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COVER PHOTO: Save the Children Sweden archive. Photo by Peter Strandberg.
THE UNIVERSITY OF MONTANA SCHOOL OF LAW WAS NAMED THE winner of the Final Rounds of the 50th Annual National Moot Court Competition held at the Association. The competition is co-sponsored by the Young Lawyers Committee of the Association and the American College of Trial Lawyers. Pepperdine University School of Law was runner-up.

The National Rounds were held January 31-February 3. Hon. Carmen Beauchamp Ciparick, Associate Judge of the New York Court of Appeals, who presided at the final argument, announced the winning team of Bobbi Frazer, John Mudd and Taryn Stampfl. They received the Russell J. Coffin Award, a cash award donated by Mrs. Russell J. Coffin to further the skills of advocacy. The team was also awarded the John C. Knox Award, a silver cup with the names of the team members inscribed.

Pepperdine University School of Law, as runner-up, won the Kathryn and Bernard Newman Bowl. The Award for Best Brief went to The University of Washington School of Law. The University of Montana School of Law also received the runner-up award for best brief.

The Best Oral Argument Award went to Robert McFarland of Pepperdine University. The Runner-Up Award for best Oral Argument went to Patricia A. Cirucci, also of Pepperdine.

The judges for the Final Rounds, in addition to Judge Ciparick, were Hon. Richard S. Arnold, Judge, United States Court of Appeals Judge for the Eighth Circuit; Hon. Joseph McLaughlin, United States Court of Appeals for the Second Circuit; Hon. Louis H. Pollak, United States District Court for the Eastern District of Pennsylvania; Hon. Shira A. Scheindlin, United States District Court, Southern District of New York; Michael E. Mone, President, American College of Trial Lawyers; and Michael A. Cooper, President, The Association of the Bar of the City of New York.

THE UNITED STATES SENATE COMMITTEE ON FOREIGN RELATIONS CONVENED a committee on United States relations with the United Nations, January 21, at the Association. This was the first congressional committee hearing held at the Association in its 130-year history and the first time the Senate Foreign Relations Committee has convened in New York City.
OF NOTE

The atmosphere was tense due to Sen. Jesse Helms’s blunt, some thought hostile, speech to the United Nations General Assembly the preceding day. Several Ambassadors to the United Nations and other foreign diplomats were in the audience, and the witnesses at the hearing, which was televised by C-Span, included United States Ambassador Richard Holbrooke and U.N. Undersecretary for Administration Joseph Connor.

* * *

ON JANUARY 7, THE ASSOCIATION HOSTED THE 43RD TWELFTH NIGHT Party, a biennial musical comedy performed by talented members of the bench and bar of New York City. This year’s tribute, “From Elmhurst to Olympus: The Life and Times of Justice Antonin Scalia,” was the first time the “target” was a United States Supreme Court Justice. Justice Scalia’s “defense counsel,” known as the Master of Revels, was his friend and former colleague on the Court of Appeals for the District of Columbia, Hon. Laurence Silberman. Twelfth Night is sponsored by the Committee on Entertainment (Kenneth T. Wasserman, Chair). The show was written (as it has been for 30 years) by Myron Cohen.

* * *

THE ASSOCIATION JOINED WITH ELEVEN OTHER STATE AND LOCAL bar associations in filing an amicus brief in Spencer Williams et al. v. United States, before the United States Court of Appeals for the Federal Circuit. The brief addressed the failure of Congress to provide cost of living increases for federal judges despite a statutory requirement, and argued that this failure constitutes an unconstitutional diminishment of the compensation of federal judges.

* * *

ON JANUARY 24, THE ASSOCIATION HOSTED GROWING AND KEEPING Talented Lawyers: New Directions in Mentoring. Co-sponsored by the Association, the New York Women’s Bar Association, and the New York Women’s Bar Association Foundation, the conference was attended by nearly 300 law school career service directors and career development counselors, as well as representatives from law firms and other legal employers. Some of the main issues addressed were associate recruitment, training, and development and retention, with a specific focus on mentoring as a way of overcoming the sense of isolation and other obstacles to job satisfaction encountered by young lawyers, particularly women and minorities.
Recent Committee Reports

