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Deferred Immigration Action and the Limits of Executive Enforcement Discretion

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The Deferred Action for Childhood Arrivals (DACA) scheme was first announced by President Barack Obama in 2012, and subsequently extended in 2014. DACA allows for illegal immigrants who meet certain criteria to apply for deferred action status, which exempts them from deportation proceedings for two-year periods. From its inception, the Administration has justified DACA's legality based on the notion of "prosecutorial discretion," that is, the wide latitude given to the government in deciding whether to initiate prosecutions for legal violations. Nevertheless, DACA has been the subject of fierce controversy since 2012: critics of the Administration maintain that it represents an impermissible abdication of the President's constitutional duties, and amounts to a unconstitutional act of law-making by the President. This article argues that DACA represents a lawful exercise of prosecutorial discretion, but that President Obama's overuse of the concept may have unwelcome consequences for the constitutionally-enacted balance of power between Congress and the President.

I. Introduction

The Deferred Action for Childhood Arrivals scheme (hereafter referred to as "DACA" or "deferred action") was first announced by President Barack Obama on June 15th 2012. DACA allows illegal immigrants who meet certain criteria to apply for deferred action status, which exempts them from deportation proceedings for two-year periods and allows them to receive work permits.[1] On November 20th 2014, Obama announced an expansion of the DACA scheme, which involved the removal of age restrictions for applicants and the extension of the deportation exemption period from two to three years. Furthermore, the program was extended to parents of U.S. citizens or legal residents who lack legal status. They are subject to the same residency and criminal history requirements as those included in the original DACA announcement.[2]

DACA lacks a statutory basis. From its inception, the Administration has justified its legality based on the notion of "prosecutorial discretion"—the wide latitude given to the government in deciding whether or not to prosecute legal violations.[3] In the Administration's view, DACA represents a permissible exercise of prosecutorial discretion, and is within the President's

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1: The original requirements were: applicants must have come to the U.S. before their 16th birthday; lived continuously in the U.S. since July 15, 2007; be under the age of 31 on June 15, 2012; have met certain educational or military service requirements; and not have been convicted of a felony or serious misdemeanor. Pursuant to 8 U.S.C. § 1103(a)(3) and 1324a(h)(3), the Secretary of Homeland Security has very wide discretion to grant work permits to inadmissible aliens, so that there are no serious disagreements as to the legality of granting work permits to DACA recipients. This paper will concentrate on the legality of the DACA scheme itself.

2: Jeh Charles Johnson, *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Who Are the Parents of U.S. Citizens or Permanent Residents*, Department of Homeland Security (2014), online at http://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf.

3: The Obama administration's use of the term "prosecutorial discretion" in the context of deportation proceedings is a misnomer, as the term is mainly used in relation to criminal prosecutions, whereas deportations are an administrative matter. "Enforcement discretion" is a more appropriate term, and is the one used by the Supreme Court in *Heckler v. Chaney*, 470 U.S. 821 (1985). In this article, both terms will be used interchangeably, as "prosecutorial discretion" is by far the most commonly-used terminology in the debate surrounding DACA's legality.

executive power to authorize as long as deferred action is granted on a case-by-case basis. The Administration has repeatedly emphasized that DACA is a temporary stop-gap measure which does not permanently confer lawful status on successful applicants or provide a path to citizenship.[4] Nevertheless, DACA has been the subject of fierce controversy since 2012. Critics of the Administration maintain that it represents an impermissible abdication of the President's constitutional duties, and amounts to a *de facto* act of law-making by the President, in violation of the Constitution. This article will examine various arguments concerning the legality of DACA. I present two primary claims: that DACA represents a lawful exercise of prosecutorial discretion by the President, but that President Obama's rhetoric about DACA exaggerates the breadth of the President's powers, and that his overuse of prosecutorial discretion may have unwelcome consequences for the constitutionally-enacted balance of power between Congress and the President.

IIa. The Legality of the Deferred Action Scheme: DACA and the President's Obligations under the Take Care Clause

The main legal objection to Obama's deferred action scheme is that DACA violates the Take Care Clause of the Constitution, which states that "[The President] shall take care that the laws be faithfully executed."[5] John Yoo and Robert J. Delahunty have argued that the Take Care Clause "imposes on the President a duty to enforce *all* constitutionally valid acts of Congress in *all* situations and cases," which precludes the existence of a general right to exercise prosecutorial discretion.[6] They argue that this duty is "defeasible" in limited circumstances, such as when a statute is unconstitutional or when the President is not given enough resources by Congress.[7] However, the former is irrelevant since the Administration has not challenged the constitutionality of the immigration laws enacted by Congress. As to the latter, the authors question the veracity of the Administration's claims that the implementation of DACA was due to budgetary constraints. Instead, they suggest that DACA's true purpose was to enact, through a backdoor, the immigration

4: U.S. Citizenship and Immigration Services, *Frequently Asked Questions* (2014), online at http://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-process/frequently-asked-questions.

5: U.S. Const. art. II, § 3, cl. 5.

6: Robert J. Delahunty & John C. Yoo, *Dream On: The Obama Administration's Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause*, 91 Tex. L. Rev. 781, 784 (2013) (emphasis in original).

7: *Id.* at 785, 845.

reform measures Congress had refused to pass.[8] Thus, they conclude that DACA represents a violation of the President's obligations under the Take Care Clause, as well as an unconstitutional exercise of executive power.

However, the Supreme Court's guidance on the subject does not support such an absolutist view of the President's obligations under the Take Care Clause. The Court has found that the Executive possesses very broad discretion when deciding whether or not to initiate legal proceedings. For instance, in *United States v. Nixon*,[9] the Supreme Court found that "the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a [criminal] case."[10] This re-affirmed the Court's holding in the *Confiscation Cases*,[11] which recognized the federal prosecutor's power at common law to discontinue criminal suits at any time.[12] Despite the Court's absolutist language in *Nixon*, it later held that the Executive's prosecutorial discretion could not be used to conduct selective prosecutions based on "reasons forbidden by the Constitution."[13] These forbidden criteria include race and constitutionally protected speech. Challenges to prosecutions on such grounds have to overcome a strong presumption that the prosecution was in good faith, thus preserving almost intact the Executive's prosecutorial discretion in criminal matters.[14]

In administrative matters such as deportation, the Executive's enforcement discretion is governed by different standards than in criminal prosecutions, though the scope of its discretion remains considerable. The leading Supreme Court case on the subject is *Heckler v. Chaney*.[15] Chaney and several other death-row inmates sued the Food and Drug Administration to prompt it to take administrative enforcement action against Oklahoma and Texas' use of certain drugs in their lethal injection protocols, which the FDA had initially declined to do. The Supreme Court, in a 9-0 decision (with two concurrences), declined Chaney's request for judicial review of the FDA's non-enforcement decision.[16]

Writing for the majority in *Chaney*, Chief Justice Rehnquist found that executive agencies possessed broad discretion in refusing to undertake enforcement actions, and that such non-enforcement decisions are

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8: *Id.* at 849.
9: 418 U.S. 683 (1974).
10: *Id.* at 693.
11: 74 U.S. 454 (1868).
12: *Id.* at 458.
13: *United States v. Armstrong*, 517 U.S. 456, 463 (1996).
14: *Id.* at 464.
15: 470 U.S. 821 (1985).
16: *Id.* at 837-38.

"presumptively unreviewable" by the courts.[17] However, the presumption can be rebutted if "the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers."[18] Thus, executive agencies cannot "disregard legislative direction in the statutory scheme that the agency administers,"[19] leaving the door open for Congress to dictate the scope of and thus curtail agencies' enforcement discretion by way of statute. Finally, the Court suggested that executive agencies' non-enforcement decisions could be subject to judicial review if they adopted a non-enforcement policy "so extreme as to amount to an abdication of its statutory responsibilities"—*i.e.*, if the non-enforcement measure effectively nullified the relevant statute.[20]

The Court's holding in *Chaney* that the Executive's non-enforcement decisions could be subject to review in some cases harked back to Justice Jackson's influential concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*.[21] There, he set out three types of situations in order of decreasing presidential power. The President's power is "at its maximum" when he acts in pursuance of Congressional authorization, weaker and "in a zone of twilight" if he acts in the absence of Congressional guidance, and "at its lowest ebb" when he acts contrary to Congress' will.[22] In the intermediate case, Jackson posited that the extent of the President's power is "likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law."[23] When the President acts in a way contrary to Congressional will, his action can only be sustained by courts if the latter "[disables] the Congress from acting upon the subject."[24] In other words, if a presidential act conflicts with Congressional directives, the courts can uphold the former only if the action is in an area over which the President has inherent power.[25] The acts of non-enforcement that are subject to judicial review, as set out in *Chaney*, all fall into the third type of situations posited by Jackson in *Youngstown*.

In sum, the Take Care Clause of the Constitution does not oblige the President to "act against each technical violation of the statute," but grants him wide discretion in deciding whether or not to initiate enforcement

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17: *Id.* at 825.
18: *Id.* at 833.
19: *Id.*
20: *Id.* at 833 (footnote 4).
21: 343 U.S. 579 (1952).
22: *Id.* at 635-8 (Jackson, J., concurring).
23: *Id.* at 637.
24: *Id*. at 637-8.
25: Erwin Chemerinsky, *Controlling Inherent Presidential Power: Providing a Framework for Judicial Review*, 56 S. Cal. L. Rev. 863, 870 (1983) (articulates that "inherent Presidential power" is hard to define).

action.[26] This discretion is not unlimited, though. It can be subject to judicial review if it is so extreme as to amount to effectively nullifying the law or if it runs against the expressed will of Congress. The next sections will examine whether DACA is vulnerable to challenge on these grounds.

IIb. DACA as an Act of Executive Law-Making?

As stated above, the Executive's enforcement discretion is not absolute or immune from review. It can be challenged if the President's actions run against Congressional directives or if they amount to an effective nullification of Congress' statutory scheme. A number of scholars have argued that DACA constitutes an impermissible suspension of parts of existing immigration statutes because it exempts a whole category of aliens from deportation proceedings. This purportedly amounts to an act of law-making by the President, and hence violates the constitutional principle of separation of powers.[27]

This idea that category-wide exercises of prosecutorial discretion are impermissible is also partly supported by the Administration's own Office of Legal Counsel ("OLC"). In its memorandum on the legality of the President's deferred action scheme, the OLC noted that granting deferred action "to individuals who satisfied [the Administration's criteria] on a class-wide basis would raise distinct questions…We advised that it was critical that…the DACA program requires immigration officials to evaluate each application for deferred action on a case-by-case basis, rather than granting deferred action automatically to all applicants who satisfied the threshold eligibility criteria."[28] However, the OLC maintains that DACA, in its current form, is legal. This is because the granting of deferred action is not automatic. Accordingly, "it does not create a categorical entitlement to deferred action that could raise concerns that DHS is either impermissibly attempting to rewrite or categorically declining to enforce the law with respect to a particular group of undocumented aliens."[29]

26: *Chaney*, 470 U.S. at 831.

27: Zachary Price, *Enforcement Discretion and Executive Duty*, 67 Vand. L. Rev. 760 (2014). See also Josh Blackman, *The Constitutional Limits of Prosecutorial Discretion*, Josh Blackman's Blog (Nov. 22, 2014), online at http://joshblackman.com/blog/2014/11/22/the-constitutional-limits-of-prosecutorial-discretion/.

28: Karl Thompson, *The Department of Homeland Security's Authority to Prioritize Removal of Certain Aliens Unlawfully Present in the United States and to Defer Removal of Others*, 38 Op. Office of Legal Counsel 18, n. 8 (2014).

29: *Id.* at 29.

In the same vein, the Administration has repeatedly emphasized, in the information provided to DACA applicants and in internal documents, that meeting all the eligibility criteria for the deferred action scheme merely entitles a request to be considered, and that a request that meets all the criteria can still be rejected based on the Immigration Service's "ultimate discretion." Furthermore, the Department of Homeland Security reserves the right to revoke deferred action status or to refuse to renew it when it expires, without a right of appeal for the applicant, further emphasizing the discretionary nature of the scheme.[30] Thus, at first sight, it is not obvious that DACA does indeed constitute a "categorical" suspension of the statute, which would require all persons within that category to be exempted from deportation.

In practice, however, there are doubts as to the extent to which discretion is actually being exercised. Some evidence suggests that if the eligibility criteria are met, the conferral of deferred action is essentially automatic. According to the Brookings Institution, only 1.0% of all the demands for deferred action have been denied.[31] This figure excludes incomplete demands, as well as demands in which the applicant had not met the eligibility threshold in the first place.[32] Moreover, there is evidence that the review of deferred action demands is cursory at best. Internal DHS documents obtained under a Freedom of Information request indicate that it had streamlined the review process considerably, including conducting only "lean and lite" background checks on applicants rather than full checks. The Department had also limited field agents' discretion to turn away applicants who required biometric processing for DACA purposes but lacked proper identification, and had granted a large number of application fee waivers—which puts in doubt the Administration's claim that the program is self-financing through application fees and does not require the use of Congressional-appropriated monies.[33]

30: Department of Homeland Security, *Deferred Action for Childhood Arrivals* (2013), online at http://www.dhs.gov/deferred-action-childhood-arrivals.

31: Audrey Singer & Nicole Prchal Svajlenka, *Immigration Facts: Deferred Action for Childhood Arrivals (DACA)*, Brookings Institution (Aug. 14, 2013), online at http://www.brookings.edu/research/reports/2013/08/14-daca-immigration-singer.

32: *Id.*

33: Judicial Watch, *Documents Reveal DHS Abandoned Illegal Alien Background Checks to Meet Amnesty Requests Following Obama's DACA* (Jun. 11, 2013), online at http://www.judicialwatch.org/press-room/press-releases/homeland-security-documents-reveal-dhs-abandoned-required-illegal-alien-background-checks-to-meet-flood-of-amnesty-requests-following-obamas-deferred-action-for-childhood-arrivals-directive/.

