

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[55] *See Id.*
[56] *Id.*
[57] 456 U.S. 152 (1982).
[58] *Id.* at 163.
[59] 470 U.S. 1 (1985). The issue in *Young* was improper argument by the prosecutor. *Id.* at 2. During closing argument, the defense counsel argued that the prosecutor did not even believe in the defendant's guilt. *Id.* at 4-5. During rebuttal, the prosecutor argued that he did believe the defendant was guilty of the charged crimes. *Id.* at 5. While finding that the prosecutor's remarks were improper, the Court concluded that they did not rise to the level of plain error. *Id.* at 14.
[60] *Id.* at 16 n.14.
[61] *Id.* at 16.

States v. Olano.[62] The issue in the case, first raised on appeal, involved the presence of alternate jurors during the jury's deliberations.[63] Recognizing the general rule of forfeiture for errors not raised at trial, the Court ruled that Rule 52(b) "provides a court of appeals a limited power to correct errors that were forfeited because [they were] not timely raised in district court."[64] The Court instructed that, for the rule to be triggered, "[t]here must be an 'error' that is 'plain' and that 'affect[s] substantial rights.'"[65]

The Court stated that "error" occurs within the meaning of Rule 52(b) "[i]f a legal rule was violated during the [trial] court proceedings, and if the defendant did not waive the rule," despite the absence of a timely objection.[66] Regarding the second requirement, the Court explained that "'[p]lain' is synonymous with 'clear' or, equivalently, 'obvious.'"[67] As for the third requirement, the Court said that in most cases[68] an error must be prejudicial to affect substantial rights, meaning that it must have affected the outcome of the trial proceedings.[69] This

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[62] 507 U.S. 725 (1993).

[63] *Id.* at 727. The alternate jurors' presence during deliberations violated FED. R. CRIM P. 24(c) which prohibits alternate jurors from attending deliberations, absent a personal waiver by the defendants of their right to exclude alternate jurors from deliberations. *Id.* at 737. Because individual waivers were not obtained from each defendant, the court of appeals held that the district court violated Rule 24(c). *Id.*

[64] *Id.* at 731.

[65] *Id.* at 732 (quoting United States v. Young, 470 U.S. 1, 15 (1985) (quoting United States v. Atkinson, 297 U.S. 157, 160 (1936))).

[66] *Id.* at 733-34.

[67] *Id.* at 734.

[68] The Court did not decide whether the phrase "affecting substantial rights" is "always synonymous" with prejudicial. *Id.* at 735. It explained:

> There may be a special category of forfeited errors that can be corrected regardless of their effect on the outcome, but this issue need not be addressed. Nor need we address those errors that should be presumed prejudicial if the defendant cannot make a specific showing of prejudice. Normally, although perhaps not in every case, the defendant must make a specific showing of prejudice to satisfy the "affecting substantial rights" prong of Rule 52(b).

Id.

[69] *Id.* at 734 (citing, *inter alia*, Kotteakos v. United States, 328 U.S. 750, 758-65 (1946)). In *Johnson v. United States*, 520 U.S. 461, 468 (1997), the Court recognized that there may be a limited class of cases which involve "structural errors." Such an error is a "defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." *Id.* The Court declined to resolve whether the error at issue in the case fell within that class of cases, however, because it did not meet the final requirement of *Olano*. *Id.* at 469. The Court noted that the evidence supporting materiality was "overwhelming" and that the element was "essentially uncontroverted at trial and has remained so on appeal." *Id.* at 470. The Court stated, "on this record there is no basis for concluding that the error 'seriously affected the fairness, integrity or

determination requires the same type of harmless error analysis required for issues that are raised at trial, with one substantial difference.[70] When an error is properly preserved for appellate review, the government bears the burden of demonstrating that an accused was not prejudiced.[71] In a plain error analysis, however, the burden rests with the appellant to show he was prejudiced by the error.[72]

The *Olano* Court not only addressed the first question of when an appellate court may notice plain error, but also the second question of when it can grant relief for such an error. It stated that when an error meets the first three definitional requirements of plain error, an appellate court has the discretion to grant relief only if it determines that the error "seriously affects the fairness, integrity, or public reputation of judicial proceedings."[73] The Court explained:

> Rule 52(b) is permissive, not mandatory. If the forfeited error is 'plain' and 'affect[s] substantial rights,' the court of appeals has authority to order correction, but is not required to do so. The language of the Rule ('may be noticed'), the nature of forfeiture, and the established appellate practice that Congress intended to continue all point to this conclusion. 'In criminal cases, where the life, or as in this case the liberty, of the defendant is at stake, the courts of the United States, in the exercise of a sound discretion, may notice [forfeited error].'[74]

The Court further explained that the rule should be used "in those circumstances in which a miscarriage of justice would otherwise result."[75] The Court did not clarify the difference between this requirement and the third definitional requirement of plain error, that an error "affect substantial rights." If the two are truly distinct, the former must mean something more than simply an adverse impact on the result

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public reputation of judicial proceedings.' Indeed, it would be the reversal of a conviction such as this which would have that effect." *Id.*

[70] *Olano*, 507 U.S. at 734.

[71] *Id.*

[72] *Id.* The Court explained that "[t]his burden shifting is dictated by a subtle but important difference in language between the two parts of Rule 52. While Rule 52(a) precludes error correction only if the error 'does *not* affect substantial rights' (emphasis added), Rule 52(b) authorizes no remedy unless the error *does* 'affect substantial rights.'" *Id*. at 734-35. The Court ultimately found that the appellants had not carried their burden of showing the error had "affect[ed] substantial rights" and, therefore, declined to grant relief. *Id*. at 740-41.

[73] *Id.* at 735.

[74] *Id.* at 735-36.

[75] *Id.* at 736 (quoting United States v. Young, 470 U.S. 1, 15 (1985)).

of the trial. The Court attempted to explain this requirement by saying the term "miscarriage of justice" can mean either that the accused is actually innocent or that the error "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings."[76] However, this definition is just as expansive and oblique as "miscarriage of justice."

The Court emphasized the distinction between the "affects substantial rights" and the "miscarriage of justice" requirements in *Johnson v. United States*.[77] In that case, which involved a prosecution for perjury, the trial court itself decided the element of materiality, rather than submitting it to the jury as an element of the crime.[78] Because no objection was made to this procedure at trial, the issue was decided under a plain error analysis.[79]

Applying the *Olano* analysis, the Court found that the first two definitional elements of plain error were met; there was error that was plain.[80] It was the third definitional element, that the error affected the petitioner's substantial rights, where the real question arose.[81] The Petitioner argued that failure to submit an element of the offense to the jury was a "structural error."[82] Such structural errors, which have been defined as a "'defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself,'" are not subject to harmless error analysis and have been held to be prejudicial per se.[83] The Petitioner argued that such errors must also necessarily "affect substantial rights," and consequently that the third definitional requirement of the plain error analysis was also met in her case.[84]

The Court declined to decide that issue.[85] Instead, the Court held that, even assuming the error affected the Petitioner's substantial rights, it did not meet the "final requirement of Olano."[86] The Court reiterated that "[w]hen the first three parts of *Olano* are satisfied, an appellate court must then determine whether the forfeited error 'seriously affects the fairness, integrity or public reputation of judicial proceedings,' before it may exercise its discretion to correct the error."[87] The Court found that the evidence of materiality was "overwhelming" and that the element was "essentially uncontroverted at trial and has

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[76] *Id.* (quoting United States v. Atkinson, 297 U.S. 157, 160 (1936)).
[77] Johnson v. United States, 520 U.S. 461 (1997).
[78] *Id*. at 463.
[79] *Id.* at 466-67.
[80] *Id.* at 467-68.
[81] *Id.* at 468-69.
[82] *Id.*
[83] *See id.* at 468-69 (citing Arizona v. Fulminante, 499 U.S. 279, 310 (1991)).
[84] *Id* at 468.
[85] *Id.* at 469.
[86] *Id.*
[87] *Id.* at 469-70.

remained so on appeal."[88] It ruled that "[o]n this record there is no basis for concluding that the error 'seriously affected the fairness, integrity or public reputation of judicial proceedings.' Indeed, it would be the reversal of a conviction such as this which would have that effect. . . . No 'miscarriage of justice' will result here if we do not notice the error, and we decline to do so."[89]

The opinion in *Johnson* provides an illustration of the distinction between the third definitional requirement of plain error, that it "affected substantial rights" and the final requirement of a "miscarriage of justice" or "seriously affected the fairness, integrity or public reputation of judicial proceeding." The error in that case most likely "affected" the Petitioner's substantial right to a trial by jury on each element of the crime. However, the Court found that, even assuming that to be true, the error caused no miscarriage of justice. Consequently, the case supports the definitive conclusion that the third and fourth *Olano* requirements are separate and distinct.

In sum, to receive relief for an error not raised at trial in the federal system, an appellant bears the burden of demonstrating: (1) there was error; (2) the error was plain; and (3) the error affected substantial rights. A successful showing of these three requirements establishes "plain error" and triggers FED. R. CRIM P. 52(b), allowing an appellate court to take notice of the error that was otherwise forfeited. An appellate court must then determine whether a miscarriage of justice would result if relief were not granted for the error. Even if the court makes such a determination, it is still not required to grant relief under the federal system.

IV. APPLICATION OF PLAIN ERROR IN THE MILITARY JUSTICE SYSTEM

Due to the unique nature of the military justice system, the operation of plain error in the military is not identical to the federal system. To fully understand how the doctrine of plain error is applied in the military, a brief overview of the military appellate system is necessary.

A. Overview of the Military Appellate System

"The UCMJ (Uniform Code of Military Justice) was enacted in 1950 to expand military justice due process and blunt criticism that commanders exercised too much control over the court-martial process."[90] The architects of the UCMJ realized that a strong and

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[88] *Id.* at 470.
[89] *Id.*
[90] United States v. Bright, 60 M.J. 936, 938 (Army. Ct. Crim. App. 2005).

functioning appellate process was crucial to the success of any justice system.[91] Congress envisioned a system of "complete review" to ensure there were no substantial errors which led to a servicemember's conviction.[92] To accomplish this goal, they created an intricate procedure, with two levels of appellate courts, to ensure that an accused tried by court-martial received a fair trial.[93]

Article 66 of the UCMJ provides the basis for the first tier of review in the respective services' Courts of Criminal Appeals.[94] It requires that every case in which the convening authority approves a sentence that includes "death, dismissal of a commissioned officer, cadet, or midshipman, dishonorable or bad-conduct discharge, or confinement for one year or more" be referred to the Court of Criminal Appeals for review.[95] Thus, it is an automatic appeal based upon an appellant's sentence. Article 66(c) defines the scope of review for military Courts of Criminal Appeals, stating:

> In a case referred to it, the Court of Criminal Appeals may act only with respect to the findings and sentence as approved by the convening authority. It may affirm only such findings of guilty and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved. In considering the record, it may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses.[96]

The legislative history of the Code makes clear that the Courts of Criminal Appeals (formerly known as Boards of Review) were to be given broad powers, more extensive than normally enjoyed by civilian appellate courts, primarily as a check on command control of the justice process.[97] Professor Edmund Morgan, the Chairman of the Drafter's committee, stated in a hearing before the House Armed Services

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[91] *Hearing on H.R. 2498 Before the Subcomm. of the H. Armed Services Comm.*, 81st Cong., 1st Sess. (1949).
[92] *Id.*
[93] *Id.*
[94] UCMJ art. 66 (2005). Rules for Courts-Martial (R.C.M.) 1203(a) provides that "[e]ach Judge Advocate General shall establish a Court of Criminal Appeals composed of appellate military judges." MCM, *supra* note 18, R.C.M. 1203(a). These courts will be referred to collectively in this article as the Courts of Criminal Appeals.
[95] UCMJ art. 66(b).
[96] UCMJ art. 66(c).
[97] *Hearing on H.R. 2498 Before the Subcomm. of the H. Armed Services Comm.*, 81st Cong., 1st Sess. (1949).

Committee that these courts evaluate a case for correctness of fact, law, and sentence and need only approve so much of the findings or sentence as they think "entirely justified."[98] He stressed that servicemembers are given "very much more" opportunity for review of criminal trials than is received in civilian courts.[99]

Congressman Elston, a member of the Armed Services Committee during the hearings on the UCMJ, stated that an accused being tried in a military case should have "at least the same rights as in civil courts."[100] He said he wanted to be sure there was a review of the facts of the case, so there would be "no injustice done at all."[101] Congressman Elston stressed that a "complete review" was necessary in every qualifying case to see whether or not any error occurred and to ensure that substantial justice was done.[102]

The second tier of the military appellate process is review by the Court of Appeals for the Armed Forces (CAAF), formerly known as the Court of Military Appeals (CMA).[103] Article 67(a) provides that the CAAF shall review the record in:

> (1) all cases in which the sentence, as affirmed by a Court of Criminal Appeals, extends to death; (2) all cases reviewed by a Court of Criminal Appeals which the Judge Advocate General orders sent to the Court of Appeals for review; and (3) all cases reviewed by a Court of Criminal Appeals in which, upon petition of the accused and on good cause shown, the Court of Appeals for the Armed Forces has granted a review.

The third case is the most usual case, where an appellant, not wholly successful at the Court of Criminal Appeals, petitions the CAAF for review of the lower court's review. The CAAF may, in its discretion, grant appellant's petition for "good cause."

Article 67(c) defines the scope of review by the Court of Appeals for the Armed Forces, stating:

> In any case reviewed by it, the Court of Appeals for the Armed Forces may act only with respect to the findings and sentence as approved by the convening authority and as affirmed or set aside as incorrect in law by the

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[98] *Id.*
[99] *Id.*
[100] *Id.*
[101] *Id.*
[102] *Hearing on H.R. 2498 Before the Subcomm. of the H. Armed Services Comm.*, 81st Cong., 1st Sess. (1949).
[103] UCMJ art. 67 (2005).

> Court of Criminal Appeals. In a case which the Judge Advocate General orders sent to the Court of Appeals for the Armed Forces, that action need be taken only with respect to the issues raised by him. In a case reviewed upon petition of the accused, that action need be taken only with respect to issues specified in the grant of review. The Court of Appeals for the Armed Forces shall take action only with respect to matters of law.[104]

A crucial component of the military appellate process that applies to both levels of appeal is Article 59(a) which provides that "[a] finding or sentence of a court-martial may not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused."[105] This rule has been said to be essentially a rule of harmless error, much like that contained in FED. R. CRIM. P. 52(a).[106] Thus, when a military appellate court reviews an error which was raised at trial and determines that error has indeed occurred, it will then determine whether the error prejudiced appellant's substantial rights under Article 59(a).[107] Once the court determines that error has occurred, the burden is allocated to the government to prove that the error was harmless and did not prejudice appellant.[108]

The degree of proof required, and what constitutes "material prejudice" under Article 59(a) depends on the type of error, specifically whether it is constitutional or non-constitutional.[109] If the error is not one of constitutional dimension, the government must show simply that the error was harmless.[110] This means that the error did not have "substantial influence" on the findings.[111] "If so, or if one is left in grave doubt, the conviction cannot stand."[112] If the error is a violation of a constitutional right, the government must meet the higher burden of showing the error was "harmless beyond a reasonable doubt."[113] To meet this standard, the government must prove that it is "clear beyond a reasonable doubt that a rational jury would have found the appellant guilty absent the error."[114]

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[104] UCMJ art. 67(c).
[105] UCMJ art. 59(a).
[106] Ham, *supra* note 32, at 19.
[107] *Id.* at 12.
[108] *Id.*
[109] Ham, *supra* note 32, at 18.
[110] United States v. Pablo, 53 M.J. 356 (2000).
[111] *Id.*
[112] *Id.*
[113] *Id.*
[114] United States v. McDonald, 57 M.J. 18, 20 (2002).

B. History of the Plain Error Doctrine in the Military

Article 59(a) does not differentiate between errors that are forfeited by lack of objection and those that are preserved for review.[115] It requires that an appellate court find "material prejudice" before a court can reverse for any error.[116] Unlike the Federal Rules of Criminal Procedure, the military justice system has no codified general plain error rule, equivalent to FED. R. CRIM. P. 52(b), applicable to all types of errors.[117] However, the military appellate courts have recognized the need for, and applied, the concept of plain error since the inception of the UCMJ.[118]

The earliest military cases attempting to resolve the issue followed the reasoning of the Supreme Court in *United States v. Atkinson*.[119] For instance, in *United States v. Masusock*, the Court of Military Appeals adopted the federal rule that error not raised at trial would generally be considered "waived,"[120] but that an "exception exists in criminal cases where the alleged error would result in a manifest miscarriage of justice, or would 'seriously affect the fairness, integrity, or public reputation of judicial proceedings."[121] The court reasoned that "to hold otherwise would result in an inefficient appellate system, interminable delays in the final disposition of cases, and careless trial representation."[122] Likewise, in *United States v. Stephen*, the same court quoted the *Atkinson* language that appellate courts "may notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity, or public reputation of judicial proceedings."[123]

In *United States v. Fisher*, the court established what would become the foundation of the modern application of the doctrine of plain error in the military.[124] The military judge failed to instruct the members at the appellant's trial to vote on proposed sentences "beginning with the lightest," in violation of the Manual for Courts-Martial.[125] The court rejected its previous treatment of such omissions as "plain error *per se*, warranting the Court to overlook the absence of

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[115] UCMJ art. 59(a).
[116] *Id.*
[117] There are, however, rules which apply the plain error rule to specific situations. *See*, *e.g.*, MCM, *supra* note 18, Mil. R. Evid. 103(d), R.C.M. 920(f), R.C.M. 1005(f), R.C.M. 1106(f). *See infra* notes 130-136 and accompanying text.
[118] *See*, *e.g.*, United States v. Masusock, 1 C.M.R. 32 (C.M.A. 1951).
[119] 297 U.S. 157 (1936).
[120] *See supra* note 46.
[121] *Masusock*, 1 C.M.R. at 32.
[122] *Id.*
[123] United States v. Stephen, 15 U.S.C.M.A. 314, 317 (C.M.A. 1965).
[124] 21 M.J. 327 (C.M.A. 1986).
[125] *Id.* at 328.

defense objection," saying that such an approach was "flawed."[126] Instead, the court incorporated the Supreme Court's rulings in *Atkinson*, *Frady*, and *Young*, into military law, stating:

> In order to constitute plain error, the error must not only be both obvious and substantial, it must also have had an unfair prejudicial impact on the jury's deliberations. The plain error doctrine is invoked to rectify those errors that seriously affect the fairness, integrity or public reputation of judicial proceedings. As a consequence, it is to be used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result.[127]

This would remain the applicable standard in the military until the Court of Appeals for the Armed Forces revisited the issue in 1998 in *United States v. Powell*.[128]

C. Current Standard of Plain Error in the Military

1. *Manual for Courts-Martial*

While there is no codified, generally-applicable plain error rule in the military, the President has created a plain error rule for certain situations, pursuant to his powers under Article 36.[129] The most significant of these rules involves evidentiary rulings.[130] Military Rule of Evidence (MRE) 103(a) provides that error cannot be based on an evidentiary ruling unless it "materially prejudices a substantial right of a party" and the party makes a timely objection to the evidence.[131] MRE 103(d) states that "[n]othing in this rule precludes taking notice of plain

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[126] *Id.*
[127] United States v. Fisher, 21 M.J. 327, 328-29 (C.M.A. 1986).
[128] 49 M.J. 460 (1998).
[129] Article 36 provides:

> Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under [the UCMJ] triable in courts-martial, military commissions and other military tribunals, and procedures for courts of inquiry, may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with [the UCMJ].

UCMJ art. 36 (2005).
[130] MCM, *supra* note 18, MIL. R. EVID. 103(a).
[131] *Id.*

errors that materially prejudice substantial rights although they were not brought to the attention of the military judge."[132]

The rule was taken almost verbatim from Federal Rule of Evidence 103, which was in turn derived from FED. R. CRIM. P. 52(b).[133] Thus, federal case law interpreting those rules provides useful guidance in the application of plain error in military appellate courts. The President has also adopted the rules of forfeiture and plain error in the context of instructions, for both findings[134] and sentencing.[135] The rules have also been applied to errors in the Staff Judge Advocate's recommendation provided to the convening authority prior to the convening authority taking action on a case.[136]

2. *United States v. Powell*

While the Manual for Courts-Martial contains several applications of "plain error," it provides no definition of the term as it applies to the military appellate system. As in the federal system, the military appellate courts have interpreted the term to establish a standard for when it should be applied to otherwise forfeited error.[137] The Court of Appeals for the Armed Forces' seminal opinion in *United States v. Powell*[138] is routinely cited as establishing the current standard for plain error in the military.[139] The Court of Appeals for the Armed Forces granted review on the following issue:

> whether the lower court erred, as a matter of law, when it determined that, even though the sentencing testimony of the government's sentencing witnesses amounted to plain error, no relief was warranted because such error did not seriously affect the fairness,

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[132] *Id.*
[133] The only change is that the standard of "material prejudice" to substantial rights was inserted in sections (a) and (d) to parallel the language in Article 59(a). The standard in FED R. EVID. 103 is "affects substantial rights."
[134] MCM, *supra* note 18, R.C.M. 920(f) (providing that "[f]ailure to object to an instruction or to omission of an instruction before the members close to deliberate constitutes waiver of the objection in the absence of plain error").
[135] MCM, *supra* note 18, R.C.M. 1005(f) (providing that "[f]ailure to object to an instruction or to omission of an instruction before the members close to deliberate on the sentence constitutes waiver of the objection in the absence of plain error").
[136] MCM, *supra* note 18, R.C.M. 1106(f)(6) (providing that "[f]ailure of counsel for the accused to comment on any matter in the recommendation or matters attached to the recommendation in a timely manner shall waive later claim of error with regard to such matter in the absence of plain error").
[137] *See supra* notes 119-128 and accompanying text.
[138] 49 M.J. 460 (1998).
[139] *See infra* note 163.

> integrity, or public reputation of the court-martial, nor did it amount to a miscarriage of justice.[140]

In its opinion, the court further refined the issue, stating, "The granted issue requires us to decide whether the Court of Criminal Appeals correctly applied the plain error doctrine. Two subsidiary questions are involved: (1) What is 'plain error' in military appellate practice? and (2) If a Court of Criminal Appeals finds plain error, must it grant relief?"[141] The first question is a threshold issue of how to define plain error. The second question addressed the action that must be taken once the definitional threshold of plain error is met.

a. What Is Plain Error?

In analyzing the first question, the court emphasized that Courts of Criminal Appeals are given broad authority to review criminal convictions and sentences.[142] However, the scope of their review is

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[140] *Powell*, 49 M.J. at 461. In order to correctly understand the court's opinion in that case, it is important to first comprehend the opinion of the Navy-Marine Corps Court of Criminal Appeals that CAAF was reviewing. The court reviewed an issue relating to evidence, not objected to at trial, that was erroneously admitted during the presentencing hearing. United States v. Powell, 45 M.J. 637, 641 (N-M. Ct. Crim. App. 1997). The court applied the *Olano* standard for plain error and held:

> [I]t was error for the witnesses to provide the court-martial with several specific examples of inadmissible misconduct. That error is obvious. Because of the nature of the uncharged misconduct and because the trial judge indicated on the record before announcing the sentence that she considered the testimony of all three prosecution witnesses, without an indication that she excluded the inadmissible uncharged misconduct from her sentencing consideration, we conclude that the appellant has carried the burden of establishing the first three plain error elements. We conclude, therefore, that there is plain error.

Id. Despite this finding, the court declined to grant relief based on the fourth part of the *Olano* test. *Id.* Returning to the language in *Atkinson*, the court held that the plain error "did not seriously affect the fairness, integrity, or public reputation of the court-martial" and that correction of the error was not necessary to prevent a miscarriage of justice. *Id.* Accordingly, the court stated that "even though the assignment of error does have some merit in that we agree that plain error exists, corrective action is neither required nor warranted under the specific circumstances of this case." *Id.* In other words, the court found that the three definitional requirements of plain error under *Olano* were met (*i.e.*, there was error, that was plain or obvious, and that affected substantial rights), but that the fourth element (allowing a court to grant relief only to prevent a miscarriage of justice or where the error "seriously affects the fairness, integrity, or public reputation of judicial proceedings) was not.

[141] *Id.*

[142] *Id.* at 463

limited by both Article 66(c) and Article 59(a).[143] Article 66(c) restricts those courts in that they may only *affirm* the findings and sentence that they independently find "correct in law and fact" and that they "determine[], on the basis of the entire record, should be approved."[144] On the other hand, Article 59(a) dictates that they may only *reverse* if an error "materially prejudices the substantial rights of the accused."[145]

The court noted that review by the Courts of Criminal Appeals is not discretionary.[146] Instead, an independent review of the entire record is mandatory for all qualifying cases.[147] As a result, the court found that the Supreme Court's decisions in *Young*, *Olano*, and *Johnson* were of limited applicability to the Courts of Criminal Appeals because those cases were all decided in the course of discretionary review.[148] The court held that because of the "plenary authority of Article 66(c)" the Courts of Criminal Appeals are "not constrained from taking notice of [forfeited] errors by the principles of waiver and plain error."[149]

Despite finding that the threshold definitional requirements of plain error did not apply to the Courts of Criminal Appeals, and consequently the issue before it, the court went on to address the requirements for plain error in the military.[150] Specifically, the court discussed the requirements for the Court of Appeals for the Armed Forces to take notice of an otherwise forfeited error.[151] It concluded that "the military rules have a higher threshold than the federal rules in that they require plain error to 'materially prejudice' substantial rights. The waiver and plain error doctrines in military appellate practice are defined in Article 59(a), MRE 103, RCM 920(f), RCM 1005(f), and our decision in *Fisher*."[152]

b. When Must Relief Be Granted for Plain Error?

The court next turned to the second question – whether the Court of Criminal Appeals was required to grant relief if it found plain error.[153] The court began its analysis by reiterating that Courts of

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[143] *Id.* at 463, 464.
[144] *Id.* at 461.
[145] *Id.*
[146] *Id.*
[147] *Id.* at 464.
[148] *Id.* at 464-65. The court explained that "the policy underlying the constraining language of FED. R. CRIM P. 52(b), to avoid 'the pointless exercise of reviewing harmless plain errors,' is applicable only to appellate courts exercising discretionary review. Thus, it is inapplicable to Courts of Criminal Appeals, for whom an independent review of the entire record is mandatory." *Id.* at 464.
[149] *Id.*
[150] *Id.*
[151] *Id.*
[152] *Id.* at 461.
[153] *Id.*

Criminal appeals are not restricted by the concepts of waiver and plain error, but instead "must review errors that are asserted on appeal but not raised at trial and determine their impact, if any, on an appellant's substantial rights."[154] Because of this duty, the court said, "there is no question that the court below properly took notice of the asserted error in this case."[155]

Even though the Court of Criminal Appeals could have noticed the error without finding it was "plain error," it made a finding that plain error existed in the case.[156] As a result, the CAAF began its analysis by determining if the lower court used the correct standard to make this conclusion.[157] It started by saying that "[u]nder a plain error analysis, appellant had the burden of persuading the court that there was plain error."[158] The CAAF then distinguished between the elements of the definition of plain error and the prerequisite for granting relief for a plain error, explaining:

> In *Olano*, Justice O'Connor makes it clear that the definition of plain error under the federal rule has three elements, not four. ('The third and final limitation on appellate authority under Rule 52(b) is that the plain error "affect substantial rights.') The fourth element added by Chief Justice Rehnquist in *Johnson* does not change the definition of plain error, but instead, defines when a court may exercise its discretionary power to correct a plain error.[159]

The court also concluded that the third element of *Olano's* plain error definition is supplanted in the military by the requirement of Article 59(a).[160] It noted that Article 59(a) "parallels the third *Olano* element," but requires that "the error *materially prejudices* the substantial rights of the accused," rather than the *Olano* standard of "*affect* the substantial rights."[161] Because Article 59(a) requires a higher degree of prejudice than that required by *Olano*, the court held that the lower court's finding of plain error using the latter standard was not sufficient to meet the threshold definitional requirement in the military.

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[154] *Id.*
[155] *Id.*
[156] United States v. Powell, 45 M.J. 637, 641 (N-M. Ct. Crim. App. 1997).
[157] *Id.*at 464-65.
[158] *Id.* (citing United States v. Olano, 507 U.S. 725, 734 (1993)). The court noted that "[i]n cases involving constitutional error, the Government must convince an appellate court beyond a reasonable doubt that the error was not prejudicial." *Id.*
[159] *Id.*
[160] *Id.* at 465.
[161] *Id.* (emphasis added).

Because of this conclusion, the court never reached the question of whether a Court of Criminal Appeals must grant relief after finding the three definitional requirements of plain error exist (error, that is plain or obvious, and materially prejudices a substantial right).[162] The court also did not expressly address whether or how Chief Justice Rehnquist's "fourth element," which provides the threshold for when a court may grant relief once plain error is found, applies to the military.

Subsequent to *Powell*, the CAAF has interpreted the doctrine of plain error in the military as a three part standard requiring (1) error, (2) that is plain or obvious, and (3) that materially prejudices a substantial right of the accused.[163] The burden of persuasion in proving these elements is ostensibly on the appellant attempting to gain relief.[164] The fourth prong of the analysis, that relief be necessary to prevent a miscarriage of justice or because the error "seriously affected the fairness, integrity, or public perception of judicial proceedings" has all but disappeared from military jurisprudence.[165]

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[162] *Id.* at 465. After reviewing the lower court's holding, the CAAF did go on to do its own brief analysis of the issue. The court found:

> We agree with the court below that the error did not justify reversing appellant's sentence. While the testimony about appellant's repeated tardiness was inadmissible as evidence of specific conduct and prohibited on direct examination by RCM 1001(b)(5), it merely repeated what appellant admitted by his guilty pleas and his responses during the plea inquiry. The evidence of 'financial irresponsibility' and bad checks was used by defense counsel to argue that a bad-conduct discharge should not be imposed. Appellant's loss of his identification card might be characterized as neglect or misconduct, but was de minimis. Admission of the evidence falls short of the standard for prejudicial plain error established by Article 59(a) and *Fisher*.

Id.

[163] *See*, *e.g.*, United States v. Bungert, 62 M.J. 346, 348 (2006); United States v. Chapa, 57 M.J. 140, 143 (2002); United States v. Tyndale, 56 M.J. 209, 217 (2001); United States v. Robbins, 52 M.J. 455, 457 (2000); United States v. Cardreon, 52 M.J. 213, 216 (1999); United States v. Schlamer, 52 M.J. 80, 85-86 (1999); United States v. Smith, 50 M.J. 451, 456 (1999).

[164] *See*, *e.g.*, United States v. Bungert, 62 M.J. 346, 348 (2006); United States v. Chapa, 57 M.J. 140, 143 (2002); United States v. Tyndale, 56 M.J. 209, 217 (2001); United States v. Robbins, 52 M.J. 455, 457 (2000); United States v. Cardreon, 52 M.J. 213, 216 (1999); United States v. Schlamer, 52 M.J. 80, 85-86 (1999); United States v. Smith, 50 M.J. 451, 456 (1999).

[165] *See*, *e.g.*, United States v. Bungert, 62 M.J. 346, 348 (2006); United States v. Chapa, 57 M.J. 140, 143 (2002); United States v. Tyndale, 56 M.J. 209, 217 (2001); United States v. Robbins, 52 M.J. 455, 457 (2000); United States v. Cardreon, 52 M.J. 213, 216 (1999); United States v. Schlamer, 52 M.J. 80, 85-86 (1999); United States v. Smith, 50 M.J. 451, 456 (1999).

V. A CRITICAL EXAMINATION OF THE MILITARY PLAIN ERROR DOCTRINE

The CAAF's application of the doctrine of plain error after *Powell* has been uneven at best. The court has so expanded its interpretation of the rule that it no longer represents a doctrine to be used in exceptional circumstances, but is instead employed as a matter-of-course analysis in run of the mill cases. Furthermore, the court has treated the burden of proof requirement haphazardly, failing to always hold the defense accountable for not preserving errors at trial. Finally, even prior to *Powell*, the court undermined the Courts of Criminal Appeals status as courts of law by holding that those courts were not confined by the rules of forfeiture and plain error. All of these practices, taken together, damage the stability and efficiency of the military justice system.

The CAAF's current test for plain error has created an illusory standard that imposes no more scrutiny than ordinary appellate review. When an objection is made at trial, an appellate court reviews the record to determine if (1) there was error (2) that materially prejudiced the substantial rights of the accused.[166] If these prerequisites are met, it grants relief. When no objection is made at trial, military courts have generally followed the three part test for plain error, which requires that an appellant demonstrate (1) error; (2) that is plain; and (3) that materially prejudices the substantial rights of the accused.[167] If these perquisites are met, the reviewing court typically grants relief. The problem with the latter standard is that it really cannot be differentiated from the former.

The only additional requirement imposed by the current military plain error rule above normal appellate review is that the error be "plain" or "obvious." This part of the test is rarely an issue, as long as the record is sufficiently developed to support a conclusion that error actually occurred.[168] The court does not even always expressly address this prong of the analysis. For instance, in *United States v. Baker*, the accused was an eighteen year old airman charged with committing indecent acts with his girlfriend, a fifteen year old girl.[169] At trial, the

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[166] UCMJ art. 59(a) (2005).

[167] *See, e.g.*, United States v. Washington, 63 M.J. 418 (2006); United States v. Cary, 62 M.J. 277 (2006); United States v. Fletcher, 62 M.J. 175 (2005); United States v. Chapa, 57 M.J. 140 (2002); United States v. Tyndale, 56 M.J. 209 (2001); United States v. Wilson, 54 M.J. 57 (2000); United States v. Pfister, 53 M.J. 158 (2000); United States v. Robbins, 52 M.J. 455 (2000); United States v. Cardreon, 52 M.J. 213 (1999);United States v. Smith, 50 M.J. 451 (1999); United States v. Finster, 51 M.J. 185 (1999).

[168] *See Cardreon*, 52 M.J. at 217 (concluding that appellant had not carried his burden of showing an error, "much less a plain or obvious error" where "the record was not fully developed because of the absence of a timely objection").

[169] United States v. Baker, 57 M.J. 330, 333 (2002).

members asked the military judge whether they should consider the proximity in age between the accused and his girlfriend in determining whether the acts were indecent.[170] The military judge answered the question with the general instruction to "consider all the evidence you have."[171]

The CAAF found plain error because this was "clearly inadequate guidance for the members to decide the issue of indecency" and "the military judge's failure to completely instruct the members materially prejudiced appellant."[172] Yet the court never specifically addressed the requirements of plain error. As Judge Crawford asserted in her dissenting opinion, "[i]f there was error in this case, it was not plain error."[173] Likewise, Judge Baker noted in his dissent, "This is a plain error case, yet the majority never defines the term. As a result, it is not clear how the majority arrives at its plain error conclusion."[174] The court's analysis in *Baker* is virtually indistinguishable from normal review in accordance with Article 59(a).[175] Unfortunately, this illusory analysis has become common for purported plain error cases.

Additionally, the heart of plain error is that it places the burden of persuasion on the appellant to demonstrate that plain error exists.[176] Yet, the CAAF's application of the doctrine has not scrupulously honored this requirement. In some instances, the court has placed a burden on the government, particularly in cases dealing with constitutional errors. In other cases, the court has omitted any discussion or analysis of the appropriate burden of proof.

Where the CAAF analyzes an unpreserved error that rises to the level of a constitutional violation, it applies a modified version of the doctrine of plain error. In such cases, the CAAF defines the standard as follows:

> To prevail under a plain error analysis, Appellant must show that: (1) there was an error; (2) it was plain or obvious; and (3) the error materially prejudiced a substantial right. If Appellant meets his burden of showing plain error, the burden shifts to the Government to prove that any constitutional error was harmless beyond a reasonable doubt.[177]

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[170] *Id.* at 331.
[171] *Id.*
[172] *Id.* at 331, 336.
[173] *Id.* at 337 (Crawford, J., dissenting).
[174] *Id.* at 343 (Baker, J. dissenting).
[175] *See also* United States v. Brown, 50 M.J. 262 (1999).
[176] United States v. Olano, 507 U.S. 725, 734-35 (1993).
[177] United States v. Magyari, 63 M.J. 123 (2006). *See also* United States v. Carpenter, 51 M.J. 393, 396 (1999).

The difficulty with this standard is that the court has previously held that prong three of the analysis, "material prejudice to a substantial right," means that the error had an unfair impact on the result of the proceeding.[178] Therefore, if an appellant is successful in showing that plain error exists, he has necessarily demonstrated that the error had an unfair impact on the verdict. Once this conclusion has been reached, it would be logically and legally impossible for the government to ever show the error was harmless beyond a reasonable doubt.

The court has glossed over this logical flaw by essentially merging the third definitional prong of plain error with the harmless error analysis. In *United States v. Carter*, the court analyzed a trial counsel's repeated improper argument that the government's case was "uncontradicted and uncontraverted."[179] Because there was no objection to the argument at trial, the court used the plain error analysis, with the same shifting burden described above.[180] In addressing the "material prejudice" requirement, the court stated that "[t]he third prong of *Powell* asks whether the error materially prejudiced Appellee's substantial rights. In the context of a constitutional error, the burden is on the Government to establish that the comments were harmless beyond a reasonable doubt."[181] As *Carter* demonstrates, the court has effectively placed the burden of proof regarding prejudice on the government for plain constitutional errors.

In addition to cases burdening the government with proving that an error was harmless beyond a reasonable doubt, the court has, at times, failed to allocate the burden at all. In *United States v. Fletcher*,

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[178] In two opinions issued on the very same day, the CAAF in fact defined prong three of the plain error analysis alternatively as an "unfair prejudicial impact on the [members] deliberations," United States v. Bresnahan, 62 M.J. 137 (2005) (citing United States v. Powell, 49 M.J. 460, 463 (1998)) and as error that "materially prejudiced Appellant's substantial rights." United States v. Hays, 62 M.J. 158, 166 (2005) (citing *Powell*, 49 M.J. at 463-65). Accordingly, it appears that the two phrases are used interchangeably with equivalent meaning in the military justice system.