**AIDS**
Letter to New York State Department of Health Re: Revised Proposed Amendments to Sections 63.1 through 63.12 of Title 10 of the NYCRR

**Alternative Dispute Resolution**
Mediation Standards Checklist

**Antitrust and Trade Regulation**
Letter Re: Modifications to Hart-Scott-Rodino Merger Review Process

**Civil Rights/Art Law**
Amicus Brief: Brooklyn Institute of Arts and Sciences v. City of New York and Rudolph W. Giuliani

**Executive**
Amicus Brief: Williams v. US (re: Compensation of Federal Judges)

**Family Court & Family Law**
Proposed Legislation and Supporting Memorandum to Mandate the Continuation of Representation through Adoption by a Law Guardian for Children in Foster Care who Have been Freed for Adoption

**Federal Courts**
H.R. 833 The Bankruptcy Reform Act of 1999

**International Trade**
States’ Rights v. International Trade: The Massachusetts Burma Law

**Land Use Planning and Zoning**
Letter to Director of the Department of Health Re: Uniform Bulk Program

**Non-Profit Organizations**
Senate Bill 5740: Proposed Amendment of the New York Insurance Law

**President/Corrections**
Letter to Silver, Bruno and Pataki Regarding Reform of New York’s Rockefeller and Predicate Felony Drug Laws
Recent Committee Reports

Social Welfare Law
New York’s Failure to Comply with the ‘Motor Voter’ Law

Op-Ed Piece: Welfare Reform Without a Leg to Stand On

Transportation
Letter to Surface Transportation Board Chairman Linda Morgan Regarding Canadian Pacific Access to New York City via East of Hudson Line

Trusts, Estates & Surrogates Courts
Report on Proposed Legislation Concerning Unitrust Default Rule

Copies of any of the above reports are available to members by calling (212) 382-6658, or by e-mail, at skumara@abcny.org.
Benjamin N. Cardozo Lecture

Why the Courts


MICHAEL A. COOPER

When I wrote to Anthony Lewis, requesting a copy of his curriculum vitae to consult in preparing my introduction of him this evening, he promptly responded with the following brief note: “Here is the requested CV. Please do not make the introduction long!” I will try not to disappoint him, but if (and to the extent) I do, I hope that he—and you—will forgive me.

The Association’s Committee on Post-Admission Legal Education, in recommending in 1940 that a lectureship be established in the name and memory of Benjamin Nathan Cardozo, specified that the lecture deal with “a legal subject of general interest to the bar...” Since 1941, the Cardozo Lecture has been delivered on 51 occasions; all of the lecturers have been judges, lawyers or law professors. Note that the Committee specified that the Lecture be about a legal subject; it did not direct or recommend that the lecturer be admitted to the bar. It occurred to me, in considering whom to invite to give the Cardozo Lecture this year, that there might be some-
one not a member of the legal profession who would have a perspective on, and insights about, the law and our legal system that would be of great value not only to Association members but to the public. And once that thought crossed my mind, the selection of Anthony Lewis became so obvious that I looked no further, for no one during the past three decades has been a more penetrating commentator than he about the nation’s legal system, the processes of legal change, and the various participants in the making and application of law.

Now to the obligatory (and condensed) CV. After graduating from Harvard College in 1948, Anthony Lewis became a deskman at The New York Times. Seven years later, he was awarded the Pulitzer Prize for a series of articles in the Washington Daily News reporting on the dismissal of a navy employee as a security risk. In 1956, after rejoining The New York Times in its Washington, DC bureau, he was awarded a Nieman Fellowship and spent the following academic year at Harvard Law School. He then returned to the Times’s Washington bureau and for the next seven years covered the Supreme Court, the Justice Department and other legal matters, including the government’s handling of the civil rights movement. His Supreme Court coverage earned him a second Pulitzer Prize in 1963.

Anthony Lewis became chief of the Times’s London bureau in 1964 and in 1969 began writing a column, “At Home Abroad,” which he has continued to write since relocating to Boston in 1973. He has authored three books: Gideon’s Trumpet, about the case in which the Supreme Court established a right to counsel in state criminal proceedings; Portrait of a Decade, about changes in American race relations; and Make No Law, about the Supreme Court’s landmark first amendment decision in New York Times v. Sullivan, a decision which he covered for the Times—no doubt with total objectivity.