While the cursory nature of the review process suggests that, in practice, DACA is more of a class-wide grant of immunity than a case-by-case exercise of prosecutorial discretion, it is doubtful that this will have any impact in determining the program's legality. Firstly, it is unclear if the distinction between case-by-case decisions of non-enforcement and a class-wide policy of non-enforcement is actually a meaningful one. As Ilya Somin points out, case-by-case decisions of non-enforcement are necessarily driven by policy considerations, and "there is no meaningful difference between a *de facto* policy of exempting a large category of violations from prosecution [based on policy considerations] and a more explicit, formal decision to the same effect."[34] Thus, the Obama administration can claim that, even if DACA constitutes a categorical policy of non-enforcement, individuals who are protected from deportation under DACA would have been *de facto* protected under the previous case-by-case policy of non-enforcement in any case. Hence, there is no meaningful distinction between DACA and previous, less universal non-enforcement practice, which was undoubtedly constitutional.[35]

Furthermore, there are numerous instances in which presidents have suspended deportation proceedings on a category-wide basis. John F. Kennedy allowed all exiled Cubans to remain in the United States for an extended period of time in 1960, George H.W. Bush exempted Chinese students from deportation proceedings by issuing Executive Order 12711 in 1990, and George W. Bush suspended deportation proceedings for victims of Hurricane Katrina in 2005.[36] Thus, the historical practice of previous

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34: Ilya Somin, *Obama, Immigration, and the Rule of Law, [Updated with Additional Material on Precedents for Obama's Action, and a Response to Timothy Sandefur],* The Volokh Conspiracy (Nov. 20, 2014), online at http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/11/20/obama-immigration-and-the-rule-of-law/.

35: Also, in *Chaney*, the Court suggested that executive agencies' non-enforcement decisions are owned more deference because "an agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise." *Chaney,* 470 U.S. at 831. Thus, Homeland Security can claim its non-enforcement decision under DACA is functionally similar to its previous informal non-enforcement practices, based on its experience in immigration enforcement. Furthermore, it may be difficult to fix a precise rejection rate threshold at which DACA becomes a "categorical" scheme, as opposed to a (large-scale) exercise of discretion, especially since there is a dearth of Supreme Court guidance on the topic.

36: American Immigration Council, *Executive Grants of Temporary Immigration Relief, 1956-Present* (2014), online at http://www.immigrationpolicy.org/sites/default/files/docs/executive_grants_of_temporary_immigration_relief_1956-present_final_4.pdf.

presidents suggests that it is not impermissible for the President to exempt aliens from deportation proceedings on a categorical basis under the principle of prosecutorial discretion.[37]

In sum, while the amount of prosecutorial discretion exercised in the vetting of DACA applicants is, in practice, limited, it is unclear whether this is sufficient ground on which to argue that DACA amounts to the nullification of Congress' statutory scheme for immigration. Both historical practice and policy considerations suggest that category-wide non-enforcement decisions do not violate the Constitution, especially given that the Supreme Court gives wide deference to executive agencies' non-enforcement decisions.

IIc. Does DACA Run Against Congressional Directives?

According to *Chaney*, prosecutorial discretion cannot be used in a way that nullifies Congress' express will or the enforcement priorities it has set up by way of statute. However, DACA does not appear to function in such a manner. As part of the Immigration and Nationality Act, Congress identified certain groups of inadmissible aliens who constitute a deportation priority, such as those who have committed certain felonies and inadmissible aliens who have been intercepted at the border.[38] However, felons and newly-arrived illegal aliens are not covered under DACA, which suggests that the program does not run against existing Congressionally-mandated enforcement priorities in their current form. Furthermore, Congress only appropriates enough money for the Department of Homeland Security to carry out around 400,000 deportations each year, while there are 11 million deportable aliens living in the United States.[39] This lack of resources, combined with the statutory removal priorities Congress has enacted, suggests that it implicitly accepts that aliens who fall outside of its enforcement priority groups, such as aliens covered by DACA, will not be generally targeted for deportation.[40]

37: Historical practice is not, of course, absolutely dispositive in determining the constitutionality of a certain action. However, it is frequently relied upon in gauging the limits of executive power. See for instance Steven G. Calabresi & John S. Yoo, *The Unitary Executive: Presidential Power from Washington to Bush* 431 (2008).

38: 8 U.S. Code § 1225 (deportation of inadmissible aliens intercepted at borders) and § 1228 (deportation of aliens convicted of certain felonies).

39: Stephen Legomsky, *The President Is Right on Immigration*, Wall Street Journal (Nov. 23, 2014), online at http://online.wsj.com/articles/stephen-legomsky-the-president-is-right-on-immigration-1416780170.

40: House of Representatives Judiciary Committee, *House Report 113-376—Faithful Execution of the Law Act of 2014* 9 (2014).

Since DACA was first enacted in 2012, Congress has considered several bills that would have reversed some of DACA's provisions by constraining the Administration's enforcement discretion, but none of these bills were enacted into law. The House of Representatives passed a bill defunding DACA in 2013, yet the Senate, which then had a Democratic majority, never acted upon the measure.[41] In any case, the Supreme Court has disapproved, on several occasions, the use of unsuccessful bills as an indicator of legislative intent.[42] Until Congress enacts a statute which restricts DACA's operation, DACA cannot be held to have run against Congress' intent, and will continue to exist in Jackson's famous "zone of twilight," with its validity depending on "the imperatives of events and contemporary imponderables rather than on abstract theories of law."[43]

IId. Does the President Have Inherent Power to Act on Immigration?

The analysis above assumed that the power to regulate the admission and deportation of aliens rests solely with Congress. While this has long been the standard view on the subject, some commentators have argued that, based on his power to conduct foreign affairs, the President possesses inherent power over the deportation of aliens. They argue deportation is not only a matter of domestic concern, but that it also impacts the United States' relation with foreign countries. Quoting *Arizona v. United States*,[44] in which the Supreme Court suggested Congress and the President shared the power to regulate aliens, they have asserted that "prosecutorial discretion is even greater in immigration" because of the President's foreign affairs power.[45]

This is a point of some consequence: if Congress' power over deportation is indeed shared with the President, then arguably Congress cannot forbid the implementation of deferred action by way of statute, as the President can still enact deferred action even in the face of Congressional opposition. To do so, the President relies "upon his own constitutional powers minus

41: Pete Kasperowicz, *House Votes to Defund Obama's 'Administrative Amnesty' For Immigrants*, The Hill (Jun. 6, 2013), online at http://thehill.com/blogs/floor-action/house/303869-house-votes-to-defund-obamas-administrative-amnesty-for-immigrants.

42: See, e.g., *Red Lion Broad. Co. v. FCC*, 395 U.S. 367 (1969).

43: *Youngstown Sheet & Tube Co.,* 343 U.S. at 637 (Jackson, J., concurring).

44: 132 S. Ct. 2492 (2012).

45: Erwin Chemerinsky & Samuel Kleiner, *Obama Has the Law—and Reagan—on His Side on Immigration*, The New Republic (Nov. 18, 2014), online at http://www.newrepublic.com/article/120328/obama-immigration-executive-action-why-it-will-be-legal.

any constitutional powers of Congress over the matter," as Jackson wrote in *Youngstown*.[46] However, the Supreme Court has, over the years, given contradictory and ambiguous guidance about the allocation of the power to regulate the entrance of aliens between the executive and legislative branches.[47] At times, the Supreme Court has asserted that Congress possesses "plenary power over immigration matters."[48] Similar language can also be found in *INS v. Chadha*,[49] and can be traced back as far as *Boutilier v. INS*.[50]

In other cases, the Supreme Court has also affirmed the existence of a Presidential power over deportations, thus implicitly rejecting the idea of a Congressional "plenary power" over immigration. Most recently, in *Arizona v. United States*, the Supreme Court established that deportations are within the power of the Federal government because of Congress' constitutional power to "establish a uniform Rule of Naturalization,"[51] but also because of the United States' "inherent power as sovereign to control and conduct relations with foreign nations."[52] Regarding the latter rationale, the Court relied on its holding in *United States v. Curtiss-Wright Export Corp.,*[53] which found that the President has "exclusive power…as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress."[54] Finally, in *Reno v. Arab-American Anti-Discrimination Committee*,[55] the Supreme Court ruled that the Federal government's enforcement discretion in immigration matters is much broader than in ordinary criminal matters because deportations have foreign policy implications, which would imply the existence of a presidential power in immigration matters.[56] Under this interpretation, the power to regulate immigration is not within the "plenary power" of Congress, but is shared between Congress and the executive branch.

46: *Youngstown Sheet & Tube Co.,* 343 U.S. at 637 (Jackson, J., concurring). Also see Kate M. Manuel & Todd Garvey, *Prosecutorial Discretion in Immigration Enforcement: Legal Issues*, R42924 Congressional Research Service Report 9 (2013).

47: Adam Cox & Cristina Rodriguez, *The President and Immigration Law*, 119 Yale L.J. 458, 465 (2009).

48: *Sale v. Haitian Centers Council,* 509 U.S. 155, 201 (1993).

49: 462 U.S. 919, 940-41 (1983).

50: 387 U.S. 118, 123 (1967).

51: U.S. Const. art. I, § 8, cl. 4.

52: *Arizona,* 132 S. Ct. at 2498.

53: 299 U.S. 304 (1936).

54: *Id.* at 320.

55: 525 U.S. 471 (1999).

56: *Id.* at 489-91.

Much of this ambiguity can be explained by the Supreme Court's tendency to treat "the legislative and executive branches of the federal government as unitary" in cases concerning immigration.[57] This seems to be the consequence of the nature of deportation cases in front of the Supreme Court. Such cases usually involve a person ordered deported challenging the government's determination, and which do not typically involve a conflict between the executive and legislative branches. *Arizona v. United States* deviated from that pattern, but involved a conflict between a state and the Federal government. Consequently, *Arizona* did not give the Court an opportunity to delineate the respective powers of Congress and the President over immigration. Indeed, in *Arizona*, the Court re-affirmed the unitary view of the Federal government's power over immigration when the majority held that decisions about deportation "touch on foreign relations and must be made with one voice."[58]

So far, the Obama Administration has been careful in justifying DACA on grounds of prosecutorial discretion alone, and has not invoked the President's foreign affairs power, either in the President's official statements or in the legal memorandums about the program's legality.[59] However, it did raise the foreign relations issue in *Arizona*, arguing that the state's laws against illegal immigrants could adversely impact the President's ability to conduct foreign affairs, a view which was cited approvingly by the Court in its decision.[60] If the legality of DACA is ever challenged in front the Supreme Court, it is possible that the Obama administration will use the same argument to justify DACA's legality, and that the Court may follow its holding in *Arizona* and reject the plenary view of Congressional power over immigration. Until the Supreme Court clarifies its jurisprudence on the subject, the issue of whether or not the President possesses extra-Congressional power in matters of immigration and deportation remains unclear.

57: Cox & Rodriguez, 119 Yale L.J. at 467 (cited in note 47).

58: *Arizona,* 132 S. Ct. at 2506-07. See also *JAMA v. Immigration and Customs Enforcement*, 545 U.S. 335, 348 (2005).

59: Lauren Gilbert, *Obama's Ruby Slippers: Enforcement Discretion in the Absence of Immigration Reform*, 116 W. Va. L. Rev. 255, 281 (2013).

60: *Arizona v. United States,* No. 11-182, Oral Argument Transcript at 48 (Apr. 25, 2012).

III. DACA, Rhetoric, & the Federal Balance of Power

While the analysis above suggests that DACA represents a permissible exercise of prosecutorial discretion, it does not follow that DACA is not problematic in certain ways. In particular, at times, the President's rhetoric about DACA suggests that he has adopted DACA mainly because of Congress' refusal to enact the DREAM Act into law, an immigration reform measure he favours. For instance, in his initial announcement of DACA in 2012, Obama stated he was enacting the deferred action scheme because of the lack of "immigration action from Congress to fix our broken immigration system," and then urged Congress to pass the DREAM Act.[61] The same rhetoric also pervades his more recent speeches. In particular, in his November 22, 2014 speech announcing the expansion of DACA, Obama said:

> …there are Members of Congress who question my authority to make our immigration system work better. Well, I have one answer for that: *Pass a bill*. The day I sign it into law, the actions I've taken to help solve this problem will no longer be necessary.[62]

Immigration is not the only issue on which Obama has used such rhetoric in order to justify his actions. For instance, when he made appointments to the National Labour Relations Board in 2012 without the Senate's approval, he argued that "when Congress refuses to act, and as a result, hurts our economy and puts our people at risk, then I have an obligation as President to do what I can without them."[63]

This line of rhetoric is dangerous as well as legally erroneous, as it implies that Congress has an affirmative duty to enact measures that the President considers necessary, and that he has the right to take unilateral action to enact the same measures if Congress refuses to pass them. In reality, there is no duty for Congress to legislate, even in times of emergency, nor is there a right

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61: Office of the White House Press Secretary, *Remarks by the President on Immigration* (Jun. 15, 2012), online at http://www.whitehouse.gov/the-press-office/2012/06/15/remarks-president-immigration.

62: Office of the White House Press Secretary, *Remarks by the President in Address to the Nation on Immigration* (Nov. 20, 2014), online at http://www.whitehouse.gov/the-press-office/2014/11/20/remarks-president-address-nation-immigration (emphasis added).

63: Office of the White House Press Secretary, *Remarks by the President on the Economy* (Jan. 4, 2012), online at http://www.whitehouse.gov/the-press-office/2012/01/04/remarks-president-economy.

for the President to arrogate to himself Congress' law-making powers, even during emergencies. As Justice Black wrote in *Youngstown*, "The Founders of this Nation entrusted the law making power to the Congress alone in both good and bad times" and the Constitution "refutes the idea that [the President] is to be a lawmaker."[64]

It is noteworthy that the legal opinions on which the Administration has relied to assert DACA's legality, as well as the executive memorandums implementing deferred action, shy away from emulating President Obama's rhetoric. Instead they are at pains to emphasize that DACA is a very narrow measure predicated entirely on the President's undoubted right to exercise prosecutorial discretion.[65] From this, a strong inference can be drawn that the Administration knows that the implementation of deferred action cannot be justified on grounds of legislative inaction, and that the President's assertion of an executive right to act in the face of legislative inaction is mistaken. This implication is particularly ironic given that the then-Senator Obama frequently criticized George W. Bush's expansive view of presidential powers during the latter's presidency.