[179] 61 M.J. 30, 32 (2005).

[180] *Id.* at 33. The court cited R.C.M. 919(c) for the proposition that, in the absence of objection to improper argument, it reviews such issues for plain error. However, R.C.M. 919(c) provides that "[f]ailure to object to improper argument before the military judge begins to instruct the members on findings shall constitute waiver of the objection." MCM, *supra* note 18, R.C.M. 919(c). In stark contrast to MIL. R. EVID. 103(d), R.C.M. 920(f), and R.C.M. 1005(f), the rule contains no exception for plain error. *Id.* Given that the President has specifically provided for such an exception in other instances, yet elected not to do so in this context, the court arguably overstepped its authority in reviewing the trial counsel's argument, rather than finding that the error was waived in accordance with the rule. It is important to note that even in situations requiring a strict application of the waiver rule, an appellant is not entirely without relief. Where the defense counsel's failure to object waives appellate review of a prejudicial error, an appellant can receive relief through the doctrine of ineffective assistance of counsel. *See supra* note 40.

[181] *Carter*, 61 M.J. at 35.

the CAAF again addressed a case concerning improper argument by the trial counsel.[182] The accused was charged with wrongful use of cocaine, based upon two positive urinalysis results.[183] During closing argument, the trial counsel made disparaging comments about the accused[184] and his counsel,[185] personally vouched for evidence and her belief in the accused's guilt,[186] and compared appellant's case to the legal problems of various public figures.[187]

The court reiterated that "[p]lain error occurs when (1) there is error, (2) the error is plain or obvious, and (3) the error results in material prejudice to a substantial right of the accused."[188] Notably, there was no discussion of which party has the burden of persuasion.[189] After finding repeated instances of "plain and obvious error" in the trial counsel's argument,[190] the court turned to the issue of prejudice.[191]

To assess the impact of the improper argument, the court stated that "prosecutorial misconduct by a trial counsel will require reversal when the trial counsel's comments, taken as a whole, were so damaging that we cannot be confident that the members convicted the appellant on

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[182] United States v. Fletcher, 62 M.J. 175, 179 (2005).
[183] *Id.* at 178.
[184] The trial counsel argued that the accused had "zero credibility" and that his testimony was "utterly unbelievable." *Id.* at 182. The court found that, while trial counsel could properly comment on the accused's credibility, it was improper for her to "use the language that she did, language that was more of a personal attack on the defendant than a commentary on the evidence." *Id.* at 183. However, the court found that "her comments were not so obviously improper as to merit relief in the absence of an objection from counsel" and therefore did not rise to the level of plain error. *Id.*
[185] Trial counsel "openly criticized defense counsel by accusing him of scaring witnesses, cutting off witnesses and suborning perjury from his own client." *Id.* at 181. She also "made comments suggesting that Fletcher's defense was invented by his counsel." *Id.* The defense counsel objected to the former comments, but not the latter. *Id.* at 182. The court found that these comments "were less incendiary than her other comments and carried with them a greater likelihood of having been provoked. Yet when combined with the erroneous comments made about defense counsel's style, the trial counsel's other comments disparaging defense counsel constitute error that was plain and obvious." *Id.* at 183.
[186] Trial counsel referred to the government's evidence as "unassailable," "fabulous," and "clear." *Id.* at 180. With regard to the accused's guilt, the trial counsel argued that "it's so clear from the urinalysis that he was doing it over and over," "He clearly is a weekend cocaine user," and "He is in fact guilty of divers uses of cocaine." *Id.* The court found that these errors were "plain," "blatant," and "obvious." *Id.* at 181.
[187] In response to defense witnesses who testified about the accused's participation in church activities, the trial counsel argued that religion is not an indicator of law abidingness. *Id.* at 178-79. She referenced figures such as Jesse Jackson, Jerry Falwell, Jim Bakker, Dennis Quaid, Matthew Perry, and Robert Downey, Jr. as examples of those who were religious or had done "good work," but who still had moral or legal trouble. *Id.* The court found that this was plain and obvious error. *Id.* at 184.
[188] *Id.* at 179.
[189] *Id.*
[190] *See supra* notes 187-189 and accompanying text.
[191] *Fletcher*, 62 M.J. at 184.

the basis of the evidence alone."[192] The court found that "the trial counsel's improper comments permeated her entire findings argument."[193] The court also stated that "[t]he military judge's curative efforts were minimal and insufficient to overcome the severity of the trial counsel's misconduct."[194] The military judge gave a "generic" limiting instruction before argument that "what the attorneys say is not evidence" and "on a single occasion during the findings argument, the military judge chastised the trial counsel for her personal attacks on defense counsel."[195] The court held that "[t]his single rebuke was not curative and was not enough to remedy the trial counsel's severe and pervasive misconduct."[196]

The court found that the government's case rested solely on the two positive urinalysis results and that the defense evidence of the accused's religious and family life "could reasonably have raised questions in the members' minds about the strength of the prosecution's evidence."[197] The court held that it could not be "confident that the members convicted Fletcher on the basis of the evidence alone."[198] As a consequence, the court found that the errors were "materially prejudicial to Fletcher's substantial rights under both Article 59(a) and the plain error doctrine" and reversed the findings and sentence.[199]

The flaw in the court's holding is that it never placed the burden of persuasion on the appellant to demonstrate that plain error occurred. Its finding essentially amounted to a ruling that, despite the defense failure to object, appellant was entitled to relief because the court could not be sure there was no prejudice. Essentially, for the government to prevent the appellant from getting relief for improper argument that was not objected to at trial, it had to affirmatively show a lack of prejudice. On the contrary, if the court had properly enforced the burden of proof for plain error, the appellant would have been required to affirmatively establish prejudice.[200]

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[192] *Id*. at 184.
[193] *Id.*
[194] *Id.* at 185.
[195] *Id.*
[196] *Id.*
[197] *Id.*
[198] *Id.*
[199] *Id.*
[200] In subsequent cases dealing with improper argument, the court has initially allocated the burden of establishing the three elements of plain error to the appellant. *United States v. Erickson*, 65 M.J. 221 (2007); *United States v. Schroder*, 65 M.J. 49 (2007). However, the court has continued to analyze the third requirement by the test of whether the argument was "so damaging that [the court] cannot be confident that the members convicted the appellant on the basis of the evidence alone" articulated in *Fletcher*. *Id*. While the government prevailed in both cases, it was because there was an affirmative finding of no prejudice, rather than because the appellant failed to carry his burden of proof. *See id*.

The result of failing to hold the appellant to his burden was that the court never imposed any consequence on the defense for failing to object to the "egregious" misconduct by the trial counsel. The court placed great weight on its conclusion that the military judge did not take sufficient curative measures, without considering that this was likely because the defense never objected. As the court noted, "[t]he military judge did not make any effort to remedy any misconduct *other than the few statements to which defense counsel objected*."[201] The court failed to recognize that, if the defense counsel had objected, the military judge would likely have taken greater curative measures at trial, or stopped the argument altogether. One of the primary reasons counsel are required to lodge an objection in order to preserve an error is to provide the trial court with the opportunity to correct the error at that level, making an appeal on the issue unnecessary.[202] In not holding the appellant to the required burden, the court rewarded the defense for failing to take action at the trial level.[203]

Fletcher was a close case on the prejudice issue. While the prosecutor certainly crossed the line during her argument, the government's case was founded on not one, but two urinalysis tests that were positive for cocaine. The defense, on the other hand, rested solely on a good character defense, with no explanation for how appellant could have tested positive twice. While it is possible that the panel members were swayed by the improper argument, it is equally possible that they were firmly convinced of the accused's guilt from the beginning and that trial counsel's comments about Jerry Falwell and Robert Downey, Jr. had no effect on them.

It is in just such a case where the allocation of the burden of persuasion is crucial to determining the result. As the Supreme Court said in *Olano*, "[w]hether the Government could have met its burden of showing the absence of prejudice . . . if respondents had not forfeited their claim of error, is not at issue here. This is a plain-error case, and it is respondents who must persuade the appellate court that [the error] was prejudicial."[204] The CAAF's failure to enforce this burden undermines the very essence of the plain error rule—holding the defense accountable for failing to object to an error at trial—and divests the rule of any difference from ordinary appellate review. Had the court held the appellant to the proper standard, the result of the case might have been different.

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[201] *Id.* (emphasis added).
[202] SALTZBURG, SCHINASI, AND SCHLUETER, *supra* note 23.
[203] *See also* United States v. Haney, 64 M.J. 101, 105 (2006) (quoting *Fletcher* for the definition of plain error and failing to discuss the burden of proof, but not finding plain error).
[204] United States v. Olano, 507 US 725, 741 (1993).

Finally, the CAAF has consistently held that the doctrines of waiver and plain error place no constraints on the Courts of Criminal Appeals, but that those courts should be guided only by the "interest of justice."[205] This conclusion is based on the courts' "plenary review authority granted by Article 66(c)."[206] As has been discussed previously, Article 66(c) provides a Court of Criminal Appeals with broad appellate authority and mandates that it only affirm so much of the findings and sentence as it finds "correct in law and fact."[207] The CAAF has stated that "[a] clearer carte blanche to do justice would be difficult to express."[208] It defined the scope of review in such cases as follows:

> If the [Court of Criminal Appeals], in the interest of justice, determines that a certain finding or sentence should not be approved – by reason of the receipt of improper testimony or otherwise – the court need not approve such finding or sentence. Of course, in the converse situation, where plain error is present, the [Court of Criminal Appeals] may not rely on waiver.[209]

This policy essentially makes the interest of an accused in receiving an error-free trial paramount, while all but ignoring the government's interest in the finality of the judgment. Essentially, the CAAF decided that the judicial economy rationale behind the plain error rule, avoiding review of harmless plain errors, is not applicable to the Courts of Criminal Appeals because they have an independent duty to review the entire record.[210] However, this conclusion provides no incentive for the defense to make objections at trial and undercuts an opportunity to correct or prevent errors at their inception.

VI. PROPOSAL FOR UNIFORM STANDARD

Appellate review in the military justice system was intended to provide a convicted accused with a complete review of his trial to ensure he was convicted in a fair and impartial proceeding. However, it is important to remember the two competing interests in appellate review: finality and justice. While a liberal application of the doctrine

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[205] United States v. Powell, 49 M.J. 460, 464 (1998); United States v. Claxton, 32 M.J. 159, 161 (C.M.A. 1991).
[206] *Claxton*, 32 M.J. at 162.
[207] UCMJ art. 66(c) (2005).
[208] *Claxton*, 32 M.J. at 162.
[209] *Id.*
[210] *Powell*, 49 M.J. at 464.

of plain error could arguably promote the latter, it eviscerates the former. As one commentator has noted:

> The courts should be careful to remember that there are two parties to the suit, and that the application of the exception in most instances will not be 'fair' or 'just' with regard to the state. An exaggerated regard for the rights of the individual would have serious ramification, and it might hamstring the entire system.[211]

A. Courts of Criminal Appeals Should Apply Plain Error

Contrary to the conclusion of the CAAF, adherence to the rules of forfeiture and plain error would not cause the Courts of Criminal Appeals to affirm a finding or sentence that was otherwise incorrect. On the contrary, in Article 36, Congress has granted the President the power to establish rules of pretrial, trial, and post-trial procedure and modes of proof for cases triable by courts-martial under the UCMJ.[212] Such rules "shall, so far as [the President] considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with [the UCMJ]."[213] The rules dictating that an issue is "waived," absent plain error, where an objection is not made, such as MRE 103, RCM 920(f), RCM 1005(f), and RCM 1106(f), are exactly the type of procedural rules Congress has given the President the power to promulgate. They establish rules of procedure defining the boundaries and standards for appellate review.

Furthermore, the rules are not inconsistent with the UCMJ. The rules simply provide more detailed guidance for when an error can render a finding or sentence incorrect. Before a finding or sentence can be rendered incorrect by certain errors, the President has mandated that the defense must either lodge an objection or carry its burden of establishing plain error on appeal.[214] Therefore, the rules promulgated by the President should apply with equal force to the Courts of Criminal Appeals. As Judge Sullivan articulated in his dissenting opinion in *Claxton*:

> [The majority's] expansive interpretation of Article 66(c), Uniform Code of Military Justice . . . has created a court of equity, not law. Admittedly, a service appellate court has extraordinary factfinding powers

[211] Gillespie, *supra* note 30, at 58.
[212] UCMJ art. 36 (2005).
[213] *Id.*
[214] *See supra* notes 130-136 and accompanying text.

> and unique sentence-assessment power. However, . . . when it purports to decide questions of law, it should be bound by rules of law like any other court.[215]

Courts of Criminal Appeals can still properly conduct a review of the entire record as required by Article 66(c) even if they apply the rules of forfeiture and plain error. Those rules simply mean that a failure to object will, in most cases, prevent an error from rendering a finding or sentence incorrect within the meaning of Article 66(c).

B. Standard for Application of the Plain Error Doctrine Should Be Heightened

The plain error remedy was intended for rare and exceptional circumstances when it was the last resort to prevent a grave injustice.[216] Consequently, a heightened requirement should be mandated before an appellant can escape the consequences of failing to preserve an issue at trial. This is accomplished in the federal system through the fourth prong of *Olano*; requiring that even where the appellant carries his burden of establishing plain error, a court may not grant relief unless it is necessary to correct a miscarriage of justice.[217] This requirement was originally present in military jurisprudence, as evidenced by the CAAF's opinion in *Fisher*.[218] In discussing the doctrine, the court said:

> [I]n order to constitute plain error, the error must not only be both obvious and substantial, it must also have had an unfair prejudicial impact on the jury's deliberations. The plain error doctrine is invoked to rectify those errors that seriously affect the fairness, integrity, or public reputation of judicial proceedings. As a consequence, it is to be used sparingly, *solely* in those circumstances in which a miscarriage of justice would otherwise result.[219]

This language clearly incorporated the "fourth element" into the military application of plain error, requiring an additional finding prior to the grant of relief. However, this requirement has all but disappeared in military jurisprudence.

Because resort to the doctrine of plain error was intended to be such an extraordinary remedy, CAAF should return to the four step

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[215] United States v. Claxton, 32 M.J. 159, 165 (C.M.A. 1991) (Sullivan, J., dissenting).
[216] United States v. Fisher, 21 M.J. 327, 328-29 (C.M.A. 1986).
[217] United States v. Olano, 507 U.S. 725, 741 (1993)
[218] *Fisher*, 21 M.J. at 328-39.
[219] United States v. Fisher, 21 M.J. 327 (C.M.A. 1986) (emphasis added).

analysis delineated in *Olano* and *Johnson*, while making adjustments for the requirements of Article 59(a). When reviewing an error not raised at trial, the appellant should have to prove (1) error; (2) that is plain or obvious; and (3) that materially prejudiced his substantial rights. Only if the appellant meets this definitional hurdle of establishing plain error should the court take notice of the error and determine if relief is in fact warranted.

A court should only grant relief in cases where it determines that the "fourth element" is satisfied: that the error "seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings."[220] However, no case has provided practical guidance as to what this standard actually should mean. Given that the "material prejudice" requirement of Article 59(a) has been said to be parallel to the third requirement in *Olano*, this "fourth element" must mean something more than "material prejudice to substantial rights." As one military court has explained:

> As an exceptional remedial measure, the plain error rule should be used only in exceptional circumstances to prevent great miscarriages of justice. Because some errors, though prejudicial, will not create great miscarriages of justice, it necessarily follows that all prejudicial errors do not rise to the level of plain error.[221]

If the standard is higher than merely prejudicial, the question remains then what is sufficient to allow relief for a plain error.

Returning to the original source of the language, the Supreme Court's decision in *United States v. Atkinson*, the context of the quote provides some illumination. The Court stated that review of errors not preserved at trial should be taken "in exceptional circumstances" and "in the public interest."[222] This reference to the "public interest," viewed in light of the protection against injury to the "fairness, integrity, or public reputation of judicial proceedings," indicates that it is not the accused's interest that is paramount when reviewing such errors. Instead, it is the prevention of the degradation of the effectiveness of the judicial system as a means for seeking and implementing justice. This requires a last balancing of the two competing interests in appellate review: finality and justice. An appellate court must ask itself if the error is so egregious, and so shocking to the judicial conscience, that society's need for justice warrants the capitulation of its interest in finality.

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[220] *See* United States v. Atkinson, 297 U.S. 157 (1936).
[221] United States v. Bolden, 16 M.J. 722 (A.F.C.M.R. 1982).
[222] *Atkinson*, 297 U.S. at 157.

This conclusion is consistent with the Supreme Court's description of plain error in *Frady* that "recourse may be had to the [rule] only on appeal from a trial infected with error so 'plain' the trial judge and prosecutor were derelict in countenancing it, even absent the defendant's timely assistance in detecting it."[223] Performance by a judge that can be characterized as "derelict" surely undermines the integrity of the judicial system. As the Court of Military Appeals has said in the context of the military, "Although the Military Rules of Evidence were intended to place additional responsibility upon trial and defense counsel, we do not believe that they meant to provide a license for slipshod performance by military judges."[224]

The significance of the fourth requirement of the plain error analysis can be seen by examining a recent CAAF opinion granting relief based on a finding of plain error. In United States v. Brooks, the court addressed an issue regarding "human-lie detector testimony."[225] The accused was charged with improper sexual activities with a five year old child.[226] Dr. Acklin, an expert in the field of clinical psychology, testified on redirect that false allegations generally occur in only about two to five percent of these types of cases.[227]

The court found that the error was plain or obvious.[228] In deciding whether the third requirement of material prejudice to a substantial right[229] was met, the court found that "several factors weigh against concluding that the members were unaffected by Dr. Ackin's quantification of the victim's probable truthfulness. This case hinged on the victim's credibility and medical testimony. There were no other direct witnesses, no confession, and no physical evidence to corroborate the victim's sometimes inconsistent testimony."[230] The court found that there was plain error because:

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[223] United States v. Frady, 456 U.S. 152, 163 (1982).
[224] United States v. Dyke, 16 MJ 426 (C.M.A. 1983).
[225] United States v. Brooks, 64 M.J. 325, 328 (2007). The issue in *Brooks* was similar to that in *United States v. Birdsall*, discussed at the beginning of this article. *See infra* notes 2-20 and accompanying text.
[226] *Brooks,* 64 M.J. at 327.
[227] *Id.*
[228] *Id*. at 329.
[229] The court initially allocated the burden of proof properly, stating "we must next determine whether Brooks has sustained his burden of demonstrating that the error materially prejudiced his substantial rights." *Id.* However, the court's statements indicating that the evidence "may have" impacted the members' findings and that they could not find that the members "were not" swayed by the evidence indicates that the burden was placed back on the government. Instead, the court should have concluded that the evidence *did* have an impermissible impact and that the members *were* swayed by the evidence.
[230] *Id*. at 330. The court noted that the military judge had given one instruction to disregard one of Dr. Acklin's other comments and that the military judge had given an instruction on credibility.

> Any impermissible evidence reflecting that the victim was truthful *may have* had particular impact upon the pivotal credibility issue and ultimately the question of guilt. . . . [W]e cannot say with any confidence that the members *were not* impermissibly swayed and thus that they properly performed their duty to weigh admissible evidence and assess credibility. Concerning similar human lie detector testimony, we have noted that the military judge must issue prompt cautionary instructions to ensure that the members do not make improper use of such testimony. Brooks had the substantial right . . . to have the members decide the ultimate issue . . . without the members viewing [the victim's] credibility through the filter of an expert's view of the victim's credibility. In this case, admitting the expert testimony quantifying the victim's credibility was plain error.[231]

Thus, the court never applied the fourth prong of the plain error analysis to the case. Even assuming that the third requirement was met because the accused suffered material prejudicial to his substantial right to have the members decide the ultimate issue of his guilt, the fourth prong arguably was not. Several facts of the case support an argument that relief should not have been granted under the four prong plain error analysis.

First, the military judge gave an instruction to the members regarding the testimony, telling them, "To the extent that you believed that Dr. Acklin testified or implied that he believes the alleged victim, that a crime occurred, or that the alleged victim is credible, you may not consider this as evidence that a crime occurred or that the alleged victim is credible."[232] While the court apparently focused on the fact that the instruction was not given promptly after the testimony, it failed to take into consideration that a defense objection would likely have triggered a more immediate response.[233]

Moreover, the expert testimony in Brooks was not conclusive on the question of guilt. The expert testified that there was only a two to five percent chance that the alleged victim was fabricating the story.[234]

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[231] *Id*. (emphasis added).
[232] *Id.* at 327.
[233] *Id.* at 330.
[234] *Id.* at 327. The expert in *Birdsall*, on the other hand, testified that the victim's allegations against their father were neither unfounded or coached and that in her opinion the boys were victims of incest. United States v. Birdsall, 47 M.J. 404, 408

While this testimony was certainly damaging, when viewed together with the limiting instruction eventually given by the military judge it does not necessarily equate to a miscarriage of justice.

The court essentially analyzed the case exactly as it would have if the error had been objected to at trial. The court should ensure that the defense is both held to its burden of establishing plain error and, even when the burden is met, ensure that reversal is necessary to prevent a miscarriage of justice. Straightforward application of the current standard enunciated by the CAAF renders the actions of defense counsel at trial and on appeal completely irrelevant to the determination as to which errors are noted on appeal and which are ignored. Such hyper-paternalism on appeal is inconsistent with—and may actually deter—the development of a zealous and competent defense bar within the military justice system, and reduces the appellate process to "a hunt for error," like a law school examination. A four prong plain error analysis would allow a more meticulous and predictable balancing of the interests of finality and justice.

C. The President Should Adopt a Rule Similar to FED R. CRIM. P. 52(b)

As discussed previously, the President has used his authority pursuant to Article 36 to provide for forfeiture and plain error only in certain circumstances. In lieu of this piecemeal application of plain error, the President should adopt a uniform rule analogous to FED R. CRIM. P. 52(b). Such a rule would ensure even application of the doctrine for all potential errors arising at trial. It would also allow the Courts of Criminal Appeals to apply the rules consistently with all other federal courts, while maintaining compliance with Article 66(c).

The President should begin by adding a definition of the term "plain error" in RCM 103, which provides the definition and rules of construction for terms used in the Manual for Courts-Martial.[235] The definition would state: "'Plain error' means (a) error; (b) that is plain or obvious; and (c) that materially prejudices substantial rights." This would establish the threshold requirements for finding plain error.

The President should also define the burden of proof and when relief can be granted in both RCM 1203 (Review by a Court of Criminal Appeals) and RCM 1204 (Review by the Court of Appeals for the Armed Forces).[236] The rule, which should be identical in each case because the doctrine of plain error should be applied uniformly at both levels of appellate review,[237] should read as follows:

(1998). The court made no reference to a limiting instruction or any corrective action by the military judge.

[235] MCM, *supra* note 18, R.C.M. 103.

[236] MCM, *supra* note 18, R.C.M. 1203, R.C.M. 1204.

[237] *See supra* notes 216-219 and accompanying text.

> A finding or sentence may not be held incorrect on the basis of an error that was not objected to at trial unless an accused establishes that:
>
> (1) the error constitutes "plain error;" and
>
> (2) the error seriously affected the fairness, integrity, or public reputation of judicial proceedings

Adoption of this rule would provide an appropriate balance of the government's interest in finality and the general need for justice. It would also ensure equal application of the doctrine of plain error in all military appellate courts.

VI. CONCLUSION

The doctrine of plain error was intended to be an extraordinary remedy to prevent miscarriages of justice. However, the current application of the doctrine in the military has transformed it into an empty principle requiring no more in depth review than an error that was vigorously objected to at trial. This practice essentially turns the military appellate process into nothing more than a process in equity, where the appellate courts can review any issue, without regard to the treatment of the issue at trial.[238]

In order to preserve their status as courts of law, military appellate courts must adhere to structured standards of review when taking notice of and granting relief for errors which were not preserved at trial. As the Supreme Court has said, "any unwarranted extension of [the] exacting definition of plain error would skew the [r]ule's 'careful balancing of our need to encourage all trial participants to seek a fair and accurate trial the first time around against our insistence that obvious injustice be promptly redressed.'"[239]

Adherence to the proposed rule will strictly hold the defense accountable for failing to object to an error at trial, thereby forgoing an opportunity to correct the error at its inception. On the other hand, it gives appellate courts enough flexibility in their review authority to correct errors that were so egregious and prejudicial that the onus was on all parties to the trial to take action to ensure an accused received a fair trial.

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[238] Robert J. Martineau, *Considering New Issues on Appeal: The General Rule and the Gorilla Rule*, 40 VAND. L. REV. 1023, 1026 (1987).
[239] United States v. Young, 470 U.S. 1, 15 (1985).

The result would have been no different for Master Sergeant Birdsall under a more structured analysis. The defense certainly would have been able to establish that there was error, which was plain, and materially prejudiced his substantial rights. Moreover, using an expert, who was purportedly qualified to tell the difference between "founded" and "unfounded" allegations of sexual abuse, to testify that in her professional opinion an accused had sexually abused his children seriously affected the fairness, integrity, and public reputation of judicial proceedings. In his case, the interest of justice would have prevailed over the interest of finality and rightfully so.

ISLAMIC "PURSE STRINGS": THE KEY TO THE AMELIORATION OF WOMEN'S LEGAL RIGHTS IN THE MIDDLE EAST

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Now there was a time when they used to say
That behind every - "great man."
There had to be a - "great woman."
But in these times of change you know
That it's no longer true.
So we're comin' out of the kitchen
'Cause there's somethin' we forgot to say to you (we say)

Sisters are doin' it for themselves.
Standin' on their own two feet.
And ringin' on their own bells.
Sisters are doin' it for themselves.[1]

I. INTRODUCTION

"Women in Gulf Arab states hold billions of dollars in assets, and banks are only beginning to capitalize on this rich market niche."[2] In early 2006, after a recitation from the Holy Quran, women from all around the Arab world opened the inaugural "Women's Expo" heralding in a new voice of economic empowerment in the Middle East.[3] Even more recently, in addition to loans for women, the First Gulf Bank in Abu Dhabi (one of the UAE's leading financial institutions) created a "ladies only" Visa credit card.[4]

This trend towards a greater financial power for women in the Middle East is nothing new. It does however signal a change in a more important area: *women's basic human rights*. As women gain a greater stronghold economically in the Arab world, so too will they gain fundamental human rights.

Certainly the world is aware of the discrimination and *de facto* gender apartheid of countries such as Saudi Arabia.[5] But, when Islam was first founded, it was readily apparent that the Prophet Mohammad strived to give women greater rights.[6] In fact, advances made with regard to women of the time were considered very progressive.[7]

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[1] THE EURYTHMICS AND ARETHA FRANKLIN, SISTERS ARE DOIN' IT FOR THEMSELVES, (RCA Records 1985), lyrics *available at* http://www.codehot.co.uk/lyrics/efgh/eurythmics/sisters.htm (last visited Feb. 2, 2008).
[2] Financial Times Information, *Africa/Mid-East: The Arab Businesswoman-A Lucrative Niche*, GLOBAL NEWS WIRE, Apr. 4, 2002.
[3] Seema Shafi, *Women Urged to Become Economically Strong*, BUSINESS RECORDER, Apr. 16, 2006.
[4] Financial Times Information, *First Gulf Bank Launches Women's Ultimate Financial Friend*, GLOBAL NEWS WIRE, Sep. 17, 2006.
[5] Colbert L. King, *Saudi Arabia's Apartheid*, WASHINGTON POST, Dec. 22, 2001 at A23.
[6] KAREN ARMSTRONG, ISLAM: A SHORT HISTORY 16 (2002).
[7] *Id.*

Today, based on the progress women have made in their own right, certain fundamental human rights are beginning to be recognized. Whether the 2005 Kuwaiti recognition of a woman's right to vote[8] is based on this economic progress or on some other international pressure is hard to say, but arguably the trend towards increased women's rights tracks the growth of Arab women's spending power. This article will attempt to prove just that.

Irrespective of just how repressive the world may claim Islamic law to be, it does grant women significant legal economic rights. Harnessing these rights has led to significant advances for women, and an increased understanding of them could prove to advance these human rights even further.

II. THE EVOLUTION OF ISLAMIC LAW PROPERTY RIGHTS OF WOMEN

From the very beginning of Islam, women were afforded significant rights. In fact, "[t]he emancipation of women was a project dear to the Prophet's heart. The Quran gave women rights of inheritance and divorce centuries before Western women were accorded such status."[9] Women also held leadership positions within the *ummah* (collective group or nation), and even fought alongside men in battle.[10] As Ms. Armstrong explained, "[Early Muslim women] did not seem to have experienced Islam as an oppressive religion, though later, as happened in Christianity, men would hijack the faith and bring it into line with the prevailing patriarchy."[11]

There is strong proof within the teachings of the Prophet that women were to be given a high status among nascent Islamic society. One expert considers the following *hadith* (occurrence or saying of the prophet) to be proof that women were given the highest place of honor:

> Mu'aviyah ibn Jahimah reported, Jahiman came to the Prophet, peace and blessings of Allah be on him, and said, O Messenger of Allah! I intended that I should enlist in the fighting force and I have come to consult thee. He said: 'Hast thou a mother?' He said, Yes. He said: 'Then stick to her, for paradise is beneath her two feet.'[12]

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[8] Challiss McDonough, *Kuwaiti Women Exercise Right to Vote*, NEWS VOICE OF AMERICA, June 26, 2006.
[9] Armstrong, *supra* note 6, at 16.
[10] *See id.*
[11] *Id.*
[12] MAULANA MUHAMMAD ALI, A MANUAL OF HADITH 310 (2001).

Considering that paradise is the ultimate goal, and that no matter what one does in life, there is no greater obtainment, it is obvious that women were to be considered in only the highest regard. Another *hadith* confirms this:

> Abu Hurairah reported that a man asked the Messenger of Allah (peace and blessings of Allah be upon him) as to who amongst his near ones has the greatest right over him. He (the Holy Prophet) replied: 'Your mother.' He asked, 'Then who is (next)?' He (the Holy Prophet) replied: 'Your mother.' He again asked, 'Then who (is next)?' He (the Holy Prophet) replied: 'Your mother.' He asked: 'Then who is (next)?' He (the Holy Prophet) replied: 'Your father.' (Agreed upon)[13]

Ironically, during a time when men were proclaiming absolute patriarchal order, the Prophet indicated that a woman, in this case a mother, was to be held above all. The father was to follow in degrees of glory only after the mother. This notion was radical in early Islam. Women were at times treated as chattel. For a man of God to come along and to proclaim the honor and dignity of women to such a degree that they were above men, was a truly novel concept.

To go along with this concept, Islam introduced (or emboldened) several new rights that women had previously not enjoyed in the early common era. Two of the most significant of these were dowry and inheritance.

A. Dowry

"Wed them with the leave of their owners, and give them their dowers, according to what is reasonable . . ."[14] This Quranic verse can be seen as both a positive and negative with regard to women's rights. Certainly observing the fact that a woman has "an owner," indicates some form of subservient status. However, the power of the second portion of that sentence cannot be underestimated. As one learned author explains, "[t]hrough the dower, women gain access to property, yet at the same time it is part of a legal system which defines women as protected dependents."[15]

The Dower or *mahr*, is a right given to all women in marriage. Under Islamic law, marriage is governed by contract law principles. Therefore, like commercial contracts, there are reciprocal rights and

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[13] ABDUL HAMID SIDDIQUE, SELECTION FROM HADITH 69 (1983).
[14] QURAN 4:25 (Abdullah Yusuf Ali trans.).
[15] Heather Jacobson, *The Marriage Dower: Essential Guarantor of Women's Rights in the West Bank and Gaza Strip*, 10 MICH. J. GENDER & L. 143 (2003).

obligations arising from a binding offer and acceptance.[16] Dower is an important part of this contract. In exchange for the women entering into a lawful relationship with her husband, and thereby offering him obedience, a wife is entitled to receive from her husband some form of dower. This can take the form of money or goods (which usually means jewelry).[17] This money is for the woman to keep. It is not intended for the use by her husband or family. In addition, a dower is owed whether or not the marriage contract specifies it. If the contract is silent, the husband still owes a reasonable or "proper dower."[18]

According to both Sunnis and Shias alike, an agreed upon dower may consist of anything that can be valued monetarily, is useful, and ritually clean. Further, both classical jurists and modern law makers agree that there is no ceiling for the dower.[19] As explained by Professor Azizah al-Hibri:

> This fact is illustrated by an early event in Islamic history. During the khilafah [caliphate] of 'Umar, young men complained about the large amounts of mahr women were demanding. Mahr is an obligatory marital gift, sometimes monetary, that a Muslim man must give his prospective wife. The amount or type of mahr is usually determined by mutual agreement. Afraid that such a trend may discourage men from getting married, Khalifah 'Umar announced in the mosque that he was going to place an upper limit on the amount of mahr. An unknown old woman rose from the back of the mosque and said to 'Umar: "You will not take away from us what God has given us." 'Umar asked her to explain her statement. Citing a clear Qur'anic verse, the woman established that the amount of mahr can be quite high. 'Umar immediately responded: "A woman is right and a man is wrong." He then abandoned his proposal.[20]

Unfortunately, while there is agreement regarding no cap to dower, there is no such agreement with regard to its minimum. Several

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[16] *Id.* at 145.
[17] *Id.* It is interesting to note that women in traditional Islamic societies often are seen wearing coins on their traditional dresses. These coins are not simply artwork, they are frequently her dowry. Because of the paucity of banks in rural settings, this is the best way for her to guard her worth.
[18] *Id.* at 146.
[19] JAMAL J. NASIR, THE ISLAMIC LAW OF PERSONAL STATUS 88 (Paperback ed., Springer 1990) (1987).
[20] Azizah Y. al-Hibri, *An Islamic Perspective on Domestic Violence*, 27 FORDHAM INT'L L.J. 195, 199 (2003).

of the classic schools of Islamic thought (Shafi, Hanbali, and Shia) believe that there is no minimum to dower. Following the logic contained in the Quran, ". . . so that you seek them with your property in honest wedlock, not debauching," these schools argue that anything of value is acceptable as dower.[21] This view is shared in Syria, Morocco, and Kuwait. It is also expressly detailed in laws of Jordan which states that the wife should be entitled to dower specified in the contract, "however small or large."[22] Some countries such as Egypt set a minimum of 10 dirhams, while others like Tunisia simply state that "the dower shall not be insignificant (*tafih*)."[23]

Irrespective of the amount of dower, the fact that a woman has a right to receive it as a part of the marriage contract ensures Muslim women of significant bargaining power both before and during marriage. Conversely, in other cultures, women are not afforded this right. Take as examples the Sikh and Hindu cultures; there it is the woman's family who give the dower to the man and/or his family. Abdul Varachhia, an expert in the area, explains, "[t]he rationale behind the giving of the dowry by the woman's parents is that the woman is given everything she needs when she enters the marriage and her parents feel they have completed their responsibilities to their daughter who, on marriage, takes a journey from her family to become a member of her husband's family."[24] Whereas in Muslim society, a woman's right to dower is so strong that if an agreed upon amount is not paid, the woman can demand a divorce.[25] Or if she decides to remain married, she can refuse to engage in sexual relations until the dower is paid.[26]

Additionally, short of a woman agreeing to discharge a portion (or all) of her dower, it is very difficult to lower the amount of dower without going to court. There are, however, simple provisions for her dower to increase. The Quran states, "[s]eeing that ye derive benefit from them, give them their dowers (at least) as prescribed; but if, after a dower is prescribed, ye agree mutually (to vary it), there is no blame on you. . ."[27] This authority to add to the dower will be considered lawful if it meets three conditions: (1) It is determinate; (2) It occurs during marriage (not during a separation or revocable divorce); and (3) It is accepted by the wife (or her guardian if she lacks legal capacity to accept).[28]

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[21] Nasir, *supra* note 19, at 88.
[22] *Id.*
[23] *Id.*
[24] Abdul Varachhia, *Heirlooms Often Given as Gifts*, BIRMINGHAM EVENING MAIL, Feb. 28, 2006, at 26.
[25] Nasir, *supra* note 19, at 90.
[26] LAMIA R. SHEHADEH, THE IDEA OF WOMEN UNDER FUNDAMENTALIST ISLAM 33 (2003).
[27] QURAN 4:24 (Abdullah Yusuf Ali trans. 2002).
[28] Nasir, *supra* note 19, at 91.

Many opponents of Islam look at fundamentalist groups like the Taliban and point out how unfair marriage for a woman can be. The notion of an arranged marriage, they argue, is abhorrent.[29] Not surprisingly, that notion is also abhorrent in the Islamic faith. A young Muslim woman cannot marry without her father or grandfather's permission. But that does not mean she can be forced to marry. Abul A'la Maududi elaborates:

> Islam does not give the father or the grandfather a final say in the marriage of a woman. The final say belongs to woman herself. She cannot be married to anyone without her free consent. It is really surprising that a minor girl should be deprived of this precious right. A woman has been given the right to assert her discretion because marriage is a matter intimately related to her life-long happiness. Looked at from this point of view, a minor girl stands as much in need of this right as a grown up woman. If maturity of judgement (sic) and great affection can entitle the father or grandfather to overrule the discretion of a minor girl, the discretion of a grown up daughter can also be overruled on the same ground.[30]

To assert that Islam is in favor of arranged marriages is similar to asserting that Christianity is in favor of arranged marriages based on the radical Mormon clan in Southern Utah who arranged for very young women to marry into a polygamist sect.[31] Indeed traditional Islam favors protecting women to the extent that men will not take advantage of them. Thus, dower serves as a financial tool to keep men in check. If you value marriage, you must show it by putting your money up front.