In addition to writing about the constitution and the press, Anthony Lewis taught the subject for many years as a lecturer on law at Harvard Law School. Since 1983 he has held the James Madison Visiting Professorship at Columbia University, and he has taught as a visitor at a number of other universities.

I reread Gideon’s Trumpet last week, largely out of curiosity to learn whether I would believe today, as I did when I first read the book three decades ago, that it is the finest work of legal history I have ever read. I do still hold that belief. Gideon’s Trumpet is a compelling story of a poor Floridian, a gambler and occasional petty thief, whose handwritten petition to the United States Supreme Court led to an historic decision over-
ruling a twenty-year-old precedent, and forever changing state law criminal law processes. The principal actors are finely sketched: Clarence Gideon, Abe Fortas (his counsel in the Supreme Court), Fortas's adversary (Florida Assistant Attorney General Bruce Jacob) and the justices of the Supreme Court, particularly Justices Frankfurter and Black, who are portrayed as having been bound by a mutual respect stronger than their polar opposite legal philosophies. But the book is so much more than a collection of portraits and a tale of a litigation that changed the legal scene forever. Anthony Lewis pauses, at several points in the narrative, to give a brief history of the right to counsel in criminal cases and to reflect on the judicial process and the evolution of the law.

Gideon's Trumpet is superbly instructive without being pedantic or preachy. If I were asked to name one book that describes and illustrates the distinctive attributes of our constitutional adjudicative process, I would unhesitatingly choose Gideon's Trumpet. In a contemporaneous review, Paul Freund, perhaps the leading constitutional law scholar of our time, described as "the surpassing merit" of the book that the reader is "made to see the general in the particular, to feel that, in the redemption of a forlorn outcast, the legal process is redeeming itself."

Many years later, reviewing Make No Law, Ronald Dworkin said that Lewis's "account of the craftsmanship of a complex judicial opinion, and of the complex process through which one justice gathers others under a collective opinion all can sign, is itself a contribution to constitutional jurisprudence."

The columns Anthony Lewis continues to write in The New York Times are as insightful as his books. He has decried more than once the inhumanity of the 1996 immigration act, which compels deportation of individuals who committed minor offenses years before the statute's enactment, and as recently as this past Saturday, he inveighed against the inconsistency, some might say hypocrisy, of judges who condemn judicial activism at the same time that, in the name of preserving federalism, they read into the Eleventh Amendment a sovereign immunity from federal legislation, an immunity that appears nowhere in the constitutional text.

For many years Anthony Lewis has trained his moral spotlight without flinching on objectionable aspects of the legislative, executive and judicial scenes that we either tolerate or oppose too feebly. For doing so he deserves our praise and our thanks.

Please join me in welcoming the 52nd Benjamin N. Cardozo lecturer, Anthony Lewis.
It is a great honor, and a daunting one, to give a lecture named for Benjamin Nathan Cardozo. Learned Hand spoke of “the gentleness and purity” of Justice Cardozo’s character, “the acuteness of his mind,...his learning, his moderation and his sympathetic understanding....” When Justice Holmes retired from the Supreme Court in 1932, Cardozo, Chief Judge of the New York Court of Appeals, was widely suggested as his successor. But the obstacles to his appointment were formidable. There were already two members of the Court from New York, Hughes and Stone, and a Jewish justice, Brandeis. Cardozo was a Democrat, President Hoover a Republican. But across the country scholars and editors and Senators called him the compelling choice. Hoover appointed him. And Justice Holmes wrote his friend Felix Frankfurter, “Like you, I rejoice in Cardozo.”

How hard it is to imagine such an exalted, non-political scenario for a Supreme Court nomination now. Judges today must expect not praise but attack: vicious attack. Steve Forbes, a candidate for the Republican
presidential nomination, made a statement last fall demanding the appointment of judges who will oppose abortion. He ended with this stark, unexplained sentence: “America simply cannot afford another Supreme Court justice like David Souter.”

When the New Jersey Supreme Court held last year that a state statute forbidding discrimination on account of “sexual orientation” made unlawful the exclusion of homosexuals by the Boy Scouts, the decision was denounced as “moral madness” and “judicial imperialism.” A law professor at Arizona State University said the New Jersey judges were “elite nihilists,” “totalitarians” who were “shamed by their hypocrisy.” Do you suppose that the source of the order for non-discrimination, a law passed by the legislature, escaped the professor’s attention? Probably not. But judges are a juicier target.