In addition to immigration, the President has relied upon prosecutorial discretion to reduce the number of federal criminal prosecutions for marijuana use and to relax the enforcement parameters of the Affordable Care Act when Congress refused to enact reforms he favoured.[66] Even though these measures are probably legal (though the House of Representatives is challenging the Administration's suspension of certain provisions of the ACA), the increased use of prosecutorial discretion risks upsetting the balance of powers between the Executive and Legislative branches as set out in the Constitution. President Obama is effectively using prosecutorial discretion to achieve policy outcomes he favours, regardless of Congress' explicit refusal to enact legislation that would produce the same outcomes. Some have already suggested that, following the Obama administration's logic, a Republican president could use prosecutorial discretion to implement a tax cut in the face of Congressional

64: *Youngstown Sheet & Tube Co.,* 343 U.S. at 587.

65: See for instance Karl Thompson, *The Department of Homeland Security's Authority to Prioritize Removal of Certain Aliens* (cited in note 28) and Johnson, *Exercising Prosecutorial Discretion* (cited in note 2), neither of which makes any reference to any immigration emergency or Congressional inaction as grounds on which DACA might be based.

66: Price, 67 Vand. L. Rev. at 672 (cited in note 27).

discretion to implement a tax cut in the face of Congressional opposition by declining to prosecute defaulting tax-payers.[68] While the last scenario might seem implausible because of its political costs, it does vividly illustrate the problematic nature of unfettered prosecutorial discretion.

In that context, the proposal Justice Marshall made in his concurrence in *Chaney* may be worth considering as a means of alleviating the dangers of excessive reliance on prosecutorial discretion by the Executive. There, he suggested that prosecutorial discretion "ought to apply only to an agency's decision to decline to seek penalties against an individual for past conduct, not to a decision to refuse to investigate or take action on a public health, safety, or welfare problem."[69] Until the Court decides to re-visit *Chaney*, the risk that presidents will use prosecutorial discretion in ways that might upset the federal balance of power will remain.

IV. Conclusion

President Obama's deferred action scheme appears to be legal, as it constitutes an exercise of prosecutorial discretion, which is not precluded by the Take Care Clause of the Constitution. It also does not appear that DACA can be challenged through judicial review, based on the Supreme Court's holding in *Chaney*, which holds that exercises of prosecutorial discretion are not open to judicial review except in very limited circumstances. The President may be able to use his foreign affairs power to assert an executive right to take action on deportation that is independent of Congress' legislative power, though Supreme Court guidance on the subject is self-contradictory. This said, the political rhetoric President Obama has used so far in justifying DACA, as well as his frequent use of prosecutorial discretion to achieve specific policy outcomes in the face of Congressional opposition, could represent an unwelcome development in American politics, as it risks upsetting the careful balance of power between the Executive and Legislative branches set out in the Constitution.

68: Delahunty & Yoo, 91 Tex. L. Rev. at 784 (cited in note 6).
69: *Chaney*, 470 U.S. at 850 (Marshall, J., concurring)

Judges, Jurors, and Punitive Damage Awards: Avoiding Over-Deterrence

Alec Konstantin†

In most punitive damage award cases, in exchange for an added sense of legitimacy, the court entrusts the jury with interpreting the case's facts, comprehending the judge's instructions, and accurately applying the facts with the guidance of judicial instructions to arrive at the size of a punitive damage award. The jury, research reveals, often falls short on its end of the bargain. Because jurors often do not entirely comprehend jury instructions, jurors resort to cognitive biases that, *inter alia*, encourage awards substantial enough to create over-deterrence, a significant problem that forces corporations to take socially excessive precautions. Ideally, the over-deterrence created by the current design of jury instructions could be resolved by simply increasing jurors' comprehension through the improvement of jury instructions. However, as this article will explore, the effectiveness of modifications to jury instructions is conditioned not only on jurors' comprehension, but also on jurors' adherence to the spirit of court procedures. The seemingly irresolvable shortcomings following from jurors' cognitive biases direct this article to conclude that the solution to mitigating the effect of jurors' cognitive biases on punitive damage awards is to redefine the roles of juries and judges in cases of punitive damages: juries should determine liability and judges should decide the size of an award.

I. Introduction

The doors were closed, the deliberation had started, and the jurors were convinced—at least six of them were. Aware of the power of innocence, the foreman contrived a plausible rationale to penalize Texaco's interference in Pennzoil's prospective acquisition: deduct $900 million for each indemnity awarded.[1] The foreman proved his worth, for he persuaded the jurors to grant Pennzoil a $3 billion punitive damage award.

Although the Texas Court of Appeals later reduced the punitive damage award to $1 billion in *Texaco, Inc. v. Pennzoil, Co.*,[2] the case's award marked the beginning of the blockbuster award era, a period where "very large punitive damage awards" became more common.[3] Some argue blockbuster awards have limited effects because the amount often receives post-verdict haircuts.[4] Others contend punitive damage awards, especially blockbuster awards, pose somber threats to the solvency of firms,[5] shareholders,[6] and consumers;[7] the latter two are punished as a result of reduced profits and inflated prices, respectively. The contenders' position presumes punitive damage award amounts are likely to either under-deter or over-deter the defendant, for the amount necessary to punish and deter the defendant operates along a seemingly indecipherable continuum. Despite these overt concerns, contenders also recognize how punitive damage awards aid in exceptional circumstances where the court must restore the defendant's aggregate damages.[8]

The disagreement regarding punitive damage awards goes beyond informed bystanders. As the jury deliberation and subsequent remittitur of *Texaco*

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1: Edith Greene, *On Juries and Damage Awards: The Process of Decisionmaking,* 52 Law & Contemp. Probs. 225 (1989).

2: 729 S.W. 2d. 768 (1987).

3: Joni Hersch & W. Kip Viscusi, *Punitive Damages: How Judges and Juries Perform,* 362 Harv. L. & Econ. Discussion Paper 2 (2002).

4: David Hyman, Bernard Black, & Kathryn Zeiler, *Do Defendants Pay What Juries Award? Post-Verdict Haircuts in Texas Medical Malpractice Cases,* 4 J. Empirical Legal Stud. 3 (2007).

5: Alison Del Rossi & W. Kip Viscusi, *The Changing Landscape of Blockbuster Punitive Damages Awards*, 12 Am. L. & Econ. Rev. 116 (2010).

6: A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: an Economic Analysis*, 111 Harv. L. Rev. 869 (1998).

7: George Priest, *Punitive Damages Reform: the Case of Alabama,* 56 La. L. Rev. 825 (1996).

8: *Id.* at 831.

illustrate, individual jurors and judges hold varying viewpoints on the amount appropriate to punish and deter. In most damage-award suits, in exchange for an added sense of legitimacy, the court entrusts the jury with interpreting the case's facts, comprehending the judge's instructions, and accurately applying the facts with the guidance of instructions to determine liability and possible compensatory and/or punitive damage awards. The jury falls short on its end of the bargain, for jurors have a limited understanding of jury instructions.[9] This deficient comprehension of punitive damage instructions impels jurors to use cognitive biases in their determination of punitive damage awards. With modifications to punitive damage instructions and procedures, the effects of these cognitive biases on punitive damage awards may be reduced while also improving the consistency of these awards.

II. Jury Instructions

In state and federal courts, committees such as the Judicial Council of California Civil Jury Instructions (CACI)—an advisory body comprised of attorneys, judges, academics, and public members—develop model jury instructions. These instructions, as Peter Tiersma notes, are "designed to save time for judges and lawyers by eliminating the need to write instructions separately for each case and also, theoretically at least, to reduce the number of appeals for faulty instructions."[10] Since *Texaco*, the instructions for punitive damages have ostensibly undergone a significant transformation. The Supreme Court has putatively revised punitive damage instructions through a line of six cases: *Pacific Mutual Life Insurance Co. v. Haslip*,[11] *TXO Production Corp. v. Alliance Resources Corp.*,[12] *BMW of North America v. Gore*,[13] *State Farm v. Campbell*,[14] *Philip Morris USA v. Williams*,[15] and *Exxon Shipping Co. v. Baker*.[16]

9: Brian Bornstein & Edie Greene, *Jury Decision Making: Implications for and from Psychology,* 20 Current Dir. in Psych. Science 63 (2011).

10: Peter Tiersma, *Jury Instructions in the New Millennium*, 36 Ct. Rev. 28 (1999). Also see, Anthony Franze & Sheila Scheuerman, *Instructing Juries on Punitive Damages: Due Process Revisited After* State Farm, 6. U. Pa. J. Const. L. 423, 469 (2003).

11: 499 U.S. 1 (1991).

12: 509 U.S. 443 (1993).

13: 517 U.S. 559 (1996).

14: 538 U.S. 408 (2003).

15: 549 U.S. 346 (2007).

16: 554 U.S. 471 (2008).

IIa. The Court's Signposts

In *Haslip*, the Court recognized "reasonable constraints" on the discretion of a jury's awards and reasoned a punitive damage to compensatory damage award ratio (hereafter "damage award ratio") of 4 to 1 was constitutionally acceptable.[17] The Court's determination of "reasonable constraints" was threefold: "(1) it 'enlightened the jury as to the punitive damages' nature and purpose'; (2) it 'identified the damages as punishment for civil wrongdoing of the kind involved'; and (3) it 'explained that their imposition was not compulsory.'"[18]

Within only two years of *Haslip*'s decision, the Court generated confusion about acceptable damage award ratios when it affirmed a 526 to 1 ratio in *TXO Production Corp*. The decision was a plurality opinion in which the justices supported varying pieces of evidence that should factor into a punitive damages award. These considerations included the underlying reasons supporting a jury's decision-making, a defendant's wealth, and a defendant's out-of-state conduct.[19]

Bringing clarity to the foggy use of factors determining the constitutionality of punitive damage awards, the Court in *Gore* developed another threefold guideline for evaluating an award's excessiveness: "(1) the reprehensibility of the defendant's conduct; (2) the relationship between the harm or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages award and the civil penalties authorized or imposed in comparable cases."[20]

Rejecting a previously acceptable consideration in *TXO* and clarifying guideposts in *Gore*, the Court ruled in *State Farm* that courts must instruct jurors not to use the defendant's out-of-state conduct, nor its adverse effects on nonparties, in determining a punitive damage award. This instruction explicitly excepted the jury's use of out-of-state conduct to measure the defendant's reprehensibility. It also implicitly encouraged the jury's consideration of a defendant's wealth. In addition to instructional variations, the Court believed the damage award ratio should not exceed single-digits.[21]

Reinforcing the out-of-state ruling in *State Farm*, the Court in *Philip Morris* reversed a blockbuster award because a jury instruction failed to discourage

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17: *Haslip,* 499 U.S. at 20.

18: Franze & Scheuerman, 6 U. Pa. J. Const. L. at 434-35 (quoting *Haslip,* 499 U.S. at 19) (cited in note 10).

19: *Id.* at 441-43.

20: *Id.* at 429.

21: Del Rossi & Viscusi, 12 Am. L. & Econ. Rev. at 118-19 (cited in note 5).

the jurors from assessing damages against a defendant for its injuries upon nonparties. The Court's ruling implicated a need to concentrate on juries' questions, not courts' use of a particular model of jury instructions.[22] Finally, the evolving notion of damage award ratios became more concretized when the Court in *Exxon Shipping Co.* formally supported a 1 to 1 damage award ratio.[23]

The transformation of punitive damage instructions between *Haslip* and *Exxon Shipping Co.* speaks to the Court's desire to construct legal boundaries that punish and deter defendants while also ensuring them fairness and establishing a sense of projectable damages. Unfortunately, the Court's endeavor is undermined by its unwillingness to impose a uniform model jury instruction. As Anthony Franze and Sheila Scheuerman note, state and federal courts' model jury instructions can be grouped into three categories: *Haslip*-minimum instructions, *Haslip*-plus-wealth instructions, and multifactor instructions.

IIb. Types of Model Jury Instructions

Haslip-minimum instructions and *Haslip*-plus-wealth instructions guide the jury as to *Haslip's* reasonable constraint standard. Patently, the latter instruction explicitly encourages jurors to consider a defendant's wealth when assessing punitive damages. Both instructions reflect a restricted version of the Court's desired jury instruction, yet a combined eighteen states plus the District of Columbia follow these instructions, with more than half following *Haslip*-minimum.[24] Unlike *Haslip*-like instructions, multifactor instructions may incorporate *Haslip's* reasonable constraints, *Gore's* guideposts, and *State Farm's* out-of-state conduct clause. Of the twenty-seven states who use multifactor instructions, only seven states have substantively amended their instructions after *State Farm*.[25] For the most part, states' model instructions can be generalized to practice in the federal courts, though certain circuit courts, such as the Ninth Circuit, model their instructions more closely to the Supreme Court's rulings.

Evidenced by the current use of *Haslip*-like instructions, states' decisions not to improve model jury instructions subsequent to Supreme Court

22: Sheila Scheuerman & Anthony Franze, *Instructing Juries on Punitive Damages: Due Process Revisited after* Philip Morris v. Williams, 10 U. Pa. J. Const. L. 1147 (2008).

23: Del Rossi & Viscusi, 12 Am. L. & Econ. Rev. at 119 (cited in note 5).

24: Scheuerman & Franze, 10 U. Pa. J. Const. L. at 1170 (cited in note 22).

25: *Id.* at 1176, 1182.

rulings reflect an essential problem in punitive damage award instructions, for judges cannot adequately guide jurors with *Haslip*-like instructions, nor with multifactor instructions that fail to distinguish how jurors should evaluate evidence. Limited instructions may alone misguide the jury, but it is likely that the jury's comprehension of instructions also contributes to the phenomenon.

III. Jurors' Comprehension of Jury Instructions

Despite jurors' confidence in grasping instructions and judges' belief that jurors understand their instructions, jurors on average perform poorly in comprehending jury instructions, especially in interpreting and applying the appropriate standard of proof.[26] Comprehension would appear to reflect the quality of instructions, though a study performed by Robert and Veda Charrow revealed that educational level and sentence complexity heavily contribute to misunderstanding instructions.[27] The design and understanding of jury instructions is exacerbated by the judge's inability to more intelligibly rephrase instructions, for the probability of a mistrial increases when a judge deviates from the model jury instructions. As a consequence, the jury is susceptible to cognitive biases and using available heuristics instead of the considerations set forth by the U.S. Supreme Court.