Dower protects women in many ways. First of all, it discourages divorce. The majority of Sunnis agree that dower is due and payable to a woman on the occurrence of either of two events: "1) the actual consummation of marriage; and 2) the death of either spouse before consummation."[32] Thus, if a man has already consummated a marriage and then decides to divorce, he faces a large financial penalty for his actions. Second, it discourages polygamy.[33] Multiple wives cost

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[29] *See generally* ASNE SEIERSTAD, THE BOOKSELLER OF KABUL (2002); AHMED RASHID, TALIBAN (2000).
[30] ABUL A'LA MAUDUDI, THE RIGHTS AND DUTIES OF SPOUSES 91 (1994).
[31] Debbie Hummel, *Utah Polygamist Convicted of Illegal Sex*, THE ASSOCIATED PRESS, Aug. 14, 2003, at 1.
[32] Nasir, *supra* note 19, at 93.
[33] Polygamy will be discussed later in this article.

men multiple dowers,[34] which can obviously add up appreciably. Finally, it also discourages domestic violence. "If a wife is seeking a judicial dissolution of the marriage on the ground of harm (*darar*), she does not need to return the *mahr* to her husband. This position is accepted by the majority of Islamic scholars."[35]

Furthermore, dower is taken very seriously prior to marriage.[36] A proud father will not let his daughters marry short of a dower fit for their status in life. For example, in Jordan, if no dower is specified, the law looks to the wife's family and then her peers in the town.[37] Aspects taken into consideration to equalize a dower are: beauty, youth, social status, virginity, wealth, intelligence, piety, manners, and having no children.[38] Unfortunately, in some fundamentalist societies men consider dower as simply a mechanism to purchase a woman of choice. Following some sort of flawed *ijtihad* (the process of making a legal decision by independently interpreting the original sources), some fundamentalists may see dower as explained here:

> Shaykh Khalil, the most prominent Maliki jurist sees the relationship of the *mahr* to marriage as a transaction: 'In the market one buys merchandise, in marriage the husband buys the genital *arvuum mulierus*. As in any other bargain and sale, only useful and ritually clean objects may be given in dower.' Also, the most prominent Shi'ite jurist, Muhaqqiq al-Hilli, defines marriage as 'a contract whose object is that of dominion over the vagina, without the right of possession,' and fundamentalists themselves allow men to dispatch their nonvirgin wives, without their *mahr*, as damaged goods.[39]

Even assuming *arguendo* that the fundamentalists are correct in that the dower represents the price of dominion, there is still a strong argument that dower protects women. Some feminists believe that

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[34] *See* Jacobson, *supra* note 15, at 143, 160. *See also* MUHAMMAD BIN ABDUL-AZIZ AL-MUSNAD, ISLAMIC FATAWA REGARDING WOMEN 214-215 (1996).

[35] David Hodson, *Special Issue: Fourth Annual World Congress on Family Law and Children's Rights: Spare the Child and Hit the Pocket: Toward a Jurisprudence on Domestic Abuse as a Quantum Factor in Financial Outcomes on Relationship Breakdown*, 44 FAM. CT. REV. 387, 404 (2006).

[36] While in Tunisia escorting students on an Arabic language immersion program, we were notified by the management to avoid the young men coming to our hotel. Apparently they were prostituting themselves to wealthy European tourists in an effort to raise money for their dowry.

[37] Nasir, *supra* note 19, at 90.

[38] *Id.*

[39] Shehadeh, *supra* note 26, at 232.

dower should be abandoned to counter this fundamentalist notion. However, as Ms. Jacobson accurately points out, the feminist movement (especially in the West Bank) started as a desire to educate women about the need to have "modern" marriages.[40] Nevertheless, "[t]he realities of life in the West Bank and Gaza Strip are such that the dower is the only independent source of wealth to which most Palestinian women have access."[41] Furthermore, dower remains:

> one of the fundamental bargaining tools in a traditional marriage negotiation–a groom's family might offer more dower in exchange for the bride agreeing to accompany her husband abroad when he works, or the bride's family might agree to accept less dower in exchange for a promise regarding the type of house that will be provided.[42]

Until there is a better alternative, depriving a Muslim woman of her dower could have terrible consequences. The most powerful tool that dower gives a women is economic leverage. She sets the amount, and no one can take it away from her. As such, "[s]he may decide to use it after marriage in starting her own business, or invest it for a later time when she may need it. It is the woman's safety net, given to her by a freely consenting prospective husband as a gift [*nihlah*]."[43] While it is true that sometimes women are left financially defenseless by thieving fathers or overbearing husbands who get their wives to waive their entitled rights,[44] overall it is still a very powerful form of protection and remains "a potentially critical element in the balance of rights and duties between the spouse."[45]

B. Inheritance

While dower is a powerful form of economic advancement for women, there is still another tool that helps women to become more economically viable. This tool is inheritance. Prior to the introduction of Islam into Arabia, women were sadly without any hope. Zainab Chaudhry best describes this time period:

> The social and political structure at that time was defined by tribal membership, and dominated by men.

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[40] Jacobson, *supra* note 15, at 147.
[41] *Id.* at 155.
[42] *Id.* at 158.
[43] al-Hibri, *supra* note 20, at 199-200.
[44] *Id.* at 200.
[45] Jacobson, *supra* note 15, at 155.

> Women played little part in the religious or political affairs of the tribe, and the 'men's rights over their women were as their rights over any other property.' In marriage, a woman's consent was not needed, and she was often purchased by the man from her father or guardian as an object of sale. Men also enjoyed the right to divorce women at will without having to provide any maintenance to them. A man 'had the right to unlimited polygamy,' and often upon his death, his wives would be considered part of the estate to be passed on to his heirs. Female infanticide was a common practice. Women had no hope of inheritance, and 'were not allowed the holding, or in any case the uncontrolled disposal, of their possessions.'[46]

With the advent of Islam however, things changed dramatically. Women's rights blossomed. The change affected all the previous negativity. And such abhorrent practices mentioned above ceased (or were significantly limited).[47] With the new changes in inheritance and other rights, women (now legal entities) could:

> own and manage her own property, and [were] granted status as an inheritor in a scheme of fixed shares. With education incumbent on all Muslims, women became leaders in many fields, including the intellectual pursuit of religious scholarship. It is interesting to note that at the time Islam was guaranteeing all of these rights for women, 'the West was mired in that unenlightened period now known as the Dark Ages.'[48]

Demystifying Islamic inheritance can be difficult. However, in reality it comes down to a basic structure. "The Islamic Law of Inheritance is also known as the 'science of the shares,' or the *ilm al-fara'id*."[49] The Quran specifies three classes of heirs: (1) the "sharers"; (2) agnatic heirs referred to as "residuaries"; and (3) uterine heirs, or "distant kindred."[50] Only if there are no sharers, or agnates, does the estate go to the "distant kindred."[51]

Notwithstanding the fact that when this system was first developed it gave much greater rights to women than any other system

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[46] Zainab Chaudhry, *The Myth of Misogyny: A Reanalysis of Women's Inheritance In Islamic Law*, 61 ALB. L. REV. 511, 513 (1997).
[47] *Id.* at 513-514.
[48] *Id.* at 515.
[49] *Id.* at 527.
[50] *Id.* at 529.
[51] *Id.* at 531.

in the world, in today's society it is not without its faults. The Quran establishes that in many cases the share of a male is equivalent to that of two females.[52] There are exceptions and manners in which a female can inherit more, but overall the system is designed to give inheritance greater significance to a man. Fortunately, Islamic law does set out a process to equalize this. First of all, in no way are females disinherited (no matter how distant). This is a great distinguishing factor from pre-Islamic Arabia.[53] Second, all distributions have to be equitable. According to the Quran this equitable distribution must take into account the actual *naf'a* (benefit) the overall distribution would provide to the bereft.[54] So even if a situation may look to give more to a son (for example), there is a mechanism in place for a daughter to inherit more under the proper conditions. Such a condition might exist if she had several children and he was an infant himself. Finally, a testator can bequeath up to one-third of his or her wealth without decreasing the division of the remaining estate.[55] Thus proper estate planning can ensure more income to the women in the family, if necessary.

Since females are not disinherited and the estate must be divided properly by taking all factors into consideration, a fair and equitable distribution remains possible. Given the additional potential for specific bequests, inheritance under Islamic law is not universally unfair to women by a factor of two to one.

Another important consideration is the fact that amongst this tangled structure, there are other Islamic legal mechanisms that protect women's inheritance rights. The Quran is very specific that no bequests

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[52] QURAN 4:11-12 (Abdullah Yusuf Ali trans.). *See also* Chaudhry, *supra* note 46, at 537. After an extensive analysis of the different types of classes that may become sharers under Islamic law, Chaudhry shows how female inheritance would work in practice. He then demonstrates that inheritance is really not that unfair to females, and adds that:

> [T]he female distributee inherits equally with a male distributee of the same class in two out of the four basic classes of relatives. These four groups of people represent the primary familial relationships of the deceased, and they are the relatives most likely to be his or her survivors. Also, in several cases, it is possible to have a configuration of heirs where females receive shares greater than any of the males and sometimes even the entire estate. It is only the daughter or the full sister who receive half of what males of equal status receive, a son or full brother, respectively, if they are inheriting jointly as Residuaries.

His thorough analysis of female Islamic inheritance law is helpful for anyone seeking further information in this area.

[53] AMINA WADUD, QURAN AND WOMAN: REREADING THE SACRED TEXT FROM A WOMAN'S PERSPECTIVE 87 (1999).

[54] *Id.*

[55] *Id.* at 88.

to heirs go before debts are paid.[56] This rule is carried strongly into all facets of Islamic law. In a *hadith* narrated by the Caliph Ali, the Prophet explicitly ruled that all debt be satisfied prior to any legacy being considered.[57] Today, this rule is considered *ijma*, or consensus, because most of the Islamic world accepts it. Thus, when it comes to a woman's right to inherit, if there is still dower outstanding from a husband to wife, it must be paid off first. This is in addition to any share she would receive as a part of his estate. Some couples use dower as a specific way of augmenting the share of a surviving wife by agreeing upon a suitable amount for the deferred portion of the *mahr* at the time of marriage.[58] In this manner a woman is given very high inheritance rights. It is another way in which dower is a powerful instrument within the hands of a marrying woman.

Islamic inheritance law is certainly not simple. As one Muslim saying goes, "knowledge of the laws of inheritance and its various shares constitutes one-half of all knowledge."[59] So it comes at no surprise that there are many exceptions within this realm. For example, many Islamic nations make it so a non-Muslim cannot inherit from a Muslim and vice versa.[60] Differences in domicile can also impact whether or not one will inherit.[61] Thus depending on the status and location of a wife's spouse or family, inheritance could potentially be affected. No surprisingly, murder, like in most civil codes, prohibits any type of inheritance as well.[62]

Overall, inheritance has many complicated rules that are well defined within the Quran. Unfortunately in the past fourteen centuries of Islamic thought, most of the passages have been interpreted through various *qiyas* (the process of analogical reasoning) and *ijtihad* done only by men. Further, many prominent Muslim women have agreed to these interpretations. For example, Islamist Nagwa Kamal Farid, (who was Sudan's first woman Islamic legal judge) believed that "inequities in inheritance are not detrimental to women since women never have to support themselves, this being the burden of men, and, therefore, it is right that men receive a larger share of inheritance."[63]

Today, however, women do provide more familial support. Thus, the basic inheritance framework needs some adjustment. Fortunately, the principles espoused by the Prophet regarding equitable treatment of women and his advancement of women's issues has

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[56] *See* QURAN 4:11-12 (Abdullah Yusuf Ali trans.).
[57] Nasir, *supra* note 19, at 223.
[58] Chaudhry, *supra* note 46, at 548.
[59] *Id.* at 527.
[60] Nasir, *supra* note 19, at 232.
[61] *Id.*
[62] *Id.* at 231.
[63] Shehadeh, *supra* note 26, at 153.

survived throughout the years and (as will be shown) will continue to advance.

Further, irrespective of its tilt in favor of men, inheritance does afford women great financial benefit. Taken together with dower, even the most poverty stricken rural daughter, sister, wife, or mother can accumulate a small amount of wealth. How she uses this wealth to advance herself is entirely upon her. How this wealth can advance the cause of oppressed women is what this article aims to prove.

The next three sections of this article will explore further wealth accumulation by women in the Middle East. First, maintenance will be briefly discussed, followed by an overview of the expansion of economic opportunity which has led to great wealth accumulation amongst Muslim women. Finally, this section will conclude with a discussion of a powerful tool that offers economic power even to the poor—microfinancing.

C. Maintenance

> Maintenance is the lawful right of the wife under a valid marriage contract on certain conditions. It is the right of the wife to be provided at the husband's expense, and at a scale suitable to his means, with food, clothing, housing, toilet necessities, medicine, doctors' and surgeons' fees, baths, and also the necessary servants where the wife is of a social position which does not permit her to dispense with such services, or when she is sick.[64]

Many, if not all, of the justifications used to retain a lower standard of inheritance from a social-economic rationale are based upon the logic that a man must provide for his women (wife, daughters, etc.). Thus, this principle has a positive effect in that men must provide for their spouses, but it has a negative Western connotation in that it seems to encourage the role of a woman in a secondary status—that of a homemaker.

Maintenance comes from the Quran, ". . . But [the father] shall bear the cost of [the mother and her child's] food and clothing on equitable terms. No soul shall have a burden laid on it greater than it can bear. No mother shall be treated unfairly on account of her child. . . if ye decide on a foster-mother for your offspring there is no blame on you, provided ye pay (the mother) what ye offered on equitable terms."[65] From this verse, Islam holds tight to the idea of taking care of

[64] Nasir, *supra* note 19, at 102.
[65] QURAN 2:233 (Abdullah Yusuf Ali trans.).

both current and potential mothers. Divorced women are also included with a Quranic form of protection, "Let the women live (in '*iddah*) [pending divorce] in the same style as ye live according to your means: Annoy them not, so as to restrict them. And if they carry (life in their wombs), then spend (your substance) on them until they deliver their burden . . ."[66] Taken together, it is very clear that the Quran lays out the requirement to provide maintenance for women. The common thread behind this seems to be pregnancy and childbirth. Nonetheless, this is an area that has been expanded to encompass nearly all women; and if the Quran is not completely clear, there is additional support for maintenance in other areas of Islamic law.

Take for example a *sunna* or tradition of the Prophet that gives direct credence to the concept of maintenance. In his last sermon, Muhammad preached to all hearers: "Show piety to women, you have taken them in the trust of God and have had them made lawful for you to enjoy by the word of God, and it is your duty to provide for them and clothe them according to decent custom."[67]

From this tradition it is hard to argue any variance from the requirement to provide maintenance for a woman. But what are the requirements to receive it? According to Dr. Nasir, there are three: (1) the wife is under a valid marriage contract; (2) if the wife "places" herself under her husband's power, and gives him access to her at all "lawful" times (call *Tamkeen)*; and (3) if she obeys all his lawful commands for the duration of the marriage.[68]

From these requirements, it is evident that a Muslim wife is supposed to be under the dominion of the husband. But remember, this really is not that different from what is called for in the Jewish[69] or Christian tradition.[70] One big difference however, is how clearly

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[66] QURAN 65:6 (Abdullah Yusuf Ali trans.).
[67] Nasir, *supra* note 19, at 103.
[68] *Id.* at 103-104.
[69] *See* Mary F. Radford, *The Inheritance Rights of Women Under Jewish and Islamic Law*, 23 B.C. INT'L & COMP. L. REV. 135, 148 (2000).

> Like Islamic fundamentalism, Jewish fundamentalism dictates an inferior and submissive status for women. Jewish fundamentalism 'does not explicitly declare that a wife must be submissive and obedient to her husband [but] the overall structure of marriage and divorce laws delegates such a degree of authority and power to the husband as to allow him effectively to coerce his wife's obedience.' Additionally, Jewish fundamentalists, in the name of 'guarding women's chastity [and] preventing women from 'tempting' men into adultery,' segregate the sexes, relegate women to the home, and restrict women's public dress.

Id. (internal citations omitted)
[70] *See 1 Corinthians* 14:34-35 ("Let your women keep silence in the churches: for it is not permitted unto them to speak; but they are commanded to be under obedience, as

Islamic law indicates that a man must provide a financial form of maintenance to his bride. This form of maintenance is not taken from her dower—it is in addition to it. In many countries it is considered a debt on the husband and only payment or discharge will settle it.[71]

A woman can lose a right to this maintenance by, for example, going to jail, or by being abducted.[72] There are some who disagree with this, however, because at least in the case of abduction, it was not caused by the woman's choice.[73] More commonly, a woman can lose her maintenance if she pursues employment without her husband's permission.[74] If she has his permission to work, however, then in most cases he would still be required to pay her his regular maintenance. Additionally, most of the income a woman earns on her own is usually considered her own. Because of this choice (to work or not work), some Islamic scholars consider that Islam grants women "economic independence and equal rights of employment, while the West frees them from the home only to enslave them in the marketplace."[75]

Other things can lead a woman to lose her maintenance. Among this list are types of "disobedience," such as leaving the matrimonial home, or even denying the husband conjugal rights.[76] There are, however, exceptions that would allow a wife to be "disobedient." Among these exceptions are: (1) a husband beating his wife; (2) a husband allowing a co-wife to live in their house without the first wife's consent; (3) a husband's kin living with the wife without her consent; (4) a command of a husband that violates Islamic law; (5) a wife not receiving prompt dower; and (6) a wife going to visit her sick father—even if he is not Muslim, and even if her husband denies her permission.[77]

The amount due for maintenance is established in much the same manner as dower. One looks to custom, family, market, other kin, and any other logical equalizing factors.[78] Also similar to dower, the amount of maintenance can be raised or lowered depending on a change in marital circumstances. There are even provisions for women to

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also saith the law. And if they will learn anything, let them ask their husbands at home . . . .") *See also Colossians* 3:18-19 ("Wives, submit yourselves unto your own husbands, as it is fit in the Lord. Husbands, love your wives, and be not bitter against them.") Granted two scriptures do not prove complete Christian subservience to men, but the point is only that in certain Christian faiths, just like in certain Jewish and Islamic faiths, women are considered subservient.

[71] Nasir, *supra* note 19, at 103.

[72] *Id.* at 105.

[73] *Id.*

[74] *Id.*

[75] Shehadeh, *supra* note 26, at 105.

[76] Nasir, *supra* note 19, at 106.

[77] *Id.* at 107.

[78] *Id.* at 108.

accumulate unpaid maintenance and have it granted legal status pending resolution of a divorce.[79]

The Quran makes clear that "([h]usbands) are the protectors and maintainers of their (wives) because Allah has given the one more (strength) than the other, and because they support them from their means. Therefore the righteous women are devoutly obedient, and guard in (the husband's) absence what Allah would have them guard."[80] But Islam, unlike Jewish and Christian faiths (for the most part), specifically requires financial maintenance. When this maintenance is taken together with a woman's right to dower, and her albeit limited right to inheritance, a woman can begin to collect a small nest egg to do with as she pleases. All circumstances and situations are different, but notwithstanding the allegation of outright misogyny in Islam, there is clear proof that at least financially, women are supposed to have significant fiscal rights.

The next question naturally posed, then, is what can a woman do with her nest egg? How can she make it work for her?

D. Women in the Middle East and Their Investments

The evolution of women and finance in the Middle East has been one of constant growth. Today, "[b]ecause of the basis of inheritance in shari'ah (Islamic law), [women] own considerable fortunes in their own right and indeed a good part of the wealth of the country."[81] In countries like Saudi Arabia, there are still many restrictions keeping women away from true equality. But each day women further open the door toward economic parity and more opportunities.

Some of the economic steps that have helped advance women were taken inadvertently by men. As early as the 1980s, Saudi banks introduced branches that were tailored exclusively for women.[82] Because of the quasi-gender apartheid of women in Saudi Arabia, this was seen as a necessary step to keep women separate from men. At the same time, it recognized that women also have financial assets and business needs.

Today, women's banks have become powerful, and other Islamic countries continue to capitalize on their appeal. On August 15, 2006, Islamic Financial Services (IFS) opened a branch in Dubai to

[79] *Id.* at 111.
[80] QURAN 4:34 (Abdullah Yusuf Ali trans.).
[81] Washington Post, *International Spotlight: Saudi Arabia—Women's Work*, WASHINGTONPOST.COM, http://www.washingtonpost.com/wp-adv/specialsales/spotlight/saudi/art14.html (last visited Jan. 25, 2008).
[82] *See* SANDRA MACKEY, THE SAUDIS: INSIDE THE DESERT KINGDOM 145 (1990).

exclusively serve women.[83] From this branch, women can invest in many services, including remote trading.[84] The branch provides women yet another outlet to invest their growing capital.

While not all women keep their money exclusively in women's banks, the amount of money controlled by women is astronomical. In addition to money women already have invested in the global economy, it was estimated as of November 2002 that Saudi women had bank deposits worth more than $26.6 billion that were not yet invested.[85] This is money just waiting to find further financial growth. Various obstacles stood in the way that precluded women from investing this huge nest egg, such as the various Islamic laws previously discussed in this article. Other roadblocks have been even more discriminatory. In spite of the obstacles, women have been pushing down these roadblocks. According to the BBC, Saudi businesswomen have at times simply ignored the business "curbs" placed in front of them, and have openly defied these obstacles in the name of commerce.[86]

Other women are simply taking their money elsewhere. According to one report, rigid Islamic financial rules regarding women have accounted for the recent flight of over $5 billion from Saudi bank accounts into capital investments in foreign countries.[87] At the same time, Kuwaiti women are learning to invest in their own country. In 2005, the Wall Street Journal reported that: "Across the Middle East, stock markets are on a tear, fueled by soaring oil prices, a wave of privatization and new willingness to invest locally. But in a twist for the region's conservative, male-dominated societies, women are starting to play a big role in the bull run."

Dressed in black robes, women are calling out stock prices and quickly learning the tools of the trade. From 2003 to 2005, the number of women registered to trade stocks tripled to about 30,000.[88] Clearly, the vice chair of a Qatari investment firm, Hanadi Nasser Bin Khalid Al-Thani was correct when he said, "women are playing an increasing role in the financial arena. They're reshaping the regional financial landscape."[89] During the first three months of 2005, women executed

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[83] Anne-Birte Stensgaard, *Al Islami Financial Services Starts Women Exclusive Branch*, AME INFO (2006), http://www.ameinfo.com/93858.html (last visited Jan. 25, 2008).
[84] *Id.*
[85] Saudia On-Line, *SR100b ($26.6 billion) in Women's Bank Accounts Waiting to be Tapped in Saudi*, SAUDIA-ONLINE (2002), http://www.saudia-online.com/newsnov02/news19.shtml (last visited Jan. 25, 2008).
[86] *See* Frank Gardner, *Saudi Women Defy Business Curbs*, BBC NEWS (2001), http://news.bbc.co.uk/2/hi/middle_east/1128951.stm (last visited Jan. 25, 2008).
[87] Saudia On-Line, *supra* note 85.
[88] Yasmine El-Rashidi, *More Middle Eastern Women Trading Stocks*, POST GAZETTE (2005), http://www.post-gazette.com/pg/05220/550638.stm (last visited Jan. 25, 2008).
[89] *Id.*

some 9000 trades worth about 100 million Kuwaiti dinars, or about $340 million.[90]

As a vestige to the current gender segregation, a great deal of this trading takes place on Kuwait's women-only floor. But this floor, which was once cramped and windowless, has now grown to three times its original size and occupies a vast balcony over the main exchange floor.[91] Modern technology allows women to broker orders on the spot from outside investors, or women can sit and drink tea (like their male counterparts) while watching the action.[92]

As of 2005, Saudi women owned approximately 20,000 firms.[93] These range from ordinary retail businesses to various types of industry. While these numbers only account for roughly five percent of all registered Saudi businesses,[94] the number of women registered in local chambers of commerce is on the rise dramatically. In Jeddah there are about 2000 women members out of the total membership of 50,000.[95] And in Riyadh, women number 2400 out of a total 35,000 members.[96]

With increased business membership, women have also begun to break down other gender barriers. In February 2006, six Saudi women in Damman ran for seats in the local chamber of commerce.[97] As reported by the Associated Press, "the election is a marker of change in Saudi Arabia, where progress toward a more open political system, including greater rights for women, is measured in inches, not miles."[98] Women are still banned from running or voting in municipal government elections, but women now serve in the Chamber of Commerce building, which was once entirely off limits to women.[99]

Women candidates for these new opportunities credit King Abdullah for this change. When the king took office after his half brother Fahd died, he intervened personally, which ultimately gave women the right to run.[100] As will become clear throughout this article, Islamic law is not the obstacle for women in the Middle East. Instead, old patriarchal structures block effective change. The fact that the Saudi monarchy is beginning to transform is a sign that forecasts great change

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[90] *Id.*
[91] *Id.*
[92] *Id.*
[93] *See* Samar Fatany, *The Status of Women in Saudi Arabia*, ARAB NEWS (2004), http://www.arabnews.com/?page=7&section=0&article=52784&d=12&m=10&y=2004 (last visited Jan. 25, 2008).
[94] *Id.*
[95] *Id.*
[96] *Id.*
[97] *See* Jim Krane, *Saudi Women Trying to Break Down More Barriers in Chamber of* Commerce Voting, SIGN ON SAN DIEGO (2006), http://www.signonsandiego.com/news/world/20060220-1036-saudi-womencandidates.html (last visited Jan. 25, 2008).
[98] *Id.*
[99] *Id.*
[100] *Id.*

in the future. The more women push for equal rights in this oppressive environment, the more likely the regime will shift.

Family-owned and operated businesses are also experiencing gender change. Fathers are also learning to accept women in the workplace:

> Due to the overwhelming number of family owned businesses, estimated to be around the 90% mark by Saudi-based consultants NextMove, the reins of many Saudi organizations are being passed not only from father to son, but also from father to daughter. Some women, armed with confidence from their success in the corporate world, have also led the way for greater female participation in the workforce.[101]

This surge of women in the workplace is not without its drawbacks. Because of the rigid rules regarding women and their place in society, one large problem can preclude a woman from excelling in Saudi Arabia: a restrictive marriage. According to Saudi Arabia's leading female technology expert, Alia Banaja:

> Women are straightforward, and their work is excellent; we've grown rapidly mainly because of the effort women put into the job. But I have found some difficulties when dealing with women. Why? Marriage. One of my employees cancelled a meeting because her fiancée refused to let her go, and threatened to divorce her.[102]

Notwithstanding the obstacles, women are continuing to grow and progress in the Middle Eastern business world. One leading indicator is the Jeddah Economic Forum. In 1999, women were not allowed to speak at the forum.[103] By 2000, 50 women sat to watch the proceedings.[104] In 2001, more than 100 women join the men, and this time they were allowed to "write-in" questions.[105] As many as 200 women attended the 2002 forum, and in 2003 the women had their own

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[101] Jordan Business 2006, *Veiled Hopes*, SAUDI ELECTION, http://www.saudielection.com/en/vb303/showthread.php?p=3313#post3313 (last visited Jan. 03, 2007).
[102] *Id.*
[103] Maggie M. Salem, *Saudi Women and the Jeddah Economic Forum*, SAUDI-US RELATIONS (2004), http://www.saudi-us-relations.org/newsletter2004/saudi-relations-interest-02-12.html (last visited Jan. 25, 2008).
[104] *Id.*
[105] *Id.*

forum.[106] It continues to grow to this day. In 2004, the forum produced a bold statement from a Saudi businesswoman by the name of Lubna Sulaiman Al-Olayan, wherein she declared that her vision for Saudi Arabia was one in which, "any Saudi citizen, irrespective of gender" could do any job.[107] Considering the background of female oppression, these words were strong indicators of change to come.

Nevertheless, if the regime does not shift or if change occurs too slowly, women will likely leave. According to one female clothing importer, the kingdom's future depends on women joining public life.[108] Samai Al-Edrisi feels, however, that if change does not occur fast enough, she will take her two college-educated daughters and leave for a freer environment.[109]

Undoubtedly, many changes in the role of women in Middle Eastern economics are slow in the making. While women have access into the business world, the type of work they are allowed to do is often limited. Most women-owned businesses deal with apparel, cosmetics, furniture and home décor, foodstuffs, health and fitness products, educational materials for children, and other such products.[110] Other economic sectors are hard for women in Saudi Arabia to enter. In fact, Saudi law oftentimes directly prohibits women from seeking certain types of employment. For example, a collegiate Saudi woman is not allowed to major in engineering, economics, or law.[111] But women are seeking to change these barriers. And while Saudi social policies may try to funnel women into a certain direction, more and more women are pushing the education envelope to ensure greater access for all women in all areas. As the Middle East struggles to progress, many believe the key to its future is in women's hands.[112] Thus, more and more people are beginning to see the relevance of an important proverb, namely: "When you educate a man, you educate a man. When you educate a woman, you educate two generations."[113] Until Saudi Arabia sees the value and truth of this, progression will be stifled.

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[106] *Id.*
[107] Jordan Business, *Women Who Lead*, ZAWYA (2006), http://www.zawya.com/story.cfm/sidZAWYA20061003085826 (last visited Jan. 25, 2008).
[108] *Id.*
[109] *Id.*
[110] *See* Joe Kaesshaefer, *Mission Statement for Saudi Businesswomen Reverse Trade Mission*, SAUDI BUSINESSWOMEN REVERSE TRADE MISSION, http://www.ita.doc.gov/doctm/saudibw.htm (last visited Jan. 25, 2008).
[111] *See* Donna Abu-Nasr, *The Veiled Life of Saudi Women*, WASHINGTON POST, Dec. 08, 2000, at A.59.
[112] Jean-Pierre Lehmann, *Rebuilding the Mideast: Women Are Key*, THE GLOBALIST (2003), http://www.theglobalist.com/DBWeb/printStoryId.aspx?StoryId=3065 (last visited Jan. 25, 2008).
[113] *Id.*

In the meantime, women are moving forward and change is becoming more widespread. For many years, progress was apparent only among Saudi elite. Women who lived on the outskirts of society seemed to have little hope for progress, because they lacked the means to get in the door of global prosperity. But now, the times are changing even for the underprivileged mother living in the countryside of the Middle East. A new concept introduced in just the last few years is helping to bring all women to the forefront, empowering even poor women to travel the road to economic success. The concept is microfinancing, and its inventor was just recently awarded the Nobel Peace Prize.[114]

E. A Note on Microfinancing

Developed by Professor Muhammad Yunus,[115] microfinancing involves very small loans called microcredits, which are typically are made for less than $100.[116] Professor Yunus founded the Grameen bank in 1976 during a particularly difficult famine in Bangladesh. The bank's goal was to help people start businesses and thereby lift themselves out of poverty.[117] Today the bank has over 6.6 million borrowers, and an amazing 97 percent of its clients are women.[118] Since 1976, the idea has spread to over 40 countries and has flourished by giving women an opportunity to bring about their own development.[119]

Professor Yunus understood that giving women more control over resources was more profitable to a community because women tend to invest more in their families than do men.[120] Studies in various countries such as Bangladesh, Brazil, Canada, Ethiopia, and the United Kingdom, found that women devote more income to education, health, and nutrition and less to alcohol and cigarettes.[121] Also noteworthy, according to Isobel Coleman in Foreign Affairs, is that:

> [I]ncreases in female income improve child survival rates 20 times more than increases in male income, and children's weight-height measures improve about 8 times more. Likewise female borrowing has a greater

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[114] *See* BBC, *Q&A: So What is Microfinancing?*, BBC NEWS (2006), http://news.bbc.co.uk/2/hi/business/6047364.stm (last visited Jan. 25, 2008).
[115] *Id.*
[116] *Id.*
[117] *Id.* It is interesting to note that Grameen literally means "village." The whole idea of the Grameen bank was to bring development to the village.
[118] *Id.*
[119] *Id.*
[120] Isobel Coleman, *The Payoff From Women's Rights*, FOREIGN AFFAIRS, Jun. 01, 2004, at 2.
[121] *Id.*

> positive impact on school enrollment, child nutrition, and demand for health care than male borrowing.[122]

It should come as no surprise then that countries that have closed the gender gap have made greater strides in education and have achieved the most economically and socially.[123] On the other hand, countries that do not promote economic growth in women lag far behind.[124] This is part of the reason why Professor Yunus focused microfinancing on women. He recognized that women are generally poor, more credit-constrained than men, and have less access to the work force.[125] He also knew that women are more likely to pay back the loans than men and that "millions of small people with their millions of small pursuits [could] add up to create the biggest development wonder."[126]

Because of the interdictions regarding *riba* (usury or excessive interest), there were critics who worried microfinancing would run contrary to Islamic law. Understanding this, Professor Yunus made sure he was properly advised on all Islamic concepts that could conflict with his financing mechanism. In his own words:

> Many Islamic scholars have also told us that the Shariah ban on the charging of interest cannot apply to Grameen, since the Grameen borrower is also an owner of the bank. The purpose of the religious injunction against interest is to protect the poor from usury, but where the poor own their own bank, the interest is in effect paid to the company they own, and therefore to themselves.[127]

More specifically, one of his advisors was very encouraged by the whole program and offered her support:

> There is nothing in Shariah law or the Quran against what you are doing. Why should women be hungry and poor? On the contrary, what you are doing is terrific. You are helping to educate a whole generation of children. And thanks to Grameen loans, women can work at home, instead of sitting around.[128]

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[122] *Id.*
[123] *Id.*
[124] *Id.*
[125] *Id.*
[126] *Id.*
[127] MUHAMMAD YUNUS, BANKER TO THE POOR 110 (2003).
[128] *Id.*

The success of microfinancing is astonishing. Grameen bank has survived accusations that it lacked adequate funds, and it now has attracted more and more world advocates, including Bill Clinton and his foundation.[129]

Truly, microfinancing is a powerful new tool in the quest to improve women's rights around the world. As women gain more power financially, they gain power to change the world around them. But how can economic advancement lead to a change in the fundamental rights of women? The next section of this article will discuss, with particularity, how the purse strings of the world can help lift women out of the trough of discrimination and lead them to a new light.

III. HOW ECONOMIC ADVANCEMENT CAN CONTRIBUTE TO THE FIVE RIGHTS NECESSARY TO ACHIEVE GENDER EQUALITY

In a recent article in the Texas Journal of Women and the Law, Edieth Wu identified what she called "global burqas," or disguised forms of discrimination.[130] She listed five fundamental rights where women around the world are not finding equality: (1) the right to life; (2) the right to equality; (3) the right to equal protection under the law; (4) the right to be free from all forms of discrimination; and (5) the right to be free from torture or other cruel, inhuman, or degrading treatment or punishment.[131] These areas serve as a good baseline. For without these rights, women will never truly be equal. It is therefore essential that, at a minimum, these rights be conferred and defended. The following section of this article will discuss these five rights and show how each can be obtained via the financial power of women in the Middle East.

A. Right to Life

A few years ago, Amina Lawal of Nigeria was sentenced to death for adultery. More specifically, she had a baby out of wedlock.[132] Fortunately, international pressure saved her life,[133] but each year many women are put to death for similar accusations. Unlike Amina Lawal,

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[129] *See* BBC, *supra* note 114.
[130] Edieth Y. Wu, *Global Burqas*, 14 TEX. J. WOMEN & L. 179 (2005).
[131] *Id.*
[132] Wu, *supra* note 130, at 181. *See also* TAHIR MAHMOOD, CRIMINAL LAW IN ISLAM AND THE MUSLIM WORLD 224-225 (1996). Both fornication and adultery are often referred to as *zina* (sexual impropriety) and looked upon equally as criminal sexual acts. There is a distinction in Islamic jurisprudence, but it is sufficient to note that in Nigeria the two acts are considered equally offensive.
[133] *Id.*

they are not given a trial, they do not have international pressure to protect them, and sometimes even their own parents support their murder. In Jordan, where approximately 25 women each year fall victim to honor killings,[134] women are often murdered because they have allegedly tarnished their family's honor. One scholar traces the roots of honor killings to a crude Arabic expression, "a man's honor lies between the legs of a woman."[135] Thus, if a woman is accused of inappropriately engaging in any unlawful sexual activity, she destroys both the honor of herself and her family. Azza Basarudin provided a disturbing anecdote of one such murder based on a shaky accusation:

> On May 31, 1994, Kifaya Husayn, a 16-year-old Jordanian girl, was lashed to a chair by her 32-year-old brother. He gave her a drink of water and told her to recite an Islamic prayer. Then he slashed her throat. Immediately afterward, he ran out into the street, waving the bloody knife and crying, 'I have killed my sister to cleanse my honor.' Kifaya's crime? She was raped by another brother, a 21-year-old man. Her judge and jury? Her own uncles, who convinced her eldest brother that Kifaya was too much of a disgrace to the family's honor to be allowed to live. The murderer was sentenced to fifteen years, but the sentence was subsequently reduced to seven and a half years, an extremely severe penalty by Jordanian standard.[136]

Kifaya is not alone. In 2003, two sisters were hacked to death by axes. One sister, who was twenty-seven, was murdered for leaving her home to marry a man without her family's consent.[137] Her 20-year-old sister was murdered for trying to leave home to join her older sister. According to one official, the scene was brutal, and one victim's head was nearly completely severed.[138] In another honor killing, a father killed a woman, stabbing her twelve times, and then waited until she

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[134] *See* Jamal J. Halaby, *In Jordan the Price of Honor is Women's Blood*, WOMEN'S E-NEWS (2000), http://www.womensenews.org/article.cfm?aid=339 (last visited Jan. 25, 2008).

[135] *See* Hank Roth, *Honor Killings*, HUMAN RIGHTS ABUSES, http://pnews.org/art/1art/HONORkillings.shtml (last visited Jan. 25, 2008).

[136] Azza Basarudin, *Whose Honor? Muslim Women and Crimes of Honor*, PAPILLONS ART PALACE, http://www.papillonsartpalace.com/whohkse.htm (last visited Jan. 25, 2008).

[137] BBC News, *Fresh "Honour Killing" in Jordan*, BBC NEWS (2003), http://news.bbc.co.uk/1/hi/world/middle_east/3097728.stm (last visited Jan. 25, 2008).

[138] *Id.*

was dead to call an ambulance.[139] The young woman's crime was simply falling in love with a Roman Catholic.[140]

Motivated by her death, the young woman's best friend wrote a book about honor killings and how the law in Jordan should be changed to support victims of this crime.[141] According to the author, 90 percent of honor killings involve virgins—young girls, like her friend, who never violated anyone's honor, but were "rumored" to have done something wrong.[142]

Jordan is not the only country plagued with this crime. But it does have a common denominator. "Experts say the phenomenon is widespread among poorer, less educated, tribal societies with a tradition of self-administered justice, like Jordan's, and in underdeveloped countries in the Middle East, North Africa, Central Asia and South America."[143] As women free themselves economically, I contend that this type of crime will be reduced. Nevertheless, before conducting the economic analysis, one must first consider how honor killings are viewed under Islamic law and international legal standards.