Even in the hurly-burly of our politics, it seems to me disgraceful for a Presidential candidate to pick out a Supreme Court justice for personal attack. Similarly, I expect something more scholarly from a law professor than hate speech directed at judges whose decision she disliked. But my reaction seems old-fashioned to me as I express it, so commonplace have savage attacks on judges become.

Another example. A 14-year-old girl in Arizona sought an abortion to terminate a pregnancy that resulted from statutory rape. By the time the legal issue was joined, she was twenty-three weeks pregnant, past the time when Arizona allows abortion. She asked judicial sanction to travel to Kansas for the operation. When a judge issued the requested order, Steve Forbes said he had “ordered an act that is nothing short of infanticide. Shouldn’t this judge be subject to an indictment for such a murderous offense?” When the Arizona Supreme Court upheld the order, Forbes said the decision threatened “to undermine our nation’s moral fabric.”

That last charge, that judges are endangering the country’s moral fabric, is a recurrent theme. It might be called the Henny-Penny Doctrine. The sky is not falling in. The United States is a healthier country today than it has been. Though race remains a profound problem, the evil of official racial discrimination is ended—thanks to the courts. Women have carried out an astonishing social revolution to achieve their rightful place in society. Men and women who by nature are sexually attracted to their own gender still face much discrimination, but to mock or murder them is no longer generally considered acceptable.

There are aspects of our society that someone of my age and outlook finds distressing: the loss of privacy, for instance, and the vulgarity of
popular entertainment; or, more seriously, the accumulation of great individual wealth while many Americans lack decent homes and health care. But the notion of a moral collapse brought on by the courts is silly.

The theme of judicially-imposed moral decay is sounded by the most piercing voice among those attacking the courts today: that of Robert Bork, former law professor and judge, rejected Supreme Court nominee. He expounded it in his book "Slouching Towards Gomorrah: Modern Liberalism and American Decline." Writing last month in The Wall Street Journal, he said: "American courts, enforcing liberal relativism, are leading the parade to Gomorrah."

One of Judge Bork’s targets in The Journal was a decision by a Federal District Judge in Cleveland. Following Supreme Court precedent, the judge held that an Ohio school voucher program used primarily to send children to religious schools violated the clause of the First Amendment forbidding "an establishment of religion." Judge Bork said it had been shown over and over again that the Establishment Clause "was never intended to prohibit nondiscriminatory aid to religion." He added the following: "The truth is that modern jurisprudence in this area is driven not by any possible meaning of the Constitution but by a desire to secularize society and by hostility to religion in general and the Catholic faith in particular."

If I understand those words, Judge Bork charged members of the Supreme Court, among others, with being motivated by anti-Catholic feelings in their interpretation of the Constitution. The present Court, like its predecessors, is often sharply divided; but in my recollection even the most passionate opinions have not ascribed evil motives to those who disagreed. Justice Brennan, who was involved in much disagreement, used to say that every one of his colleagues was as profoundly devoted to the Constitution as he was. The extremity of Judge Bork’s words shows how far attacks on judges have gone. I do not believe that Professor Bork would have used them. Hell hath no fury like ambition scorned.

The argument made by Bork and others is that judges have strayed from the original understanding of the Constitution. The cure, they say, is to read the text in line with the intention of its framers. Thus, in his attack on the Ohio school voucher decision, Bork said: "The First Congress, which proposed the First Amendment, also aided religion in ways that today’s ACLU and the federal courts now consider clear constitutional violations."

Originalism, as the argument has come to be known, runs aground on the case of Brown v. Board of Education. When the Fourteenth Amend-
ment was adopted in 1868, schools were segregated in the District of Columbia, a federal enclave under the jurisdiction of Congress. The public galleries of the Senate were segregated. So it is impossible to say that the framers of the Equal Protection Clause intended it to outlaw segregation. Yet Bork says he agrees with the 1954 decision that public school segregation violated the clause.