IIIa. Jury Instructions' Effect on the Jury's Decision-Making

Jurors incapable of deciphering the seemingly obfuscatory jury instructions rely on general knowledge, a case's evidence, and prior experience to arrive at a figure sufficient to punish and deter the defendant. Plausibly, media depictions, the defendant's background, and awards proposed within a case serve as useful markers in generating a punitive damage award. However, these available heuristics in combination with other cognitive biases not only decrease the impartiality of the court, but also increase the variability of punitive damage awards, especially blockbuster awards.

As legal information becomes increasingly available, the media's power to distort the reasoning and outcome of cases also grows. As Daniel Bailis and Robert MacCoun recognize, to satisfy its consumer-base, the media has

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26: Bradley Saxton, *How Well Do Jurors Understand Jury Instructions ? A Field Test Using Real Juries and Real Trials in Wyoming*, 33 Land & Water L. Rev. 59 (1998).

27: See Peter Tiersma, *Reforming the Language of Jury Instructions,* 22 Hofstra L. Rev. 37, 46-51 (1993).

an incentive to publish anomalous cases that report blockbuster awards.[28] The media's perception may be an indirect consequence of its profit-motive, but the jurors who rely on this material to justify a blockbuster award do not distinguish the media's perception and intention. Relatedly, reports of corporations earning exorbitant profits, paying taxes at dwarfed rates, and being exonerated for their adverse effects upon ordinary citizens may unsettle jurors as they determine a punitive damage award. Terming it the corporate-identity effect, MacCoun theorizes that corporate defendants are treated differently from ordinary defendants, and even wealthy defendants, because jurors find it easier to punish an impersonal entity and are skeptical of the evidence corporations present.[29] Moreover, Valerie Hans and David Ermann have found that jurors impose higher standards upon corporations.[30]

Jurors who disregard external influences in their assessment of punitive damage awards may still be lead astray by *ad damnums*. Because jurors valorize a plaintiff's *ad damnum* more than a defendant's, the amount of a punitive damage award often exceeds a defendant's request and nestles into a figure below the plaintiff's request.[31] Jurors' preference for a plaintiff's *ad damnum* is indicative of a confirmation bias and a verdict-driven, compared to an evidence-driven, deliberation style, since jurors use evidence to support or confirm a pre-existing belief about an appropriate punitive damage award. This process of equifinality, as Michelle Anderson and Robert MacCoun observe, may allow jurors to use award requests as a pathway to confirming their belief about an award amount; however, if *ad damnums* alone are insufficient, the principle of equifinality presumes jurors will find and use other pathways to bring about their goal.[32]

Jurors' use of available heuristics and cognitive biases are not without oversight. Reviewable upon post-trial motions, judges in most courts have the power to reduce a punitive damage award should the jury arrive at an award that either shocks the judge's conscience or arises from prejudice or passion.[33]

28: Daniel Bailis & Robert MacCoun, *Estimating Liability Risks with the Media as Your Guide*, 80 Judicature 64 (1996).

29: Robert MacCoun, *Is There a Deep-Pocket Bias in the Tort System?,* Rand Institute for Civil Justice Issue Paper, online at http://www.rand.org/pubs/issue_papers/IP130.html?.

30: Valerie Hans & M. David Ermann, *Responses to Corporate Versus Individual Wrongdoing,* 13 Law & Hum. Behav. 151 (1989).

31: Michelle Anderson & Robert MacCoun, *Goal Conflict in Juror Assessments of Compensatory and Punitive Damages,* 23 Law & Hum. Behav. 313 (1999).

32: *Id.* at 315-16.

33: James Ghiardi, *Punitive Damage Awards—An Expanded Judicial Role,* 72 Marq. L. Rev. 33 (1988).

The counterbalancing role of judges is an effective measure in reducing punitive damage awards, though judges are imperfect, and do not invariably exercise their power of remittitur where it is appropriate.[34] But given the poor design of jury instructions and the effects of poor comprehension of the same instructions, courts must reevaluate and improve their current procedures for reviewing punitive damage awards and jury instructions.

IV. Possible Improvements to Punitive Damage Procedures and Instructions

Punitive damage awards are, as the evolution of jury instructions and their effects on these awards demonstrate, a fledgling form of punishing and deterring defendants. As the blockbuster award era continues, over-deterrence has captured the attention of corporations, researchers, and consumers. Over-deterrence poses a significant problem, for it forces corporations to take socially excessive precautions—"precaution[s]…that cost more than the reduction of harm produced by [them]."[35]

To eliminate over-deterrence, one solution suggests eradicating punitive damage awards. Facially, this would be a plausible solution; however, in practice, jurors unable to award punitive damages inflate compensatory damage awards, sometimes to the extent that inflated awards "serve punitive ends."[36] The separation of damage awards is necessary, given that it specifies the purpose behind the award: compensatory damages are plaintiff-focused, whereas punitive damages are defendant-focused.

Besides the uncompromising solution of eliminating punitive damage awards, over-deterrence may be overcome through improvements in jury instructions and award procedures. Judicial Councils, such as CACI, could ameliorate current jury instructions by incorporating *Gore's* guideposts, *State Farm*'s out-of-state conduct clause, and *Exxon Shipping Co.*'s damage award ratio. Additionally, the judicial council may expand upon the Court's guidance and include clauses that clarify the burden proof governing punitive damage awards and remove the consideration of defendants' wealth. The council may also consider suggesting formulas such as the total damages multiplier, which would encourage jurors to consider the total damages (compensatory and

34: Joni Hersch & W. Kip Viscusi, *Punitive Damages: How Judges and Juries Perform,* 33 J. Legal Stud. 1 (2004).

35: Polinsky & Shavell, 111 Harv. L. Rev. at 879 (cited in note 6).

36: Anderson & MacCoun, 23 Law & Hum. Behav. at 328 (cited in note 31). Also see Edith Greene, David Coon, & Brian Bornstein, *The Effects of Limiting Punitive Damage Awards,* 25 Law & Hum. Behav. 217 (2001).

punitive) to be equal to "harm multiplied by the reciprocal of the probability that the injurer will be found liable when he ought to be."[37] Moreover, the judicial council could develop alternative language to jury instructions, so judges could clarify jurors' questions without the fear of compromising a case's impartiality. Ideally, improvements to jury instructions would increase juror comprehension, further define juror considerations in their jury deliberation, and tame the variability of awards. However, the effectiveness of adjustments in jury instructions is conditioned on the comprehension and ability of jurors.

Instead of relying strictly upon jurors, courts can alter their award procedures to lessen the likelihood of over-deterrence. The change in procedures may be as simple as issuing written instructions or as complex as redefining the jury's and judge's roles in assessing punishment. Larry Heuer and Steven Penrod indicate that it is effective to give jurors written, as opposed to verbal, instructions.[38] This slight modification in the judge's issuance of jury instructions may bring about desirable effects, but the chance of over-deterrence can be further limited by statutory caps, a legislative reform that defines an award's maximum possible amount. Theoretically, statutory caps applied in combination with the 1 to 1 damage award ratio in *Exxon Shipping Co.* "would eliminate about two-thirds of the cases from the $100 million blockbuster category."[39] Given its potential to significantly reduce over-deterrence, this option appears ideal. However, similar to the elimination of punitive damages, compensatory damage awards become inflated when punitive damages are capped.[40] Furthermore, Ronen Avraham and Álvaro Bustos found that the awareness of a statutory cap amount functions as a psychological anchor that artificially increases an award.[41] The shortcomings of statutory caps indicate the need to redirect courts' attention to the decision-makers and the decision-making structure behind award determinations.

37: Polinsky & Shavell, 111 Harv. L. Rev. at 889 (cited in note 6).

38: Larry Heuer & Steven Penrod, *Instructing Jurors: a Field Experiment with Written and Preliminary Instructions,* 13 Law & Hum. Behav. 409 (1989). Also see Neil Vidmar & Matthew Wolfe, *Fairness through Guidance: Jury Instruction on Punitive Damages after* Philip Morris v. Williams, 2 Charleston L. Rev. 307, 319 (2007).

39: Del Rossi & Viscusi, 12 Am. L. & Econ. Rev. at 155 (cited in note 5).

40: Anderson & MacCoun, 23 Law & Hum. Behav. at 328 (cited in note 31).

41: Ronen Avraham & Álvaro Bustos, *The Unexpected Effects of Caps on Noneconomic Damages,* 30 Int'l Rev. L. & Econ. 291 (2010). The language of an anchor is borrowed from Valerie Hans & Valerie Reyna, *To Dollars from Sense: Qualitative to Quantitative Translation in Jury Damage Awards,* 8 J. Empirical Legal Stud. 120, 134 (2011).

Over-deterrence is truly the result of juries, for they award more punitive damages than judges per unit of compensatory damages,[42] and account for 98 percent of blockbuster awards.[43] Theodore Eisenberg and Michael Heise reason that judges' decreased susceptibility to awarding greater punitive damage amounts derives from their awareness of and adherence to precedents set forth by higher courts.[44] Additionally, their professional reputation incentivizes them to avoid awarding amounts likely to be adjusted upon appeal.[45] Evidently, the solution lies in reducing jurors' power and, to some extent, increasing judges' oversight on award determinations.

Unlike the issuance of written instructions and implementation of statutory caps, the bifurcation of trials redefines the roles of award procedures. There are a number of ways to bifurcate trials, though the most favorable options arise from adjusting jurors' responsibilities and balancing the verdict power between juries and judges. Bifurcated trial solutions that preserve the power of juries recreate similar shortcomings of juries' current practices. For example, a bifurcated trial dividing a punitive damage award's determination into two phases and between two juries, where one jury determines liability and a second jury determines the award, encourages juries to assess awards with incomplete information, which perpetuates jurors' reliance upon available heuristics and cognitive biases. Reframing this example, bifurcated trials that assign to juries the power to determine compensatory damage awards and punitive damage liability but reserve to judges the authority to determine the size of the punitive damage award also experience their own set of drawbacks. Aside from the potential informational problems, this solution replicates the effect observed by Anderson and MacCoun with regard to completely eliminating punitive damage awards: juries will inflate compensatory damages to ensure sufficient punitive damages.[46]

The shortcomings of these two examples illustrate the need for a bifurcated trial solution that balances the power of jurors in both compensatory and punitive damages. Satisfying this requisite, a bifurcated trial that grants juries the ability to determine liability for compensatory and punitive damages, and judges the power to determine these damages awards not only limits the effect of jurors' use of available heuristics and cognitive biases, but also

42: Theodore Eisenberg & Michael Heise, *Judge-Jury Difference in Punitive Damages Awards: Who Listens to the Supreme Court?,* 8 J. Empirical Legal Stud. 325 (2011).

43: Hersch & Viscusi, 362 Harv. L. & Econ. Discussion Paper at 8 (cited in note 3).

44: Eisenberg & Heise, 8 J. Empirical Legal Stud. at 349 (cited in note 42).

45: *Id.*

46: Anderson & MacCoun, 23 Law & Hum. Behav. at 328 (cited in note 31).

increases the predictability of awards. Because judges' professional reputation incentivizes them to be conscious of award adjustments, judges will award amounts consistent with precedent, higher courts' rationale, and possibly an economic formula such as the total damages multiplier. Although the muting of jurors' input on damage awards poses a facial threat to the legitimacy of courts, the courts will have an incentive to award damages that satisfy the jury and, by extension, members of the community. The proposed balanced trial and judicial incentive structure is a promising solution, for its systematic constraints on juries and judges reduces the likelihood of blockbuster awards and over-deterrence.

V. Conclusion

The lack of guidance, poor understanding of existing directions, and proclivity for assessing punitive damage awards with insufficient information contribute to blockbuster awards and over-deterrence. Despite the Supreme Court's efforts, most judicial councils have failed to mirror Supreme Court cases' mandates or suggestions in their jury instructions. In combination with jurors' miscomprehension of these underdeveloped instructions, juries are likely to develop specious rationales to justify ballooned awards. Similar to other juries awarding blockbuster awards, the jury in *Texaco* may have arrived at a much lower figure than the $3 billon assessed if instructions had been improved, a statutory cap was enacted, or a bifurcated trial limiting jurors' responsibility was the norm. Fortunately, a judge later exercised his power of remittitur. But where judges overlook the jury's award, the aforementioned set of solutions aid in reducing emotionally charged awards, though improved instructions and statutory caps may not be as effective as some forms of bifurcated trials.

Determined the most promising solution, bifurcated trials as proposed here have not been empirically tested, nor would research corroborating their effectiveness necessarily prove their generalizability. However, given the increasing concern for counteracting unpredictable blockbuster punitive damage awards and the alternatives to trial bifurcation, this solution effectively removes the adverse effects of jury instructions, moderates the variability of damage awards, and places the power of the law in the court's steward—the judge.

Autonomous Automobile Liability

Evan J. Zimmerman†

I argue that autonomous cars, by their nature, present an unusual case in product liability in the event of accidents, considering that vehicle collisions are traditionally considered strict liability cases in which drivers are responsible. I derive a "wheel or button" standard which holds that, in the cars of the future, in which we merely enter a destination on a touchscreen, liability for accidents should lay with the manufacturer.

I. Introduction

The future of autonomous cars may be upon us. Google and Baidu, two tech giants, have both been developing autonomous cars. At the 2015 Consumer Electronics Show, several major car manufacturers, including BMW and Mercedes-Benz, demonstrated that many of their "soft" driver-assistance technologies have been leading to more advanced self-driving features. Before, there were cars that could park themselves, but now, buttressed by decades of self-driving lab and field work, there are vehicles that can save you from crashing and make you more efficient. Reviewers have been in awe of their precision and versatility. Like all car features, however, these advances are not perfect. It is only a matter of time before someone somewhere crashes a car in the process of using one of these functions. As one might expect, the driver of that vehicle is almost certain to be sued, and the defense is sure to claim that the true fault lies with the autonomous car's manufacturer. After all, whatever happened, the car did it on its own.