1. *Islamic Law and Honor Killings*

According to the Quran, if either a man or woman commits adultery, they should be flogged with a hundred lashes.[144] Nowhere does the Quran justify killing the adulterer. To prove this, Maulana Ali, a Quranic expert, notes that the Quran doles out a different punishment for slave-girls. If they commit adultery, they are to only receive punishment which is "half that for free women"[145] If an adulterer was supposed to be stoned to death, this verse would be impossible. One cannot stone someone "half to death."[146]

This punishment is also confirmed via *hadith*. According to Bukhari,[147] "Zaid bin Khalid reported that he heard the Messenger of Allah (pbuh) making pronouncement about him who had committed adultery and had not been married that he should be given one hundred lashes and sent to exile for one year."[148] It is possible to find, however,

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[139] BBC News, *Speaking Out Over Jordan "Honour Killings",* BBC NEWS, (2003) http://news.bbc.co.uk/1/hi/world/middle_east/2802305.stm (last visited Jan. 25, 2008).
[140] *Id.*
[141] *See* NORMA KHOURI, HONOR LOST: LOVE AND DEATH IN MODERN-DAY JORDAN (2003).
[142] BBC News, *supra* note 139.
[143] Halaby, *supra* note 134, at 2.
[144] QURAN 24:2 (Abdullah Yusuf Ali trans.).
[145] QURAN 4:25 (Abdullah Yusuf Ali trans.). *See also* THE HOLY QURAN, commentary # 1736, (M. Ali trans. and commentary, 1995).
[146] *Id.*
[147] Al-Bukhari is one of the most reliable sources of *hadith*.
[148] Siddique, *supra* note 13, at 132.

other *hadiths* that support killing someone for adultery. In a lesser-accepted *hadith*, Tirmizi reports:

> Abu Umamah bin Sahl reported that 'Uthman bin Affan look towards the people from above his house on the day of blockade and said: I adjure you by God, Aren't you aware of the fact that the Messenger of Allah (pbuh) said: That the shedding of blood of a Muslim was unlawful except when he committed any crime out of these three crimes: Adultery after marriage, renouncing Islam after embracing it, killing anybody without right, or being killed (in this attempt).[149]

There is also a *hadith* that relates to stoning a Jewish adulterer. In this *hadith*, the Prophet ordered the Jewish citizen's death.[150] Maulana Ali explains, however that the reason for this order was because stoning was prescribed under Jewish law.[151] The Prophet was simply applying Jewish law to Jewish offenders. Nowhere was stoning to death supposed to have been applied to Muslims for the crime of adultery.[152] Further, according to Maulana Ali, any reference to stoning outside of this reference to Jewish law, was given by the Prophet prior to the revelation of the Quran 24:2, wherein the punishment was set at one hundred lashes—nothing more.[153]

Irrespective of whether an adulterer should receive lashes, or assuming *arguendo* that an adulterer should be stoned to death, there is still another problem that must be overcome prior to the imposition of such a punishment. According to the Quran, in order to convict someone of adultery, there must be four witnesses.[154] This alone should prove a great obstacle to ever convicting someone of adultery. Additionally, if someone makes an accusation of adultery, but this accusation is false, the Quran specifies that this false accuser should be given eighty lashes.[155] A prominent *hadith* also confirms this:

> Hilal bin Umaiya accused his wife before the Prophet of committing illegal sexual intercourse with Sharik bin Shama. The Prophet said, 'Produce a proof, or else you would get the legal punishment (by being lashed) on

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[149] *Id.* at 127
[150] SAHIH BUKHARI, Vol. 4, 23:61 (M. Muhsin Khan trans.), available at http://www.usc.edu/dept/MSA/fundamentals/hadithsunnah/bukhari/056.sbt.html (last visited Feb. 08, 2008).
[151] THE HOLY QURAN, commentary # 1736, (M. Ali trans. and commentary, 1995).
[152] *Id.*
[153] *Id.*
[154] QURAN 24:4 (Abdullah Yusuf Ali trans.).
[155] *Id.*

> your back.' Hillal said, 'O Allah's Apostle! If anyone of us saw another man over his wife, would he go to search for a proof.' The Prophet went on saying, 'Produce a proof or else you would get the legal punishment (by being lashed) on your back.' The Prophet then mentioned the narration of Lian (as in the Holy Book).[156]

Given that the sin of adultery is hard to prove and given that there is absolutely no strong evidence, Quranic or otherwise, that Islamic law permits stoning an adulterer to death as punishment, it is particularly surprising that anyone would try to justify honor killings. As stated previously, these killings often occur over mere speculation or rumor of promiscuity, not even full-fledged adultery. Adultery would intuitively be considered worse under Islamic law, yet some women are never given the benefit of the doubt. According to Professor Azizah Y. al-Hibri, domestic violence has no place within the context of the Islamic perspective.[157]

Professor al-Hibri recognizes, however, that some radical Islamists believe that hitting a woman (usually a spouse) is justified under the Quran. These radicals support their belief using a verse regarding chastisement.[158] The verse states that, "as to those women on whose part ye fear disloyalty and ill-conduct, admonish them (first), (Next), refuse to share their beds, (And last) spank them (lightly) but if they return to obedience seek not against them."[159] Professor al-Hibri finds no justification for a beating in this verse.[160] She points out that the chastisement punishment is "both conditional and structurally complex, leaving room for erroneous, culturally skewed, or subjective interpretations."[161]

Based on the history of the Chastisement verse, it becomes evident that any type of chastisement is to be done in a very restrictive manner. According to Maulana Ali, this punishment should occur only in the most extreme circumstances.[162] So rare in fact is this punishment that it is practically impossible to ever justify it. Furthermore, the Prophet made it clear that even if justified, a man should refrain from doing so, and in so refraining, his reward would be that much higher.[163]

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[156] Basarudin, *supra* note 136, at 3.
[157] *See* al-Hibri, *supra* note 20, at 204.
[158] *Id.*
[159] QURAN 4:34 (Abdullah Yusuf Ali trans.).
[160] al-Hibri, *supra* note 20, at 204.
[161] *Id.*
[162] *See* THE HOLY QURAN, commentary # 572, (M. Ali trans. and commentary, 1995).
[163] *Id.*

So then, if the mere hitting of a woman is so difficult to justify, how can the justification of murder ever be in accordance with Islamic law? The answer is that it cannot. In her narrative description of the history behind the Chastisement verse, Professor al-Hibri mentioned that during the period of *Jahiliyyah*, men were very cruel to their wives. *Jahiliyyah* is the period of ignorance preceding the coming of Islam. As stated previously, Islam changed many things for the better. Most significantly it ended many forms of violence and discrimination against women.

Some claim that the first roots of honor killings date to either the Code of Hammurabi in 1752 B.C. or as far back as the Assyrian legal code of 3000 B.C., wherein men who committed rape were punished by having their wives raped by other men.[164] Yet neither of these sources gives rise to any justification under Islamic law. Indeed, honor killings were and are forbidden under Islamic law, and should never be practiced under any circumstances. The difficulty, however, is in convincing the communities where an honor killing occurs that it is not justified and that the only honor they are achieving is an honorific place in hell. As more become aware of this crisis, however, hopefully the practice will soon end.

2. *International Law's Response to Honor Killings*

Just as Islamic law does not support honor killings, international law also condemns it. Jordan is a party to a number of human rights treaties that either directly or indirectly condemn honor killings.[165] Nevertheless, Jordan provides that Islam is the state religion.[166] While this does not counter the fact that Jordan is a party to these treaties, it can modify the extent to which Jordan feels obligated to follow a particular treaty.

Many Islamic countries attach reservations to human rights treaties that indicate that they are not bound to a particular portion of the treaty inasmuch as "it conflicts with the provisions of the Islamic

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[164] *See* Roth, *supra* note 135.

[165] These include: International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S., http://www.ohchr.org/english/law/cescr.htm [hereinafter ICESCR]; International Covenant on Civil and Political Rights, Dec. 16, 1966, 21 U.N. GAOR, Supp. No. 16 (A/6316), 999 U.N.T.S. 302, reprinted in 6 I.L.M. 383 (1966) [hereinafter ICCPR]; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, G.A. Res. 46, at 197, U.N. GAOR, 39th Sess., Supp. No. 51, U.N. Doc. A/39/51 [hereinafter CAT]; and the Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 34 U.N. GAOR, Supp. No. 21 (A/34/46), at 193, U.N. Doc. A/RES/34/180, 1249 U.N.T.S. 14, reprinted in 19 I.L.M. 33 (1979) [hereinafter CEDAW].

[166] THE CONSTITUTION OF THE HASHEMITE KINGDOM OF JORDAN ch. 1, art. 2.

Shariah."[167] In one example, the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), Jordan does not explicitly list this type of reservation, but Jordan does indicate that they are not bound to many portions of the treaty without giving a specific reason.[168]

The fact that many international human rights treaties contain reservations by Islamic states begs the question about the impact of international treaties on an Islamic state. At first glance, some might argue that Islamic states give little credence to international treaties.[169] This, however, is wrong. Simply stated, Islamic law gives strong support for an Islamic country to follow an international treaty. Furthermore, one could argue that an international treaty signed by many Islamic countries is an indication of *ijma* and therefore consensus in terms of Islamic law.

Indeed, Muhammad looked upon treaties in a very favorable way. From Islamic history, it is clear that Islam adopted the principle of *pacta sunt servanda.*[170] Dr. Khadduri explains, "once the treaty is concluded Muslim authorities are strict in regard to the necessity of living up to its terms. The Qur'an urges the Muslims not to break oaths after making them . . . [thus] *pacta sunt servanda* is inherent in the conception of *aqd* [treaty] and is recognized by all Muslim jurist-theologians."[171] Such was the case with regard to the Treaty of Hudaibiya, which was signed between the Prophet and the Quraish in 628 C.E. The formal negotiating history and the strict observance by Muslims were strong indications of the Prophet's belief in adherence to treaties.[172]

Further evidence of Islamic adherence to *pacta sunt servanda* is found in the Quran: "O you who believe, fulfill (all) obligations."[173] Dr. M. Ali explained that the translation of this verse and the Arabic word, *aqd*, includes, "[r]espect for all *covenants, contracts, agreements, leagues, treaties*, and *engagements*."[174] The Quran further exhorts believers to "[f]ulfill the Covenant of Allah when ye have entered into it, and break not your oaths after ye have confirmed them: Indeed ye

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[167] *See, e.g.,* Kuwait's reservations to the CEDAW at United Nations, *CEDAW Reservations*, UN CEDAW SESSIONS, http://www.un.org/womenwatch/daw/cedaw/reservations-country.htm (last visited Jan. 25, 2008).
[168] *Id.* at 9.
[169] For a general discussion *see* Abdullah A. An-Na'im, *Human Rights in the Muslim World: Socio-Political Conditions and Scriptural Imperatives*, 3 HARV. HUM. RTS. J. 13 (1990).
[170] "agreements must be respected"
[171] MAJID KHADDURI, WAR AND PEACE IN THE LAW OF ISLAM 204 (1955).
[172] M. Cherif Bassiouni, *Protection of Diplomats Under Islamic Law*, 74 AM. J. OF INT'L L. 609, 611 (1980).
[173] QURAN 5:1 (Abdullah Yusuf Ali trans.).
[174] THE HOLY QURAN, commentary # 656, (M. Ali trans. and commentary, 1995).

have made Allah your surety; for Allah knoweth all that ye do."[175] Nor should covenants be broken because one community feels stronger than another.[176] In fact, breaking treaties puts the violator into a state lower than animals.[177]

Understanding that Islamic law supports the enforcement of treaty provisions, it is important to consider treaty provisions applicable to the cessation of honor killings. To begin, Article 5 (a) of the CEDAW specifies that:

> States Parties shall take all appropriate measures . . . *[t]o modify the social and cultural patterns of conduct of men and women*, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.[178]

Jordan has not given any reservation, understanding, or other declaration regarding this article, so they are bound by international legal obligation to take all appropriate measures to modify the culturally deplorable practice of honor killing. Additionally, as shown, there is no Islamic legal justification for the practice, so Jordan is also bound by moral grounds to stop it.

The International Covenant on Civil and Political Rights (ICCPR) further supports this obligation by declaring that, "every human being has the inherent right to life . . ." and "[n]o one shall be arbitrarily deprived of his life."[179] According to Article 4, even in times of emergency, there shall be no derogation from this principle.[180] Additionally, ICCPR requires governments to ensure one's right to life and security, without any distinction of any kind—including gender.[181] Clearly, an arbitrary decision of an irate family member killing a young woman over a mere rumor of sexual impropriety violates this convention. Therefore, the state, in this case Jordan, must do what it can to stop the practice, even in the most remote corners of the country.

CEDAW further guarantees a woman's right to be defended from honor killings, which are committed (for the most part) by private

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[175] QURAN 16:91 (Abdullah Yusuf Ali trans.).
[176] QURAN 16:92 (Abdullah Yusuf Ali trans.).
[177] QURAN 8:55-56 (Abdullah Yusuf Ali trans.) ("For the worst of beasts in the sight of Allah are those who reject him: they will not believe. They are those with whom thou didst make a covenant."). This *ayat* was in response to Banu Quraiza's repeated treachery after making treaties with the Muslims and then breaking them.
[178] CEDAW, *supra* note 165 (emphasis added).
[179] ICCPR, *supra* note 165.
[180] *Id.*
[181] ICCPR, *supra* note 165, articles 2, 6, and 9.

actors. In 1992, the CEDAW committee adopted General Recommendation 19, which states emphatically that, "states may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights, or to investigate and punish acts of violence."[182] In addition to this responsibility, the committee explained that traditional ideologies which "regard women as 'subordinate to men' and seek to 'justify gender-based violence as a form of protection or control' deprive women of mental and bodily integrity."[183]

Other sources of international law indicate that the end of violence against women is reaching customary international legal status. The United Nations General Assembly has indicated strongly that:

> States should condemn violence against women and should not invoke any custom, tradition or religious consideration to avoid their obligations with respect to its elimination. States should pursue by all appropriate means and without delay a policy of eliminating violence against women and to this end, should . . . [e]xercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons.[184]

While this declaration is not binding international law, it shows that the world recognizes the importance of state responsibility regarding the end of violence against women. Many declarations and other international instruments reinforce the importance of an individual's right to life.[185] Importantly, so does the Islamic Declaration

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[182] CEDAW Committee, General Recommendation 19, Violence against women, (Eleventh session 1992), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HR\GEN\1\Rev. 1 at 84 (1994), (contained in document A/47/38), ¶ 9.

[183] Amnesty International USA, Culture of Discrimination*: A Fact Sheet on Honor Killings*, AMNESTY INTERNATIONAL USA, http://www.amnestyusa.org/women/honorkillings.html (last visited Jan. 25, 2008).

[184] Declaration on the Elimination of Violence against Women, 23 Feb. 1994 G.A. res. 48/104, 48 U.N. GAOR Supp. No. 49 (217), U.N. Doc. A/48/49 (1993), art. 4.

[185] *See, e.g.* Universal Declaration of Human Rights, Dec. 10, 1948, G.A. res. 217A (III), U.N. Doc A/810 at 71 art. 3 [hereinafter UDHR]; American Declaration of the Rights and Duties of Man, Apr. 1948, *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 17 (1992); ICCPR, *supra* note 165, art. 6.1; European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 04, 1950, ETS No. 5, 213 UNTS 222, art. 2; The American Convention of Human Rights (Pact of San Jose), Nov. 22, 1969, art. 4; The African Charter on Human and Peoples' Rights, June 27, 1981, OAU Doc. CAB/LEG/67/3/Rev.5, art. 4 (1981), *reprinted in* 21 I.L.M. 58 (1982).

of Human Rights (IDHR). It, however, takes life a step further by proclaiming the need to protect a body even after death:

> Human life is sacred and inviolable and every effort shall be made to protect it. In particular no one shall be exposed to injury or death, except under the authority of the Law . . . Just as in life, so also after death, the sanctity of a person's body shall be inviolable. It is the obligation of believers to see that a deceased person's body is handled with due solemnity.[186]

From this declaration, it is again easy to find that Islamic law values the right to life. The IDHR even goes so far as to proclaim how valuable one's body is after death. Therefore, within the context of honor killings, it is clear that not only should a woman be protected in life, but even if a victim is subject to an honor killing, her body should also be treated respectfully, not beheaded or mutilated.

From the above, it is evident that both Islamic law and international law forbid the concept of honor killings. So then, how can economic advancement help?

3. *Economic Advancement and the End of Honor Killings*

"Most often, the [honor] killings occur among the poorer and less educated, particularly in Arab tribal societies like Jordan's and the Palestinians . . . . The killings are rare among the educated and urbane."[187] While it may be impossible to bring an entire country to a new socio-economic level overnight, steps in this direction will ultimately help end honor killings. One of the most positive steps in this area is the recognition that this problem exists in the first place. A search of print or electronic media from approximately fifteen or twenty years ago yields virtually no results regarding "honor" or "honor killings."[188] It is only recently, from 1995 forward, that this issue has been given due attention.[189] Unfortunately, most of the attention has been from the journalistic approach of identifying the issue; little if any attention has been given on how to solve the problem via economic or

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[186] Islamic Declaration of Human Rights, Sept. 9, 1981, 21 Dhul Qaidah 1401, articles 1 (a) and (b).

[187] Douglas Jehl, *Arab Honor's Price: A Woman's Blood*, ARAB WOMEN'S BLOOD (1999), http://polyzine.com/arabwomen.html (last visited Jan. 25, 2008).

[188] A Lexis-Nexis search for news articles on "Honor Killings" found only 40 results with the date restriction from 1985-1990, only 167 hits were found from 1990-1995. Over 3,000 hits appeared when the date was restricted from 1995-2005.

[189] *See* Alasdair Soussi, *Women Challenge "Honor" Killings*, CHRISTIAN SCIENCE MONITOR (2005), http://www.csmonitor.com/2005/0302/p15s01-wome.html (last visited Jan. 25, 2008).

other material methods. Dr. Tahira Khan, a professor at Pakistan's Agha Khan University, however, has done in-depth research in the area.[190] In his view, financial interests often create an "honor killing industry."[191]

According to Dr. Khan, too much emphasis has been placed on understanding honor killings from a socio-cultural standpoint. This in turn, Dr. Khan explains, undermines the material/economic dimensions. Indeed, "[f]inancial and property considerations, more than simply an obsession with female chastity, fuel male control over female sexuality."[192] In truth, stopping honor killings requires a focus on not only on the cultural norms but also on the material/economic dimensions that lead to acceptance of the crime.

According to the research conducted by Dr. Khan, honor killings do not only involve adultery or sexual impropriety; they also occur where the sexuality of the woman was not even involved. Instead, the underlying issue in some cases was property and economic gains.[193] It is therefore possible that gains from inheritance or dower produced wealth, causing women to be targeted. Another potential explanation would be that the male did not want to have to pay the amount he still owed his bride based on her dower contract—or where death of his bride may allow the husband to receive his wife's dower and then permit him to marry another woman of his choice.[194] A high percentage of honor killings are committed due to property.[195] While Dr. Khan's research focuses on Pakistan, many similar findings could undoubtedly be discovered in any less-developed country that still uses honor as a justification for murder.

Like Jordan, honor killings in Pakistan occur primarily in rural areas. Here, the marriage of a daughter is a "well-calculated affair."[196] To keep property together, marriages are often arranged within the family on an exchange basis.[197] Property considerations also support the determination that inheritance leads to many honor killings. As discussed previously in the section on inheritance, most lines of succession run through the father's side of genealogy. Therefore, any allegations regarding a woman's sexual impropriety might be considered more serious because of the potential complications involved

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[190] *See* Mazna Hussain, *Take My Riches, Give Me Justice: A Contextual Analysis of Pakistan's Honor Crimes Legislation*, 29 HARV. J.L. & GENDER 223, 228 (2006).
[191] *Id.*
[192] *Id.*
[193] *Id.*
[194] *Id.* at 229.
[195] *Id. See also* Neshay Najam, *Honor Killings in Pakistan*, CRESCENT LIFE, http://www.crescentlife.com/articles/social%20issues/honor-killings_in_pakistan.htm (last visited Jan. 25, 2008).
[196] *Id.* at 228.
[197] *Id.* at 229.

with children born from another man. This is perhaps one reason why men in these "patrilineal, patrilocal" societies receive more leeway if allegations of their sexual misconduct arise.[198] For in these cases, honor killings rarely involve a man as the victim.

Dr. Khan offer no direct economic solution to the problem of honor killings, but he accurately identifies the economic driving force behind it. As one attorney explained, "[h]onour is only a pretax [sic] to murder women for property and in many cases, for getting lighter punishment for heinous crimes."[199] With money as one identified source, what is the solution to these honor killings?

One of the first issues to address would be to empower women so they are considered more than just property themselves. Dr. Kahn explains that in these poor rural communities, "[w]omen are considered the property of the males in their family irrespective of their class, ethnic, or religious group. The owner of the property has the right to decide its fate. The concept of ownership has turned women into a commodity which can be exchanged, bought and sold."[200]

To change this perspective, groups like Human Rights Watch and Amnesty International are working to bring awareness to the problem. As recently as December 2002, their efforts helped encourage the United Nations to pass a resolution condemning honor killings.[201] Unfortunately twenty nations did not sign the resolution, including Russia, China, and Pakistan.[202] To change this, global economic pressure, including pressure from the United States, may be needed.[203]

To Jordan's credit, some of the country's leaders have begun to take notice and to push for change. King Abdullah II opposes honor killings and has backed the proposed legislation that would make penalties for the practice more severe.[204] However, as noted previously, Jordan also has other groups fighting to resist this legislation. With the king's support, however, a beneficial side effect has occurred—more groups are openly speaking out against the practice, which in turn may help to end it.[205]

Jordan is also beginning to reap the rewards of a financially driven female working force. Understanding the importance of education, Jordan has made remarkable improvement over the last

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[198] *Id.*
[199] *See* Najam, *supra* note 195.
[200] Hassain, supra note 190, at 228. *See also* Kayla White, *Honor Killings*, THE WORLD Youth Manifesto Project, http://www.pwc.k12.nf.ca/cida/manifesto/honor_killings.htm (last visited Jan. 25, 2008).
[201] White, *supra* note 200.
[202] *Id.*
[203] The political reasons why this pressure may not come from the United States would be too much to explore in this article.
[204] White, *supra* note 200.
[205] *Id.*

couple of years. The literacy rate for women is now 83.9 percent, and 67 percent of women have some secondary education.[206] Education of young and old women is an important step toward improving the economic standing of an entire country. As Isobel Coleman points out, "Educating women, especially young girls, yields higher returns than educating men."[207] Coleman elaborates regarding some of the results:

> Girls' education also lowers birthrates, which, by extension, helps developing countries improve per capita income. Better-educated women bear fewer children than lesser-educated women because they marry later and have fewer years of childbearing. They also are better able to make informed, confident decisions about reproduction. In fact, increasing the average education level of women by three years can lower their individual birthrate by one child . . .[208]

All of these benefits are helpful, but perhaps the greatest result of empowering women economically is the possibility of ending domestic violence. Coleman explains that microfinancing has had a number of positive impacts around the world—including the improvement of the social status of women.[209] She also explains that, "women with microfinancing get more involved in family decision-making, are more mobile and more politically and legally aware, and participate more in public affairs than other women."[210] More germane to the topic of honor killings, Coleman points out that, "[f]emale borrowers also suffer less domestic violence—a consequence, perhaps, of their perceived value to the family increasing once they start to generate income of their own."[211]

B. Right to Equality

Continuing to explore the positive changes that can occur with empowering women economically, this article will now look at a woman's right to equality. In 1987, a Palestinian film emerged from Israel showing both the struggle of Palestinians living under Israeli occupation as well as a beautiful portrait of a traditional Arab

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[206] *See* Janet Afary, *The Human Rights of Middle Eastern and Muslim Women: A Project for the Twenty-first Century*, WOMEN'S RIGHTS: A HUMAN RIGHTS QUARTERLY READER 133, 146 (2006).
[207] *See* Coleman, *supra* note 120, at 2.
[208] *Id.*
[209] *Id.*
[210] *Id.*
[211] *Id.*

wedding.[212] The film, *Urs al-jalil*, was about an elderly man who made a bargain with the local Israeli military. In order to be permitted to have a wedding for his son, the military was allowed to attend. As the wedding unfolded, the film portrayed a traditional Arab celebration.

This remarkable film showed the preparation in putting on a wedding while at the same time demonstrating the clear separation lines between men and women. Upon close examination, it also demonstrated the differences between Western and Islamic notions of marriage. In the film, there were no wedding vows exchanged, and no "you may now kiss the bride." Instead the movie showed the wedding feast, the community involvement, and the importance of tradition. Little significance was given to any formalization of the wedding.[213] This is because, in Islamic law, marriages are primarily an arrangement finalized by a contract. Thus, the significance of exchanging vows is of little import to a traditional Islamic marriage.

When addressing the concept of women's equality, marriage is a great starting point. Cultural and traditional customs may place a Middle Eastern woman in the untenable position of an "arranged marriage," but Islamic law does not support it.[214] Thus, at least at the inception of marriage, a woman and a man are on equal footing. However, two issues arguably place women in a lesser position when it comes to marriage. The first is polygamy. Clearly if a man is permitted to marry more than one woman, it is impossible to argue that any of his wives are on equal grounds as their husband. The other inequality is divorce. As will be discussed, the difficulty women face in obtaining a divorce, which contrasts the ease with which men may obtain them, may lead a woman to stay in an otherwise abusive marriage. Therefore, divorce is an example of how Muslim women are put at a disadvantage.

To address the right to equality, these two areas of marriage will be reviewed along with Islamic legal principles and international law. Finally, using economics as a tool for change, this section will conclude

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[212] WEDDING IN GALILEE (Marisa Films 1987).

[213] In most cases, Muslim weddings are usually performed in front of an *iman* or a *qadi* (judge). The marriage ceremony generally follows the customs of the country where the marriage is taking place. *See* Svetlana Ivanova, *The Divorce Between Zubaida Hatun and Esseid Osman Aga*, WOMEN, THE FAMILY, AND DIVORCE LAWS IN ISLAMIC HISTORY 112, 115 (1996).

[214] According to the Prophet's teachings, a woman's consent was a prerequisite of a valid marriage contract. This is confirmed by one *hadith* wherein, "Ibn Abbas reported that a girl came to the Messenger of Allah, and she reported that her father had forced her to marry without her consent. The Messenger of God gave her the choice . . . (between accepting the marriage or invalidating it)." (Ahmad, Hadith No. 2469). Another version of the report states that, "The girl said: 'Actually, I accept this marriage, but I wanted to let women know that parents have no right to force a husband on them.'" (Ibn-Majah). *See* JAMAL BADAWI, GENDER EQUITY IN ISLAM 23 (2003).

with ways in which money can be a factor in diminishing both inequalities on the individual and national levels.

1. *Islamic Law and Polygamy*

> [P]olygamy is not a mere Islamic phenomenon. It was recognized by pre-Islamic people for many centuries. For instance, it was exercised by Babylonians, Greeks, Persians, and Arabs. Indeed, many pre-Islamic religions such as Judaism acknowledged polygamy among its adherents. It was also the tradition of all Prophets (p.b.u.t.) except Jesus (p.b.u.h.).[215]

If this article were a review of Christian law rather than Islamic law, it would be difficult to show that Christianity had any objections to polygamy. To the contrary, a historical review of Christian law might show a strong support of the practice.[216] But today, in most Christian societies, secular legal systems have overtaken religious laws to ultimately prohibit the practice.[217] Since polygamy is becoming rare even in Muslim societies, some would argue there is no need to discuss change in this area. Just as it has in Christian societies, there is an argument that time is likely to lead to the prohibition of polygamy, even in Muslim societies.[218] Whether this is true or not, the fact remains that polygamy must cease completely for women to truly have equality. It is natural, then, to first consider whether polygamy is even legal under Islamic law.

The Quran makes clear in a number of references that men and women are equal before God:

> And their Lord hath accepted of them, and answered them: Never will I suffer to be lost the work of any of you, be he male or female: Ye are from, one another.[219]

> If any do deeds of righteousness – Be they male or female – and have faith, they will enter Heaven, and not the least injustice will be done to them.[220]

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[215] IBRAHIM A. AL-MARZOUQI, HUMAN RIGHTS IN ISLAM 236 (2000).
[216] *See* Heather Johnson, *Special Collection: Seminar Papers on Women and Islamic Law: There are Worse Things Than Being Alone: Polygamy in Islam, Past, Present, and Future*, 11 WM. & MARY J. WOMEN & L. 563 (2005).
[217] *Id.*
[218] *Id.* at 564.
[219] QURAN 3:195 (Abdullah Yusuf Ali trans.).
[220] QURAN 4:124 (Abdullah Yusuf Ali trans.).

> For Muslim men and women – for believing men and women, for devout men and women, for true men and women, for men and women who are patient and constant, for men and women who humble themselves, for men and women who give in charity, for men and women who fast (and deny themselves), for men and women who guard their chastity, for men and women who engage much in Allah's praise – for them has Allah prepared forgiveness and great reward.[221]

> One Day shalt thou see the believing men and the believing women – How their Light runs forward before them and by their right hands: (Their greeting will be): Good News for you this Day! Gardens beneath which flow rivers! To dwell therein for aye! This is indeed the highest achievement.[222]

Clearly in Islamic law, men and women are equal before God. In fact, if there is any indication of who is superior on earth, it would be the one who is the most obedient to God:

> O mankind! We created you from a single (pair) of a male and a female, and made you into nations and tribes, that ye may know each other (not that ye may despise each other). Verily the most honoured of you in the sight of Allah is (he who is) the most righteous of you. . .[223]

Indeed, Islamic law further equalizes men and women by proclaiming that Adam and Eve were both equally responsible for their sin in the Garden.[224] Along this same line, the Quran does not blame women for the "fall of man," nor does it view pregnancy as punishment for Eve's transgression.[225] So then, if men and women are equal before God, why would polygamy ever be allowed under Islamic law?

A simple reading of stories in *A Thousand and One Nights*[226] might lead one to think that Islamic society views women as nothing more than chattel best suited for a harem. Frankly, many in Western society misunderstand the practice.[227] According to one author,

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[221] QURAN 33:35 (Abdullah Yusuf Ali trans.).
[222] QURAN 57:12 (Abdullah Yusuf Ali trans.).
[223] QURAN 49:13 (Abdullah Yusuf Ali trans.).
[224] QURAN 7:19-27 (Abdullah Yusuf Ali trans.); *see also* Badawi, *supra* note 214, at 7.
[225] Badawi, *supra* note 214, at 7.
[226] *See* A THOUSAND NIGHTS AND ONE NIGHT (J.C. Mardrus, Routledge 2001).
[227] *See* Johnson, *supra* note 216, at 563.

"[a]ssociating polygamy with Islam . . . is one of the most persistent myths perpetuated in Western literature and media."[228] Polygamy was already being widely practiced during the *Jahiliyyah* period (era prior to the introduction of Islam). In fact, the pre-Muhammad era was a world "rife with misogyny."[229] Women were not treated as full human beings and men were in supreme authority.[230] There is historical evidence of laws that permitted men to "pull out their wives' hair and cut their ears" if their wives were not obedient.[231] Further, "[i]ncestuous marriages, slavery, concubinage, and unlimited polygamy were widely practiced."[232] Muhammad[233] sought to change all this, and in the end, the manner in which he accomplished this goal represented a major step forward for women's equality.

In its infancy, Islam did not outlaw polygamy, but it significantly regulated it.[234] After the *Battle of Uhud*, many Muslim men were killed, leaving behind a large number of widows and orphans.[235] Shortly thereafter, a passage in the Quran was revealed to the Prophet indicating what guidance should be followed to support these destitute souls:

> If ye fear that ye shall not be able to deal justly with the orphans, marry women of your choice, two, or three, or four; but if ye fear that ye shall not be able to deal justly (with them), then only one, or (a captive) that your right hands possess. That will be more suitable, to prevent you from doing injustice.[236]

Although Islamic law "adopted" polygamy, it did not leave a woman without options. A proposed second wife always could reject the marriage proposal, because a woman has a right to choose.[237] Additionally, if a first wife did not want to be a part of a polygamous relationship, she had a right to include that condition in her marriage contract.[238]

For an example of the proper manner in which to pursue a polygamous relationship, one need not look further than to the Prophet. Muhammad was first married to a very powerful woman, Hadija, who

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[228] Badawi, *supra* note 214, at 26.
[229] Johnson, *supra* note 216, at 575.
[230] *Id.*
[231] *Id.*
[232] *Id.*
[233] With the guidance from Allah.
[234] Badawi, *supra* note 214, at 27.
[235] *Id.* at 28.
[236] QURAN 4:3 (Abdullah Yusuf Ali trans.).
[237] Badawi, *supra* note 214, at 28.
[238] *Id.*

actually asked him to marry her.[239] Muhammad was married to Hadija for twenty-three years, took no other wives during this time, and did not remarry until some time after her death.[240] Much later, he married Aisha, who was the daughter of Abu Bakr.[241] This marriage was taken as a way for the Prophet to honor his friend who ultimately became the first Caliph upon Muhammad's death.[242]

Before his death, the Prophet continued to demonstrate the proper application of an acceptable form of polygamy. All of Muhammad's wives, with the exception of Aisha, were widows.[243] Among them, one was a widow because of the *Battle of Uhud;* two were facing poverty and destitution at the time of their marriage proposal; and another faced becoming a beggar because her Christian husband died, and she refused to abandon Islam and seek Christian aid.[244] Other wives joined Muhammad because of his genius at establishing peace and his compassion for the war torn. Juwayriyah Harith, daughter of a chief from an opposing clan, was a captive from a military operation.[245] When she agreed to marry Muhammad, the remaining captives were released because they were now related to the Prophet by marriage.[246] Based on this generous action, the rest of the clan converted to Islam.[247]

Gradually after the death of the Prophet and with the passage of time, polygamy morphed from assisting destitute women to fulfilling selfish male needs. In a 2004 study in Egypt, male respondents were asked what would justify polygamy. Over 20 percent said that it would be justified if the wife could not have kids.[248] Over 13 percent indicated that polygamy would be justified if a wife had a chronic illness.[249] Only 12.5 percent of the total sample said that it was justified because "religion allows it."[250]

One of the reasons why it is difficult for a man to justify a polygamous relationship in Islam is because the Quranic justification makes clear that if a man has more than one wife, he must treat all of his wives equally.[251] This has been interpreted to require equal economic

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[239] Johnson, *supra* note 216, at 576.
[240] *Id.*
[241] *Id.*
[242] *Id.*
[243] *Id.* at 579.
[244] *Id.*
[245] *Id.*
[246] *Id.*
[247] *Id.*
[248] *See* LYNN WELCHMAN, WOMEN'S RIGHTS AND ISLAMIC FAMILY LAW 52 (2004).
[249] *Id.*
[250] *Id.*
[251] *See* Mackey, *supra* note 82, at 174.

support.[252] Author Sandra Mackey gives an excellent anecdotal application of this rule:

> The injunction to treat all wives equally is taken seriously. I once saw an old Bedouin man squatted down in the Dirrah gold *souqs,*[253] surrounded by four veiled wives huddled in a circle. In his hand, he clutched a large roll of SR 50 bills, which he was distributing one at a time around and around the circle. When he reached the end of the roll, each wife grabbed her share, stuffed it in her plastic purse, and scurried off to spend it with her favorite gold trader.[254]

Based on the requirement to treat each bride equally, many countries like Tunisia and Turkey found religious justification to end polygamy.[255] The argument is syllogistic. The Quran makes it clear that it is impossible to treat women equally: "ye are never able to be fair and just as between women, even if it is your ardent desire . . ."[256] Thus, if having more than one wife requires that the husband treat them equally, and it is impossible for anyone to treat wives equally (except maybe the Prophet), then no man may legally have more than one wife. This logic could very well have assisted President Habib Bourguiba in 1956 when he sought to end polygamy in Tunisia.[257] Although he was a social progressive, he still made his reforms in an Islamic state.

Unfortunately, unlike Tunisia, men in countries like Saudi Arabia and the Sudan still use *aya*[258] 4:3 of the Quran to justify polygamy for reasons other than protecting widows.[259] As explained by Heather Johnson, "[p]roviding a man with a legal framework to keep multiple sexual partners not only does not 'serve any moral or social purposes that are compatible with the Quranic ideals of chastity and justice . . . [it] also pervert[s] these ideals.'" [260]

It should be clear from this analysis that polygamy, while permissible under Islamic law, is nevertheless difficult to justify. It is also difficult to envision a manner in which a man can truly treat four wives equally. Irrespective of this challenge, men are still finding ways to continue the practice. But women do have at least one tool at their

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[252] *Id.*
[253] Markets.
[254] Mackey, *supra* note 82, at 174.
[255] *See* DAOUD S. EL ALAMI & DOREEN HINCHCLIFFE, ISLAMIC MARRIAGE AND DIVORCE LAWS OF THE ARAB WORLD 3 (1996).
[256] QURAN 4:129 (Abdullah Yusuf Ali trans.).
[257] *See* DIANA DARKE, TUNISIA 16 (1996).
[258] Verse.
[259] Johnson, *supra* note 216, at 586.
[260] *Id.*

disposal to help end polygamy—divorce. Unfortunately, it too might be seen as unfairly balanced in favor of men.

2. *Islamic Law and Divorce*

In the United States, it is not uncommon for a spouse to first learn of a pending divorce while being served divorce papers by a justice of the peace. Imagine though, a wife who learns that she is divorced simply by receiving a text message on her cell phone. In Malaysia, the government's adviser on religious affairs said "as long as the message was clear and unambiguous it was valid under Islamic Sharia law."[261] While this advice was issued in 2003, it indicates that in at least one forum in the Muslim world, divorce for a man can be very simple.