The evils that Judge Bork sees in the courts today led him, in his “Slouching Towards Gomorrah,” to propose the following cure: “There appears to be only one means by which the federal courts, including the Supreme Court, can be brought back to constitutional legitimacy. That would be by constitutional amendment making any federal or state court decision subject to being overruled by a majority vote of each House of Congress.”

With such an amendment in place, Americans could no longer look with any confidence to the courts for protection of their rights. The right to free speech, for example. The First Amendment now provides that “Congress shall make no law...abridging the freedom of speech, or of the press.” The Bork amendment would effectively change it to read: “Congress may make any law it wishes to abridge the freedom of speech, or of the press.”

That kind of constitution, eliminating the independent power of the judiciary, would be more democratic in the sense that it would remove constraints on majority rule. A majority in Congress or in state governments could do what it wished. Would that be a better, a wiser form of democracy?

The good thing about the attack on the courts is that it may make us think about why we value the independence of judges in our system of government, why we want them—if we do—to have the power to say no to legislators and governors and presidents from time to time. A valuable answer to those questions has lately been given by a judge of high international reputation, the president of the Supreme Court of Israel, Aharon Barak.

“Democracy is not only majority rule,” Justice Barak said. “Democracy is also the rule of basic values...values upon which the whole democratic structure is built, and which even the majority cannot touch.” In the past, he said, many democracies believed that the delicate balance between majority rule and respect for basic values “could be guaranteed by relying on the self-restraint of the majority.” But “the Twentieth Century shattered this approach. In many regimes, the majority was ready to abuse its full power in order to violate values, principles and human rights
which stood in its way. One of the lessons of the Second World War and the Holocaust is that it is vital to place formal limits on the power of the majority. The concept that ‘It is not done’ needs to receive the formal expression, ‘It is forbidden.’”

A constitution alone “is not sufficient,” Justice Barak said. There must be an institution that decides when the balance between majority rule and fundamental rights has been upset. “It must be an independent institution,” Justice Barak said, “not subject to the mercies of the majority or the minority. It must be the courts.”

The comments of Justice Barak are especially compelling because Israel was re-established as a state in 1948 without a written constitution. Over the last 50 years its Supreme Court, which has had many distinguished judges, has developed the idea of fundamental rights implicit in the declaration of a democratic Jewish state.

Israel is not alone in its embrace of the principle that governments and their officials must be subject to fundamental rules enforced by judges. Since World War II many democratic countries have decided that majority rule is not enough without a protective structure of constitutionalism.

The constitution of the Fifth French Republic is interpreted by judges. The German Republic that rose from the ashes of the Nazi state has a constitution guaranteeing individual rights and a strong constitutional court to enforce them. Canada has a new Charter of Rights. The high courts of Hungary, India, Australia and other countries play a constitutional role. The peaceful transition to the new South Africa was made possible by agreement on a constitution with a bill of rights, enforced by a constitutional court that has already held a number of actions by the post-apartheid government invalid. Perhaps the most striking recent development has been in Britain, where later this year the European Convention on Human Rights will become part of domestic law. That is, British courts will have to consider whether acts of Parliament violate the Convention just as American courts measure governmental acts against the Constitution. That is a remarkable change, given the long-standing totem of Britain’s political structure, absolute Parliamentary sovereignty.

Americans might take pride in the widening international adoption of the constitutional model: fundamental rights enforced by judges. We invented the idea, and it was ours alone for more than one-hundred-sixty years.

The essential elements of our constitutionalism first came together in
the state where I live, Massachusetts. It was a colony in rebellion when, in 1780, its leading citizens decided that it should have a written constitution. John Adams led the drafters; the text was approved at a “convention and then, in local meetings, by the people. That constitution—which in amended form is still in force—called for all judges to be appointed by the governor, subject to the consent of his council, and to serve during good behavior. The Federal Convention at Philadelphia seven years later copied the provisions for appointment and tenure of judges: “One of John Adams's profoundest conceptions,” the historian Samuel Eliot Morison said. What the provisions crucially assured was judicial independence. “Ideas about judicial independence had been afloat,” Justice Benjamin Kaplan of our Supreme Judicial Court said some years ago, “but their particular combination and expression in the Massachusetts Constitution were a mighty invention.”

The other essential question was the status of the new constitution: Would judges treat it as merely admonitory, a guide for those who would govern the commonwealth? Or would they interpret and enforce it as law? The question was soon answered.