The demand for these types of cars is likely to be immense; only 4% of a car's life is spent driving, and 30% of that time is spent looking for parking.[1] Cars are one of the largest purchases made by households, so one might find it surprising that they get so little use out of their cars. Consequently, the cost of calling an autonomous car from a network like Uber is certain to be

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1: James Batchelor, *The Google Car: Production Version of Google's Driverless Car Revealed*, Auto Express (Jan. 15, 2015), online at http://www.autoexpress.co.uk/car-news/87196/the-google-car-production-version-of-googles-driverless-car-revealed.

cheaper, both individually and societally, than owning one. This will only become truer as the technology develops, the manufacturing matures, the marketing becomes more adroit, and businesses realize the potential utility of a cabbie on call that has no need for breaks or pay. In the meantime, as carmakers look for additional ways to differentiate themselves from each other while still investing in self-driving cars, they will use what they have already developed to market "driver assist" technologies; useful, excitement-inducing, and increasingly ubiquitous, car buyers will use these features more and more. Thus, these cars will be used progressively frequently in the future, making it all the more likely that cases wrestling with the liability of autonomous vehicles will become commonplace. The public certainly wants guidance on this question of liability—a recent poll found that 77 percent of Americans were concerned about legal liability for drivers of self-driving vehicles.[2] I seek to provide such guidance in this short article.

Section II explains some of the basics of autonomous driving. In particular, I take care to differentiate between driver-initiated features and computer-initiated features. Section III explains the current state of automotive liability. Using this information, I synthesize a standard for autonomous driving liability using a driver-initiation standard.

II. Types of Autonomous Features

Cars have been replacing human input for decades. The most obvious, well-known option is automatic transmission, which replaced manual transmission. However, it was not until recently that vehicles could direct themselves, unless, of course, one counts horses. 1992 was a breakthrough year in which Volkswagen demonstrated its parallel parking Futura concept. Although not commercially available, Volkswagen showed that its labs had developed an array of sensors and software lightweight enough to be run by an onboard PC, an incredible technical feat. It would take a decade for the technology to make its way into a commercial car, when in 2003 Toyota offered an "Intelligent Assistant" option for automated parallel parking in its 5th generation Prius hybrid. For about a decade, this remained a niche, expensive, and non-essential feature offered by a few manufacturers of (mostly) luxury cars, and self-parking features were almost solely about outsourcing that scourge, parallel parking.

The *annus mirabilis* for autonomous parking was 2012. That year, most

2: Joshua Bleiberg & Darrell M. West, *Americans Aren't Sure How to Feel About Driverless Cars*, Brookings Institute (Aug. 18, 2014), online at http://www.brookings.edu/blogs/techtank/posts/2014/08/18-driverless-cars-survey.

major manufacturers sold a car that offered some type of intelligent parking, usually through one of their luxury labels. These cars could usually do more than just parallel parking on their own, as they also featured corner parking and normal spot parking. These features normally all work the same way: a driver essentially presses a button, has the opportunity to exit the car, and then leaves the machine to its own devices. This is an example of a driver-initiated automated feature. Many hailed automated parking as a harbinger of the future. We couldn't have flying cars, so we might as well be able to have cars that take us places while we sleep. Moreover, the very spectacle of automated parking, particularly in that a driver could step outside and watch her car park itself, functioned as a symbol for the coming "driverless revolution."

However, not all types of autonomous driving are explicitly triggered by the driver. Mostly, automated driving features exist to compensate for human error. This is especially true for some newer cars. As one tester, Chris Ziegler of The Verge, recently noted, "I tried to crash a BMW, but it parked itself instead."[3] The case of Ziegler's parking is actually one of the more common and light forms of non-driver-initiated features; for years, Mercedes-Benz, Lexus, Tesla, and other high-end manufacturers have offered automatic stopping to avoid collisions while driving, advertising this option as a safety feature. A similar feature keeps a car in a lane if it seems like its driver is swerving, another feature that is marketed as a safeguard against sleepy driving. So, indeed, most automatic driving features exist to compensate for human error.

A more extreme version of car-initiated automation is completely driverless cars. The most famous and most advanced iteration is the "Google car." Originally, this autonomous vehicle was a Lexus with a sensor rack strapped to it that ran Google Chauffeur, a software suite. Since the Google car won a DARPA contest in 2005, it has logged over a million kilometers of driverless time,[4] and in that time has only been in two accidents, both caused by humans.[5] For many years now, a driver could sit at the wheel of a Google-

3: Chris Ziegler, *I Tried to Crash a BMW, But It Parked Itself Instead*, The Verge (Jan. 5, 2015), online at http://www.theverge.com/2015/1/5/7494989/bmw-i3-self-parking-anti-collision-ces-2015.

4: Chris Urmson, *The Latest Chapter for the Self-Driving Car: Mastering City Street Driving*, Google Blog (Apr. 28, 2014), online at http://googleblog.blogspot.com/2014/04/the-latest-chapter-for-self-driving-car.html.

5: John Markoff, *Google Cars Drive Themselves, in Traffic*, New York Times (Oct. 9, 2010), online at http://www.nytimes.com/2010/10/10/science/10google.html?_r=1. Also see Justin Hyde, *This Is Google's First Self-Driving Car Crash*, Jalopnik (Aug. 5, 2011), online at http://jalopnik.com/5828101/this-is-googles-first-self-driving-car-crash.

equipped Lexus and watch while it drove itself. As a symbol of its vision for the future, Google's most recent car, which it designed itself, has no steering wheel.

There are four main components of the self-driving features of a car: inputs, computer-based control, outputs, and an activator. First, a self-driving car needs an input. For example, a car that is attempting to park itself must know how close it is to hitting an obstacle. For this, self-driving cars are automated with an array of sensors. Next, the car must decide what to do and how to interpret its environment. This can come in several ways. Google's car, for instance, makes a high-powered map of the entire world around it, making notes of details as minute as imperfections in road curbs. A car that is attempting to drive might, for instance, want to know whether an obstacle is a tree or another car, or even a cat, so that it knows whether to simply move around a stationary object or to do a more complicated dance with something that can dynamically react to it. Once it decides what to do, the car's "brain" needs a way to actually get the car to move.

An essential question, the remaining aspect, is how a car is activated. In theory, a car could activate itself. It would use the previously discussed technologies available to it to assess the world around it and decide on its own whether or not it needs to act. This is not entirely far-fetched, as cars do this today; emergency self-braking is an example. On the other hand, a human being can be said to activate the car, but at this point it becomes a trickier question. Clearly a human being decides when a car automatically parks, but does a human being initiate a self-driving car, which does everything on its own, by pushing the "on" button? The question of liability for accidents looms large here. Should a sufficiently advanced car be considered an agent of a human being, simply acting in accordance with the human's commands? Or should autonomous vehicles be considered autonomous from the very people they are transporting? Allocating liability to either the human "driver" or the car's manufacturer hinges upon the answers to these questions. This discussion is expanded in the next section.

III. Liability in Driving

Four states have currently passed laws pertaining to driverless cars: California,[6] Nevada,[7] Florida,[8] and Michigan,[9] as well as the District of Columbia.[10] Some states, like Texas[11] and New York,[12] are mulling possible legislation on this issue. An essential question to ask is: what do these laws require?[13] I will first briefly discuss this question. We will see that these provisions are largely reactionary and do not actually answer the types of questions that we might expect to see when autonomous cars become widespread—and better operators than humans. I will provide a sketch of a broader theory that might address this question, drawing on some surprising sources for guidance. First, let us discuss the existing law on autonomous vehicles, a legal field that is small and focuses on one of two areas.

Existing and pending laws permit the licensure of self-driving cars. Typically, existing laws require that "any person who holds a [civilian class license] or its equivalent may operate its autonomous [vehicle] in autonomous mode upon a public highway."[14] Furthermore, as an important feature, a person is considered to be "in operation" of the vehicle "regardless of whether such a person is physically present in the autonomous vehicle."[15] These laws all specifically permit driving in public highways, and delineate testing and consumer purchases, reflecting the nascent nature of the technology. This standard has started in Nevada, which influenced Florida, whose law has become a standard for others.[16] The licensure laws do not have any special requirements or tests for those who wish to purchase an autonomous vehicle. One state, Nevada, calls for an authority to set forth insurance requirements for drivers, but makes no acknowledgement of any type of change in the

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6: S.B. 1298 2011-2012 Cong. (2012 Cal.).

7: A.B. 511 76th Cong. (2011 Nev.), S.B. 140 76th Cong. (2011 Nev.), S.B. 313 77th Cong. (2013 Nev.).

8: C.S./H.B. 1207, *Vehicles With Autonomous Technology*, 2011-2012 Cong. (2012 Fla.).

9: A.N. 251, 97th Leg. (2013 Mich.), A.N. 231, 97th Leg. (2013 Mich.).

10: L. 19-0278, "Autonomous Vehicle Act of 2012," 2012-2013 Cong. (2013 D.C.).

11: H.B. 2932, 83rd Leg. (2013 Tex.).

12: A. 7391A-2013, at 1 (New York).

13: One interesting side-note that I will largely ignore is that most states have enacted laws regarding texting while driving. Drivers of autonomous vehicles are actually exempt from laws restricting texting while driving.

14: A. 7391A-2013 at §4(1) (New York) (cited in note 12).

15: *Id.* at §4(2).

16: In fact, Massachusetts' current law is almost an exact replica of the Florida statute.

law surrounding liability for individuals.[17] Furthermore, because they are fully autonomous, Google-style cars are not yet for sale to individuals in any capacity. Accordingly, there are no lawsuits from which to draw precedent.

Second, existing and pending laws address the liability of manufacturers—that is, "the original manufacturer of a vehicle converted to an autonomous vehicle."[18] In particular, every law that addresses original manufacturer liability says in one form or another that "the original manufacturer of a vehicle converted by a third party into an autonomous vehicle shall not be liable, and shall have a defense to and be dismissed from, any legal action brought against the original manufacturer by any person injured due to an alleged vehicle defect caused by the conversion of the vehicle, or by equipment installed by the converter, unless the alleged defect was present in the vehicle as originally manufactured."[19] This is quite clear-cut, but it is the only component of these laws that addresses any sort of liability. It is quite reasonable, but it is likely to be outdated relatively soon, as first-party manufacturers like Mercedes-Benz and Audi have been developing autonomous driving systems of their own, which these laws do not address. Furthermore, these laws ultimately do not settle the essential question: is the party that made the car drive by itself liable for collisions, or the person who bought it?

There is debate in state legislatures about how to protect motorists from the damage that might be caused by a defective autonomous car. This is buttressed by the existence of clauses explaining that such cars must "have a means to alert the operator thereof if a technology failure affecting the ability of such vehicle to safely operate autonomously is detected while the autonomous vehicle is operating autonomously, so as to direct the vehicle operator to resume control of the motor vehicle."[20] Note that such wording makes no mention of whether such manufacturers must permit human beings to operate the car at *any* time. As Bob Lutz, a former General Motors Vice Chairman, recently noted on CNBC, "the autonomous car doesn't drink, doesn't do drugs, doesn't text while driving, doesn't get road rage…young, autonomous cars don't want to race other autonomous cars, and they don't go to sleep."[21] Consequently, he predicts that technologies like the 2017 Cadillac Super Cruise will improve driver safety, and that the accident rate for fully autonomous cars will be less than 10% of that of human drivers. If that is

17: A.B. 511, at §8(b) (cited in note 7).

18: C.S./H.B. 1207, *Vehicles with Autonomous Technology* (cited in note 8).

19: *Id.* at §5(2).

20: A. 7391A-2013 at §3(c) (New York) (cited in note 12).

21: Bob Lutz, *Reality for Driverless Cars,* CNBC (Sep. 8, 2014), online at http://video.cnbc.com/gallery/?video=3000308938.

the case, it is possible that human beings will become liable for taking over to drive if they end up in an accident. In that instance, clauses like the ones above might be removed since it could be safer for a defective, self-driving car to control itself than a comparatively more defective human being. Such a world might see new laws, in sharp contrast to these current laws, outlawing steering wheels and other human-control mechanisms from cars.

All considered, none of this addresses the fundamental question of what occurs in normal operation. As we have seen, legislatures have barely even toyed with the issue, and the few instances they seem to have considered are edge cases. There are also no court cases that address accidents resulting from these limited-use autonomous features, like self-parking. So in the abstract, can we reason out what occurs when a self-driving car, in normal operation, is involved in an accident?

The first route one might consider is simple product liability. Product liability is a tort in which a manufacturer is penalized for injuries caused by its defective product. An alternative route would be to look not at the manufacturer but instead at the driver. Under this line of reasoning, the car involved in the accident, as an object, was used by the owner of the car, and the owner is just as liable for using this object as one would be in a tort involving a hammer. In order to make such an argument, one would have to argue that an autonomous car is similar enough to other forms of property. The obvious type of property to consider is a pet, which operates independently, like an autonomous vehicle.

Owners are not always liable for their pets.[22] For example, due to dogs' historical standing as a protective species, owners are typically not liable for attacks that take place on their property. In general, though, statements of liability note that someone is liable if they are negligent—i.e., that they "should have known" that another person would be harmed by their (in)-action. This is a slightly nebulous standard. In particular, "[t]he words 'reason to know'…denote the fact that the actor has information from which a person of reasonable intelligence…would infer that the fact in question exists, or that such person would govern his conduct upon the assumption that such fact exists."[23] In particular, when dealing with dogs and similar animals, "[E]xcept as stated in [the Restatement of Torts] § 517, a possessor of a domestic animal, which he has reason to know has dangerous propensities abnormal to its class,

22: Some states operate under a strict liability standard (California; see Cal. Civ. C. §3342); some have a one-chance standard (Texas: see *Marshall v. Ranne,* 511 S.W. 2d 255 (1974); and some only operate under a negligence standard (Massachusetts: see Mass. Gen. L. P. I. Ti. XX. Ch. 144. §155).

23: See *Restatement of Torts* §12.

is subject to liability for harm caused thereby to others, except trespassers on his land, although he has exercised the utmost care to prevent it from doing the harm."[24] It is essential to note that this is a very situation-specific standard. Many states require acknowledgment of the dangerousness of classes—e.g., the acknowledgment that Pitbulls are particularly aggressive—but some prohibit such a judgment, and in either case, the jury must always make a facts-based determination as to guilt.[25]

The law for pets does help settle the question of autonomous automotive liability. For example, autonomous cars are known to function suboptimally in the rain. One could argue that drivers are liable if they knowingly take their cars out in the rain, as long as they were warned by the manufacturer, or should have reasonably been able to tell, that the rain might impair the car's ability to drive itself safely. However, this standard does not address normal operation of the car. What if, for no discernable reason, there is an accident? What if there is a collision, absent a conspicuous malfunction within the autonomous vehicle? For this, even though a car is not a person, it is helpful to consider agency theory.