The roots of a "cell phone" divorce trace back to the process of *talaq* in Islamic law. *Talaq* is the concept of repudiation, and it is either revocable or irrevocable based on the manner in which it is performed.[262] During a period of purity[263] if a man "repudiates" his wife by proclaiming such words as "I repudiate thee," he has effectively divorced his wife. This would be an example of a revocable, or *talaq wahida*, divorce.[264] The divorce is revocable because it is not finalized until after the period of *idda*. *Idda* is a "statutory waiting period following a divorce or a husband's death during which a woman is not allowed to remarry."[265] The duration of this waiting period is usually three menstruations; if the woman is unable to menstruate, then the period normally equates to three months.[266] If a woman is pregnant, the *idda* period is extended until after the birth of the baby.[267]

If the couple works out their differences during the *idda*, the marriage can continue by simple consummation prior to the end of the *idda*.[268] If, however, no consummation occurs during the *idda*, the marriage is over.[269] This is the preferred form of *talaq*.[270] Because of its simplicity, there is a defense mechanism built in to protect women from the whims of a divorcing man who might be inclined to divorce by repudiation and then seek to return to his wife continuously. The Quran states that "[a] divorce is permissible only twice; after that, the husbands

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[261] *See* BBC News, *Malaysia Permits Text Message Divorce*, BBC NEWS (2003), http://news.bbc.co.uk/2/hi/asia-pacific/3100143.stm (last visited Jan. 25, 2008).
[262] JOSEPH SCHACHT, AN INTRODUCTION TO ISLAMIC LAW 11 (1982), at 163.
[263] The wife is no longer menstruating. *See* Al-Marzouqi, *supra* note 215, at 267.
[264] *Id.* at 268.
[265] JUDITH E. TUCKER, IN THE HOUSE OF THE LAW 169 (1998).
[266] *Id.*
[267] *Id.*
[268] Nasir, *supra* note 19, at 119.
[269] *Id.*
[270] *Id.*

should either retain their wives together on equitable terms, or let them go with kindness."[271] This means in practice that if a man repudiates his wife and then takes her back, he must be careful because he is only allowed to do this (*talaq*) one more time before a third repudiation would make the divorce irrevocable.[272] At that time, he would have to let her go.

A man can still remarry his wife after he has repudiated her three times, but there is a significant consequence. According to the Quran, if a man repudiates his wife (and thereby divorces her) three times, he cannot "after that, remarry her until after she has married another husband and he has divorced her." And, if this new husband divorces her, "there is no blame on either of them if they reunite."[273] Al-Imadi, a recognized Islamic legal advisor of the past, answered a question about how this works in practice:

> QUESTION: There is a woman whose husband divorced her thrice, and she completed her waiting period. Then he married her to his adolescent slave in a legal marriage, and the slave consummated the marriage by inserting the tip of his penis into the meeting point of the lips of her vagina. Then he withdrew from her. The marriage was annulled, and her waiting period ended. Is she permissible to the first [husband]? ANSWER: Yes, and the matter is fully explained.[274]

From the above, it is clear that even though repudiation is a simple form of divorce for a man to practice, if he is not careful, he might have to permit his wife to remarry, consummate the marriage with another man, and then await a divorce from the second husband before he is allowed to have her back.[275] The reason the "cell phone" divorce can be disturbing is because some Islamic scholars have concluded that a man can repudiate his wife with three successive declarations.[276] This would, in turn, create an irrevocable divorce within seconds. It follows that modern technology would permit a Malaysian husband to "text message" his wife with three repudiation messages, thereby terminating the marriage.

Most Islamic scholars agree with Joseph Schacht[277] that the triple renunciation divorce is highly discouraged, but still "recognized as

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[271] QURAN 2:229 (Abdullah Yusuf Ali trans.).
[272] Schacht, *supra* note 262, at 163.
[273] QURAN 2:230 (Abdullah Yusuf Ali trans.).
[274] Tucker, *supra* note 265, at 88.
[275] *See also* Schacht, *supra* note 262, at 164.
[276] *Id.*
[277] Joseph Schacht is one of the most quoted sources regarding Islamic law.

valid" in Islamic law.[278] A woman has no similar right under Islamic law.[279] For this reason, a *talaq* divorce is one of the main reasons why much of the Western world considers Islamic divorce to be an example of where a woman's rights are not equal to a man's.[280] In Islamic law a woman must generally go before a *qadi* (judge) and have legal justification or agree with her husband to a *khul* divorce. She is, with few exceptions, not allowed to unilaterally end the marriage.[281] Thus, while Islamic law may protect a woman from the whims of a man using *talaq*, it does not adequately provide a mechanism for a woman to end a marriage on her own.

The first option of going to a judge is not without difficulties. For a woman to successfully obtain a divorce in court by the decision of a *qadi*, she would normally have to prove that her husband was either impotent, showed a lack of piety, or did not perform his Islamic duties.[282] The most common ground for divorce in this manner is the husband's inability to perform his requirements under the marriage contract.[283] If the wife proves her case, which normally requires the assistance of "acceptable" witnesses, then the *qadi* might grant her the divorce "without compromising her financial rights."[284]

Unfortunately, if a woman cannot make her case in front of the judge, the only other right she could normally resort to is that of the *khul* divorce, which is known as the woman's right to repudiation. It, however, is significantly different from that of *talaq* in that if a *qadi* grants a wife a *khul* divorce, the woman must forfeit any alimony, and most of the time she must also pay back her *mahr* (dowry).[285]

It is generally more profitable for a woman if her husband seeks the divorce. In cases of a *talaq*, upon the third divorce or proclamation thereof, a woman can demand immediate payment of her *mahr*.[286] If the pronouncement only occurred once, then the ex-wife can seek the total *mahr* after the *idda* period has expired—assuming of course that her husband has not yet taken her back.[287]

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[278] Schacht, *supra* note 262, at 164.
[279] *Id.*
[280] *See* Welchman, *supra* note 248, at 39. "Divorce law is a striking example of the [guardianship status of men over women]; *talaq* occurs at the wish of men, while women have to go to court to establish a cause if the wish to obtain a divorce against the wishes of their husband."
[281] *Id.*
[282] Abdal-Rehim Abdal-Rahman Abdal-Rehim, *The Family and Gender Laws in Egypt*, WOMEN, THE FAMILY, AND DIVORCE LAWS IN ISLAMIC HISTORY 96, 105 (Amira Sonbol, 1996).
[283] *Id.*
[284] *Id.*
[285] *Id. See also* Nasir, *supra* note 19.
[286] Tucker, *supra* note 265, at 92.
[287] *Id.*

The rights of a woman seeking a divorce and the rights of a divorced woman who has been subjected to a man's repudiation vary based on the type of society in which they live. In some more fundamentalist societies, a more patriarchal *qadi* may only allow a woman to seek divorce if the husband is "impotent or sterile, a leper, or insane." Further, "in certain cases, a one-year waiting period is allowed for therapy and if this fails, *khul* is initiated."[288] Other societies may not allow a woman any voice when it comes to divorce. For example, in societies that permit honor killings, a woman may have little chance to escape an abusive relationship without some consequence—financial or otherwise.

Because such societies often also discourage education of women,[289] it is hard for a woman to learn about her legal rights in the first place. If she were educated in Islamic law, she might learn that the Prophet highly discouraged divorce when he said, "Marry and do not divorce your wives, for divorce causes God's throne to tremble."[290] He also made it clear that the triple repudiation form of divorce was an absolute abomination. It is reported in a *hadith* narrated by Nasa'i that when the Prophet heard of such a divorce, he stood up in anger and declared, "You make fun of Allah's book and I am still among you!"[291]

This *hadith* is clear; nevertheless, many Islamic scholars still see triple repudiation divorces as valid.[292] It should come as no surprise then, that some (as in Malaysia) would agree that even a "text message" divorce is valid. For if a simple vocal utterance pronounced three times is valid, why not three text messages proclaiming the same?

So then, what can a woman do to obtain equal divorce rights within Islamic law? To answer this question, this article will look at international law's views of polygamy and divorce and then it well delve into the economic answers that can help improve these inequalities on behalf of Muslim women.

3. *International Law's Response to Polygamy and Divorce*

"Men and women of full age, without limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution."[293] Although not binding in nature, the Universal Declaration of Human Rights (UDHR) unequivocally states the

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[288] Shehadeh, *supra* note 26, at 34.
[289] *Id.* at 232.
[290] *Id.*
[291] *Id.*
[292] *Id.*
[293] Universal Declaration of Human Rights, G.A. Res. 217 A(III), U.N. Doc A/80, art. 16 (1948) [hereinafter UDHR].

international legal standard with regard to marriage, polygamy, and divorce. Men and women are entitled to enter into a marriage and end a marriage on equal grounds. Although the UDHR does not use the word "polygamy," it goes without saying that giving a man a right to marry more than one bride does not prove equal.

In addition to the UDHR, the CEDAW[294] also makes it clear that a woman has a right to enter and leave marriage on the same footing as a man.[295] CEDAW culminates an international effort designed to improve the status of women. Indeed, one could argue that CEDAW is reaching the status of customary international law, because the principles of CEDAW are exemplified by the legal obligation that nations have felt to "not discriminate against women."[296] This legal obligation, or *opinio juris*, has evolved via the women's movement that has become pervasive worldwide.[297] The women's movement also "demonstrates the second element of customary international law, widespread and consistent state practice involving the nondiscrimination norm."[298]

The discussion regarding the status of women's right from an international perspective could end here if CEDAW was unquestionably considered customary international law. The problem, however, is that many of the Islamic signatories to CEDAW have expressed reservations that undermine the convention's effectiveness. One could question the universal applicability of CEDAW, because these reservations demonstrate that many of these Islamic countries are actually "persistent objectors" to the norms surrounding women's rights. Indeed, more treaty-modifying reservations have been made to CEDAW than to any other convention.[299] While Islamic countries are not alone with regard to CEDAW reservations, they are often accused of establishing reservations that appear to be incompatible with the convention's object and purpose.[300]

Egypt, for example, objected to Article 16 and its equalizing provisions regarding marriage and divorce.[301] In its justification for their reservation, Egypt explained how dower and maintenance were

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[294] CEDAW, *supra* note 165.
[295] CEDAW, *supra* note 165, art. 16 (a)-(c).
[296] Chantalle Forgues, *A Global Hurdle: The Implementation of an International Nondiscrimination Norm Protecting Women from Gender Discrimination in International Sports*, 18 B.U. INT'L L.J. 247, 255 (2000).
[297] *Id.*
[298] *Id.* at 262.
[299] *See* Ann E. Mayer, *Rhetorical Strategies and Official Policies on Women's Rights: The Merits and Drawbacks of the New World Hypocrisy*, FAITH AND FREEDOM: WOMEN'S HUMAN RIGHTS IN THE MUSLIM WORLD 104, 105 (1995).
[300] *Id.* at 106.
[301] *Id.*

important balancing factors in favor of women that were equalized by the more stringent rules placed upon a woman seeking divorce.[302]

According to Egypt, the country provided equal rights for women by following Islamic legal rules that favored women in some areas but disfavored them in others.[303] Thus, Egypt reasoned, even though certain rules looked discriminatory, placed in an Islamic legal context, the whole structure was fair. Morocco's reservations followed the same logic.[304]

Looking at these reservations, it is evident that in countries like Egypt and Morocco, signing CEDAW did not signal that much of the internal legal structure of their country would change. In fact, in 1987 the UN Committee on the Elimination of Discrimination Against Women recommended a study to evaluate how women were faring in Islamic countries.[305] The study also would have examined why Islamic countries invoked Islamic law in not endorsing all parts of CEDAW. It did not get off the ground, however, because many Muslim countries, including Iran, Senegal, Morocco, Oman, Sudan, and Bangladesh, strongly objected, finding the study insulting.[306]

With strong and continuing reservations from Islamic countries regarding CEDAW, diplomatic pressure alone will not likely change all unfair and discriminatory practices in reserving countries. However, in addition to diplomatic pressure, economics offer an alternate approach that can help women acquire equal rights in the Middle East. This approach uses the rights women already have under Islamic law to help gain additional rights elsewhere. Morocco and Egypt both maintain that dower and maintenance equalize the lack of rights women have regarding divorce in those countries. So the real question is: How can the pursuit of these rights lead to more equity for women with regard to divorce and polygamy?

4. *Financial Measures that Help Equalize Marital Rights*

According to Professor al-Hibri, although the pace of change regarding women's rights in the Middle East is progressing slowly, any attempts to accelerate change without understanding its complexity could lead to an abrupt halt.[307] It is true that many Islamic cultures may live in such a way as to inhibit women's rights. Nevertheless, a proper

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[302] *Id.* (citing LARS ADAM REHOF, GUIDE TO THE TRAVAUX PREPARATOIRES OF THE UNITED NATIONS CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN 257 (1993)).
[303] *Id.*
[304] *Id.* at 112.
[305] *Id.* at 117.
[306] *Id.* at 118.
[307] *See* Azizah Y. al-Hibri, *Muslim Women's Rights in the Global Village: Challenges and Opportunities*, 15 J. L. & RELIGION 37 (1999).

reading of Islamic law in those societies would find that in fact the Quran "engages in affirmative action with respect to women."[308]

To protect a woman from the patriarchal world of 600-700 C.E., the Quran advanced women in many significant ways. For example, a woman retains her name after marriage.[309] In addition, "[s]he also retains her financial independence. She can own property in her own right whether she is married or single, and no one, not even her husband, may access her funds or property, or demand any form of financial support from her."[310] If she is to ever give her husband any money, it is considered a loan.[311] Placed in the context of the period, it is clear that these financial rights were in fact measures taken to progress women from the status of chattel to that of an equal voice in life and marriage.

Today, with the same infrastructure in place, it may behoove those wishing to progress women's rights not to attack the system, but to educate women on how they can advance within it. As previously described, before a man may lawfully wed a woman, he is required under Islamic law to agree upon a proper dower. This dower can take the form of *sadaq* (designated property) or *mahr* (money).[312] Because of the nature of dower, some claimed that dower is simply a "bride price" and thus places a woman into the status of property.[313] This, however, misses the point completely regarding the power of dower. Recall that dower is money or property that is paid to the bride. It is hers and hers alone. She also has the right to negotiate the terms surrounding it. It is true that sometimes fathers negotiate the dower, and it is true that in some cases, "fathers do not adequately protect their daughters' interests."[314] But, as stated before, from a Quranic perspective, dower is meant to advance the interests of women.

Since marriages under Islamic law must be done pursuant to a valid contract and dower must be a part of that contract, dower is one area in which women can gain rights and thereby limit the potential discriminatory features of the more patriarchal societies. In addition to dower, a woman could also make certain conditions a requirement within the marriage that if not fulfilled would render the marital contract voidable. Unfortunately, not all countries look at the ability to negotiate certain terms within a marital contract in the same light.

Of the four major schools of Sunni thought, three of them (the Hanafi, Maliki, and Shafi'i) believe that "marriage contracts are of such importance that they may not be rescinded by voidable conditions and

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[308] *Id.* at 47.
[309] *Id.*
[310] *Id.*
[311] *Id.*
[312] *Id.* at 48.
[313] *Id.*
[314] *Id.*

that they are too sacred to be treated merely as financial contracts for a consideration."[315] In essence, they would say there is no need to allow for a marriage contract to be voidable because a couple wishing to void a marital contract would simply need to resort to divorce.

Notwithstanding these interpretations, one exceptionally powerful school of Islamic thought sees negotiations surrounding a marital contract very differently. The Hanbalis, "permit any beneficial condition which the husband and wife may stipulate as long as it does not violate the religious texts."[316] According to this school of thought and more specifically Ibn Taimiya, the school's historical leader, "marriage contracts are so sacred and important and depend on the accord between husband and wife [that] such conditions are essential for lasting compatibility."[317]

Since the Hanbali school is the predominate school of Islamic thought throughout Saudi Arabia,[318] this open interpretation can prove very valuable for women who live in the extremely conservative country. With no civil code presently in Saudi Arabia, the incorporation of the Hanbali school of thought is particularly strong.[319] This can impact women's rights in that:

> The Hanbali school is especially permissive concerning conditions to contracts which other schools of law prohibited. No distinction is made between conditions contained in financial contracts for a consideration, gratuitous dispositions, guarantees, or contracts of marriage and matters related to them. Every condition which either contracting party may choose to stipulate is permitted, unless it is contrary to the legal nature and purpose of the contract, or unless it implies the combining of two transactions in one, which the Prophet warned was suspect of usury.[320]

Living in Saudi Arabia, a woman may appear to have few rights; however, with the broad power of contract negotiation, she can limit the potential for discrimination significantly. For example, using the marriage contract in her favor, a prospective first wife can make it a condition of marriage that her husband practice monogamy.[321] Once

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[315] P. Nicholas Kourides, *The Influence of Islamic Law on Contemporary Middle Eastern Legal Systems: The Formation and Binding Force of Contracts*, 9 COLUM. J. TRANSNAT'L L. 384, 430 (1970).
[316] *Id.*
[317] *Id.*
[318] *Id.* at 429.
[319] *Id.* at 428.
[320] *Id.* at 429.
[321] *See* Badawi, *supra* note 214, at 28.

accepted, this condition is binding. If the husband later chooses to seek out an additional wife, his first wife is entitled to divorce and to the financial rights associated with it.[322]

Thus, one way in which a woman can effectively counter polygamy is to negotiate a contingent marital contract. Her marriage could be agreed upon with a very high dower, some of which would be waived if the husband follows certain conditions (i.e. no polygamy). If the husband breaks the provisions of his marital contract and his actions lead to divorce, the contingent portions of the marital contract would impose a hefty financial penalty on the man for choosing to follow a discriminatory path. Many marriage contracts are already set up close to this arrangement. For example the Hanafi practice was for the dower to be split into two portions.[323] The first portion, or *muqaddam*, was paid at the time of the signing of the marriage contract, and the second portion was paid at the time of divorce or death of the spouse.[324] Using this mechanism, a woman could agree to a small sum to enter marriage, but a large sum would be her entitlement should her husband cause a divorce.

Similarly, a woman has the power to equalize the divorce playing field by placing in her marital contract conditions that permit divorce. As long as these conditions do not run counter to the underlying principles of the Quran and the *sunna* (traditions of the prophet), they would likely be enforced.[325] This is especially true even in Saudi Arabia.

As discussed earlier in this article, the concept of *pacta sunt servanda* is not foreign to Islamic law; indeed it is central to the Islamic law of contracts.[326] This was demonstrated in the arbitration award case between Saudi Arabia and the Arabian American Oil Company.[327] In that case, a contract dispute was resolved in favor of an oil company that challenged Muslim leadership. In the end, "the principles of freedom of contract, the binding force of contracts, and the requirement that the Muslim ruler fulfill his obligations were all upheld."[328]

In a country that takes contractual obligations so seriously, it is fair to posit that even in a marital contract, Saudi Arabia would not

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[322] *Id.* It is also important to note that even if the condition against polygamy is not included in the marriage contract, under Islamic law, if the first wife does not want an additional wife to join the family, she is entitled to seek a marriage under the provisions of *khul*.
[323] *See* Tucker, *supra* note 265, at 52.
[324] *Id.*
[325] Kourides, *supra* note 315, at 430.
[326] *Id. See also* QURAN 5:1 (Abdullah Yusuf Ali trans.) ("O ye who believe! Fulfill all obligations.").
[327] Saudi Arabia v. Arabian-American Oil Co. (ARAMCO), Aug. 23, 1958, 27 INT'L L. REP. 117 (1963).
[328] Kourides, *supra* note 315, at 433.

discard obligations lightly. Certainly not all women in Saudi Arabia feel they are in a position to make bold assertions of their rights in all marital contracts. Many may not want to assert their rights at all. It is important, however, to note that these rights exist. Further, the more that women (and their families) begin to claim these rights, the more that discrimination will diminish.

While it is true that the Hanbali school is predominate in Saudi Arabia, a *Sunni* Muslim has the right to follow whichever of the four schools of thought he or she desires.[329] Thus if a spouse wanted to include within his or her marital contract a choice of law provision that called for the Islamic court (of whatever country in which they reside) to interpret the contract using Hanbali ideals, such a choice of law provision could be validated based on the overwhelming Islamic legal concept that obligations are to be followed.[330] How such a choice of law provision would be followed in any particular country is subject to enormous speculation. For example, in a country like Morocco where the Malaki school is predominate, the courts might ignore such a provision. Nevertheless, a Muslim woman is not prohibited from trying.

Equalizing the playing field regarding marriage in the Middle East will not take place over night. However, each day that a spouse learns of her rights under Islamic law, the more that change can lead to equality. Just as Professor al-Hibri explained, change will not take place at exceptionally fast speeds,[331] but the more the world understands the framework of women's rights in the Middle East, the more the world can help women work within their own legal frameworks to achieve necessary equality.

C. Right to Equal Protection under the Law

Human rights activists in the West sometimes view the 2005 enfranchisement of women in Kuwait with an "it's about time" attitude. However, it is important to recall that women in most Western countries did not acquire the right to vote until the twentieth century.[332] Great Britain gave women the right in 1918, the United States followed suit in 1920, France in 1944, and Switzerland in 1971.[333] While the democracies of the West have been in development for centuries, Muslim countries have only acted independently within the past few decades.[334]

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[329] Interview with Fathalla Al-Meswari, Professor of Islamic Law at George Washington University, in Washington D.C. (Feb. 14, 2007).
[330] *Id.*
[331] *See* al-Hibri, *supra* note 307, at 37.
[332] *See* MIR ZOHAIR HUSAIN, GLOBAL ISLAMIC POLITICS 25 (2002).
[333] *Id.*
[334] *Id.*

From this perspective, impatience is illogical. Soon, women in the Middle East will all have the right to vote. It is only a matter of time before existing regimes recognize that women are entitled to equal protection under the law and that Islam does nothing to prohibit a woman from having equal rights in this area. In a number of ways, Islamic countries have led the world by example.

In 1988, Pakistan became the first Muslim country with a woman (Benazir Bhutto) as the head of the government.[335] Turkey elected Tansu Ciller as its first female prime minister in 1993, and Bangladesh has had two female prime ministers—Khaleda Zia and Hasina Wajed.[336] Indonesia, which is by far the most populous Muslim country, named its first female president in 2001, when Megawati Sukarnoputri took office from Abdurrahman Wahid.[337]

While none of these administrations have been held in perfect esteem amongst their constituents,[338] they still offer an example to the West. The United States, for example, which is considered the West's preeminent super power, has never elected a woman as President or even Vice President.[339]

This background reveals why it is truly only a matter of time that women in Islamic countries will see equality when it comes to voting rights. The right to hold office may take longer, but it too shall arrive. To demonstrate this, the article will now focus on Islamic law and politics and then turn to the international legal framework that women can use to help achieve equality.

1. *Islamic Law and the Right to Vote and Hold Office*

"Patriarchal societies have so heavily influenced the Maghreb states that Muslims now have difficulty differentiating which aspects of life are mandated by true interpretations of the Qur'an and which have resulted from the persistence of a male-dominated structure."[340] Indeed, "Islamic Governments, rather than Islam, are the true obstacles to women gaining equality in the public domain."[341]

Not only does the Quran state that on the day of judgment a woman will be absolutely equal to a man,[342] it also recurrently refers to

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[335] *Id.* at 26.
[336] *Id.*
[337] *Id.*
[338] *Id.* Bhutto was dismissed from office in 1990 and later accused of corruption after her subsequent reelection. Ciller was accused of graft and corruption.
[339] *Id.* at 25.
[340] Joelle Entelis, *International Human Rights: Islam's Friend or Foe? Algeria as an Example of the Compatibility of International Human Rights Regarding Women's Equality and Islamic Law*, 20 FORDHAM INT'L L.J. 1251, 1300 (1997).
[341] *Id.*
[342] QURAN 4:124 (Abdullah Yusuf Ali trans.).

"men and women" when referencing people and their duties.[343] Additionally several *hadith* of the Prophet indicate that women are to be treated equally. It is reported that the Prophet frequently stated that "all people are equal, as equal as the teeth of a comb. There is no merit of an Arab over a non-Arab, or of a white over a black person, or of a male over a female. Only God-fearing people merit preference."[344]

Because the Quran places men and women on the same footing before God, and because God is the source of Islamic law, a syllogism can be made that Islam recognizes the concept of equal protection of the law because men and women are equal before God.[345] Unfortunately, bringing Islamic leaders to this interpretation is not easy. "[I]n many Arab countries, especially Saudi Arabia, progress is often reversed because sharia 'texts are often not so much interpreted, as twisted to fit pre-existing traditions.'"[346]

In Saudi Arabia for example, "[t]raditionalists argue that women could never be allowed to vote because they would have to mix with men in polling places."[347] Once again "tradition all but shuts women out of the economic and political system."[348] Tradition also has the negative impact of forbidding women from holding office as well. In one quoted *hadith*, the Prophet is reported to have said, "[n]ever will succeed such a nation as makes a woman their ruler."[349] As such, many traditionalists rely on this saying as justification for keeping women from entering politics.

What these fundamentalists oftentimes neglect to report, however, is the underlying basis for this *hadith*. The Prophet made this statement after receiving news that "the people of Persia had made the daughter of Khosrau their queen."[350] Because the Persian rulers of the time showed great contempt towards the Prophet and did not live a proper life, some regard this statement as only a prediction by the Prophet of the Persian's "impending doom" for reason of their unjust empire.[351] Thus, because the statement refers to Persia, the argument continues that "such a nation" is really referring to one nation—Persia.

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[343] QURAN 33:35, 33:36 (Abdullah Yusuf Ali trans.).
[344] Husain, *supra* note 332, at 24.
[345] *See* Entelis, *supra* note 340, at 1305 (citing Urfan Khaliq, *Beyond the Veil?: An Analysis of the Provisions of the Women's Convention in the Law as Stipulated in Shari'ah*, 2 BUFF. J. INT'L L. 1, 13 (1995)).
[346] Wu, *supra* note 130, at 189. (quoting *Out of the Shadows, Into the World*, ECONOMIST, June 19, 2004, at 28).
[347] Tucker, *supra* note 265, at 148.
[348] *Id.*
[349] *See* Al-Marzouqi, *supra* note 215, at 224.
[350] Badawi, *supra* note 214, at 38.
[351] *Id.*

No categorical exclusion of women can therefore be made regarding all leadership positions held by women.[352]

Regardless of the usage of this *hadith*, it does not detract from the fact that "the general rule in social and political life is participation and collaboration of males and females in public affairs."[353] In fact, there is strong "historical evidence of participation by Muslim women in the choice of rulers, in public issues, in lawmaking, in administrative positions . . . and even in the battlefield."[354]

In one symbolic battlefield, women led the charge for the right to vote and won. Kuwait originally made several reservations to CEDAW because the country refused to give women the right to vote.[355] However, as mentioned at the beginning of this article, Kuwaiti women gained suffrage in 2005. The Susan B. Anthony of Kuwait, Rula Dashti, who is also the chairwoman of the Kuwait Economic Society, helped organize rallies outside the streets of parliament and did everything possible to encourage her government to change.[356]

Throughout her quest for equality, "[s]he stressed granting political rights to women would add to their positive role in the society and wouldn't cause any harm, adding 'the Sharia texts cited in all the marathon arguments and debates don't say a definite 'NO' for granting political rights to women.'"[357] Instead, Islamic law leaves the door open for interpretation. And that finally happened in 2005, when the Kuwaiti Parliament interpreted Islamic law to allow women the right to vote, leaving Saudi Arabia as the only Middle Eastern country where women have no such right.[358]

Unfortunately the debate surrounding the vote has not ended. To assuage hard-line Islamists, the Kuwaiti Parliament attached a proviso that women voters and politicians would still have to follow the precepts of Islamic law.[359] By adding this proviso, the door remains open for traditional Islamists to effectively control the new found right. Regardless, the Middle East is beginning to see the significance of women's political rights. The right to vote and hold office violates neither Islamic law nor international law.

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[352] *Id.*
[353] *Id.* at 37.
[354] *Id. See also* BOUTHAINA SHAABAN, THE MUTED VOICES OF WOMEN INTERPRETERS, FAITH AND FREEDOM: WOMEN'S HUMAN RIGHTS IN THE MUSLIM WORLD 61, 62 (1995).
[355] *See* Mayer, *supra* note 299, at 115.
[356] Eliana Benador, *If She Can Die ... She Can Vote; Echoes of Asrar in Battle for Rights*, ARAB TIMES, Mar. 07, 2005, at 1.
[357] *Id.*
[358] *See* Associated Press, *Kuwaiti Women Win the Right to Vote*, ST PETERSBURG TIMES, May 17, 2005, at 1.
[359] *Id.*

2. *International Law and the Right to Vote and Hold Office*

Some international legal scholars point to four primary documents as the "International Bill of Human Rights"[360]—the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), and the Optional Protocol to International Covenant on Civil and Political Rights.[361] Within these documents, the UDHR calls for equal protection of the law.[362] It also asserts the right to hold office and the universal right to vote.[363] The ICCPR mandates that States Parties to the Covenant will "ensure the equal right of men and women to the enjoyment of all civil and political rights."[364] Finally, ICESCR also requires States Parties to the Covenant to take steps to "ensure the equal rights of men and women to the enjoyment of all economic, social and cultural rights."[365]

While a number of Islamic countries have expressed reservations to these mandated rights,[366] the fact that the right to vote and hold office is clearly expressed and the fact that so many countries have signed the underlying documents of the Bill of Rights,[367] indicate there is strong state practice in this area. Further, strong international pressure on states to ensure these rights indicates the world feels obligated to provide them. The right to vote and hold office is arguably therefore within the realm of *opinio juris*. Taken together, even in the Middle East, voting and political participation appear to be rights that have reached customary international legal status.

Some countries, like Saudi Arabia, could be considered persistent objectors for refusing to sign the UDHR, claiming its equality provisions were contrary to Islam.[368] However, as a signatory to the

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[360] *See* Entelis, *supra* note 340, at 1305 (quoting ANN E. MAYER, ISLAM AND HUMAN RIGHTS: TRADITION AND POLITICS 38 (1995)).

[361] UDHR, *supra* note 185; ICCPR, *supra* note 165; ICESCR, *supra* note 165; First Optional Protocol to the International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, *available at* http://www.ohchr.org/english/law/ccpr-one.htm [hereinafter ICCPR Protocol One].

[362] UDHR, *supra* note 185, art. 7.

[363] *Id.* art. 21.

[364] ICCPR, *supra* note 165, art. 3.

[365] ICESCR, *supra* note 165, art 3.

[366] *See generally* Mayer, *supra* note 299, at 105-115. States like Morocco, Egypt, Kuwait, and Saudi Arabia have all expressed reservations regarding women and Islamic law.

[367] 151 countries for ICESCR and 154 countries for ICCPR. *See* Blackstone's Statutes, INTERNATIONAL LAW DOCUMENTS 101, 108 (Malcolm D. Evans ed., 2005).

[368] *See* John Kelsay, *Saudi Arabia, Pakistan, and the Universal Declaration of Human Rights*, *in* HUMAN RIGHTS AND THE CONFLICT OF CULTURES: WESTERN AND ISLAMIC

Charter of the United Nations, Saudi Arabia has reaffirmed "faith in fundamental human rights, in the dignity and worth of the human person, [and] in the equal rights of men and women and of nations large and small."[369] Thus, notwithstanding any objections, Saudi Arabia is bound by signature and customary international law to principles of equality for all. The difficulty, therefore, is ensuring enforcement of these rights.

Fortunately, as women gain power, even countries like Saudi Arabia may soon find women in position to demand equal rights. This quest, however, will not be easy. Saudi Arabia, like the Vatican, regards women's equality as contrary to authoritative moral norms.[370] Changing Saudi law may be as difficult as producing a change within the Vatican. Both do not view discriminatory practices against women (like no women in the priesthood) as discriminatory, because "[m]orality as set forth in natural law should be immutable,"[371] and "true equality" for women entails "rights and obligations that [differ] from those enjoyed by men."[372]

Unlike the Vatican, however, Saudi Arabia has a large population of women who do not live there by choice. Indeed, unlike the nuns of Vatican City, Saudi Arabian women were predominantly born in Saudi Arabia, and they did not choose to live under rules that provide for certain forms of discrimination.

Today, women in the Middle East are proving that they have a choice. Just as Kuwaiti women took charge and fought for the right to vote, Saudi Arabian women will inevitably fight for this right. Like Kuwait, much of this fight will be rooted in economics. International pressure will undoubtedly aid in fostering change, but ultimately, the dollar will drive real change.

3. *Economic Steps to Obtain Right to Vote and Hold Office*

There is convincing proof that, at least in part, money strongly influenced the Kuwaiti parliament when it voted to grant women the right to vote:

> Parliament extended political rights to Kuwaiti women [on May 16, 2005] . . . . In an effort to win over some opponents, the Kuwaiti Cabinet met [that same day] to approve a pay increase for Kuwaiti state employees and

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PERSPECTIVES ON RELIGIOUS LIBERTY 35, (David Little, John Kelsay, and Abdulaziz Sachedina, eds., 1988).

[369] U.N. Charter, Preamble.

[370] Mayer, *supra* note 299, at 124.

[371] *Id.*

[372] *Id.*

> pensioners that will cost the government $445-million a year. [After the pay increase], [t]he government . . . insisted Parliament vote on a women's rights bill it introduced a year ago to end the prohibition on women voting and running for office.[373]

Obviously, the money at issue in Kuwait did not come directly from Kuwaiti women. But the influence of women within the country certainly helped lead to change. This was especially true around the time of the first Gulf War, as one women's rights advocate stressed:

> 'Our women defended Kuwait during the Iraqi invasion, participated in resistance operations and marched in protest demonstrations against the invaders,' Sheikha Amthal said. 'They also did their part in explaining the aftermath of Iraqi occupation to the whole world.' All these factors prove Kuwaiti women's demand for political rights comes from a history of positive achievements and not out of nothing.[374]

Because of the participation of women and the assistance they have afforded Kuwait, Kuwait's emir, Sheik Jaber Al Ahmed Al Sabah, has been one of the strongest supporters of women's rights.[375] In 1999, he granted women political rights by decree.[376] It wasn't however, until 2005 that his grant came to fruition. And real change was due in no small part to financial incentives.

Indeed the advancement of women's rights oftentimes follows the economic results of women after either salvaging a country during war or helping it to prosper post war. In 1920, when women in the United States obtained the right to vote, the country was in the midst of an economic boom. Like Kuwait, the United States, and the world had just emerged from war.[377] As one commentator wrote: "Grateful to American women for their active participation during World War I (1917–1918), Congress passed a woman suffrage constitutional amendment by a narrow margin in 1919. It was ratified by the states in August 1920."[378]

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[373] Associated Press, *Kuwaiti Women Win the Right to Vote*, ST PETERSBURG TIMES, May 17, 2005.
[374] Benador, *supra* note 356.
[375] Associated Press, *supra* note 373.
[376] *Id.*
[377] *See* Michael Duffy, *War Timeline*, FIRST WORLD WAR (2004), http://www.firstwoldwar.com/timeline/index.htm.
[378] Elizabeth H. Pleck, *Suffrage*, SCHOLASTIC, http://teacher.scholastic.com/activities/suffrage/history.htm (last visited Jan. 25, 2008).

After World War I ended, men like Henry Ford could focus on new ways to increase prosperity. Ford invented an affordable motor vehicle by the use of his concept of the assembly line.[379] With the post-war economic boom and new manufacturing processes, America began to realize it could no longer ignore the voice of half its population. Rather, America began to recognize women for what they gave the country, including their role in the nation's economy.[380]

Kuwait experienced similar change. In the years preceding Kuwaiti suffrage, Kuwaiti women had reached "high positions in the oil industry, education and the diplomatic corps."[381] Combined with the assistance women provided during the first gulf war, it was only a matter of time before Kuwait, like the United States, would recognize a woman's right to be heard.

As women in Saudi Arabia now fight for this fundamental right, they too will soon wield the sword of economics to help gain the right to vote. As explained previously, Saudi women in February 2006 experienced the first steps at achieving national suffrage when they ran for seats on a local chamber of commerce.[382] With thousands of firms owned by women,[383] and thousands of women already actively participating in their respective chambers of commerce,[384] it is only a matter of time before Saudi Arabia will also recognize a woman's right to vote.

D. Right to be Free from All Forms of Discrimination

> The origin of the veil in Saudi Arabia is unknown. Face veiling in the Middle East is recorded as far back as the Assyrians (1500 B.C.), followed by a brief revival about the time of the Crusades. The most accepted theory about the specific veiling practices in Saudi Arabia is that when the eastern coastal areas were under Turkish control, women of high social standing wore veils, probably to protect their complexions against the brutality of the desert sun. The desire for status—an

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[379] *See* The Henry Ford, *The Life of Henry Ford*, HENRY FORD MUSEUM, http://www.hfmgv.org/exhibits/hf/default.asp (last visited Jan. 25, 2008).

[380] It is interesting to note that "the first woman in North American colonies to demand the vote was Margaret Brent, the owner of extensive lands in Maryland. In 1647 Brent insisted on two votes in the colonial assembly, one for herself and one for Cecil Calvert, Lord Baltimore, whose power of attorney she held. When the governor denied her request, Brent boycotted the assembly." *See* Pleck, *supra* note 378. Thus, even in 1647, money was one way in which women could powerfully impact society. *See id*.

[381] Associated Press, *supra* note 373.

[382] Krane, *supra* note 97.

[383] Fatany, *supra* note 93.

[384] *Id.*

> overpowering emotional need among Arabs—decreed, therefore, that every woman wear a veil so everyone could lay claim to being upper class. Another theory is that when Bedouin tribes made war on each other and raided the livestock of the rival tribe, the women were veiled so that the beautiful ones would not be carried off with the goats. Others say Bedouin women were such fierce fighters in these raids that, by a code of desert chivalry, women were veiled as a form of identity and kept out of battle so intrepid men were spared the risk of fighting them.[385]

Whatever the origin of the veil, whether to protect chattel or protect wealthy women from sunburn, the modern requirement for women to wear veils in many parts of the world demonstrates how women suffer discrimination. But is it really discrimination? One Arabic professor explained how the Saudi requirement doesn't bother her.[386] She felt that in one way it made life easier for a woman. All she had to do when going someplace outside was to throw on an *abaaya*[387] over her undergarments and she was ready to greet the world. There was no need for make-up, and no need to spend time doing her hair. For her, it was liberating.