In 1783, three years after the adoption of the constitution, the case of Quock Walker came before the Supreme Judicial Court. Walker was a slave, bought as an infant by James Caldwell of Worcester. Caldwell died, and his widow married one Nathaniel Jennison. At the age of 28 Quock Walker, claiming that Caldwell had promised him his freedom at 25, ran away. Jennison found him, beat him and brought him back. Jennison was prosecuted for assault and battery. His defense was that slavery was well-established in Massachusetts, and he had every right to seize and punish a runaway.

The Supreme Judicial Court was unchanged in its membership since the constitution came into force: five gentlemen of the old school, soundly conservative. But they were well aware of the new constitution which, as Chief Justice William Cushing put it, “sets off with declaring that all men are born free and equal and that every subject is entitled to liberty.”

The court did not publish a judgment. But Chief Justice Cushing described his views fully in a notebook that he kept. Jennison's lawyers argued in defense, he said, “that rights to slaves, as property acquired by law, ought not to be divested by any construction of the constitution by implication; and that slavery in that instrument is not expressly abolished.” But the Chief Justice disagreed. “Slavery,” he wrote, “is in my judgment as effectively abolished as it can be by the granting of rights
and privileges wholly incompatible and repugnant to its existence....Perpetual servitude can no longer be tolerated in our government...."

Twenty years before Marbury v. Madison, the Massachusetts court enforced a constitution as law. It did not confine the reach of the constitution to its literal words. It was not deterred from its conclusion by the fact that the text did not expressly abolish slavery. It did not examine the intention of the framers.

I think the judges of the Supreme Judicial Court in 1783 did what they were used to doing as common law judges: shaping the law, case by case, to meet “the felt necessities of the times.” That phrase—I am sure you know—comes from the opening passage of Justice Holmes’s “The Common Law.” In deciding cases, he wrote, judges are moved by “the felt necessities of the time, the prevalent moral and political theories, intuitions of public policy....”

Reading Chief Justice Cushing’s notes, one feels that his thinking was shaped exactly as Holmes describes. The American Revolution had changed attitudes, he said. “Sentiments more favorable to the natural rights of mankind, and to that innate desire for liberty which heaven, without regard to complexion or shape, has planted in the human breast—have prevailed since the glorious struggle for our rights began.”

As American judges began to interpret the Federal Constitution, they naturally used the techniques familiar to them—the techniques of the common-law decisional process. Case by case, they applied principles to changing facts and conditions. A good example is the Charles River Bridge case, decided by the Supreme Court in 1837. In the Dartmouth College case eighteen years earlier the Court had held that New Hampshire’s attempt to change Dartmouth’s trustees despite the college’s royal charter violated the contract clause of the Constitution. Now a company operating a toll bridge over the Charles River under a Massachusetts state charter claimed that it was a violation of the contract clause for the state to charter a new, competing bridge. The Court rejected the claim. If it prevailed, Chief Justice Taney wrote, “what is to become of the numerous railroads established on the same line of travel with turnpike companies, and which have rendered the franchises of the turnpike companies of no value? ...We shall be thrown back to the improvements of the last century.” The felt necessities of the time.

I am indebted to Mark Kozlowski of the Brennan Center for Justice for that example and more. During the first half of the Nineteenth Century, he says in a paper on the judiciary, American courts transformed “virtually all categories of private law in ways conducive to the expansion
of a national market economy.” Common-law judges created rules “appropriate for a national commercial order.”

The creative adjustment of the common law to meet economic needs did not stop in the Nineteenth Century. A celebrated example was the work of Cardozo on the New York Court of Appeals. In MacPherson v. Buick in 1916 the plaintiff had bought a car with a defective wheel. Cardozo overturned the old rule that required him to sue the dealer—who had few resources and little responsibility for the defect—and instead allowed him to sue the manufacturer. Cardozo’s successor, Chief Judge Judith Kaye, has called the decision “the perfect vehicle to guide the law of torts in an increasingly motorized, mobile, mass-produced society.”

Why do I mention the common law in a talk about today’s attacks on the courts, attacks aimed largely at constitutional decisions? Because the attackers say it is not the business of judges to reshape the law; that, they say, is the job of legislators, who have democratic legitimacy. But it has been the business of judges for centuries: Anglo-American judges creating the common law. We live under regimes of human relationships substantially defined by judges.