An agent is a party that is legally required to carry out an action on behalf of an original employer. The original employer, however, is liable for the actions the agent undertakes in the course of carrying out the task. This is in contrast to an independent contractor, as "the characteristics of the independent contractor are that he is a person (usually carrying on a distinct occupation) who for a stipulated compensation (usually a lump sum) undertakes to do a piece of work (usually of some magnitude) by his own forces and instrumentalities (usually supplying labor and materials), being responsible to his employer for the stipulated results, *but…being left in control of the operation of the forces and instrumentalities by which the stipulated result is to be accomplished*."[26] In other words, the independent contractor is not "subject to the control of his employer, except as to the results or product of his work."[27] The essential feature in the common law agency test is whether one is "allowed the initiative and decision-making authority, normally associated with an independent contractor."[28]

Does a person make any decisions when driving an autonomous car? Perhaps. A person puts a destination in a car and pushes the "go" button, but

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24: *Id.* §509.

25: See *Solimene v. B. Grauel & Co.*, 399 Mass. 790, 794 (1987).

26: American Law Institute, *Agency: Restatement No. 1* §6 (1926) (emphasis added).

27: *Falls v. Scott*, 249 Kan. 54, 64 (1991).

28: *N.L.R.B. v. United Insurance Co. of America*, 390 U.S. 254, 258 (1968). Also see *FedEx Home Delivery v. N.L.R.B.,* 563 F.3d 492 (D.C. Cir. 2009).

not much else. This puts the "essential characteristic, being left in control" in the hands of the car, with only the end destination, rather than the journey, being the province of the car owner. This formulation is extreme, but perhaps acceptable due to the advanced nature of the artificial intelligence in these cars. Such a standard would make the car a contractor of the owner rather than the owner's agent. The analogy is certainly imperfect, but suggests that except in cases of a driver's negligence, the liability for an accident would lie with the manufacturer of the autonomous car. One could argue that by purchasing the car, one has "purchased" the liability as well, but that would render all product liability tort null and void, which would go against both the letter and the spirit of those laws. Furthermore, the fact that users usually sign "terms of service" agreements, and receive constant software updates, buttresses the important argument that the self-driving features of the cars are a service, rather than a product *per se*, making manufacturer liability more compelling.[29]

What might count as negligence? There are a few options. As mentioned above, one option is putting the car in a situation in which the car will not perform as well as it normally would. Another example involves drivers choosing not to take control, even if conditions suggest that they should. As we saw previously, most states that have a law on the books relating to autonomous cars have a law stipulating that these vehicles must allow a person to take control when the system spots an error. In such a case, a person who fails to take control would be considered liable. Of course, this becomes a slippery slope in which one could argue that a person who actively spotted a danger should have taken control anyways from an imperfect system. Without an explicit standard, all liability would then shift onto the driver, as before, making the negligence standard moot. One could question the slippery slope argument, but it is not difficult to imagine an emotional jury, afraid of a self-driving car and assured of the supposed driving superiority of man, concluding that the car was not being sufficiently monitored. Such a judgment is therefore dependent on whether or not a person *could* have taken control. Consequently, we arrive at a strange result: a driver is likely liable if his self-driving car has a steering wheel.

Regardless, the liability for an accident could, theoretically, not lie with the person who bought the autonomous vehicle. As we have seen, any problem with the car responsible for an accident could reasonably be said to lie with the car itself, as it is advanced enough that it drives without meaningful inputs from the human "operator." However, since it is an object and not a living

29: See Lori A. Weber, *Bad Bytes: the Application of Strict Products Liability to Computer Software,* 66 St. John's L. Rev. 469, 470 (1992).

being, such problems would be considered defects, and the liability would therefore lie with the manufacturer of the autonomous control module. And, crucially, the difference would be in whether the consumer could control the car or not, since it would determine whether the car was, in fact, the object-equivalent of an agent of the purchaser. Hence, the crucial factor is whether or not the car has a wheel or a button.

IV. Conclusion

As can be seen, the issue of autonomous automobile liability is difficult and highly speculative. There are no precedents on the matter, and the only statute on the subject does nothing to address manufacturer vs. human liability. Some of the technology is still constantly developing. Hence, this paper has been limited to presenting a way to think about this question of liability rather than providing a definitive answer. Nonetheless, providing this initial discussion might inform the resolution of this issue of liability in the future.

One complicating matter that I did not address in this paper is commercial insurance. In the future, it is plausible that individuals will typically not own personal cars anymore. Instead, self-driving cars could form transportation networks operated by large groups, like companies or governments. In a commercial context, it is not certain that driving dynamics would be the same, that the software operating autonomous vehicles would be the same, or consequently whether the law governing their operation might be different. This is an interesting area for future legal research, but this reality simply does not exist yet; all one can do is speculate.

The most difficult factor in assessing this section of the law is the nature of what is being discussed. In the next decade, individuals will begin to be able to purchase machines with a degree of automation—dare we say, intelligence?—unlike any seen before by any person, or conceived of by any legal system. As evidenced by this paper, I believe that such autonomous systems will be sufficiently advanced enough not even to be considered agents of a person. This position may turn out to be incorrect. It is also entirely possible, of course, that the first time a self-driving car crashes there will be an utterly histrionic response, resulting in the complete ban of such technology and thus making all scholarship relating to the subject moot.

In any case, the "wheel or button" standard described in this paper is, if one chooses to accept that we might apply agency theory to this problem, a viable solution. It would imply significant liability for insurers—in fact, since America uses a strict liability system for driving, it would put all the risk on manufacturers, perhaps slowing or even stopping the production of

such devices. Until that time, the march of progress will continue, and our streets will be graced with cars with no controls and our courtrooms with the lawsuits that follow.

On The Regulation Of Conflict Minerals

Michael Kinzer†

Conflict minerals originate from the Democratic Republic of Congo (DRC) and surrounding countries and have partially financed armed groups for more than a decade. While they might be traded globally for a variety of purposes, frequently they are utilized as components of highly desired electronic products. In 2010, the United States became the first country in the West to legislate against conflict minerals when it passed Section 1502 of the Dodd-Frank Consumer Protection Act. This section, while not prohibiting the import of conflict minerals, requires companies doing business in the U.S. to disclose whether their products contain minerals from the DRC and surrounding region, and, if so, whether the trade of these minerals funded armed groups active in the area. Domestically, the law has faced legal challenges by members of the electronics industry negatively impacted by its operation.

Notably, the law has resulted in a *de facto* embargo on Congolese minerals, as companies have simply divested from the DRC in an attempt to avoid being branded as financers of war and to side-step the law's regulatory impositions. In spite of this *de facto* embargo, there has been very little discussion in the United States about whether the law violates any World Trade Organization trade agreements. Nevertheless, this article notes arguments against the legal validity of American regulation of conflict minerals by considering challenges to the U.S.' Country of Origin Labeling (COOL) provisions, which mandate disclosures about traded livestock, and the Kimberley Process Certification Scheme (KP), which seeks to eliminate the trade of conflict (blood) diamonds. In short, the legality of the U.S.' regulation of conflict minerals is not a settled issue; instead, this question merits greater discussion than it has received.

I. Factual & Legal Background

The term "conflict minerals" refers to minerals coming from the Great Lakes Region—the eastern portion of the DRC, Rwanda, Burundi, and the Central African Republic. It refers specifically to tin, tantalum, tungsten, and gold (abbreviated 3TG), the trade of which finances armed groups active in the Great Lakes Region. While some readers may be familiar with the term "blood diamonds," which denotes a conflict mineral of sorts, it is important to note that this article, as well as the general human rights and legal discourse, refers only to these Congolese minerals as "conflict minerals." A section of the American Dodd-Frank Wall Street Reform Act of 2010 requires companies to disclose whether they use conflict minerals. The text of that act reads as follows: "The term, 'conflict mineral' means- (A) columbite-tantalite (coltan), cassiterite [an ore of tin], gold, wolframite [an ore of tungsten], or their derivatives; or (B) any other mineral or its derivatives determined by the Secretary of State to be financing conflict in the Democratic Republic of the Congo or an adjoining country."[1]

The issue with conflict minerals originally developed as follows: the 1994 Rwandan Genocide sparked a series of conflicts in the Great Lakes Region of Africa, leading to the Great War of Africa (1998-2003), fought primarily in the DRC with significant involvement by Uganda and Rwanda. Since 2003, violence and instability have continued to reign in eastern DRC as various armed groups struggle for control over strategic, resource-rich, and ethnically or politically contested territory.

The DRC, even though it is one of the most impoverished countries on Earth, has mineral reserves estimated to be worth $24 trillion.[2] In eastern DRC, effective government is absent; instead, a series of armed groups fight for a variety of reasons, such as the control of the land or the region's vast mineral wealth. In fact, the control of mines often translates into a considerable source of income for these armed groups, which often use child slavery and rape as tactics to control local opponents, and, by extension, local mines. From the DRC, minerals are smuggled to the east coast of Africa, where they are exchanged for money and weapons that further enable armed

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1: Dodd-Frank Wall Street Reform and Consumer Protection Act, H.R. 4173, 111th Cong. §1502 (e) (4) (2010) (hereafter Dodd-Frank).

2: *DR Congo: UN Advises Prudent Use of Abundant Resources to Spur Development,* UN News Centre (Oct. 10, 2011), online at http://www.un.org/apps/news/story.asp?NewsID=39986#.VGliSJPx178.

groups to commit crimes against humanity. These minerals are shipped to smelting firms in Asia, where they are combined with other minerals from around the world to be refined and ultimately used in the production of electronics. Some are shipped into the U.S. as finished products and others come as components to be assembled in the U.S.

As a result of the lobbying by American NGOs dedicated to ending the conflict minerals trade, a section was added to the Wall Street Reform Act of 2010. This section (§ 1502) did not restrict the import of conflict minerals; rather, it legislated forced-disclosure.[3] The Securities and Exchange Commission was directed to issue rules requiring companies to disclose to the public A) whether the minerals used in their products originate from the Great Lakes region, and if so, B) whether the used minerals "directly or indirectly finance or benefit armed groups in the Democratic Republic of the Congo or an adjoining country."[4] Additionally, the section required companies to describe their products as "DRC conflict free" or not "DRC conflict free" in their disclosures.[5]

After a series of extensions, comment periods, and roundtables, the SEC released its Final Rule in August, 2012. Whereas Section 1502 was only a few pages of the Dodd-Frank Act, the released rule was over 300 pages in length, clarifying which companies were subject to the regulation, determining how long the "phase-in" period was for companies of various sizes, clarifying terminology, and resolving issues as to how to classify recycled and scrap metals.

Companies for whom tin, tantalum, tungsten or Gold (3TG) are "'necessary to the functionality or production of a product' manufactured by those companies,"[6] are required by the Final Rule to disclose the measures that they have taken to determine whether their products are "DRC Conflict Free" or not and to disclose those products that are "Not Found to Be 'DRC Conflict Free.'"[7] Importantly, the rules apply only to those involved with the manufacturing of the product, meaning retail companies like Best Buy, Wal-Mart, and Costco are not required to submit these annual disclosures to the SEC. Under pressure from the electronics industry, the Final Rule allowed a temporary transition period. During this period, companies were allowed to label their products "DRC Conflict Undeterminable" in their Conflict

3: Dodd-Frank, § 1502, 15 U.S.C. §78m(p) (cited in note 1).
4: *Id.* § 78m (p) (1) (a) (ii).
5: *Id.* at (1) (A) (ii) & (E).
6: *Disclosing the Use of Conflict Minerals*, SEC (Jul. 29, 2014), online at http://www.sec.gov/News/Article/Detail/Article/1365171562058#.VHkLm6QfNtJ.
7: *Id.*

Minerals Report.

The Final Rule sets forth that "For all issuers, this period will last two years, including issuers' 2013 and 2014 reporting periods, but will not be permitted for the reporting period beginning January 1, 2015. For smaller reporting companies, this period will last four years, including issuers' 2013 through 2016 reporting periods, but will not be permitted for the reporting period beginning January 1, 2017."[8] In other words, smaller companies are allowed to state that they have not been able to exercise full due diligence up through their 2017 reporting period. This means that 2018 will be the first year that all filings in that year must explicitly disclose whether the products of a company are "DRC conflict free" or not "DRC conflict free." This also means that the 2016 filings (disclosing company behavior for the 2015 reporting period) will be the first filings in which all large companies are forced to have completed full due diligence. However, the Final Rule noted that each year, "issuers taking advantage of this temporary category are still be required to conduct due diligence and prepare and file a Conflict Minerals Report."[9] This means that disclosures are still necessary even if the disclosure only notes that the company has not determined whether its products are "DRC conflict free."

As such, in June, 2014, companies first disclosed their due diligence efforts for the 2013 reporting period. As per the transition period, all companies were legally permitted to list in their Conflict Minerals Reports that their products were "DRC Conflict Undeterminable." Research by Elm Sustainability Partners L.L.C. and the Georgetown University Law Center indicates that the vast majority of companies filing did not note whether their products were "DRC Conflict Free" or not.[10] In fact, according to a preview of their final research, in which they had analyzed 850 out of a total of 1,300 filings, 426 companies simply did not specify whether their products were "DRC Conflict Free" or not, 242 companies listed their products as "DRC Conflict Undeterminable," 143 only submitted "Reasonable Country of Origin" information without any due-diligence information, and only 12 specified all or some of their products as "DRC Conflict Free."[11] Thus, to-date, an overwhelming majority of companies are benefitting from the 2- or 4-year transition period.

8: Conflict Minerals, 17 CFR 240 & 249b. Also see, Dodd-Frank, *SEC Release No. 34-67716* (II) (C) (6) (c) (Sep. 12, 2012), online at http://www.sec.gov/rules/final/2012/34-67716.pdf.

9: *Id.*

10: *Our Conquest of the Mt. Everest of Conflict Minerals is Complete*, Elm Sustainability Partners (Sep. 13, 2014), online at http://www.elmsustainability.com/conquest-mt-everest-conflict-minerals-complete/.