Other women readily agree. "Indeed, many Muslim women consider the head scarf a form of feminist expression, because it forces people to judge them by their character rather than their looks."[388] An American, Jennifer Fadel, who converted to Islam 10 years ago, also finds the *hijab*[389] as liberating.[390] In her own words: "it protects my dignity. I don't have to worry about looking good and doing my hair all up just to impress others."[391] Ms. Fadel, however, wears her *hijab* by choice. In countries like Saudi Arabia, women have no choice.

In addition to the veil, other restrictive covenants, such as the prohibition against driving cars, are imposed on women in Saudi Arabia

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[385] Mackey, *supra* note 82, at 143.

[386] Interview with Fadwa Nahhas, Professor of Arabic, USDA Graduate School, in Washington D.C. (Nov. 30, 2006).

[387] "The *abaaya*, or black cloak, worn by women has large sleeves and hands over the head. Unlike the Iranian *chador*, it does not cover the face. Two styles of veils are seen on Saudi women. Rural women commonly wear a veil that drops from a velvet band across the forehead and leaves the wearer's eyes exposed. Urban women wear veils made of a heavy gauzelike fabric that completely covers their faces and is anchored at the top of the head by the *abaaya*." Mackey, *supra* note 82, at 12.

[388] Mackenzie Carpenter, *Muslim Women Say Veil is More about Expression than Oppression*, PITTSBURGH POST-GAZETTE, Oct. 28, 2001.

[389] A *hijab* is frequently just a simple head scarf whereas a *niqab* is a head scarf that covers the face, leaving the just eyes exposed.

[390] Carpenter, *supra* note 388.

[391] *Id.*

and other Islamic cultures. Are these restrictions required under Islam? What does international law say about them? To demonstrate the power of economic amelioration, this article will consider the role of economics in ending these two restrictions and other forms of discrimination and inequity.

1. *Islamic Law and the Veil*[392]

To justify the requirement that women wear a form of the veil, Islamic law requires a certain amount of interpretation. At least in Saudi Arabia, most of the dress code is designed so that "a woman cannot sexually arouse a man whom she casually passes on the street."[393] The Quran does not offer much support to arrive at this restriction, stating: "say to the believing women that they lower their gaze and guard their modesty: that they should not display their beauty and ornaments."[394]

Muslim scholars argue about the meaning of "ornaments" or "*zīnat*" in Arabic. Some claim it refers to external adornment or jewelry while others maintain it refers to a woman's natural beauty.[395] Either way, the Quran does not place the requirement to "restrain gaze" and to "control sexual passion" solely upon women. In the preceding verse, men are instructed to do the same thing.[396] Thus, arguing that the veil requirement is based on "not arousing a man's sexual desire" is folly, because men are required by Islamic law to control their own passions as well.

The traditions of the Prophet also offer little support for the requirement that women be fully covered. In one instance:

> Asma, daughter of Abu Bakr, came to the Prophet, and she was wearing very thin clothes (through which the body could be seen). The Prophet turned away his face from her and said, 'O Asma! [W]hen the woman attains her majority, it is not proper that any part of her body should be seen except this and this,' pointing to his face and his hands.[397]

One could argue that this saying requires only that a woman should dress conservatively in sufficiently thick clothing that is not see

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[392] When referencing the "veil," the intent is to include all categories of women's coverings: i.e., the *abaaya*, *hijab*, *niqab*, *chador*, or *burqa*.
[393] Mackey, *supra* note 82, at 142.
[394] QURAN 24:31 (Abdullah Yusuf Ali trans.).
[395] THE HOLY QURAN, commentary # 1751, (M. Ali trans. and commentary, 1995).
[396] QURAN 24:30 (Abdullah Yusuf Ali trans.).
[397] MAULANA M. ALI, THE RELIGION OF ISLAM 486 (1990).

through. It does not necessarily follow that a woman should be completely covered. Taken literally, the passage at a minimum indicates that the woman's face and hands should be showing.

In another tradition that counters the idea of a woman being fully covered, the Prophet makes it clear that no woman shall put on a veil during the *hajj*.[398] If a woman is not allowed to use a veil during one of the most holy religious ceremonies, why should she be forced to wear one in a secular setting? Fundamentalists often justify veil wear and other discriminatory practices based on a need to keep women from intermingling with men so as to avoid sexual attraction.[399] Yet during the pilgrimage, women have a much greater chance of intermingling.[400] It seems counter-intuitive to require a veil outside the pilgrimage but not while the pilgrimage is being performed.

A survey of Muslim nations[401] and their laws demonstrates there is no agreement in Islamic law regarding the veil and its usage. Nazira Zin al-Din, who is considered the most serious and knowledgeable of women scholars,[402] explains this interpretation debate as follows:

> When I started preparing my defence of women, I studied the works of interpreters and legislators but found no consensus among them on any subject; rather, every time I came across an opinion, I found other opinions that were different or even contradictory. As for the *aya(s)* concerning *hijab*, I found over 10 interpretations, none of them in harmony or even agreement with the others as if each scholar wanted what he saw and none of the interpretations was based on clear evidence.[403]

The *hijab* requirement is often justified based on morality. The Quran, however, offers no proof of an obligation to be fully covered. Rather, it stresses modesty. *Aya* 24:31, for example, states that women should wear their head-coverings "over their bosoms."[404] From a historical context, this injunction makes sense. In pre-Islamic times, women were known to flaunt their beauty in many different manners including the exposure of their bosom.[405] This *aya* was therefore

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[398] *Id.* at 485.
[399] Mackey, *supra* note 82, at 142.
[400] Ali, *supra* note 397, at 485.
[401] Turkey at one extreme, where the veil is outlawed, to Saudi Arabia and Afghanistan, which require full body cover.
[402] *See* Shaaban, *supra* note 354, at 64.
[403] *Id.* (quoting NAZIRA ZIN AL-DIN, AL-SUFUR WA'L-HIJAB 37 (1928)).
[404] QURAN 24:31 (Abdullah Yusuf Ali trans.).
[405] Ali, *supra* note 397, at 486.

necessary to curb this practice and require women to dress modestly. It did not, however, mean that a woman should be completely covered.

In her writings, Zin al-Din has gone as far as to assert that the *hijab* requirement actually defeats the goal of morality. She points to the fact that thieves and murderers mask their identities to protect themselves from being caught doing something wrong.[406] Further, a mask eliminates one of the prime factors that keeps people from misbehaving—fear of social disgrace.[407] Thus, she explains, by being forced to wear the *hijab*, women are deprived of this social imperative.[408]

Recognizing, however, that the *hijab* is an obligation forced upon women, Zin al-Din believes the real reason for its usage is because men do not trust the women in their lives.[409] If the husband or father truly trusted their bride or daughter, why would they require them to cover themselves? Indeed, according to Zin al-Din, it makes no sense that Islam, which gives so much glory to the mother, would give so little faith in her own ability to choose right from wrong.[410]

One should also recall that Islam stands for the proposition that all men and women are equal before the eyes of God. If the veiling of women derived from the pre-Islamic custom of rich women, it would make no sense that Islam would encourage all women to adopt such a practice.[411]

In the end, no matter what interpretive gymnastics are performed, there is no clear proof in Islam that the veil is an absolute requirement. While modesty is indeed required, there is no proof that a woman has to be completely covered.

There are, however, further discriminatory practices that receive even less Islamic authorization. One such practice is found in Saudi Arabia, where women are not allowed to drive a car.

2. *Islamic Law and the Driving Restriction*

The Permanent Council for Scientific Research and Legal Opinions (CRLO) is "the official institution in Saudi Arabia entrusted with issuing Islamic legal opinions."[412] When asked under what circumstances a woman would be allowed to drive a car, CRLO issued the following *fatwa*[413]:

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[406] Shaaban, *supra* note 354, at 68.
[407] *Id.*
[408] *Id.*
[409] *Id.*
[410] *Id.*
[411] *Id.* at 72.
[412] *See* KHALED ABOU EL FADL, SPEAKING IN GOD'S NAME 173 (2003).
[413] Legal pronouncement.

> It is impermissible for a woman to drive an automobile, for that would entail unveiling her face or a part of it. Additionally, if her automobile were to break down on the road, if she were in an accident, or if she were issued a traffic violation, she would be forced to co-mingle with men. Furthermore, driving would enable a woman to travel far from her home and away from the supervision of her legal guardian. Women are weak and prone to succumb to their emotions and to immoral inclinations. If they are allowed to drive, then they will be freed from appropriate oversight, supervision, and from the authority of the men of their households. Also to receive driving privileges, they would have to apply for a license and get their pictures taken. Photographing women, even in this situation, is prohibited because it entails *fitnah* and great perils.[414]

Not surprisingly, this *fatwa* offers little Quranic or other Islamic legal support for its propositions. Such support does not exist. In addition to holding powerful positions of leadership during the time of the Prophet, women also rode horses and camels.[415] Not allowing women to drive is not a concept that Islam (during the time of the Prophet) would have contemplated.

Since no Islamic legal support exists to justify this prohibition, the CRLO instead resorted to the Islamic jurisprudential concept known as *sadd al-dharī'ah*.[416] This literally means "the blocking of a means."[417] According to the CRLO, driving may not be bad, but it leads to bad things. Thus, it must be prohibited because if allowed, a woman will likely do things she is not permitted to do.[418]

Irrespective of how reasonable this argument is (or is not), the fact remains that there is no direct Islamic legal source standing for the proposition that women should not be allowed to drive. It is therefore one example of outright discrimination that women face. From an international legal perspective, it is a form of discrimination that should end.

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[414] El Fadl, *supra* note 412, at 272.
[415] *Id.* at 190.
[416] *Id.*
[417] *Id.*
[418] *Id.*

3. *International Law's Response to the Veil and Driving*

CEDAW defines "discrimination against women" as:

> any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.[419]

While the CEDAW definition of discrimination clearly encompasses "all forms of discrimination," not all Islamic countries have adopted CEDAW. Further, as explained above, those countries that have adopted CEDAW frequently place reservations indicating acceptance only in terms of compliance with Islamic law.

Nevertheless, at least from an international perspective, outright discrimination is clearly contrary to accepted concepts of international law. Even though CEDAW does not specifically mention the prohibition on driving or the veil requirement, such discriminatory practices are forbidden internationally.

The real issue internationally is not whether these practices are contrary to international law, but how far a country will go to stop these practices. In some circumstances, it appears the pendulum has swung too far. Should a woman who wants to wear a veil be prohibited from wearing it? This issue has been grounds for a long and troublesome debate in France.

In 2004, France adopted Law number 2004-228,[420] which provides that students may not wear religious displays or symbols while attending public schools. Although the law was not written in a way that directly targeted the wearing of the veil, a number of cases have involved Muslim women who wanted to wear the veil.[421] The fact that France in some circumstances prohibits women from wearing a veil by choice demonstrates how the veil requirement is seen as a universal form of discrimination in many places around the world.

Internationally, it is safe to conclude that overt forms of discrimination against women are not favored. Yet, such forms of discrimination continue to exist. So then, what can make them stop?

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[419] CEDAW, *supra* note 165, art. 1.

[420] LOI nº 2004-228 du 15 mars 2004 encadrant, en application du principe de laïcité, le port de signes ou de tenues manifestant une apparatenance religieuse dans les écoles, colleges et lycées publics (Fr.).

[421] *See* Elizabeth Bryant, *Secular France Struggles with Veil*, WASHINGTON TIMES (2003), http://www.washtimes.com/world/20030913-112055-97or.htm.

As has been maintained throughout this article, economics may prove to be the key factor.

4. *Economic Steps to End Discrimination*

Women in Saudi Arabia have dealt with discrimination in their own way. Upper class women, including those in the royal family, often simply escape the discrimination by spending time abroad.[422] One princess spends a great deal of time in Europe and California, and she returns to Saudi Arabia with style even in her conformity, wearing a $700 *abaaya* with the initials of Dior discreetly initialed into the silk.[423]

Other women rebel against Saudi discrimination in their own way. It is estimated that each year the Saudi Arabian Public Transportation Company loses about Saudi riyal 4 million (a little over one million U.S. dollars) because women do not pay their fares when riding public buses.[424] These segregated women usually ride in a section of the bus separated from the men's section by a heavy metal wall.[425] Their fare box hangs on the back of the wall out of sight and reach of the bus driver.[426] Knowing that men are not allowed to touch them,[427] they depart the bus under the cover and secrecy of a black cloak.

In other sectors of Saudi Arabia, "educated Saudi women, many of them occupying positions of influence in the royal family,"[428] are gaining enough strength to counter the voice of religious authorities and thereby demand change. Nevertheless, it does not appear that change will come from the wealthy. According to a one regional expert, the future of women in Saudi Arabia will come from the new middle class:

> It is the new middle class that has experienced the greatest psychological impact from development and it is there that much of the limited rebellion that is occurring is to be found. The women who most acutely suffer the pains of change are those who have lived abroad either as students or with their student husbands. Almost all speak a second and sometimes a third language. Returned to Saudi society, they float between two worlds. Since the King Faisal hospital was the most Westernized institution in Riyadh, women

[422] Mackey, *supra* note 82, at 156.
[423] *Id.*
[424] *Id.* at 178.
[425] *Id.*
[426] *Id.*
[427] *Id.*
[428] *Id.* at 179.

> patients, dressed in traditional garb, entered the examining rooms of male physicians. Without hesitation, however, they removed their veils, allowing the doctor to examine them while they comfortably conversed in perfect English. Then they donned their veils again and emerged once more into the sea of black-clad women.[429]

Change in Saudi Arabia is likely to occur, but this change will be slow. Just as women in commerce will help Saudi women acquire the right to vote, so too will this economic prosperity help women end discrimination as well.

Veil and driving restrictions, are not, however, the worst forms of discrimination women in an Islamic world may face. In addition to honor killings, there is another reprehensible act that is sometimes speciously justified in the name of Islam—female genital mutilation.

E. The Right to be Free from Torture or Other Cruel, Inhuman, or Degrading Treatment or Punishment

The United Nations Human Rights Commission has been active in its pursuit to end violence against women. The list of cruelties committed against women is long. It includes such things as: woman-battering, marital rape, incest, forced prostitution, female infanticide, forced marriage, son preference, female genital mutilation, and honor crimes.[430] While it is difficult to justify any of these inhuman actions, female genital mutilation is especially troubling. It garners no legitimate support from any religious group, yet it is still widely practiced. Many have accused Islam of furthering female genital mutilation, but in reality, true Islam offers no support for such a reprehensible practice.

In fact, the Quran has no reference to female circumcision.[431] Like most barbaric practices that sometimes find Islamic justification, female genital mutilation preceded Christianity and Islam.[432] Indeed, the most radical form of mutilation described above is also known as the "Pharaonic Procedure."[433] Thus, at least in name, it was practiced long before Islam came into existence.

Just like honor killings, female genital mutilation most frequently occurs in the poorer areas of the world. In Egypt:

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[429] *Id.* at 157.
[430] *See Report of the Special Rapporteur on Violence Against Women*, U.N. Doc. E/CN.4/1999/68 (1999).
[431] Badawi, *supra* note 214, at 48.
[432] *Id.* at 47.
[433] *Id.*

> Researchers often estimated that 50 to 60 percent of Egyptian women have been circumcised. The reason that the figures are quite high is related to the class divisions in Egyptian society. The far more numerous poorer classes, both Christians and Muslims, follow this Nile valley tradition, while the families of Turco-Circassian derivation, the main segment of the small historic elite, do not.[434]

While instantly increasing the economic strength of women in these types of communities would be ideal, only time and/or increased economic development will effectuate economic change. To prove this point, Professor Clair Apodaca has introduced the Women's Economic and Social Human Rights (WESHR) achievement index.[435]

The WESHR index provides a mathematical formula to track women's achievement in such diverse areas as a woman's right to work, rates of gainful employment, sex-differentiated literacy rates, and other rights to education.[436] Like a litmus test, the index ranges from 0 to 14. Low numbers indicate a low status of women in society, while higher numbers show that women's rights are absolute.[437] A score of 7 indicates a perfect balance between men's and women's rights.[438]

Scores from Islamic states indicate that women are gaining rights in some countries.[439] From 1975-1990, Kuwait went from 4.92 to an impressive 5.63.[440] Egypt, on the other hand, saw only a 0.25 increase in score from 4.45 in 1975 to 4.70 in 1990.[441] Compared to the United States and Canada at 6.61 and 6.46, respectively, both countries have progress to make.[442]

While the index is not perfect, it offers a helpful indication of women's social and economic progress. Considering that violence against women is more likely to occur in areas of the world that are more economically challenged, the index helps identify states with a higher potential for abusing women. It can also indicate where international assistance might produce economic and social change that will end deplorable practices like female genital mutilation.

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[434] *Id.*
[435] *See* Clair Apodaca, *Measuring Women's Economic and Social Rights Achievement*, WOMEN'S RIGHTS: A HUMAN RIGHTS QUARTERLY READER 485, 487 (2006).
[436] *Id.* at 512-515.
[437] *Id.* at 489.
[438] *Id.*
[439] *See id.* at 516-519.
[440] *Id.* at 518.
[441] *Id.* at 517.
[442] *Id.* at 516, 519.

IV. CONCLUSION

Islamic law is often viewed as a repressive legal system which effectively denies women equal rights around the world. The truth is that Islamic law is fundamentally fair, and can be interpreted in such a way as to protect a woman's fundamental rights. Placed into context with international law, Islamic law can find conformity.

Unfortunately, because Islamic law is often taken hostage by customs and traditions that are clearly not Islamic, the fairness of Islamic law has been trumped at times by putative scholars trying to justify patriarchal traditions by misinterpreting Islamic law. When Islamic law is properly interpreted, however, one sees a system intended to benefit, if not advance, the rights of women.

To encourage states to properly interpret Islamic law so as to protect the basic human rights of women, a mechanism is needed to change the underlying attitudes that halt such interpretations. This underlying mechanism is the economic development of women. As women in Saudi Arabia, Kuwait, Egypt, and other Islamic countries begin to experience economic advancement, they will also by necessity experience improved human rights. In reality, when a woman acquires financial freedom, she is able to unshackle constraints on her pre-existing legal rights, whether those rights are based in international human rights or Islamic fundamental rights of women.

THE *BUTTERBAUGH* FALLACY

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I. INTRODUCTION

"*Butterbaugh* appeals" to the U.S. Merit Systems Protection Board (MSPB), filed by federal employees based on the Uniformed Services Employment and Reemployment Rights Act[1] (USERRA), seek compensation for "military leave" erroneously charged by federal agencies for many years.[2] Litigating those many appeals has imposed substantial costs upon all federal agencies in administrative litigation manpower, "leave credits" awarded by the MSPB to current employees, and money payments awarded to former and retired employee-reservists who prevail before the MSPB. Most recently, an August 2007 *Butterbaugh* decision by the U.S. Court of Appeals for the Federal Circuit permits MSPB appellants to reach back as far as 1980.[3] This result yielded an estimate from appellant's counsel that *Butterbaugh* appellants could number "300,000 federal employees" and "the average compensation per employee could be more than $3000."[4] Putting aside federal costs already incurred from *Butterbaugh* MSPB appeals, even a fraction of that $900 million estimate (not including attorney fee awards

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[1] Uniformed Services Employment and Reemployment Rights Act of 1994, 38 U.S.C. §§ 4301-4334 (2006) [hereinafter USERRA].

[2] *See* Butterbaugh v. Dep't of Justice, 91 M.S.P.R 490 (2002), *rev'd and remanded*, 336 F.3d 1332 (Fed. Cir. 2003), *remanded to* 101 M.S.P.R. 202 (2004).

[3] Hernandez v. Dep't of the Air Force, 498 F.3d 1328 (Fed. Cir. 2007).

[4] Brittany R. Ballenstedt, *Reserve Returns*, GOVERNMENT EXECUTIVE, August 30, 2007, *available at* http://www.govexec.com/dailyfed/0807/083007pb.htm (last visited Jan. 23, 2008). Ballenstedt notes the significance of the court's decision:

> The decision will allow reservists to seek compensation for improperly charged leave since 1980, rather than 1994, nearly tripling the amount of compensation available, said Mathew Tully, Hernandez's attorney. Tully estimated that as many as 300,000 federal employees could be affected and the average amount of compensation per employee could be more than $3,000.

Id.; *see also*, Brittany R. Ballenstedt, *Union, law firm partner to pursue reservists' benefit claims*, GOVERNMENT EXECUTIVE, Oct. 30, 2007, *available at* http://www.govexec.com/story_page.cfm?articleid=38401&sid=2 (last visited Jan. 23, 2008), where Ballenstedt reported:

> The American Federation of Government Employees has teamed up with a New York law firm to help federal employee reservists collect thousands of dollars in back pay. The union and Tully, Rinckey & Associates will co-represent about 10,000 AFGE members who claim they were improperly charged leave for reserve duties, even if such duties occurred on weekends, federal holidays or other days when they were not regularly scheduled to work.

Id.

to MSPB appellants' counsel)[5] shows *Butterbaugh* appeals are having and will continue to have an enormous impact on all federal agencies' resources and funds.

At the heart of every *Butterbaugh* appeal is fatally-flawed logic, a textbook mistake in reasoning,[6] termed here "The *Butterbaugh* Fallacy." This article demonstrates the MSPB's flawed reasoning—the errors of law and logic underlying every *Butterbaugh* appeal. Further, it shows why no employee was, in fact, erroneously charged military leave "due to" or "because of" the employee's military status or military service, the *sine qua non* of every USERRA-based *Butterbaugh* appeal,[7] and thus any *Butterbaugh* appeal filed with the MSPB must be dismissed as a matter of fact and of law.

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[5] USERRA Appeals: Remedies, 5 C.F.R. § 1208.15(b) (2007) ("Attorney fees and expenses. If the Board issues a decision ordering compliance under paragraph (a) of this section, the Board has discretion to order payment of reasonable attorney fees . . . and other litigation expenses . . . .").

[6] Lands Council v. McNair, 494 F.3d 771, 786 (9th Cir. 2007) (Ferguson, C.J., concurring):

> Judge Smith takes the plain fact that district courts in our circuit have enjoined logging projects in the past, adds the claim that the timber industry is declining, and asserts a causal relation between the two. In doing so, Judge Smith commits a textbook logical fallacy: *post hoc, ergo propter hoc* (after this, therefore because of this). *See, e.g.*, Robert J. Gula, *Nonsense: A Handbook of Logical Fallacies* 95 (2002). The mere fact that there has been a "severe decline in logging" does not mean that it has been "brought about by sweeping federal court injunctions."

[7] Lee v. Dep't of Justice, 99 M.S.P.R. 256 (2005). ("An appellant may establish jurisdiction over a USERRA appeal by showing: (1) performance of duty in a uniformed service of the United States; (2) an allegation of a loss of a benefit of employment; and (3) an allegation that the benefit was lost due to the performance of duty in the uniformed service.") "The formulation above is not a universal test for USERRA jurisdiction, but instead is simply the most appropriate way to state the jurisdictional elements relevant to the specific facts alleged by the appellants herein [*Butterbaugh* appellants] . . . ." *Id.* ¶ 9 n.5. This article asserts that as a matter of fact and law, no *Butterbaugh* appellant can make a non-frivolous assertion of the third element required to invoke the Board's USERRA jurisdiction for all *Butterbaugh* appeals, requiring dismissal of any *Butterbaugh* appeal. Equally important, in *Lee* the Board also held it was only through a USERRA-based appeal that those *Butterbaugh* appellants were able to avoid application of the six-year statutes of limitation in the Barring Act, 31 U.S.C. § 3702 (2006), and the Backpay Act, 5 U.S.C. § 5596 (2006). *Lee*, 99 M.S.P.R. 256 ¶¶ 9-27. A showing that the Board's USERRA-based *Butterbaugh* holdings are incorrect relegates all *Butterbaugh* MSPB appeals to summary dismissal, including those routinely barred by application of the six-year statutes of limitation in the Barring Act and the Backpay Act.

II. BACKGROUND[8]

The federal statute at issue, 5 U.S.C. § 6323(a)(1) ("§ 6323"), grants to federal employees who also happen to be U.S. military reservists ("employee-reservists") the benefit of being absent from their civilian jobs for fifteen days annually to perform military service.[9]

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[8] In the interest of full disclosure, prior versions of some, but not all the points raised in this article asserting Board error were previously submitted to the Merit Systems Protection Board through two different routes. To date however, the Board has declined to address substantively any of the errors asserted: first, the Board declined on procedural grounds; later, the Board summarily denied review without discussion. In the first instance, Board permission was sought in 2005 to file an amicus curiae brief demonstrating the logical and legal flaws in the *Butterbaugh* case. *See Lee*, 99 M.S.P.R. at 261 n.3. In *Lee*, the Board denied the amicus curiae request:

> [T]he Department of the Air Force has filed a motion for leave to participate as an amicus curiae with a brief in support of its motion. IAF, Tab 18. The appellants have filed an opposition to the brief, arguing that it does not address the issue certified to the Board. *Id.*, Tab 19. We agree. Accordingly, we deny, without prejudice, the request of the Air Force to participate as an amicus curiae at this stage in the proceedings.

Id. Next, in 2006 another version of some, but not all of the assertions of Board error presented herein were placed before the Board through a petition for review in *Cloutier v. Department of the Air Force*, 102 M.S.P.R. 432 (2006) (reversing the initial decision, in part, on other grounds). In denying the *Cloutier* petition for review (to the extent it raised the assertions of Board error addressed in this article), the Board wrote, "For the reasons set forth below, we find that the petition does not meet the criteria for review set forth at 5 C.F.R. § 1201.115, and we therefore DENY it." *Cloutier*, 102 M.S.P.R. at 434. Despite the Board's use of the phrase "[f]or the reasons set forth below", none of that petition for review's assertions of error found in this article was addressed by the Board in its *Cloutier* decision denying the petition for review. Thus, the Board has declined to date to address substantively these assertions of Board error.

[9] 5 U.S.C. § 6323(a)(1) (2006). This statute provides the following:

> Subject to paragraph (2) of this subsection, an employee as defined by section 2105 of this title or an individual employed by the government of the District of Columbia, permanent or temporary indefinite, is entitled to leave without loss in pay, time, or performance or efficiency rating for active duty, inactive-duty training (as defined in section 101 of title 37), funeral honors duty (as described in section 12503 of title 10 and section 115 of title 32), or engaging in field or coast defense training under sections 502-505 of title 32 as a Reserve of the armed forces or member of the National Guard. Leave under this subsection accrues for an employee or individual at the rate of 15 days per fiscal year and, to the extent that it is not used in a fiscal year, accumulates for use in the succeeding fiscal year until it totals 15 days at the beginning of a fiscal year.

Id.

Their absences from federal, civilian employment to perform military duty are chargeable as paid "military leave." However, prior to § 6323's amendment in 2000,[10] the U.S. Office of Personnel Management (OPM) interpreted the statute to require that all federal agencies charge employee-reservists military leave even when the day on which the employee was absent from the civilian workplace performing military duty wasn't a civilian workday for that employee.[11] These "non-workdays" were typically weekend days or federal holidays, but were all days on which the employee had no obligation to be present at the federal, civilian employment workplace. The end result prior to § 6323's amendment in the year 2000 was that, for example, employee-reservists with a consecutive five-day, civilian employee workweek (Monday through Friday) who were absent performing military duty on seven, consecutive days were charged seven days of military leave, rather than five days (to cover their five-day civilian workweek), thus debiting their military leave balance for absence performing military duty on two non-workdays. In short, they were charged military leave for two days on which they had no obligation at all to be present at their federal, civilian workplace.[12]

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[10] The Board's 2002 decision in *Butterbaugh* discussed the events surrounding the 2000 amendment to § 6323:

> In 2000, as part of the Treasury and General Government Appropriations Act of 2001, Pub. L. No. 106-554, 114 Stat. 2763, Congress amended 5 U.S.C. Sec. 6323 to provide that "[t]he minimum charge for leave under this subsection is one hour, and additional charges are in multiples thereof." The change became effective on December 21, 2000. Based on this amendment, OPM stated in a memorandum to federal agencies that employees should not be charged military leave for hours that they would not have worked and therefore reservists and members of the National Guard should not be charged [mis-charged] military leave for non-duty days. The agency promptly changed its policy to comport with the statute and OPM's guidance. Nothing in the December 21, 2000 statute indicates that its effect was anything other than prospective and the appellants have not argued that it should have a retroactive effect.

Butterbaugh v. Dep't of Justice, 91 M.S.P.R 490, 500 (2002), *rev'd and remanded*, 336 F.3d 1332 (Fed. Cir. 2003), *remanded to* 101 M.S.P.R. 202 (2004) (citation to record omitted).

[11] *Butterbaugh*, 91 M.S.P.R. at 492 ("During the period at issue in this appeal, the agency charged the appellants military leave for each workday on which he or she was absent for military service *and for non-workdays falling between workdays for which they took military leave.*") (footnote omitted) (emphasis added).

[12] The Federal Circuit Court recognized this practice in *Pucilowski v. Department of Justice*:

> Prior to the 2000 amendment to section 6323, the government's standard practice was to charge guard members military leave for

Department of Justice (DOJ) employees who had been charged military leave for non-workdays under OPM's pre-2000 policy, applying § 6323, appealed to the Merit Systems Protection Board ("Board"), asserting a USERRA violation and seeking compensation for the previously mis-charged military leave. Following an adverse decision by the Board in 2002,[13] they appealed further and in 2003, in *Butterbaugh v. Department of Justice*, the U.S. Court of Appeals for the Federal Circuit held OPM's pre-2000 interpretation of § 6323's military leave charging requirements was error.[14] The court of appeals held that contrary to OPM's statutory interpretation of § 6323, the statute hadn't required or allowed agencies to charge military leave for an employee-reservist's absence from work on non-workdays (OPM's pre-2000 military leave charging practice and that of all federal agencies ceased when § 6323 was amended by Congress in 2000).[15] *Butterbaugh* has spawned hundreds, perhaps thousands, of MSPB appeals based upon USERRA, alleging discriminatory treatment "due to," "because of," or "motivated by" the appellants' performance of military duty, filed by employee-reservists who worked in any federal agency during the decades prior to the 2000 amendment of § 6323, to recover under USERRA for "mis-charged" military leave.[16]

> every day they were away on guard duty, even if they were not scheduled to work some of those days. In other words, a regular Monday to Friday employee who had guard duty from a Monday through the next Tuesday would be charged for nine days of military leave, rather than seven.

Pucilowski v. Dep't of Justice, 498 F.3d 1341, 1343 (Fed. Cir. 2007).

[13] *Butterbaugh*, 91 M.S.P.R. 490.

[14] Butterbaugh v. Dep't of Justice, 336 F.3d 1332 (Fed. Cir. 2003), *rev'g* 91 M.S.P.R 490 (2002), *remanded to* 101 M.S.P.R. 202 (2004).

[15] *Id.* at 1343. *See also* O'Bleness v. Dep't of the Air Force, 106 M.S.P.R. 457, 460-61 (2007) (discussing OPM's interpretation of § 6323 prior to the 2000 amendment).

[16] Ralph Smith, *The Billion Dollar Case for Federal Employees*, FEDSMITH, Aug. 29, 2007, *available at* http://www.fedsmith.com/article/1352/ (last visited Jan. 23, 2008). Smith quotes Mathew B. Tully, attorney of record for *Hernandez v. Dep't of the Air Force*, on the volume of military leave claims since *Butterbaugh* was decided: "Mr. Tully says that 'We have processed nearly 6000 claims since 2003 when *Butterbaugh* first was issued. Our average award is between $1500 and $3000 (depending on the employees [sic] grade and years of military service). Our biggest award was $27,000 (a SES employee with many years of military service).'" *Id. See also*, Stephen Barr, *Courts Aren't Done With Complex Military Leave Case*, WASH. POST, Sep. 21, 2005, at B02, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2005/09/20/AR2005092001560.html (last visited Jan. 25, 2008). Barr reported the Bush administration recognized the *Butterbaugh* decision could yield thousands of MSPB appeals filed by employee-reservists:

> [A] federal appeals court, in a case called *Butterbaugh*, ruled that the government was wrong to measure by calendar days and that federal employees in the Guard and reserves should not be

III. THE USERRA ISSUE

Central to the *Butterbaugh* case was whether the pre-2000, OPM-mandated policy charging employee-reservists military leave for non-workdays violated USERRA;[17] specifically, USERRA's § 4311[18] barring discrimination "because of" or "due to" military status or the performance of military service. The two essential USERRA questions in *Butterbaugh* were: (1) Did the agency practice charging military leave for non-workdays deny employees a benefit of employment?; and (2) If so, was the employee's military status or military service obligation "a motivating factor" for that denial (or, was the denial of the benefit of employment "because of" or "due to" the employee's military status or performance of military service)? Answering affirmatively to both essential USERRA questions demonstrates a violation of USERRA's § 4311(a) & (c).[19]

This article demonstrates the following: (1) While the answer to the first USERRA question above is certainly "yes," neither the Board nor the U.S. Court of Appeals for the Federal Circuit has ever ruled the answer is "yes" to the second essential USERRA question; (2) The answer to the second essential USERRA question must be "no", as a matter of fact and of law; and, it necessarily follows that no federal

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> charged for leave for "non-workdays" when they were away for military service.
> . . .
> Bush administration officials say they do not know how many employees were shortchanged. But the number may be in the thousands, and the cost to agencies and taxpayers could be substantial.
> . . .
> Federal employees who were shortchanged on leave also can bypass their agencies and file claims directly with the Merit Systems Protection Board.

Id.

[17] 38 U.S.C. §§ 4301-34 (2006).

[18] 38 U.S.C. § 4311 (2006) ("Discrimination against persons who serve in the uniformed services and acts of reprisal prohibited").

[19] The Board in *Butterbaugh* discussed the inquiry into the second essential USERRA question:

> The statute continues that an employer (including a federal agency) shall be considered to have engaged in a prohibited activity *if the individual's military status or obligation is a motivating factor for* one of the actions identified above (*denial of* initial employment, reemployment, retention in employment, promotion, or *any benefit of employment*), unless the employer can prove that the action would have been taken in the absence of the military status or obligation.

Butterbaugh, 91 M.S.P.R at 494 (emphasis added).

employee-reservist can meet the prima facie USERRA burden in reliance on *Butterbaugh*; and, (3) Any assertion that the answer to the second essential USERRA question is "yes" succumbs to the *post hoc; ergo, propter hoc* error in reasoning, which is at the core of "The *Butterbaugh* Fallacy."

Because no employee-reservist (MSPB appellant) can successfully shoulder the USERRA prima facie burden as a matter of fact and law, any MSPB appeal based upon the *Butterbaugh* case must be dismissed for that reason.

A. A *Butterbaugh* Appellant's Prima Facie USERRA Burden

An employee's USERRA burden in an MSPB *Butterbaugh* appeal was stated by the Board as follows: "To prevail in their appeal, the appellants must prove by preponderant evidence that *their military status or obligations were a motivating factor for* the *denial of a benefit of employment* . . . ."[20] For convenience, the Board's description of the USERRA prima facie burden levied upon a *Butterbaugh* appellant is simply reversed in order here.

1. *The First Essential USERRA Question: Were Employees Denied a Benefit of Employment?*

The Board's 2002 *Butterbaugh* decision (later reversed by the U.S. Court of Appeals for the Federal Circuit, discussed and cited below) hinged on the Board's view of the correct interpretation of § 6323, based on the Board's reading of congressional intent:

> The ordinary meaning of "day" is a calendar day. Thus, because the statute granted reservists and National Guardsman [sic] up to 15 days of military leave, absent some other applicable definition of "day," of which we are unaware, it can be assumed that Congress meant 15 calendar days. Accordingly, the agency's military leave granting policy provided the appellants exactly the benefit they were entitled to under the law in effect at the time of the leave at issue in this appeal.
> . . .
> . . . If Congress had intended military leave to be charged differently, it could have amended the statute, as it did [later] in 2000. Its failure to do so prior

[20] *Id.* at 495 (emphasis added).

> to that time indicates approval with the way military leave was being charged.
> . . .
> . . . [W]e find that the appellants have *failed to identify how the agency's actions denied them a benefit of employment* . . . . [T]he fact that the agency charged military leave for intervening non-workdays . . . *is not sufficient to establish that the agency's practice denied the appellants a benefit of employment* due to their performance of duty in the uniformed service. Accordingly, the appellants' request for relief is denied.[21]

The Board's rationale in its 2002 *Butterbaugh* decision makes clear it answered "no" to the first essential USERRA question, thus finding the employee was not denied a benefit of employment by the agency. The appellants' prima facie case failed for that reason and the Board's 2002 *Butterbaugh* holding went no further. Board comments unnecessary to its 2002 holding, addressing the second essential USERRA question[22] are dicta because the appellants failed to survive Board scrutiny regarding the first essential USERRA question.

The Board's 2002 *Butterbaugh* decision and its rationale, quoted above, were rejected by the U.S. Court of Appeals for the Federal Circuit.[23] Specifically, the Board's § 6323-based rationale and its "benefit of employment" analysis finding no agency denial of a benefit of employment were reversed. The court of appeals' description of the Board's rejected 2002 rationale is important to understanding the limited reach of the court of appeals' 2003 holding for all *Butterbaugh*-based appeals. The court wrote:

> [T]he Board ruled that the [agency's] practice of charging non-workdays against military leave did not deprive Petitioners of a benefit of employment because, *as a matter of statutory interpretation*, the Board held that the grant of "15 days" of leave in 5 U.S.C. § 6323(a) meant 15 calendar days of leave, not 15 workdays. Hence, agencies were properly charging Petitioners for all days they spent in military training whether or not those were workdays.
> . . .

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[21] *Id.* at 497, 499-500 (emphasis added) (citations omitted).
[22] Was the employees' military status or military service "a motivating factor" for the agency denial of the benefit of employment; or, was the denial of the benefit of employment "because of" or "due to" the employee's military service?
[23] Butterbaugh v. Dep't of Justice, 336 F.3d 1332 (Fed. Cir. 2003).

> *The issue . . . is the correct interpretation of 5 U.S.C. § 6323(a)(1)*: Petitioners cannot claim they were denied a benefit of employment if the [agency] granted them the full measure of leave due to them under section 6323(a)(1). Accordingly, *the only issue we must decide is whether the Board correctly interpreted 5 U.S.C. § 6323(a)(1)*.
>
> . . .
>
> [We] conclude that *5 U.S.C. § 6323(a)(1) cannot be interpreted to require federal employees to expend military leave days for reserve training days on which they were not required to work*. . . . We therefore reverse the decision of the Board and remand the case for further proceedings.[24]

In reversing the Board, the court of appeals answered "yes" only to the first essential USERRA question, thus finding the employee was denied a benefit of employment. That answer by the court left unanswered the second essential USERRA question regarding whether the denial was because of the employee's military service. Although the court included comments on the second essential USERRA question, in light of the court's express limiting of its scope of review,[25] those comments were, necessarily, also dicta. Yet, it is now clear that *Butterbaugh* appellants charged military leave for non-workdays were "denied a benefit of employment," answering the first essential USERRA question in every *Butterbaugh* appeal.

Nonetheless, *Butterbaugh* appellants still must meet the second element of their prima facie burden under USERRA: they must prove by preponderant evidence their military status or military service was "a motivating factor" for the denial of the benefit of employment (or, they must show their agency's denial of the benefit of employment—the agency's mis-charging of military leave—occurred "because of" or "due to" the employee's performance of military service.) This they cannot prove.

2. *Dicta and the Second Essential USERRA Question: Was the Denial of the Benefit of Employment "Because of" or "Due to" the Employee's Military Service?*

Neither the Board's (2002) nor the court of appeals' (2003) comments on the second essential USERRA question were necessary

[24] *Id.* at 1334, 1336, 1343 (emphasis added) (footnote omitted).
[25] The court stated "the *only issue we must decide* is whether the Board correctly interpreted 5 U.S.C. Sec. 6323(a)(1)"). *Id.* at 1336 (emphasis added).

for the decisions and, thus, were dicta. However, it is useful to examine those comments closely.

After stating a *Butterbaugh* appellant's prima facie burden, the Board (in 2002) wrote:

> Cases like *Sheehan* and *Schoch* focus on whether an individual's military status or obligation was a substantial or motivating factor for the agency action and, if it was, whether the agency would have taken the same action anyway for a valid reason. That analytical framework is simply not applicable here since *it is undisputed that the only reason the appellants were charged military leave the way that they were was because of their military reserve obligations*. The issue in this appeal is not whether the appellants' reserve duty was a substantial or motivating factor for the agency's action, but whether the appellants suffered a denial of a benefit of employment . . . .[26]

Then, in footnote 6, the Board continued:

> The appellants . . . allege they were charged leave for non-workdays *because* they were serving in the military reserves. *The agency does not disagree*. Thus, . . . the appellants provided direct evidence that their military service was a substantial or motivating factor for the agency's action.[27]

As is seen here, the parties to the *Butterbaugh* appeal before the Board in 2002 had conceded the answer to the second essential USERRA question. Yet, in light of the Board's 2002 holding adverse to the appellants on the first essential USSERA question (finding no denial of a benefit of employment), it is apparent the Board's comments on the second USERRA question were unnecessary to the Board's decision and, for that reason, were plainly dicta.

The same is true of the court of appeals' comments on the same issue. The court wrote in its 2003 decision, "For purposes of this appeal, *neither side contests* the Board's determination that Petitioners have alleged denial of a benefit of employment due to their performance of military duties, thereby alleging a USERRA violation . . . ."[28] Just as

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[26] *Butterbaugh*, 91 M.S.P.R at 495 (emphasis added).
[27] *Id.* at 495 n.6 (emphasis added).
[28] *Butterbaugh*, 336 F.3d at 1336 (emphasis added).

the Board had done, the court of appeals observed the parties then before the court did not dispute the answer to the second essential USERRA question. However, concessions, admissions, settlement provisions, or even stipulations of fact entered by parties before a tribunal generally cannot and do not bind any non-parties.[29] Thus, while

[29] Kneeland v. Luce, 141 U.S. 437, 440 (1891) ("[The stipulation] is signed by no one, and in terms names no one, and so could of course be binding only upon the parties to the record, and those who in fact assented to it."). The MSPB has endorsed the rejection of agency consideration, for punishment purposes, of a stipulation entered in litigation to which the employee-appellant was not a party:

> In regard to the *Lail* matter, the District Court relied on a stipulation by the USDA to grant summary judgment on the issue of liability and find that the appellant was known sexual harasser. It is undisputed that the appellant was not a party in the *Lail* matter and that he had no opportunity to defend himself in that matter. Thus, I find that the agency's reliance on the *Lail* decision and prior matters at USDA was improper.

Batts v. Dep't of the Interior, No. DC-0752-04-0233-I-1, 2004 MSPB LEXIS 1807, at *67 (MSPB Sept. 3, 2004) (citation omitted), *agency petition for review granted, removal reinstated*, 102 M.S.P.R. 27 (2006). The MSPB later affirmed the administrative judge's findings:

> The AJ found that the agency's reliance on *Lail* to show a history of similar misconduct [by appellant] was improper because the appellant was never disciplined by the Department of Agriculture for any misconduct related to Lail, was not a party to the *Lail* litigation, and never had an opportunity to defend himself against Lail's allegations. . . . [T]here is support for the AJ's finding that the agency improperly treated the *Lail* lawsuit as equivalent to prior discipline.

Batts, 102 M.S.P.R. at 30. The Board has also made the point that terms found in settlement agreements or in stipulations generally do not bind those who are not parties to them:

> [F]actual admissions in a settlement agreement have been held not to be binding on a person who was not a party to the agreement, and who did not have an opportunity to contest the alleged facts before the agreement was approved. Similarly, a stipulation that was unsupported by the evidence, and that appeared to the trial court to be simply an artifice for protecting the interests of one of the parties to the stipulation, was found not to be binding on organizations that were not parties to the case in which the stipulation was made.

Parker v. Office of Pers. Mgmt., 93 M.S.P.R. 529, 534 (2003) (citations omitted), *aff'd*, 91 Fed. Appx. 660 (Fed. Cir. 2004). *See also* Yeabower v. Dep't of Agric., 10 M.S.P.R. 386 (1982) (implicitly recognizing nonparties are not bound by stipulations they do not join, the Board reversed a supervisor's demotion for racial discrimination despite that the agency and the supervised Black employee had entered a stipulation stating the Black employee had been discriminated against); State *ex rel.* Jeany v. Cleveland Concrete Constr., Inc., 836 N.E.2d 554, 555 (Ohio 2005) ("The stipulations arose out of

the parties before the court of appeals in 2002 in *Butterbaugh* may have conceded the answer to the question, the Federal Circuit Court of Appeals' 2003 *Butterbaugh* decision did not resolve that issue for future *Butterbaugh* appeals.

Instead, the court of appeals wrote, "[T]he *only issue we must decide* is whether the Board correctly interpreted 5 U.S.C. § 6323(a)(1)."[30] Thus, the court's decision did not resolve and did not intend to resolve whether the appellants then before that court had made out a USERRA violation. Rather, the court limited its holding to the first essential USERRA question. The court's 2003 *Butterbaugh* decision only addressed and resolved the correct, statutory interpretation of § 6323.

Finally, it is true that in another Federal Circuit Court of Appeals' 2007 decision (another *Butterbaugh* appeal), the court wrote, "However, in *Butterbaugh*, we held that this practice was contrary to section 6323 *and constituted the denial of a benefit of employment in violation of USERRA*."[31] And, more significantly, the court stated, "Here, as well as violating USERRA under *Butterbaugh*, the department's pre-2000 practice of charging military leave also violated USERRA's predecessor statute, the Vietnam Era Veterans' Readjustment Assistance Act of 1974 ("VEVRAA"), Pub. L. No. 93-508, 88 Stat. 1578."[32] However, the court's *Hernandez* decision cites only to its own 2003 *Butterbaugh* decision. This means the *Hernandez* opinion necessarily rests, in turn, on an answer to a question that the parties in *Butterbaugh* had not contested in 2003 and, in fact, had conceded.

Stated plainly, notwithstanding the *Hernandez* decision, the Federal Circuit Court of Appeals' 2003 *Butterbaugh* decision did not establish that OPM's mis-charging of military leave under § 6323 violated USERRA. The 2003 *Butterbaugh* decision resolved only whether the Board correctly interpreted § 6323(a)(1), not whether the appellants had made out a USERRA violation. While the court's 2007 *Hernandez* decision cited to *Butterbaugh*, *Hernandez* did not alter *Butterbaugh*'s narrow holding.

In sum, neither the Board (in 2002) nor the Federal Circuit Court of Appeals (in 2003 or therafter) issued any holding or ruling of law on the second essential USERRA question. It next remains to be

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a 1987 lawsuit to which the [Appellee] commission was not a party. The only Ohio court to have confronted this question—the Seventh District Court of Appeals—has held that factual stipulations are not binding on a nonparty."); Roberts v. James Mfg. Co., 197 So. 2d 808, 811 (Miss. 1967) ("Parties cannot by stipulation affect any right but their own and persons not parties to the stipulation are not bound thereby.").

[30] *Butterbaugh*, 336 F.3d at 1336 (emphasis added).

[31] Hernandez v. Dep't of the Air Force, 498 F.3d 1328, 1329 (Fed. Cir. 2007) (citing Butterbaugh, 336 F.3d at 1336) (emphasis added).

[32] *Id.* at 1331.

seen whether the Board issued any precedential ruling on the second essential USERRA question when it received the *Butterbaugh* case from the court of appeals on remand.

B. The Board's Remand Decision

In 2004, the Board's decision following remand by the court of appeals briefly summarized the *Butterbaugh* case, including its own 2002 decision and the court of appeals' 2003 decision, then spoke to the requisite remedy:

> [T]he Board issued an Opinion and Order finding that it had jurisdiction over the appeals, but that the appellants had not been denied a benefit of employment . . . .
> . . .
> . . . [T]he U.S. Court of Appeals for the Federal Circuit . . . reversed the Board's decision. It found that applicable statutory law [§ 6323] did not provide for charging employees military leave for days when they were not scheduled to work in their civilian jobs, and that the Board therefore should have granted the petition for review on the ground that the initial decision was based on an erroneous interpretation of statute. The court remanded the case 'for further proceedings.'
>
> Analysis
>
> In light of the court's finding that the agency should have charged the appellants military leave only for days when they were scheduled to work in their civilian jobs, it is clear that the agency must correct its records to reflect that no military leave was charged for any other days during the time period relevant to this case.[33]

The Board issued no holding or ruling on the second essential USERRA question that would affect any non-parties. Instead, the Board merely observed the agency-appellee in *Butterbaugh* (the Department of Justice) was obligated to correct the errors that had flowed from OPM's pre-2000 military leave policy based on § 6323.

[33] Butterbaugh v. Dep't of Justice, 101 M.S.P.R. 202, 203 (2004) (citations omitted).

At most, it may be inferred that the Board wholly relied upon the *Butterbaugh* parties' prior concessions concerning the second essential USERRA question. However, those prior concessions by the parties bound only the parties then before the Board on remand, and the Board (on remand) issued no ruling on the second essential USERRA question to bind any non-parties. Most significantly here, neither the Board's 2002 and 2004 *Butterbaugh* decisions nor the court of appeals' 2003 *Butterbaugh* opinion ruled, found, or otherwise established as a matter of law, the answer to the second essential USERRA question—whether the agency's denial of the benefit of employment (its mis-charging of military leave) occurred "because of" or "due to" the employee's military status or performance of military service.

Because neither the Board nor the court of appeals resolved this essential USERRA issue in *Butterbaugh*, their decisions did not eliminate future *Butterbaugh* appellants' prima facie burden to make the requisite showing by preponderant evidence. While it is true that in *Cobb v. Department of Defense* the Board wrote, "[I]n military leave cases, *it is generally self-evident* that . . . *the appellant's military service was a substantial and motivating factor in the action*,"[34] this article maintains the Board's proposition is, to the contrary, not supported by *Butterbaugh* and most certainly not "self-evident." The *Butterbaugh* decision in 2002 disposed of the MSPB appeal based on the first essential USERRA question, holding there was no "denial of a benefit of employment." In light of this holding, the Board's 2002 comments in *Butterbaugh* on the second essential USERRA question were not necessary to the decision and merely dicta.

Thus, in *Cobb* the Board cited its own 2002 *Butterbaugh* decision for a legal proposition that is simply not found there. Further, the Federal Circuit Court of Appeals' 2003 *Butterbaugh* decision also did not address (and did not seek to resolve) the second essential USERRA issue, the court stating instead, "[T]he only issue we must decide is whether the Board correctly interpreted 5 U.S.C. Sec. 6323(a)(1)."[35] More importantly, the proposition put forth by the Board in *Cobb* ("it is generally self-evident that . . . military service was a substantial and motivating factor in the action") is demonstrably incorrect: The *Butterbaugh* Fallacy.

The next section of this article demonstrates exactly why, contrary to the Board's statement otherwise in *Cobb*, no *Butterbaugh* appellant can meet the prima facie USERRA burden. The assertion that must be proved is not true. No *Butterbaugh* appellant was mis-charged military leave "due to" or "because of" the employee's military status or military service, as a matter of fact and of law. Rather, employees were

[34] Cobb v. Dep't of Defense, 106 M.S.P.R. 390, 393 (2007) (emphasis added) (internal citations omitted).
[35] *Butterbaugh*, 336 F.3d at 1336.

mischarged military leave because of OPM's incorrect interpretation of the statute.

C. The Actual Cause for the Incorrect Charging of Military Leave

In its 2003 *Butterbaugh* decision, the court of appeals examined the nearly-100 year history of and the reasoning behind the federal government's charging of military leave, including OPM's pre-2000 military leave-charging policy under § 6323. Quoting from the Board, the court's review began "[b]efore 1899" with the government's charging of both annual and sick leave for non-workdays and proceeded next to "[a]n 1899 act" that altered the charging of annual and sick leave (thereafter charging annual and sick leave only for workdays).[36] Then, the court cited "[t]he first statute [1917] specifically granting civilian federal employees military leave of up to 15 days a year for training."[37] The court continued:

> [A 1951 change] defined "days" for purposes of annual and sick leave as being exclusive of non-workdays [but that change only applied to annual and sick leave.] Thus, for military leave purposes, "days" retained its ordinary meaning that the term had for all types of leave prior to the 1899 statutory change [meaning post-1899, federal employees' military leave, but not their annual or sick leave, was still charged for non-workdays.]
>
> The Civil Service Commission incorporated the long-standing practice for charging military leave [for non-workdays] into the Federal Personnel Manual [circa 1963] . . . . When the Civil Service Commission was abolished and the Office of Personnel Management was created [in 1978], the Office of Personnel Management retained the provision, which the Bureau of Prisons incorporated into its leave policy.[38]

The court meticulously showed that a combination of factors caused OPM to mis-charge military leave for non-workdays. Decades of legislative amendments regarding the charging of annual and sick leave and changes in the statutory definition of "days" for various purposes all led to the military leave charging policy that OPM inherited from the Civil Service Commission in 1978. OPM's pre-2000 military leave-

[36] *Id.* at 1335.
[37] *Id.*
[38] *Id.*

charging policy was further supported by "Comptroller General opinions stretching back to 1930 [and forward to 1992], all opining that employees must be charged military leave for non-workdays occurring within the period of their absence [from their federal jobs to perform military duty.]"[39]

Of course, the court of appeals then rejected OPM's "statutory construction" basis for its military leave charging policy under § 6323. The court's rejection necessarily included the consistent practices of all federal agencies, since all were based upon OPM's military leave charging policy and all rested on the mistaken OPM conclusion that Congress endorsed OPM's military leave charging practice. In rejecting OPM's conclusion regarding § 6323, the court of appeals wrote, "We therefore cannot conclude that Congress has acquiesced to or endorsed the [pre-2000] administrative interpretation of section 6323(a)(1)'s current text [and] conclude [§ 6323] cannot be interpreted to require federal employees to expend military leave for reserve training days on which they were not required to work."[40] Plainly, the court of appeals' *Butterbaugh* decision expressly found OPM's conclusions regarding § 6323 were incorrect (a mistake of law).

The court of appeals' review of the pertinent legislative history explained why employee-reservists had been incorrectly charged military leave for many years pre-2000. The cause was a legal error of statutory interpretation or statutory construction committed by OPM, a mistake of law. OPM (and the Civil Service Commission before it) had incorrectly interpreted congressional intent as it pertained to the charging of military leave under § 6323. The court's review of § 6323's history led the court to one inescapable conclusion: OPM's legal interpretation of congressional intent concerning what § 6323 required was wrong. All federal employee-reservists had been incorrectly charged military leave for many years pre-2000 (and all employees had been denied that benefit of employment) only because OPM made a legal error of statutory construction. However, being denied a benefit of employment "because of" or "due to" a bona fide error is manifestly not the equivalent of being denied a benefit of employment "because of" or "due to" military status or the performance of military service.

The correct and dispositive USERRA question (the second essential USERRA question) in all *Butterbaugh* appeals is, Was an employee's military status or military service "a motivating factor" for OPM to commit its legal error of statutory construction and, based on that error, incorrectly require that military leave be charged for non-workdays? Stated differently, did OPM commit its legal error misinterpreting § 6323 (and, as a result, incorrectly require that military

[39] *Id.* at 1341.
[40] *Id.* at 1343.

leave be charged for non-workdays) "because of" or "due to" any employee's performance of military service? In light of the court of appeals' *Butterbaugh* decision, the answer to both questions is obviously, "no." No employee's military status or military service caused OPM's mistake of law. Employees were mis-charged military leave before 2000 only because of and only due to the fact that OPM made a mistake of law when it incorrectly interpreted § 6323.

Perhaps the clearest illustration of this point is found in the Board case *Crawford v. Department of Transportation*.[41] In a sense, *Crawford* presents the "reverse" of the *Butterbaugh* facts and for that reason warrants close review. *Crawford* also shows the validity of the three points: (1) an agency's action misinterpreting this federal statute (§ 6323) is a "mistake of law" (concerning the mandate of the federal statute); (2) such a misinterpretation of law is not "due to" or "because of" an employee-reservist's military status or performance of military service; and, (3) therefore, the resulting agency action cannot be held to violate USERRA.

In *Crawford*, the Department of Transportation (DOT) had initially granted "Service Computation Date" (SCD) credit for leave accrual purposes to an employee based on the employee's prior attendance at the Coast Guard Academy. Eight months later, however, OPM held that the granted SCD credit was actually barred by the applicable statute, 10 U.S.C. § 971(b).[42] OPM then instructed the DOT to re-calculate the employee's SCD without any credit for military academy attendance, effectively "denying the benefit of employment."[43] The employee appealed to the Board, asserting a USERRA violation.[44] The MSPB Administrative Judge (AJ) noted in the Initial Decision "the pivotal issue was whether the appellant's military service was a substantial or motivating factor in [OPM's]" denial of SCD credit for his military academy attendance.[45] Most importantly, "the AJ [also] found that the appellant did not prove a discriminatory motive [violative of USERRA] because the agency was simply following OPM's letter providing guidance on this issue, and the agency believes that OPM's guidance is correct."[46]

As an initial matter, the AJ's finding is identical to the underlying factual scenario in all *Butterbaugh* appeals. In all *Butterbaugh* appeals, all federal agencies, prompted by OPM's pre-2000 mandate on charging military leave, incorrectly charged employees

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[41] Crawford v. Dep't of Transportation, 95 M.S.P.R. 44 (2003), *aff'd*, 373 F.3d 1155 (Fed. Cir. 2004).
[42] *Id.* at 46.
[43] *Id.*
[44] *Id.*
[45] *Id.*
[46] *Id.*

military leave for non-workdays only because they believed (albeit, mistakenly) OPM's guidance regarding § 6323 was correct and required that result. Equally important in *Crawford*, the Board concluded 10 U.S.C. § 971(b) prohibited granting SCD credit to employees for attendance at military academies. OPM's statutory interpretation of the federal statute at issue was deemed to be correct in *Crawford*, opposite to the result concerning § 6323 in *Butterbaugh*. Therefore, said the Board in *Crawford*, "the agency properly denied the appellant credit for leave accrual purposes for his cadet time."[47]

Comparing *Crawford* and *Butterbaugh* reveals they are identical in all key respects save one: the "legal correctness" of OPM's view of the controlling federal statute. Both cases dealt with OPM's denial of a statutory benefit of employment, a statutory entitlement flowing from the performance of military service. In both cases the agency's denial of the benefit of employment was solely based on OPM's interpretation of the relevant federal statute (respectively, 10 U.S.C. § 971(b) in *Crawford*; and, § 6323 in *Butterbaugh*). In *Crawford*, OPM correctly interpreted the statute as the Board found. In *Butterbaugh*, OPM incorrectly interpreted the statute, as the Federal Circuit Court of Appeals found. However, and key here, in both cases only OPM's legal interpretation of the underlying federal statute *caused* the denial of a benefit of employment.

Since OPM's view of what the federal statute required (correct or incorrect) alone caused the denial of the benefit of employment in both cases, it necessarily follows that in neither case was the employee's military service or military status the cause of, or the reason for, or a "motivating factor" in, the denial of the benefit of employment. Only OPM's view of each statute's mandate "caused" or "motivated" the denial of the benefit of employment in each case. The fact that the Federal Circuit Court of Appeals found in *Butterbaugh* that OPM was incorrect as a matter of law concerning § 6323's requirement on charging military leave merely reinforces the conclusion that the denial of that benefit occurred only "because of" and only "due to" the mistake of law committed by OPM. It is apparent that OPM's mistake of law in *Butterbaugh* was the direct and sole reason for, the sole cause of, and the sole "motivating factor" for OPM and all federal agencies to mis-charge military leave. And a mistake of law which causes agency action has long been held by substantial precedent to be a legitimate, non-discriminatory reason for agency action, treated in detail in Section IV of this article.

One possible rejoinder to this comparison of *Crawford* and *Butterbaugh* is that in *Crawford* the federal statute at issue (§ 971(b)) served as a statutory 'exception' to what otherwise would have been a

[47] *Id.* at 50.

USERRA violation, while in *Butterbaugh* the statute (§ 6323) was unavailable to the agency (as the Federal Circuit held) as an exception to USERRA's mandate. Assuming its accuracy, this misses the key USERRA inquiry: What caused OPM to mis-charge military leave in *Butterbaugh*? The observation that OPM was wrong in its legal view of § 6323 merely confirms that the only "motivating factor" for the mis-charging of military leave was OPM's mistake of law. OPM's mistake of law was certainly contrary to § 6323's actual mandate, as the Federal Circuit Court of Appeals' decision declared. But, because the mis-charging of military leave in all cases was caused and motivated only by OPM's mistake of law, and was not caused by or due to an employee's military service or status, no USERRA violation can be shown. *Butterbaugh* appellants are properly left to pursue remedies available to them whenever federal agencies deny them statutory benefits, but not through MSPB appeals premised on the Board's USERRA jurisdiction.

IV. OPM'S MISTAKE OF LAW PRECLUDES SHOWING A USERRA VIOLATION

Substantial authority (including Board authority) supports the principle that when an agency shows it has taken an action toward an employee who is in a protected class for a bona fide mistaken reason, the agency cannot be shown to have acted "because of" the employee's protected status. The Supreme Court of the United States found in an Age Discrimination in Employment Act (ADEA) lawsuit that an agency's adverse action which is shown to have been based exclusively on the employee's race cannot be shown to have been taken "because of" the employee's age and the ADEA prima facie case fails for that reason. "[I]t cannot be true that an employer who fires an older black worker *because* the worker is black thereby violates the ADEA. The employee's race is an improper reason, *but it is improper under Title VII, not the ADEA*."[48] While firing a black worker *because of* his race is obviously illegal, his firing on that basis is not "because of his age," a required element of a prima facie ADEA violation.

Consistent with *Hazen Paper Co.* it may be conceded that "due to" and "because of" OPM's pre-2000 mistake of law, federal agency employees were incorrectly charged military leave under § 6323. However, that fact alone does not show the agency's improper charging of military leave was "because of" the employees' military status or military service obligation. Applying the Court's reasoning in *Hazen Paper Co.* to all *Butterbaugh* cases, it cannot be said that a federal agency-employer who incorrectly charged military leave because OPM made a legal error interpreting § 6323's requirements thereby violates

[48] Hazen Paper Co. v. Biggins, 507 U.S. 604, 612 (1993) (emphasis added).

USERRA. Charging military leave contrary to the requirements of § 6323 is improper (as was found by the U.S. Court of Appeals for the Federal Circuit), but it is improper under § 6323, not under USERRA.[49]

To the same effect, when the Department of Health & Human Services applied the wrong legal standards to an applicant (a bona fide "mistake of law") and the applicant alleged illegal discrimination, the Eighth Circuit Court of Appeals concluded:

> There is absolutely no evidence that the application of the wrong standards *was anything but an honest mistake*. The Secretary's stated reason for the GS-7 classification . . . was, in fact, the Secretary's actual reason. We do not believe this evidence can show pretext or still less that it can give rise to a reasonable inference of intentional discrimination. Without more, *the evidence only shows that the Secretary applied the wrong standards in the context of a complex administrative system . . . . That the [correct] standards should have been applied . . . does not make the Secretary's inadvertent failure to do so somehow based on race or national origin*.[50]

The court continued in a footnote:

> Much like the example in *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 612, 123 L. Ed. 2d 338, 113 S. Ct. 1701 (1993), in which racial discrimination was described as an "improper" reason under Title VII, but not under the Age Discrimination in Employment Act, the Secretary's use here of the wrong standards was improper under . . . the Indian Preference Act, but not under Title VII. On the record before us, the application of the wrong standards was merely *inadvertent and simply a mistake of law*. Accordingly, it is not evidence of an intent to discriminate.[51]

The Secretary's "honest mistake" in applying incorrect legal standards to an applicant (a "mistake of law") precluded showing that the applicant's race or national origin was the "motivating factor" for the agency's decision.

It may similarly be said of OPM's mandated, pre-2000 military leave policy under § 6323 that the evidence only shows OPM applied

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[49] *See, e.g., id.*
[50] Dionne v. Shalala, 209 F.3d 705, 709-10 (8th Cir. 2000) (emphasis added).
[51] *Id.* at 710 n.8 (emphasis added).

the wrong statutory construction tools and, therefore, reached the wrong legal conclusion in the context of a complex legislative history, a mistake of law.[52] Further, that OPM should have applied the correct rules of statutory construction (as the court of appeals did) does not make OPM's failure to do so somehow based on an employee's military status or military service obligation.[53]

The court of appeals' *Butterbaugh* decision demonstrates that OPM misinterpreted § 6323 and congressional intent underlying that statute. Further, *Butterbaugh* shows OPM's misinterpretations alone caused OPM to mis-charge military leave for non-workdays for many years. These findings in *Butterbaugh* simply cannot support, and instead conclusively refute, the USERRA-required assertion that OPM's actions mis-charging military leave occurred "because of" or "due to" an employee's military status or military service. In addition, given the support OPM's pre-2000 military leave charging policy received from its predecessor Civil Service Commission and from Comptroller General opinions which had parroted OPM's mistaken view for 60 years, OPM can fairly be said to have made "an honest mistake."[54]

It follows that no MSPB appellant asserting a USERRA violation based upon the *Butterbaugh* case can meet the second essential element of a USERRA prima facie case. No appellant can show that their military status or military service obligation was a motivating factor for the denial of the benefit of employment, because the court of appeals' *Butterbaugh* decision vividly illustrates that OPM's pre-2000, incorrect charging of military leave was solely "motivated by" and only occurred "because of" OPM's misreading of Congress's intent. The OPM made an error, an honest mistake of law, which does not demonstrate a USERRA violation.

When considering a bona fide misinterpretation of an agency directive that explained the agency's action in not promoting an employee (who then alleged age-based and national origin discrimination), the Equal Employment Opportunity Commission (EEOC) wrote, "[C]omplainant has failed to show that the District Manager's *misinterpretation of the [Food Safety and Inspection Service directive] was nothing* [sic] *more than a non-discriminatory error*."[55] Another EEOC case makes the same point:

> [T]he agency terminated appellant in accordance with the Commissioner's staffing advisory. *Whether or not the agency was wrong in their assessment that a*

[52] *See, e.g., id.* at 709-10.
[53] *See, e.g., id.*
[54] *See, e.g., id.*
[55] Mishra v. Veneman, No. 01A45143, 2004 EEOPUB LEXIS 6007, *3 (Oct. 29, 2004) (emphasis added).

> *reemployed annuitant appointment is the same as a temporary appointment [the latter requiring termination] is irrelevant*. . . . [W]here an employer *wrongly believes* an employee has violated company policy, it does not discriminate in violation of Title VII if it acts on that belief.[56]

Finally, the Board itself has held that proof a bona fide mistake caused an agency's action refutes a prima facie showing of discrimination. When an agency, in the context of a reduction-in-force (RIF), incorrectly determined the employee's assignment rights, the Board wrote, "[A]ll evidence of record showed that the agency's reasons for taking action were non-discriminatory in nature, *although its determination concerning the appellant's assignment rights ultimately proved to be incorrect*."[57] Further, writing in dissent in a subsequent case, MSPB Board Member Marshall observed, "That an agency's decision to take a contested action is *ultimately proved to be incorrect* does not preclude a finding that its reasons for taking that action were nondiscriminatory in nature."[58]

Applying similar reasoning to the context of a *Butterbaugh* appeal, the court of appeals' 2003 *Butterbaugh* decision establishes as a matter of fact and law that all employees who were incorrectly charged military leave for non-workdays before 2000 were incorrectly charged military leave only "because of" and only "due to" OPM's mistake of law in interpreting § 6323. The same 2003 court of appeals' *Butterbaugh* decision also precludes any *Butterbaugh* appellant from showing (as he or she must do in order to make out a prima facie USERRA case) that "military status or military service obligation was 'a motivating factor' for" OPM's action in incorrectly charging the employee military leave. *Butterbaugh* appellants were, in fact, incorrectly charged military leave solely because of OPM's legal mistake of statutory interpretation. Any suggestion otherwise succumbs to a well-known flaw in reasoning.

V. THE LOGICAL FLAW: *POST HOC; ERGO, PROPTER HOC*

The 2002-2004 *Butterbaugh* decisions of the Board and the court of appeals included dicta suggesting employees were incorrectly charged military leave "because of" or "due to" their military status; or,

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[56] Natividad v. Chater, No. 01954970, 1997 EEOPUB LEXIS 1453, *11 (Apr. 11, 1997) (citing Turner v. Texas Instruments, Inc., 555 F. 2d 1251 (5th Cir. 1977)) (emphasis added).

[57] Buckler v. Fed. Ret. Thrift Inv. Bd., 73 M.S.P.R. 476, 497 (1997) (emphasis added).

[58] Poole v. Dep't of Defense, 89 M.S.P.R. 456, 460-61 (2001) (Marshall, Mem., dissenting) (citing *Buckler*, 73 M.S.P.R. at 497) (emphasis added).

"because of" or "due to" their military service, and the Board's recent decision in *Cobb v. Department of Defense* makes the same assertion. This article counters that such reasoning is fatally flawed.

The Board in its 2002 *Butterbaugh* decision (and similarly, in *Cobb*)[59] wrote: "[I]t is undisputed that the only reason the appellants were charged military leave the way they were was because of their military reserve obligations."[60] Then in footnote 6 the Board continued: "Thus, . . . the appellants . . . provided direct evidence that their military service was a substantial or motivating factor for the agency's action."[61]

Further, court of appeals' dicta in *Butterbaugh* makes the same causative assertion: "Moreover, we agree with the Board that, in contrast to cases such as [*Sheehan*], the question in this case is not whether Petitioners' military status was a substantial or motivating factor in the agency's action, *for agencies only grant military leave to employees who are also military reservists*."[62]

The reasoning in these excerpts from the Board and the court of appeals falls prey to the "fallacy of coincidental correlation;" or, *post hoc; ergo, propter hoc* ("after this; therefore, because of this").[63] An explanation of the *post hoc* error in reasoning is shown here:

> Post hoc ergo propter hoc, Latin for "after this, therefore because of this", is a logical fallacy (of the questionable cause variety) which assumes or asserts that if one event happens after another, then the first must be the cause of the second. It is often shortened to simply post hoc and is also sometimes referred to as false cause or coincidental correlation. It is subtly different from the fallacy *cum hoc ergo propter hoc*, in which the chronological ordering of a correlation is insignificant.
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> Post hoc is a particularly tempting error because temporal sequence appears to be integral to causality. The fallacy lies in coming to a conclusion based *solely* on the order of events, rather than taking into account other factors that might rule out the connection. Most

[59] Cobb v. Dep't of Defense, 106 M.S.P.R. 390, 392 (2007).
[60] Butterbaugh v. Dep't of Justice, 91 M.S.P.R. 490, 495 (2002).
[61] *Id.* at 495 n.6.
[62] Butterbaugh v. Dep't of Justice, 336 F. 3d 1332, 1336 (Fed. Cir. 2003) (emphasis added).
[63] NEW YORK PUBLIC LIBRARY DESK REFERENCE 313 (3d ed. 1998); Wikipedia, the free encyclopedia: Post Hoc Ergo Propter Hoc, http://en.wikipedia.org/wiki/Post_hoc_ergo_propter_hoc (last visited Jan. 20, 2008).

> familiarly, many superstitious beliefs and magical thinking arise from this fallacy.
>
> . . .
>
> The form of the post hoc fallacy can be expressed as follows:
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> - A occurred, then B occurred.
> - Therefore, A caused B.[64]

The *post hoc; ergo, propter hoc* logical flaw has been recognized in MSPB case law, as well as by the U.S. Court of Appeals for the Federal Circuit.[65]

Illustrating the *post hoc; ergo, propter hoc* error in each of their respective *Butterbaugh* decisions, the Board and the court of appeals followed this false path of reasoning:

• Employee-reservists were entitled to military leave under § 6323 *because of* or *due to* their military status or performance of military service;
• The agency then *incorrectly* charged them military leave for non-workdays;
• *Therefore*, the agency incorrectly charged employee-reservists military leave for non-workdays *because of* or *due to* their military status or performance of military service.

Or,

• An employee-reservist's military status or performance of military service is "a motivating factor" for his or her entitlement to military leave;
• The agency then *incorrectly* charged the employee-reservist military leave;
• *Therefore*, the employee-reservist's military status or performance of military service was "a motivating factor" for the agency's incorrectly charging the employee-reservist military leave.

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[64] Wikipedia, the free encyclopedia; Post Hoc Ergo Propter Hoc, http://en.wikipedia.org/wiki/Post_hoc_ergo_propter_hoc (last visited Jan. 20, 2008).

[65] *See* Special Counsel v. Nichols, No. HQ12068610018, 1987 MSPB LEXIS 1476, *14 (Jan. 16, 1987), *recommended decision adopted as modified*, 36 M.S.P.R. 445 (1988) ("On analysis of the record, I conclude that the factual line of causation drawn is much too attenuated to constitute preponderant evidence establishing the offenses charged. The circumstances emphasized by petitioner to buttress its charges have logical and legitimate explanations. As I view the total fact picture, this case illustrates the fallacy of *post hoc ergo propter hoc* rationalizations."); U.S. Steel Group v. United States, 96 F.3d 1352, 1358 (Fed. Cir. 1996) ("[T]o claim that the temporal link between these events *proves* that they are causally related is simply to repeat the ancient fallacy: *post hoc ergo propter hoc*.").

Perhaps the most apt illustration of the *post hoc* logical flaw, in the context of a *Butterbaugh* MSPB appeal, can be stated as follows: a federal employee-reservist who is currently in military status (which status alone entitles her to shop in and make purchases from the on-base military clothing sales store) gives the store clerk a $10 bill for a $5 purchase. The clerk miscounts the change (makes a bona fide error) and returns only $4 to the employee-reservist. Can it be said the employee-reservist's military status was "a motivating factor" for the clerk to *incorrectly* count the reservist's change and return the wrong amount of change? Or, can it be said that the clerk's counting error was "because of" or "due to" the reservist's military status or performance of military service? Of course not. The reservist's military status or performance of military service entitled her to enter the military clothing sales store, make purchases there, and to receive change back. Yet, her military status or her military service had no causal relation to the clerk's error in miscounting the reservist's change.

In precisely the same way, proof that OPM and all federal agencies that followed OPM's incorrect military leave-charging policy committed a legal error of interpretation and, based solely upon that error, incorrectly charged federal employee-reservists military leave for non-workdays under § 6323 forecloses any *Butterbaugh* appellant's suggestion that he or she was incorrectly charged military leave "because of" or "due to" military status or "because of" or "due to" military service. Proof of OPM's mistake of law also forecloses any employee-reservist's assertion that military status or military service obligation was "a motivating factor" for a federal agency's action in incorrectly charging military leave.

In the example above, the store clerk's attention was focused exclusively on the objective, military status-neutral question, How much is ten dollars minus five dollars? The clerk's effort produced an incorrect answer, but the process evinced no interest in the military status of or military service performed by the employee-reservist who'd handed the clerk the $10 bill. Similarly, OPM's attention was focused exclusively on the objective and military status-neutral question, What meaning of "days" did Congress intend must be used when applying § 6323? OPM's effort also produced an incorrect answer as found by the U.S. Court of Appeals for the Federal Circuit, but OPM's effort during its inquiry also evinced no interest in the military status or military service of any employee-reservist. That OPM reached an incorrect conclusion was not "caused by" or "due to" any employee-reservist's military status or performance of military service.