11: *Id.*

II. Legal Challenges in Domestic Courts

Despite its slow implementation, the law has faced a series of legal challenges in U.S. courts brought by industries claiming to be negatively affected by its final regulations. Following the release of the final SEC rules, the U.S. Chamber of Commerce and the National Association of Manufacturers alleged in court that the rules compelled speech in violation of the First Amendment. They also contended that the rules contravened the Administrative Procedure Act because they were "erroneous, arbitrary and capricious, or an abuse of [agency] discretion."[12] Shortly thereafter, the Business Roundtable joined the petitioners, and Amnesty International intervened on behalf of the SEC. As may be expected, many (but not all) industry groups filed briefs in support of the petitioners, arguing that the SEC did not fully consider the economic impact of its rules on the electronics industry. In particular, the electronics industry was most concerned with the lack of *de minimis* contact clarification, meaning companies that used even the smallest amounts of one of the 3TG's could be subject to the rules.

Perhaps more surprising was an amicus brief filed in support of the petitioners by "Experts on the Congo"—many of whom had dedicated large portions of their careers to supporting human rights in the DRC.[13] The experts filed their brief in order to generally highlight the unintended consequences of Section 1502—namely a *de facto* embargo of Congolese minerals. More specifically, the brief charged that, "the SEC ignored its statutory obligation to analyze the rule's purported benefits."[14] In other words, allegedly, it failed its obligation—as per section 1502 – to determine the negative and positive consequences of its proposed rules.

After the district court decided in favor of the SEC, rejecting both the

12: Dynda A. Thomas, *Challenging the Conflict Minerals Rule – A Review of the Docket*, Conflict Minerals Law Blog (Nov. 25, 2012), online at http://www.conflictmineralslaw.com/2012/11/25/challenging-the-conflict-minerals-rule-a-review-of-the-docket/. Also see Ved P. Nanda, *Conflict Minerals And International Business: United States And International Responses*, 20 ILSA J. Int'l & Comp. L. 285, 295 (2014).

13: Dynda A. Thomas, *Challenging the Conflict Minerals Rule – A Review of the Docket – Petitioners' Brief and Amicus Briefs*, Conflict Minerals Law Blog (Feb. 27, 2013), online at http://www.conflictmineralslaw.com/2013/02/27/challenging-the-conflict-minerals-rule-a-review-of-the-docket-petitioners-brief-and-amicus-briefs/.

14: Brief of Amicus Curiae, Experts on the Democratic Republic of the Congo, *NAM v. SEC,* No. 12-1422 at 17 (D.D.C. 2013).

First Amendment and the APA challenges raised by the petitioners,[15] NAM and the other plaintiffs succeeded in securing a partial reversal by the D.C. Circuit.[16] First, the appellate court denied the petitioner's challenges that the SEC violated the APA; however, it did hold that the Final Rule and Section 1502, by compelling speech, were in violation of the First Amendment.[17] *En banc* review was granted in November 28, on the petition of the SEC.[18] Therefore, the Court might reverse its prior interpretation of the disclosure requirements as a violation of the First Amendment. The question of their legal validity, per domestic standards, remains unsettled.

III. Unintended Consequences of § 1502

As noted above, an array of DRC experts filed an amicus brief in this case. The experts' brief noted concerns about the repercussions of the Conflict Minerals regulation. As such, it is necessary to deviate from the strictly legal issues and to note the broader discussions amongst the Congolese, western activists, and scholars over the effectiveness of Section 1502 and the SEC Rule. The greatest critique of Section 1502 and the SEC Final Rule was that they created a *de facto* embargo on Congolese minerals. In short, the wording of Section 1502 encouraged manufacturers, smelters, and most parties along the supply chain to simply avoid sourcing any 3TG minerals from the Congo for two reasons.

First, many companies sought to avoid being branded as violators of human rights. The essential logic behind requiring companies to disclose whether they were using conflict minerals or not was that companies would change their behavior to avoid being labeled as financial supporters of rape, murder, or other acts of violence and terror. It was a 'name-and-shame' tactic. This presumption was accurate. However, the logic behind and the wording of Section 1502 did not consider the easiest option for firms to avoid being branded as human rights perpetrators in the DRC: altogether avoiding minerals originating from the country. For downstream companies (like Nintendo, Apple, Sony, Boeing, etc.) unsure of how quickly the SEC would issue rules, how much detail they would be required to disclose in their reports, and how difficult it would be to determine whether Congolese minerals were coming from a rebel controlled mine or not, it was simply

15: *National Association of Manufacturers* v. *S.E.C.,* 956 F. Supp. 2d 43 (D.D.C. 2013).

16: *National Association of Manufacturers* v. *S.E.C.,* 748 F.3d 359 (D.C. Cir. 2014).

17: *Id.* at 373.

18: 2014 U.S. App. LEXIS 21753.

easier to ask their smelters upstream not to buy any Congolese minerals.[19]

As David Aronson, writing for the New York Times, stated, the "smelting companies that used to buy from eastern Congo have stopped. No one wants to be tarred with financing African warlords—especially the glamorous high-tech firms like Apple and Intel that are often the ultimate buyers of these minerals. It's easier to sidestep Congo than to sort out the complexities of Congolese politics—especially when minerals are readily available from other, safer countries."[20] The last sentence highlights that all of the conflict minerals—tin, tantalum, tungsten, and gold—can be found throughout the world; thus, Congolese minerals are easily replaceable in the global mineral trade. In summary, American firms responded to the threat of having to label their own products as conflict minerals by simply divesting from the region.

Secondly, divesting proved additionally attractive because it would lessen the total amount of auditing required of companies. Section 1502 and the Final Rule issued by the SEC created a three-step structure of disclosure.[21] The first step is to determine whether a company even uses any of the 3TG minerals in manufacturing their products—which is generally very easy for a company to determine. The second step requires that issuers "conduct a reasonable country of origin inquiry [RCOI] regarding the origin of its conflict minerals."[22] Many companies at the end of the stream (consumer electronic companies, aerospace companies, etc.), viewed this regulatory requirement as an undue hassle, as most of them were entirely unaware of the origins of the 3TG minerals used in their products; however, needing to conduct an RCOI was largely unavoidable for most of these companies, as technology companies simply cannot stop using 3TG minerals in their products.

On the other hand, many companies are able to avoid having to move to the third step in the disclosure process. The third step requires that those companies who determined in their RCOI that the country of origin was

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19: See, e.g., Laura Seay, *What's Wrong with Dodd-Frank 1502? Conflict Minerals, Civilian Livelihoods, and the Unintended Consequences of Western Advocacy,* Center for Global Development Center ffWorking Paper 284 (Jan. 5, 2012), online at http://www.cgdev.org/publication/what%E2%80%99s-wrong-dodd-frank-1502-conflict-minerals-civilian-livelihoods-and-unintended. See also Jason Stearns, *Obama's Law: Conflict and Minerals in the Congo* (2013), and Dominic P. Parker & Bryan Vadheim, *Ban it or Buy it? The Unintended Consequences of Conflict Mineral Policies*, Working Paper (Apr. 2, 2013), online at http://www.aae.wisc.edu/mwiedc/papers/2013/parker_nick.pdf.

20: David Aaronson, *How Congress Devastated Congo*, N.Y. Times (August 7, 2011).

21: 17 CFR at 240 and 249b, (II) (B), (II) (D), & (II) (E) (cited in note 8).

22: *Id.* (I) (D) at 24.

the DRC or one of its neighbors must "exercise due diligence on the source and chain of custody of its conflict minerals and provide a Conflict Minerals Report describing its due diligence measures."[23] In other words, if a company determines that its minerals are originating from the DRC, the company must exercise due diligence, specifically determining whether the production or trade of those minerals financed an armed group. In some instances, this requires companies to determine from which specific mine the minerals came.

Many companies viewed the third step as requiring an extraordinary and burdensome amount of due diligence. While companies using any of the 3TG minerals were unable to avoid the first two steps, step three was avoidable, so long as none of a company's minerals could be associated with the DRC conflict. As such, many companies simply asked the upstream smelters not to buy any 3TG minerals from that region. As noted by the Senior VP of Environment and Sustainability at the Industry Technology Industry Council during a House Congressional Hearing on the unintended consequences of Section 1502, "Major smelters report that a majority of their direct customers are demanding metals that are *Congo-free,* rather than *conflict-free*."[24] Accordingly, in its efforts to outlaw trade that supports conflict and violence in the region, the rule has even blocked trade that, unrelated to any conflict, might actually prove beneficial to local economies.

IV. Other National Laws

Global trade in conflict minerals is an international issue; however, the United States is the only country outside of Central Africa to enforce any legislation regarding conflict minerals. The DRC, following the passage of Section 1502, banned the artisanal mining of and the export of tin, tantalum, and tungsten (but not gold) in 2010.[25] The ban was implemented unexpectedly and only applied to the three provinces from which conflict minerals were known to originate.[26] The purported (and generally accepted)

23: *Id.* (I) (D) at 28.

24: *The Unintended Consequences of Dodd-Frank's Conflict Minerals Provision: Hearing on Dodd-Frank Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, § 1502,* Subcommittee on Monetary Policy and Trade of the House Comm. on Financial Services, 113th Cong. at 57 (May 21, 2013) (emphasis added).

25: Aloys Tegera, *Impact Of Presidential Mining Ban on Mining and Trading Of Minerals in Eastern DR Congo*, Good Electronics (Oct. 29, 2010), online at http://goodelectronics.org/news-en/impact-of-the-presidential-ban-on-mining-and-trading-of-minerals-in-the-eastern-dr-congo.

26: Parker & Vadheim at 11 (cited in note 19).

reasoning behind the mining ban was similar to that of Section 1502—to eliminate the financing of armed groups in the eastern portion of the country; however, facing criticism over the effectiveness of an export ban, the Congolese government lifted both the mining and export ban a few months later in 2011.[27]

Since then, no country that plays a major role in the trade of conflict minerals has enacted any significant policy regulating that trade. Both Canada and the European Union have recently discussed legislation similar to Section 1502. In Canada, the proposed bill, Bill C-486, failed to pass in the House of Commons on 24 September 2014.[28] In the European Union, no legislation nor directives have been passed to date; however, the European Commission is considering a proposal "setting up a Union system for supply chain due diligence."[29] The European Parliament's Committee on Development discussed the proposal most recently in November, 2014.[30]

V. The WTO, GATT, and International Law

While national laws regulating conflict minerals are few, there are no international conventions or treaties governing the practice (outside of regional frameworks like the International Conference on the Great Lakes Region). The World Trade Organization (WTO) has not adopted any significant policies on the issue; at most, when one conducts a search of internal WTO documents, "conflict minerals" are only mentioned tangentially in documents not clearly relevant to their trade. Considering the United States arguably created a *de facto* embargo on Congolese 3TG minerals, one might expect that the DRC, being a member state of the General Agreement on Tariffs

27: *Id.* at 12.

28: Conflict Minerals Act, Bill C-486, 41st Canadian Parliament (September 24, 2014).

29: *Proposal for a: Regulation Of The European Parliament And Of The Council, Setting Up a Union System For Supply Chain Due Diligence Self-Certification Of Responsible Importers of Tin, Tantalum And Tungsten, Their Ores, And Gold Originating In Conflict Affected And High-Risk Areas*, European Commission 2014/0059 (COD) (May 3, 2014), online at http://trade.ec.europa.eu/doclib/docs/2014/march/tradoc_152227.pdf.

30: *Draft Agenda*, European Parliament-Committee on Development (Nov. 10-11, 2014), online at http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2f%2fEP%2f%2fNONSGML%2bCOMPARL%2bDEVE-OJ-20141110-1%2b01%2bDOC%2bPDF%2bV0%2f%2fEN.

and Trade (GATT)[31] since 1963,[32] would file a case against the United States; however, the DRC has not yet, at the time of writing, claimed that the United States has violated any GATT article.[33] Despite the likelihood that the U.S. law has had negative economic effects on legitimate sectors of the Congolese economy, distinct from the conflict, the Congolese government has not challenged the U.S. for its role in leading the *de facto* embargo.

This article will neither systematically answer why the DRC has not brought this issue to the WTO nor attempt to determine whether the country might state a viable claim under the GATT rules. Rather, this paper will note the astounding lack of discussion about Section 1502 violating GATT provisions. It will then explore the similarities between Section 1502 and the U.S.' Country of Origin Labeling provisions and the Kimberly Process.

As noted above, Section 1502 was worded in such a way that it led to a massive decrease in demand for Congolese 3TG minerals. As such, one could conceive Section 1502 as a regulation functioning as a type of non-tariff barrier or a technical barrier to trade. One could conceivably frame the American regulation as a technical barrier to trade, discriminating against DRC 3TG minerals specifically. To elucidate this argument, it is relevant to consider the WTO's ruling against the United States regarding its Country of Origin Labeling (COOL) standards, as many of the WTO's criticisms there might also attach to the mandatory RCOI (Reasonable Country of Origin Inquiry) disclosure mandated by Section 1502's Final Rule.[34] The COOL standards refer to provisions passed by the U.S. Congress in 2008 requiring retailers to inform consumers about the country of origin of the meat they purchased. Specifically, Congress required retailers to label the country in which the livestock was born, raised, and slaughtered.[35] Such disclosure placed higher regulatory costs on those retailers whose livestock had been imported into the United States. As a result, it proved in the economic interest of many retailers to discriminate against imported livestock, harming Canada's and

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31: The GATT seeks to contribute to "the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international commerce." GATT, pmbl. (1986).

32: *Congo and the WTO*, WTO Member Information (2014), online at http://www.wto.org/english/thewto_e/countries_e/congo_e.htm.

33: *Map of Disputes Between WTO Members*, WTO Dispute Settlements (2014), online at http://www.wto.org/english/tratop_e/dispu_e/dispu_maps_e.htm.

34: 17 CFR at 240 and 249b (cited in note 8).

35: *GATT Dispute Panel on United States–Country of Origin Labeling (COOL) Requirements*, WT/DS384/RW, WT/DS386/RW (Oct. 20, 2014), online at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds384_e.htm#bkmk384rw.

Mexico's exports. Canada and Mexico filed a dispute with the WTO against the U.S. COOL provisions.

In their dispute, they cited a host of agreements they believed the U.S. had violated. Most notably, they claimed the U.S. contravened the Technical Barriers to Trade (TBT) Agreement and the Agreement of Rules of Origin.[36] The WTO eventually ruled in favor of Canada and Mexico, stating that the "COOL measure violates Article 2.1 of the TBT Agreement because it accords to Canadian and Mexican livestock less favourable treatment than that accorded to like U.S. livestock."[37] Article 2.1 of the TBT Agreement states that the members are to ensure that their regulations do not favor domestic products over like products of other member countries. In its decision against the U.S., the WTO also referenced multiple sections of Article 2 of the Agreement of Rules and Origins, including Article 2(c) that states, "rules of origin shall not themselves create restrictive, distorting, or disruptive effects on international trade"[38] As such, the WTO effectively adopted Canada and Mexico's arguments that COOL opereated as a "rule of origin" with impermissibly negative effects on international trade.