The U.S. Circuit Court of Appeals for the Federal Circuit found that OPM's mistake of law was the sole cause for federal employees

being incorrectly charged military leave in *Butterbaugh*.[66] That court's decision demonstrates conclusively that OPM's pre-2000 military leave charging practice was only caused by OPM's mistake of law, since that is precisely what the court held:

> [*Contrary to OPM's long-standing interpretation of 6323 upon which it based its military leave charging policy*, we] cannot conclude that Congress has acquiesced to or endorsed the former [pre-2000] administrative interpretation of section 6323(a)(1)'s current text.
> . . .
> . . . [W]e conclude that 5 U.S.C. § 6323 cannot be interpreted to require federal employees to expend military leave for reserve training days on which they were not required to work.[67]

The court's decision, in fact, described OPM's reasoning process in detail, and then the court declared flatly that it was error. It is clear that employees were incorrectly charged military leave only "because of" and "due to" an error, a "mistake of law," by OPM.

VI. NO DISPARATE TREATMENT: EMPLOYEE-RESERVISTS RECEIVE THE SAME LEAVE BENEFITS AS NON-RESERVIST EMPLOYEES PLUS MILITARY LEAVE

The preceding sections of this article show no employee-reservist was denied the benefit of employment of military leave "due to" or because of" the employee-reservist's military status or performance of military service. Even if that were not the case, military leave, as a benefit of employment available exclusively to employee-reservists, is not a benefit that can be the subject of disparate treatment toward employee-reservists because it is a benefit that is wholly unavailable to employees who are not reservists, explained here.

An examination of the common, federal employee leave benefits shows employee-reservists were deprived of nothing in comparison to non-reservist employees. In fact, employee-reservists receive greater leave benefits than all similarly-situated federal employees who are not military reservists. That reality refutes the assertion that employee-reservists were treated disparately, discriminatorily, or "less well" than federal employees who are not reservists, even when § 6323 military leave was mis-charged pre-2000.

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[66] *Butterbaugh*, 336 F.3d at 1332.
[67] *Id.* at 1343 (emphasis added).

The chart below shows common federal leave benefits granted employees who are not military reservists and compares them to leave benefits granted employee-reservists (*Butterbaugh* appellants):

Federal Employee Leave Benefits:

Non-Reservist Employees	Employee-Reservists
• Annual Leave[68]	• Annual Leave
• Sick Leave[69]	• Sick Leave
• *Family Medical Leave Act* Leave[70]	• *Family Medical Leave Act* Leave
	• Military Leave (5 U.S.C. § 6323(a)(1))

As shown here, all employee-reservists receive the same federal leave benefits enjoyed by non-reservist employees. Then, employee-reservists also receive military leave under § 6323, an extra benefit of employment granted exclusively to employee-reservists.[71]

It defies logic to assert that employee-reservists, who alone among all federal employees receive the extra benefit of military leave, are somehow denied a benefit of employment in comparison to non-reservist employees, who receive no such military leave benefit. No matter what method is used to charge or calculate military leave, correctly or incorrectly, it remains an extra benefit of employment granted only to employee-reservists (*Butterbaugh* appellants).

An agency's incorrect charging of military leave may have contravened § 6323, which was precisely the Federal Circuit Court of Appeals' sole *Butterbaugh* holding, but it does not and cannot violate USERRA because employee-reservists are denied nothing granted to employees who are not military reservists. Similarly, an agency may certainly be required to administratively correct its incorrect calculation

[68] 5 U.S.C. § 6303 (2006).
[69] 5 U.S.C. § 6307 (2006).
[70] 5 U.S.C. § 6382 (2006).
[71] While this article compares only the most common federal employee leave provisions, other provisions in Title 5 of the U.S. Code address other types of federal employee leave. However, the author found no indication in those provisions of any material difference between the leave entitlements of non-reservist federal employees and those of employee-reservists. For example, Title 5 of the U.S. Code also contains these leave provisions: Absence of veterans to attend funeral services, 5 U.S.C. § 6321 (2006); Leave for jury or witness service; official duty status for certain witness service, 5 U.S.C. § 6322 (2006); Absence of certain police and firemen, 5 U.S.C. § 6324 (2006); Absence resulting from hostile action abroad, 5 U.S.C. § 6325 (2006); Absence in connection with funerals of immediate relatives in the Armed Forces, 5 U.S.C. § 6326 (2006); Absence in connection with serving as a bone-marrow or organ donor, 5 U.S.C.S. § 6327 (2006); and, Absence in connection with funerals of fellow Federal law enforcement officers, 5 U.S.C. § 6328 (2006).

or mis-charging of military leave. But the agency must do so only because the agency misapplied § 6323, not because the agency violated USERRA by discriminating against employee-reservists "due to" or "because of" their military service, when only employee-reservists are entitled to military leave at all. In the vernacular, when it comes to § 6323 military leave, there are no other federal employees who employee-reservists can be "treated worse than" because no other federal employees receive military leave.

In the terminology of discrimination case proof analysis, there are no similarly-situated employees outside of an employee-reservist's protected class who receive the benefit involved because *only* employee-reservists receive the benefit of military leave. Thus, no employee-reservist can show disparate or discriminatory treatment with regard to military leave under § 6323 in comparison to any other federal employee who is not a reservist. In sum, federal agencies mis-charged military leave, a benefit of employment available only to employee-reservists and to no other federal employees, based upon an agency (OPM) legal mistake, but no other federal employee was treated better than employee-reservists as regards military leave because only employee-reservists receive the benefit of military leave. No disparate treatment (and thus, no USERRA violation) can be shown.

VII. MILITARY LEAVE IS UNIQUE; NO COMPARABLE LEAVE IS AVAILABLE TO NON-RESERVIST EMPLOYEES

Finally, it might be asserted that none of the other types of leave available to non-reservist employees is charged for non-workdays; and, therefore, employee-reservists were disadvantaged or treated worse in violation of USERRA when military leave, but no other type of employee leave, was charged for non-workdays. This assertion also fails.

USERRA's § 4316(b)(1)(B) does demand that employee-reservists absent performing military service receive the same "rights and benefits" the employer provides to non-reservist employees absent from the workplace "on furlough or leave of absence" for non-military reasons:

> (b) (1) Subject to paragraphs (2) through (6), *a person who is absent from a position of employment by reason of service in the uniformed services shall be—*
>
> (A) deemed to be on furlough or leave of absence while performing such service; and

> (B) *entitled to such other rights and benefits* not determined by seniority *as are generally provided by the employer* of the person *to employees having similar seniority, status, and pay who are on furlough or leave of absence* under a contract, agreement, policy, practice, or plan in effect at the commencement of such service or established while such person performs such service.[72]

The assertion based on this section of USERRA argues that employee-reservists absent on military leave are entitled to the same "rights and benefits" provided non-reservist employees who are on a "leave of absence" for non-military reasons. Further, since no form of leave available to non-reservist employees is charged for non-workdays, military leave available to employee-reservists may not be so charged without depriving employee-reservists of a "right or benefit" non-reservist employees enjoy. To charge military leave for non-workdays violates § 4316(b)(1)(B), the assertion goes, based upon "inequality in the methods of charging leave." However, case law interpreting § 4316(b)(1)(B) does not support this assertion.

In *Tully v. Department of Justice*,[73] Mathew Tully, an employee of the Bureau of Prisons (BOP), was absent performing military service for approximately 30 months in Leave Without Pay (LWOP) status.[74] Relying on USERRA's § 4316(b)(1)(B) and on *Waltmyer v. Aluminum Co. of America*,[75] Tully asserted first to the Board and then to the Court of Appeals for the Federal Circuit that the BOP's failure to pay him for paid holidays during his 30-month LWOP absence on military orders violated his rights under USERRA's § 4316(b)(1)(B) because BOP provided holiday pay to employees who took leaves of absence to attend judicial proceedings as jurors or witnesses (Court Leave).[76] Therefore, Tully argued BOP was obligated to provide holiday pay to him while he was on leave (LWOP) for 30 months performing military service and to do otherwise violated § 4316(b)(1)(B) by depriving him of a "right or benefit" (holiday pay) while he was absent performing military duty, holiday pay granted non-reservist employees absent on Court Leave.[77]

Tully demanded equality of treatment for his absence performing military service in LWOP status in comparison to non-reservist employees absent on Court Leave. He asserted § 4316(b)(1)(B) requires an employee-reservist on leave performing

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[72] 38 U.S.C. § 4316(b)(1)(B) (2006) (emphasis added).
[73] Tully v. Dep't of Justice, 481 F.3d 1367 (Fed. Cir. 2007)
[74] *Id.* At 1368.
[75] Waltmyer v. Aluminum Co. of Am., 804 F.2d 821 (3d Cir. 1986).
[76] *Tully*, 481 F.3d at 1368.
[77] *Id.*

military service receive the same "rights and benefits" (here, pay for holidays) as attach to leave enjoyed by non-reservists (in his case, Court Leave with holiday pay in comparison to LWOP performing military service without holiday pay). In sum, Tully claimed "disparate treatment" because his absence performing military duty in LWOP status deprived him of holiday pay when non-reservist employees absent on Court Leave received holiday pay. However, both the Board and the Federal Circuit Court of Appeals rejected Tully's view of USERRA's § 4316(b)(1)(B).

The Board reasoned *Waltmyer* requires a comparison of the nature of the employee-reservist's absence for military duty with the nature of other types of absences for which agency policy provided non-reservist employees holiday pay, finding Tully's leave of absence for military service was significantly longer than the typical period of Court Leave for service as a juror or witness. As a consequence, the Administrative Judge (AJ) held the fact that BOP provided holiday pay to employees absent on more brief Court Leave did not establish that Tully was denied a benefit generally available to employees on extended leaves of absence in violation of § 4316(b)(1)(B)[78].

The Federal Circuit Court of Appeals also rejected Tully's assertion that § 4316(b)(1)(B) "entitles uniformed service members to the best benefits available to any [non-reservist] employee for any leave of absence, and that it is therefore impermissible for [non-reservist] employees on court leave to receive better benefits than employees on a leave of absence for military purposes," holding instead, "the 'leave of absence' to which § 4316(b)(1)(B) refers is not any leave of absence, but rather one *comparable to the leave* provided to the service member for military service."[79] The court added, "Accepting [Tully's] position would mean that the benefits provided [to non-reservist employees] in connection with any absence from work, no matter how different in character from the service member's absence, must be provided for all absences attributable to uniformed service."[80]

The court-required comparison between "typically brief" Court Leave granted to non-reservist employees (with holiday pay) and Tully's 30-month LWOP absence performing military duty (without holiday pay) led the court to conclude Tully's 30-month LWOP absence performing military duty was "significantly different in character" from comparatively brief Court Leave, and the MSPB AJ's ruling denying Tully holiday pay based on that different character was not violative of § 4316(b)(1)(B).[81] Based on *Tully*, we must compare the "nature" or the "character" of military leave (leave charged for non-workdays) with the

[78] *Id.* at 1368-69.
[79] *Id.* at 1369.
[80] *Id.* at 1370.
[81] *Id.* at 1371.

"character" of other leaves of absence afforded non-reservist employees (leave not charged for non-workdays).

Military leave afforded employee-reservists under § 6323 is unique compared to the nature or character of all other kinds of federal leave available to non-reservist federal employees. That is so because military leave alone affords an employee-reservist a paid absence from civilian employment in one federal agency during which the employee performs paid federal duties with and in another federal agency (the Department of Defense). There is simply no other form or kind of leave available to a non-reservist federal employee during which the employee may be employed by and perform federal duties with and in another federal agency or federal employer and receive pay from both federal agencies. In fact, federal law generally prohibits such "dual compensation", shown here:

> 5 U.S.C. Sec. 5533, *Dual pay from more than one position; limitations; exceptions*
>
> (a) Except as provided by subsections (b), (c), and (d) of this section, *an individual is not entitled to receive basic pay from more than one position for more than an aggregate of 40 hours of work in one calendar week (Sunday through Saturday)*.[82]

and;

> 5 U.S.C., Sec. 5536, *Extra pay for extra services prohibited*
>
> An employee or a member of a uniformed service whose pay or allowance is fixed by statute or regulation *may not receive additional pay or allowance for the disbursement of public money or for any other service or duty*, unless specifically authorized by law and the appropriation therefor specifically states that it is for the additional pay or allowance.[83]

These "dual compensation" statutes show federal law generally forbids federal employees from being employed by and receiving pay from another federal agency. That is what makes military leave unique in its "nature" or its "character" and, therefore, not comparable to any other type of leave benefit available to non-reservist federal employees.

[82] 5 U.S.C. § 5533 (2006) (emphasis added).
[83] 5 U.S.C. § 5536 (2007) (emphasis added).

Military leave under § 6323 provides a unique exception to the statutory prohibitions cited above.

For example, there is no type, category, or "character" of federal paid leave which allows a non-reservist federal employee of the Department of the Treasury to declare, "I'd like paid time off from my Department of Treasury position to take a job with the Department of Defense (DOD) and continue to receive my federal pay from Treasury in addition to federal pay from DOD." Yet, that is precisely the "character" of military leave in accordance with § 6323. In fact, the general rule regarding federal civilian employment and military service is that only through statutory exceptions may a federal civilian employee also receive military pay.[84] The fact is that § 6323 military leave is significantly different in character, so different that it is unique in comparison to every other type of leave available to non-reservist federal employees. The unique character of military leave prevents the comparison that *Tully* deemed appropriate in determining whether USERRA's § 4316(b)(1)(B) has been violated. That military leave alone, among all types of federal employee leave, was charged for non-workdays does not show a violation of USERRA's § 4316(b)(1)(B) because under *Tully*, military leave's unique character shows it to be not comparable to any type of leave available to non-reservist federal employees.

While it may be said that non-reservist federal employees are free to use annual leave and, while absent from the federal workplace on annual leave, work elsewhere for pay, this observation ignores two facts. First, it ignores the significantly different character of military leave in comparison to annual leave, described above. Military leave provides a paid absence to employee-reservists to perform federal duties *in another federal agency* (DOD, albeit in military status), being paid simultaneously by the first employing federal agency and by the second federal agency (DOD) for federal military service. "Annual leave" provides no such entitlement and possesses no "nature or character" similar to military leave. Second, it ignores that in *Tully*, the Federal Circuit Court of Appeals rejected the assertion that § 4316(b)(1)(B) "entitles uniformed service members to the best benefits available to any [non-reservist] employee for any leave of absence," holding instead, "the 'leave of absence' to which § 4316(b)(1)(b) refers is not any leave of absence, but rather one *comparable* to the leave provided to the

[84] *See, e.g.*, Opinion of the Comptroller General of the United States B-133972, 46 Comp. Gen. 400; 1966 U.S. Comp. Gen. LEXIS 26 (Nov. 14, 1966) ("Reference is made to 37 Comp Gen 255 which reflects the rule long followed by the accounting officers of the Government denying pay for duties performed in a Government civilian capacity by a member of a military service, in the absence of a statute specifically authorizing payment in the civilian capacity.")

service member for military service."[85] The court added, "[a]ccepting [Tully's] position would mean that the benefits provided [to a non-reservist employee] in connection with any absence from work, no matter how different in character from the service member's absence, must be provided for all absences attributable to uniformed service."[86]

As shown, there is simply no form of paid leave available to non-reservist employees that is "comparable to the [military] leave provided to [employee-reservists] for military service." Instead, military leave is unique among all categories or types of leave available to federal employees and is only available to employee-reservists. To assert that military leave mistakenly mis-charged for non-workdays violated USERRA's § 4316(b)(1)(B) ignores the "significantly different character" of military leave in comparison to all other types of federal paid leave and ignores the court's analysis in the *Tully* case. The unique character of military leave prevents the comparison demanded by *Tully* and precludes a finding that the mis-charging of military leave for non-workdays violated USERRA's § 4316(b)(1)(B).

In sum, charging military leave for non-workdays due to OPM's mistake of law, while violative of § 6323, did not violate USERRA's non-discrimination provisions because military leave is available only to employee-reservists in addition to all other types of leave available to all federal employees. Thus, mis-charging military leave to employee-reservists deprived them of nothing compared to their non-reservist counterparts, who are not entitled to military leave at all. Further, the mis-charging of military leave "due to" and "because of" OPM's mistake of law did not violate USERRA's § 4316(b)(1)(B) because military leave is unique in character and not comparable to any other type of leave afforded to non-reservist employees in that military leave permits "dual compensation" to employee-reservists which is prohibited to all non-reservist employees. The "significantly different character" of military leave compared to all other types of leave afforded federal employees shows that under *Tully*, the fact that military leave alone was charged (mis-charged) for non-workdays did not violate USERRA.

VIII. CONCLUSION

As a matter of fact and of law, no employee-reservist relying on *Butterbaugh* can show that he or she was incorrectly charged military leave for non-workdays "because of" or "due to" the employee's military status or performance of military service. No employee's military status or performance of military service was a "motivating factor" for the employee's having been mis-charged military leave. The

[85] *Tully*, 481 F.3d at 1369.
[86] *Id.* at 1370.

U.S. Court of Appeals for the Federal Circuit has never held otherwise. In fact, the court's 2003 *Butterbaugh* decision established that employee-reservists who were incorrectly charged military leave were mis-charged military leave only "because of" and only "due to" a mistake of law committed by OPM.

Since only a mistake of law "caused" OPM to mis-charge military leave, it follows that any MSPB *Butterbaugh* decision finding a USERRA violation and granting relief to the appellant is based on a flawed premise, a flawed premise repeated by the Board in 2007 in *Cobb*:

> [I]n military leave cases, it is generally self-evident that, if the agency improperly charged the appellant's military leave account on a nonworkday when he was performing military duties, *the appellant's military service was a substantial and motivating factor in the action*. *Butterbaugh v. Department of Justice,* 91 M.S.P.R. 490, ¶ 8 (2002), *rev'd on other grounds,* 336 F.3d 1332 (Fed. Cir. 2003).[87]

To the contrary, *Cobb* and its precedessor cases including *Butterbaugh* are incorrect on this essential USERRA point because OPM's mistake of law was the sole cause and the sole "motivating factor" for all federal agencies to mis-charge military leave pre-2000 for all federal employee-reservists under § 6323. Further, agency action taken "because of" or "due to" a bona fide mistake of law is a legitimate, non-discriminatory reason for that agency action, precluding a finding of a violation of USERRA as a matter of law. Therefore, any appellant's attempt to make the required prima facie showing of a USERRA violation in reliance on the *Butterbaugh* case, based upon having been incorrectly charged military leave for non-workdays pre-2000 under § 6323, must fail.

No employee-reservist who was mis-charged military leave due to OPM's mistake of law suffered "disparate treatment" in comparison to non-reservist employees, because employee-reservists received the benefit of every type of federal leave enjoyed by non-reservist employees in addition to the benefit of military leave. No matter how military leave was charged, it remained an extra benefit of employment enjoyed only by employee-reservists. Moreover, that military leave and no other type of federal paid leave was mis-charged for non-workdays due to OPM's mistake of law did not violate USERRA's § 4316(b)(1)(B), because military leave is a unique leave benefit permitting "dual compensation" that is prohibited to all non-reservist

[87] Cobb v. Dep't of Defense, 106 M.S.P.R. 390, 393 (2007) (emphasis added).

federal employees, which shows that military leave is "significantly different in character" from every other form of federal employee leave.

The *Butterbaugh* case and all *Butterbaugh* appeals filed in reliance upon it are based on flawed logic, analysis, and application of USERRA protections. The *Butterbaugh* Fallacy illustrated herein demonstrates that no USERRA violation occurred in *Butterbaugh*, and none can be shown by any appellant relying on *Butterbaugh*, as a matter of fact and law.

THE DECAY OF "DIVERS" AND THE FUTURE OF CHARGING "ON DIVERS OCCASIONS" IN LIGHT OF *UNITED STATES V. WALTERS*

LIEUTENANT COLONEL JOHN E. HARTSELL
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And although they will never complete [a new, terrifying tower of Babel], any more than they did the last one, nevertheless You could have prevented men from making this second attempt to build the tower and thus shortened their sufferings by a thousand years . . .[1]

I. INTRODUCTION

Use of the well-worn phrase, "on divers occasions," which court-martial practitioners have seen for decades, may ultimately lead to the reversal, with prejudice, of an otherwise legally sound conviction. Thus, every prosecutor and each advisor to a convening authority must now use caution when trying to simplify specifications and shorten charge sheets with this language. This case note attempts to examine this arguably astonishing development in recent case law and its subsequent implementation by court practitioners in an effort to educate counsel on the pitfalls of using potentially fatal charging terms.

Use of the inclusive phrase "on divers occasions" has long been a mainstay in military prosecutors' charging methodology.[2] By alleging "on divers occasions," the government can charge more than one instance of misconduct in a single specification. Many times, charging multiple criminal actions as a single offense allows a prosecutor to simplify his or her case by summarizing misconduct in an all-encompassing specification. Providing one event of misconduct does not improperly spillover into another, thereby creating improper "bootstrapping,"[3] this charging language is generally favorable to an accused. By not objecting to the use of "on divers occasions," an accused avoids the possibility that the specification is severed[4] into multiple specifications, with the accompanying risk of additional convictions and an increased sentence.

The use of "on divers occasions" bestows a certain degree of sentence limitation upon an accused's case. For instance, a drug distributor charged with misconduct "on divers occasions" during a certain time period may face maximum confinement for fifteen years rather than a lifetime behind bars even though he or she may have sold drugs on ten known occasions.[5] In another instance, a drug distributor

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[1] FYODOR DOSTOEVSKY, THE BROTHERS KARAMAZOV 337 (Andrew R. MacAndrew, trans., Bantam Books 1970) (1880).

[2] *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 307 Discussion (2005) [hereinafter MCM].

[3] The use of an instruction may preclude an improper spill-over effect. U.S. DEP'T OF ARMY, PAM. 27-9, LEGAL SERVICES: MILITARY JUDGES' BENCHBOOK (15 Sep. 2002) [hereinafter BENCHBOOK], para. 7-17.

[4] MCM, *supra* note 2, R.C.M. 906(10).

[5] *See* UNIFORM CODE OF MILITARY JUSTICE (UCMJ), Article 112a(e) (2005); *cf.* U.S. v. Mincy, 42 M.J. 376 (1995). In bad check cases, "the maximum punishment is

charged with the same misconduct "on divers occasions" during a certain time period is extended double jeopardy protection for additional drug distribution activities during the same charged period. So while use of "on divers occasions" language summarizes and simplifies a prosecutor's job as he or she drafts charges, it also reduces and restricts an accused's potential culpability. It is a mutually beneficial charging methodology for both parties, but despite its practical benefits, its future use is less certain as *U.S. v. Walters*[6] is applied and implemented.

II. THE "*WALTERS* PROBLEM"

In *Walters,*[7] the Court of Appeals for the Armed Forces (CAAF) addressed a unique potential problem inherent in specifications alleging misconduct "on divers occasions." When an accused is charged with committing "illegal conduct 'on divers occasions' and the [court-martial] find[s] the accused guilty of charged conduct but strikes out the 'on divers occasions' language, the effect of the findings is that the accused has been found guilty of misconduct on a single occasion and not guilty of the remaining occasions."[8] This situation gives rise to the so-called "*Walters* problem."[9]

In such a case, if "the findings do not disclose the single occasion on which the conviction is based, the Court of Criminal Appeals cannot conduct a factual sufficiency review or affirm the findings because it cannot determine which occasion the servicemember was convicted of and which occasion the servicemember was acquitted of."[10] In the end, appellate courts are hamstrung in the performance of their responsibilities and they cannot affirm the factual sufficiency of the finding.[11] Because an accused has a "substantial right to a full and

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calculated by the number and amount of the checks as if they had been charged separately, regardless whether the Government correctly pleads only one offense in each specification or whether the Government joins them in a single specification…" *Mincy*, 42 M.J. at 378.

[6] 58 M.J. 391 (2003).

[7] *Id.*

[8] U.S. v. Scheurer, 62 M.J. 100, 111 (2005) (citing U.S. v. Augspurger, 61 M.J. 189, 190 (2005) and U.S. v. Walters, 58 M.J. 391 (2003)).

[9] The Court of Appeals for the Armed Forces uses the term, "*Walters* problem" in U.S. v. Seider, 60 M.J. 36, 37 (2004).

[10] *Scheurer*, 62 M.J. at 111.

[11] The *Walters* court specifically considered the common law rule on general jury verdicts ("It was settled law in England before the Declaration of Independence, and in this country long afterwards, that a general jury verdict was valid so long as it was legally supportable on one of the submitted grounds even though that gave no assurance that a valid ground, rather than an invalid one, was actually the basis for the jury's actions." *Walters*, 58 M.J. at 394 (citing U.S. v. Walters, 57 M.J. 554, 556 (2002) and Griffin v. U.S., 502 U.S. 46, 49, 112 S.Ct. 466, 116 L.Ed.2d 371 (1991))). Nonetheless, The Court of Appeals for the Armed Forces determined that *Walters* centered upon the legal effect of uncertainty over what specific conduct may have served as the basis for a

fair review of his conviction under Article 66(c)," such an ambiguity results in a material prejudice to that right.[12] Such an ambiguous verdict precludes any proper exercise of the appellate review authority in Article 66(c), Uniform Code of Military Justice, [13] which has been described by the CAAF as an "awesome, plenary, de novo power"[14] in that it requires a *de novo* review of both the legal *and* factual sufficiency of a conviction.[15]

Legal and factual sufficiency are distinct principles. Legal sufficiency in an Article 66(c) context is whether, considering the evidence in a light most favorable to the prosecution, a reasonable fact-finder could have found all the essential elements beyond a reasonable doubt.[16] On the other hand, factual sufficiency is whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, the appellate military judges are themselves convinced of the appellant's guilt beyond a reasonable doubt.[17] The *Walters* court notes that, as a general rule, civilian appellate courts do not possess the authority to conduct this type of factual sufficiency review.[18]

Of course, appellate courts cannot find as fact any specification's allegation of which the accused has been acquitted.[19]

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jury's verdict of not guilty – and not the effect of uncertainty over what conduct may have served as the basis for a verdict of guilty. *Walters*, 58 M.J. at 396.

[12] *Walters*, 58 M.J. at 397 (citing Article 59(a), UCMJ (2000)).

[13] Art 66(c) provides:

> In a case referred to it, the Court of Criminal Appeals may act only with respect to the findings and sentence as approved by the convening authority. It may affirm only such findings of guilty and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved. In consideration the record, it may weigh the evidence, judge the credibility of issues, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses.

UCMJ, art. 66(c) (2005).

[14] *Walters*, 58 M.J. at 395 (citing U.S. v. Quiroz, 55 M.J. 334, 338 (2001) (quoting U.S. v. Cole, 31 M.J. 270, 272 (C.M.A. 1990)).

[15] *Id*., at 395 (emphasis in original) (citing U.S. v. Washington, 57 M.J. 394, 399 (2002) and U.S. v. Turner 25 M.J. 324, 325 (C.M.A. 1987)).

[16] *Id* (citing U.S. v. Turner, 25 M.J. at 324 (citing Jackson v. Virginia, 443 U.S. 307, 319 (1979)).

[17] *Id.* (citing U.S. v. Turner, 25 M.J. at 325).

[18] *Id*. Thus it follows, that since civilian appellate courts do not possess the authority to conduct this type of factual sufficiency review they do not experience a similar problem of ambiguity in the findings.

[19] *Id.* (citing U.S. v. Smith, 39 M.J. 448, 451 (CMA 1994) and U.S. v. Nedeau, 7 C.M.A. 718, 721, 23 C.M.R. 185 (1957)).

Appellate judges simply don't know the conclusions of the factfinder.[20] That limitation is precisely what precludes an appellate review of a *Walters*-type verdict.[21]

In such a case, the stakes could not be higher; dismissal of the affected finding with prejudice is the result of a *Walters* violation.[22] The reasoning is because double jeopardy principles bar any rehearing on incidents of which the accused was found not guilty, and because ambiguous findings preclude distinguishing incidents that resulted in acquittal from the single incident that resulted in a conviction. The remedy is to set aside the finding of guilty to the affected specification and dismiss it with prejudice.[23]

Accordingly, the court has instructed military justice practitioners on how to remedy a "*Walters* problem."

a. First, where a specification alleges wrongful acts on "divers occasions," "the members must be instructed that *any findings by exceptions and substitutions that remove the "divers occasions" language must clearly reflect the specific instance of conduct upon which their modified findings are based*."[24] Such can be accomplished by using the substituted language in order to refer to a relevant date or other facts that will put the accused and reviewing authorities on notice of what conduct served as a basis for the conviction.[25]

b. Further, a military judge can "secure clarification of the ambiguity" upon review of the findings *prior to* their announcement under RCM 921(d).[26]

The *Walters* court addresses this latter alternative in a key footnote, specifically addressing potential ramifications of what might happen if such "clarification" is not done prior to announcement of the court's

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[20] It appears that *Walters* does not overrule *United States v. Vidal*, 23 M.J. 319 (C.M.A. 1987). In *Vidal*, the Court of Military Appeals upheld a conviction where the Government offered two separate theories of liability (perpetrator and aider and abettor) and the factfinder did not specify if 2/3 or more voted for one specific theory. The Court held, "It makes no difference how many members chose one act or the other, one theory of liability or the other. The only condition is that there be evidence sufficient to justify a finding of guilty on any theory of liability submitted to the members." *Id* at 325. Thus, an alternate theory conviction is valid so long as there is enough evidence to support an Article 66(c) review.

[21] *Id.* (citing U.S. v. King, 50 M.J. 686 (A.F. Ct. Crim. App. 1999) (*en banc*)).

[22] U.S. v. Scheurer, 62 M.J. 100, 112 (2005).

[23] *Id.* (citing U.S. v. Walters, 58 M.J. at 397, and U.S. v. Seider, 60 M.J. 36 (2004)).

[24] *Walters*, 58 M.J. at 396 (emphasis added). This italicized language can be tailored and inserted into the standard findings instructions concerning "Variance" in the BENCHBOOK.

[25] *Walters*, 58 M.J. at 396.

[26] *Id*. (emphasis added).

findings. Significantly, the court observes that 'post-announcement' clarification under Rule for Courts-Martial (RCM) 922 can cross the line into prohibited 'reconsideration' under RCM 924; accordingly, the *Walters* court warns that ambiguities of this type should be resolved prior to announcement.[27]

Both of the court's remedies share limitations that can create problems in the courtroom. First, court members are often inexperienced and uncomfortable with even limited changes on a findings worksheet and their post-deliberative annotations sometimes swing from slight mistakes to tortured and incomprehensible additions. Inconspicuous flaws in the worksheet itself, plodding attempts to complete the worksheet, and an infinite reservoir of problematic possibilities in voting on exceptions and substitutions invite unwelcome error. Second, the task of specifying misconduct with precision becomes exponentially more difficult as the number of criminal acts increases. Financial crimes, conspiratorial crimes, crimes of abuse over lengthy periods, and crimes involving hundreds of pieces of contraband, to name a few, may force the creation of an extensive findings worksheet with tailored exceptions and substitutions for each act and exhaustive lesser included offenses and potentially protracted instructions on how to vote on particular items which in the hands of lay court members may become a confounding agony of contradictions. A findings worksheet can ultimately exceed the length of an applicable charge sheet and written findings instructions combined, thereby possibly becoming more legally volatile than uranium-235. Third, it moves military justice away from a comprehensible system that all servicemembers—accuseds, victims, court members, commanders, and convening authorities alike—can understand and appreciate towards a more complicated system of technicalities, legalese, and "but/for" accountability. This potential shift towards a complex, labyrinthine process of factfinding in every case charged as "on divers occasions" would further distance uniformed members from a uniform code, and

[27] *Id*. at 396 n.5 (emphasis added). This "should" language has been interpreted on one occasion by the Air Force Court of Criminal Appeals as not reflecting a mandatory intent, but rather a "preference for clarification prior to announcement": "*Walters* does not forbid clarification after announcement, and we are confident that the Court of Appeals for the Armed Forces would have used mandatory language – "shall," rather than "should" – had that been its intent." U.S. v. Barrett, 2006 CCA LEXIS 39, at *1 (A.F. Ct. Crim. App. Feb. 26, 2006), *aff'd in part, vacated in part, remanded by* U.S. v. Barrett, 64 M.J. 307 (2006), *aff'd by* U.S. v. Barrett, 2007 CCA LEXIS 298, at *1 (A.F. Ct. Crim. App. Mar. 21, 2007) (per curiam). The Court of Appeals for the Armed Forces rendered its *Walters* decision after announcement of findings in *Barrett*, but prior to the authentication of the record and action by the convening authority. Accordingly, *Barrett*'s military judge immediately held a post-trial session pursuant to RCM 1102, in order to clarify the verdict in accordance with *Walters*. This post-trial session occurred after announcement, but prior to authentication. *Barrett*, 2006 CCA LEXIS 39, at *2.

unfortunately usher in descriptions of military justice as "Kafkaesque." Of course, the extent of these limitations really depends on the extent of any "*Walters* problem."

The "*Walters* problem" has been described as existing in the "narrow circumstance" involving the conversion of a "divers occasions" specification to a "one occasion" specification.[28] However, it is worth considering whether this "narrow circumstance" may actually be much, much broader—and therefore whether "*Walters* problems" may be much more widespread.

Consider the following hypothetical: suppose an accused is charged with committing misconduct "on divers occasions," and the trial counsel puts forth evidence of five separate incidents. The court members convict the accused as charged ("on divers occasions"), but—unknown to the parties or the military judge—in reality only convict the accused based upon two of the five incidents. On the surface, the court's finding matches the allegation—"on divers occasions." Because the finding matches the allegation, it might initially appear that there are no *Walters* issues. But, the accused has, in reality, been acquitted of three separate incidents! The subsequent sentencing case by the parties may have no resemblance to the conviction actually handed down by the members. More importantly, *Walters* is, at its core, grounded in the eventual concern that a military appellate court "could not determine what conduct the accused had been found guilty of and what conduct he had been acquitted of."[29]

As was the case in *Walters*, that concern is equally true here in our scenario. Even where an accused is charged with committing misconduct "on divers occasions" and he is convicted as charged, such a finding does not necessarily disclose the conduct upon which the conviction is based, and an appellate authority still cannot conduct a complete factual sufficiency review of the conviction. Thus, in this hypothetical, the concern is precisely the same as in *Walters*—there still exists a potentially fatal inability to identify and segregate those instances of which the accused was acquitted from those of which he was convicted.

As most (if not all) military justice practitioners will attest, the above hypothetical can be extremely common; many military crimes are charged as "on divers occasions" including bad checks, child pornography, drug use, indecent acts, and others. Accordingly, *Walters* issues (and perhaps even "*Walters* problems") may be widespread throughout military criminal practice—possibly existing in all litigated cases charged "on divers occasions" and where the trial counsel puts forth proof of more than two acts of misconduct.

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[28] *Barrett*, 2006 CCA LEXIS 39, at *2-*3.
[29] *Id.*

III. THE PROPOSED "FIX"

If *Walters* issues are, in fact, this commonplace, a consistent remedy is most certainly in order; fortunately, additional *Walters* court's guidance may help resolve the issue in some cases.

First, *Walters* demands that where a specification alleges wrongful acts "on divers occasions," the members must be instructed that exceptions and substitutions that remove that language must clearly reflect the specific instance of conduct upon which the modified finding is based.[30] The idea is that members will use substitution language in order to identify a time/date/manner that will point to which conduct served as a basis for the conviction. Perhaps this requirement should be expanded, such that in all cases which are pled "on divers occasions," members should be required to identify the conduct supporting the conviction, even if the conviction is, nonetheless, a conviction "on divers occasions." The appropriate mechanism for this would be for members to draft a description of the conduct underlying their conviction; the description would then be included on the findings worksheet and in the announcement of the findings in open court pursuant to RCM 922. In practice, this can be tricky and result in a critical mass of confusion; after all, members would not be entering findings by "exceptions and substitutions," but would instead be inserting their own additional clarifying language into the specification (the "on divers occasions" language would remain). In this case, the worksheet would account for exceptions, substitutions, and then clarifications.

A second option is for military judges to wait until he/she reviews the findings worksheet,[31] and require court members to compose such a description in regard to any specification pled "on divers occasions," unless the finding results in an acquittal as to that specification. Again, this review should, in accordance with *Walters*' guidance, occur before announcement of findings, and would only be accomplished after the judge determines that it is necessary. This option could complicate deliberations at the wrong time, i.e. at their conclusion. In fact, members could find themselves requesting a "reconsideration" instruction[32] and conducting another ballot.[33]

A third, and likely more prudent, option, especially in light of the limitations discussed above, is for the government to resolve this issue at preferral, by alleging the various incidents of misconduct with sufficient specificity in order to avoid *Walters* problems entirely. In some cases, charging decisions might require pleading a case that would

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[30] *Walters*, 58 M.J. at 396.
[31] MCM, *supra* note 2, R.C.M 921(d).
[32] BENCHBOOK, *supra* note 3, para. 2-7-14.
[33] *See Walters*, 58 M.J. at 396.

otherwise have been charged "on divers occasions" as separate specifications under a single charge. Obviously, such an approach would substantially increase the sentence to which an accused might be exposed and perhaps even cause convening authorities to pursue a more serious forum for disposition of offenses—but the logic underlying *Walters* may ultimately demand no less. In some cases, *Walters* issues might also be avoided at preferral by using the specification format recommended by Air Force Instruction 51-201 concerning the drafting of specifications in check cases, using the so-called "mega-spec."[34] By using such a list-type format, prosecutors could permit court members to easily identify the incident(s) of which they acquit an accused by simply excepting that language from the specification during findings.

IV. CONCLUSION

Walters problems have their genesis in ambiguous verdicts, which, for better or worse, are frequently the product of ambiguous or generalized charging practices. The inclusion of "on divers occasions" language in a specification may seem expeditious at the preferral stage, but it can cause unnecessary complications at trial and beyond. Counsel and paralegals who draft specifications need to, more than ever, think like litigators and appellate counsel. Accordingly, the authors recommend extremely careful use of "on divers occasions"—if the now problematic language is ever to be used again. Ultimately, it is up to trial practitioners to determine if *Walters* spells the death of "on divers occasions" or simply heralds the reversal of a limited number of future cases.

[34] *See* U.S. DEP'T OF AIR FORCE, INSTR. 51-201, ADMINISTRATION OF MILITARY JUSTICE (21 Dec. 2007) Figure 3.2. Such a specification could also assist counsel in drafting child pornography charges where the accused is alleged to have possessed or received a great number of images, files, and/or movies.

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