I draw attention to the U.S.-COOL dispute as it is one of the most recent trade disputes involving the United States, with the WTO issuing panel reports as recently as October, 2014. Additionally, it is the most recent WTO dispute involving the Rules of Origin.[39] It thus serves as good case to compare to a hypothetical dispute raised by the DRC against the U.S. Whereas many trade disputes have been lodged against the U.S. recently, many of those disputes are about dumping or anti-dumping measures, countervailing measures, or other non-tariff barriers legally acting at the import level. Neither the COOL provisions nor Section 1502 fall into any of those categories for they legally act at the consumer level. In both cases, there is no legal prohibition against the import of Mexican/Canadian livestock or the import of Congolese minerals. Rather, both regulations create economic disincentives to import goods from these countries. Therefore, they can be classified as technical barriers to trade and abuses of the Rules of Origin. Drawing parallels between the two issues is appropriate for the didactic purpose of highlighting legal challenges that Section 1502 might face. This endeavor can also highlight differences that could explain why the DRC has not and might not file a trade dispute

36: *Id.*

37: *Id.*

38: *Agreement on the Rules of Origin*, WTO Legal Texts 2 (c) (April 15, 1994).

39: *Disputes by Agreement*, WTO Dispute Settlements (2014), online at http://www.wto.org/english/tratop_e/dispu_e/dispu_agreements_index_e.htm?id=A14.

accusing the United States of violating WTO agreements.

First, as noted above, the WTO cited Article 2.1 of the TBT Agreement against the U.S. in the COOL dispute. The U.S. was in violation of this Article, because the COOL provisions (the technical regulations) favored domestic livestock over livestock imported from Mexico or Canada. In both the Canada/Mexico and DRC cases, the technical regulations are types of disclosure that, respectively, hurt Canadian and Mexican exporters of livestock and Congolese miners; however, regarding conflict mineral regulations, the United States might not be in violation of the TBT's Article 2.1, as Section 1502 does not benefit domestic industries. The United States' mining sector is simply not affected by import of Congolese minerals to the same degree that the U.S. livestock industry is affected by the import of Mexican and Canadian livestock.

Secondly, the U.S.–COOL dispute is notable for being the most recent trade dispute involving any country violating the Agreement on the Rules of Origin.[40] The WTO ruled that several sections of this agreement were violated, including Article 2(c), which might also be violated by the conflict minerals regulation. That provision states that the "rules of origin shall not themselves create restrictive, distorting, or disruptive effects on international trade."[41] The COOL provisions, an example of a rule of origin, were in violation of WTO laws as they distorted international trade by distorting the normal economic incentives of importing Mexican and Canadian livestock. One might argue that the Conflict Mineral regulations are also in violation of Article 2(c) as those minerals with Congolese origins are discriminated against because of Section 1502.

The above exercise, drawing surface-level parallels between the COOL provisions and the conflict mineral regulations, is only meant to illustrate that one could question the legality of the latter. This article does not claim that any dispute against the United States will or should be filed. Rather, this paper hopes to illustrate that a dispute could be filed. Imaginging a dispute is necessary, as effectively no one has publically noted that American regulation of conflict minerals might be in violation of international trade laws. While some legal scholars allude to possible WTO challenges in the footnotes of their articles,[42] no scholars, to date, have seriously explored the possible international legal challenges that Section 1502 could face. Then, to date, the only mention of possible violations of WTO trade law in a widely-read

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40: *Id.*

41: *Rules of Origin*, at 2 (c) (cited in note 38).

42: See Celia R. Taylor, *Conflict Minerals and SEC Disclosure Regulation*, 2 Harv. Bus. L. Rev. 105, 106, n. 6 (2012).

American publication was an article published by Lauren Wolfe in *Foreign Policy* in February, 2015. There, she notes that "Rosa Whitaker, a former negotiator at the World Trade Organization (WTO) and assistant U.S. trade representative for Africa, says that countries that are economically impacted by Dodd-Frank are considering bringing a suit against the United States through the WTO on the grounds that Section 1502 is against its rules of trade."[43] Beyond Wolfe's work, no other article in the American media has discussed Section 1502 as a possible violation of WTO trade law. Moreover, even though I examined over a hundred of the public comments submitted to the SEC during Section 1502's comment period, I was unable to find a single mention of the WTO, let alone any possible infraction of WTO rules.[44] Finally, and most interestingly, in the House hearing on the "Unintended Consequences" of the law, which largely focused on the *de facto* embargo on Congolese minerals, there was no discussion about whether this embargo was in violation of international trade law.

This dearth of discussion is noteworthy. While this article noted a number of surface level similarities between Section 1502 and Country of Origin Labeling requirements, a substantive comparison between Section 1502 and the Kimberley Process is also necessary. The Kimberley Process Certification Scheme (KP) regulates the international trade in rough diamonds. The Kimberley Process emerged at the end of the Sierra Leone civil war, as an effort to reduce or eliminate the financing of armed groups in Sierra Leone and Angola.[45] Its framework works more broadly though, and aims to eliminate the financing of armed groups through the smuggling of blood diamonds throughout the entire world–including the DRC.[46] In short, the KP requires all of its member countries to pass domestic legislation banning the import and export of rough diamonds from and to non-KP member countries. Accordingly, since the United States is a member of the KP, it was required to pass domestic legislation banning rough diamond imports from non-KP countries.[47]

As noted by Karen Woody, the Kimberley Process is arguably in violation

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43: Lauren Wolfe, *How Dodd-Frank Is Failing Congo,* Foreign Policy (Feb. 2, 2015), online at http://foreignpolicy.com/2015/02/02/how-dodd-frank-is-failing-congo-mining-conflict-minerals/.

44: *Comments for SEC Proposed Rule: Conflict Minerals*, SEC Release No. 34-63547 (2012), online at http://www.sec.gov/comments/s7-40-10/s74010.shtml.

45: *KP Basics* (2014), online at http://www.kimberleyprocess.com/en/about.

46: Karen E. Woody, *Diamonds on the Souls of Her Shoes: The Kimberley Process and The Morality Exception to WTO Restrictions*, 22 Conn. J. Int'l L. 335, 336-338 (2007).

47: *Id.* at 339.

of several GATT articles. Most notably, GATT's Article XI prohibits GATT members from restricting trade with other GATT members.[48] KP members are not allowed to trade rough diamonds with non-KP members, even if those non-KP members are GATT members.

She notes that the members of the Kimberley Process have not been penalized by the WTO as KP members were actually granted a waiver in February 2003, which has been renewed multiple times since.[49] This waiver waives the WTO obligations that KP members have in regards to rough diamond trading—the waiver power coming from Article IX(3) of the WTO Agreement.[50] Woody further notes that even without the waiver, KP members might not be in violation of international trade laws as Articles XX and XXI of the GATT allow general and security exceptions to the GATT respectively.[51] Additionally, there exist morality and protection of human life exceptions for practices impinging trade generally protected by the GATT. Woody states that the human life exception is the most cited in defense of the KP, given that its purpose is to reduce violent conflict; however, given the difficulty in proving causality between the regulation of the rough diamond trade and the decrease in violence in Sierra Leone, this exception might not serve as the most sound legal defense of KP. Rather, Woody suggests that the morality exception would be a better legal defense—in effect, the United States could argue that it is *morally* unwilling to be complicit in the financing of violence in Sierra Leone.[52] As a final option, Woody also highlights the GATT's natural security exception, which might also sustain a legal defense of the KP, given the proposed link between the violent groups in Sierra Leone and transnational terrorism.[53]

One can quite easily imagine replacing the words "conflict diamonds" and "Sierra Leone" with "conflict minerals" and "the DRC" in the section above. If one were to argue that Section 1502 was in violation of the GATT for restricting trade from the DRC, a WTO member country, one could just as easily argue that the GATT's human life, morality, and national security exceptions also apply to the regulation of conflict minerals. Section 1502 could arguably protect human life if a causal relation exists between its regulations and a decrease in conflict in and around the DRC. Moreover,

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48: *Id.* at 340.

49: *Id.*

50: Isabel Feichtner, *The Waiver Power of the WTO: Opening the WTO for Political Debate on the Reconciliation of Competing Interests,* 20 Euro. J. Int'l L., 615, 619 (2009).

51: Woody, 22 Conn. J. Int'l L. at 341-343 (cited in note 46).

52: *Id.* at 343.

53: *Id.*

given the U.S.'s increasing propensity to invoke national security in a host of issues, one would also expect an argument that §1502 is in the ultimate national security interests of the United States. Regardless, there are important differences between Section 1502 and the KP—namely the former is U.S. policy designed and enforced unilaterally, whereas the KP is a multilateral "regulation system."[54] Moreover, the KP limits imports *de jure* whereas as Section 1502 limits Congolese exports *de facto*. As such, while the substantive issues behind the Kimberley Process and regulation of conflict minerals are quite similar, legally they operate quite differently.[55]

As such, one could argue that the legal defenses provided for the Kimberley Process could also be applied to the regulation of conflict minerals—as the moral, human life, and security exceptions under the GATT also apply to Section 1502. So perhaps any discussion questioning whether Section 1502 is violation of any international trade laws is moot; however, it is still curious that there has been very little American legal and policy discourse about whether the U.S.'s regulation of conflict minerals could be challenged in a WTO dispute. The absence of discussion is made all the more remarkable by the fact that, prior to the U.S. joining the Kimberley Process, there was public debate about possible WTO challenges to the KP.[56]

VI. Conclusion

There are plenty of legal issues around conflict minerals, many of which this paper has not explored. Section 1502 was an American attempt to reduce the trade of conflict minerals by increasing transparency in international supply chains. Since Section 1502's passage, there have been a host of legal challenges; however, those legal challenges have been exclusively domestic.

In other words, despite the fact that conflict minerals are an international issue, there have been no attempts to deal with conflict minerals as a matter of international law thus far. The only attempts to deal with this international issue have been through national legal instruments. These national attempts

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54: *Id.* at 336.

55: In fact, legally, the COOL provisions operate more similarly to the regulation of conflict minerals than does the Kimberley Process. As such, the essential legal question might be whether the exemptions under the GATT apply to violations of the TBT and the Rules of Origin Agreement. However, this paper will not include a discussion about the legal relationship between the GATT exemptions and the TBT. See Senai W. Andemariam, *Can (Should) Article XX(b) GATT Be a Defense against Inconsistencies with the SPS and TBT Agreements?*, 7 J. World Investment & Trade 519, 536-543 (2006).

56: Woody, 22 Conn. J. Int'l L. at 341 (cited in note 46).

(Section 1502) have even created further international issues (the *de facto* embargo of Congolese 3TG minerals), but still no party has alleged any violation of international law.

While this article did note that the lack of discussion in the U.S. about whether Section 1502 might be in violation of international trade laws is curious, this paper did not seek to explain why that is. As such, further research is needed to see if such conversations occurred or are occurring privately and internally within law firms, between the governments of the United States and the DRC, and within American governmental bodies. Furthermore, it would also be prudent to investigate whether such conversations are happening amongst the Congolese themselves.[57]

Secondly, this article noted that Section 1502 seeks to limit the financing of armed groups through the legal instrument of forcing companies to disclose; the Kimberley Process, rather, operated through the legal instruments of restricting imports. Many scholars have explored the varied exceptions that the United States has claimed under the GATT.[58] It could be beneficial to explore whether "non-economic policy objectives"[59]—particularly human rights—are traditionally pursued by creating legal import prohibitions or restrictions—as was the case with the KP—or whether they are more commonly pursued by creating technical barriers to trade—as is the case with the U.S.-COOL provisions and Section 1502.

Lastly, this article is about "hard law" rather than "soft law." Soft law, as defined by Andrew Guzman, is "those nonbinding rules or instruments that interpret or reform our understanding of binding legal rules or represent promises that in turn create expectations about future conduct."[60] Hard law, on the other hand, refers to binding rules or instruments. As noted above, the United States is the only Western country to have passed hard law governing conflict minerals. With the absence of treaties and conventions on conflict minerals, there is also a lack of international hard law on conflict minerals.

57: In her article, Wolfe does note that countries impacted by the law (possibly the DRC, Uganda, and Rwanda) are "considering bringing a suit against the United States." Wolfe, *How Dodd-Frank Is Failing Congo* (cited in note 43).

58: Steve Charnovitz, *The Moral Exception in Trade Policy*, 38 Va. J. Int'l L. 689 (1998). Also see Salman Bal, *International Free Trade Agreements and Human Rights: Reinterpreting Article XX of the GATT*, 10 Minn. J. Global Trade 62 (2001).

59: John H. Jackson, William Davey, & Alan Sykes, Jr., *International Economic Relations: Cases, Materials and Text on the National and International Regulation of Transnational Economic Relations* 1175 (6th ed. 2013).

60: Andrew T. Guzman & Timothy L. Meyer, *International Soft Law*, 2 J. Legal Analysis 171, 174 (2010).

Most of the work being done to regulate conflict minerals is done through soft law. Specific examples of soft laws regulating conflict minerals would be the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas[61] and similar guidelines created by the UN Group of Experts on the DRC as mandated by UN Security Council Resolutions.[62]

In the case of the regulation of conflict minerals, soft law efforts—which are being led by entities like the Organization for Economic Co-Operation and Development (OECD), the Public Private Alliance for Responsible Mineral Trade (PPA), the Conflict Free Sourcing Initiative (CFSI) organized by the Electronic Industry Citizenship Coalition (EICC), the Global e-Sustainability Initiative (GeSI), and the United Nations—are the greatest developments towards the international regulation of conflict minerals. As such, further writing and research is needed to highlight the role that international soft law plays in the absence of international and national hard law.

61: *OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas,* Organization for Economic Co-Operation and Development (2nd ed. 2013), online at http://www.oecd.org/fr/daf/inv/mne/mining.htm.

62: *Due Diligence Guidelines of the Group of Experts on the DRC*, United Nations, http://www.un.org/sc/committees/1533/egroupguidelines.shtml.

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