Of course it is true that constitutional decisions are different. They cannot be revised by legislatures, which can and do override other judicial decisions. A constitutional judgment of the Supreme Court that offends the basic sense of the American people is unlikely to last. Think of the Dred Scott case, overruled by war and constitutional amendment, or the number of decisions overruled by the Court itself. But the great power of judges to say no to legislators and executives, the power of judicial review, does require a different level of justification.

The first thing to say is that the Framers of the Constitution expected judges to play that role. They were worried about abuse of power by legislators. As Madison put it in The Federalist, “the tendency of republican government is to an aggrandizement of the legislative at the expense of the other departments.” And they wanted judges to prevent that abuse. The limits on legislative power, Hamilton said, “can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void.”

From the beginning, the Supreme Court and other courts made decisions that today’s attackers would surely award their most dreaded adjective, activist. Marbury, which stood alone for decades in striking down an act of Congress, is not the only significant example. Think of the impact of such cases as Gibbons v. Ogden, holding a state restriction on commerce
invalid even in the absence of a directly relevant federal statute. And of McCulloch v. Maryland, upholding Congress’s charter of the Bank of the United States as within federal power, with Chief Justice Marshall’s expansive declaration: “We must never forget that it is a constitution we are expounding...a constitution intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs.” Without those decisions and others like them, the country we know would not exist today.

The attackers sound as if only today’s judges were, in their view, unduly bold. The past was a glorious time when modest judges kneeled to politicians, murmuring like Uriah Heep, “I’m an ‘umble man.” But the narrow literalist, mode of interpretation has not dominated our two hundred years of constitutional adjudication. Nor have many of our judges accepted the notion that the meaning of a clause is forever fixed.

Long before “originalism” became a vogue theory, Chief Justice Hughes wrote: “If by the statement that what the Constitution meant at the time of its adoption it means today it is intended to say that the great clauses of the Constitution must be confined to the interpretation which the Framers, with the condition and outlook of their time, would have placed upon them, the statement carries its own refutation.”

Has it been good for us, for the country, that judges have exercised their power as they have? We all know that there have been excesses, self-deluding adventures. But it is also unarguably true that we have relied on the courts for change in the law that was essential to this country and that could not have come from any other source.

Race is the obvious example. With few exceptions, not even the fiercest attackers criticize the Supreme Court for finding racial segregation unconstitutional. My guess is that some must object to the Brown decision for its boldness but do not say so for fear of losing their audience. The fact is that Brown v. Board of Education irresistibly illustrates why judicial review is necessary in this country and why judges must, as Holmes said, consider constitutional questions “in the light of our whole experience.”

When the Supreme Court decided Plessy v. Ferguson in 1896, it said that racial segregation was a stamp of inferiority only if those segregated chose “to put that construction upon it.” No one could assert that proposition in 1954, after Hitler, after the marking of Jews with yellow stars was followed by the Holocaust. The principle laid down in 1868 had to be applied in light of the reality, now understood, that segregation is a stamp of inferiority.
Brown v. Board of Education also illustrates the radiating effects a judicial decision can have in our system. When it was decided, blacks lived as helots in much of the American South: not just confined to separate and grossly unequal public schools but kept out of “white” hospitals and hotels and restaurants, in many areas prevented by trickery and violence from voting.

In the Brown decision the Supreme Court told whites in the South that white supremacy was wrong. Just as important, it told southern blacks that, whatever local law and its enforcers said, the fundamental law of the country was on their side. That was a crucial encouragement to blacks to struggle for their rights. It takes nothing away from Dr. Martin Luther King Jr. to understand that his great protest movement rested on the legal and moral foundation of the Brown decision. It takes nothing away from the courage of Rosa Parks to recall that the Montgomery bus boycott did not succeed on its own. Segregation on those buses ended when the Supreme Court held it unconstitutional.

The Brown case also had profound effects on the legislative process. Through the first half of the Twentieth Century all attempts to pass civil rights legislation, even to deal with something as egregious as lynching, were stymied by Southern filibusters in the Senate. Three years after Brown, Congress passed a civil rights bill for the first time in eighty years. I was there, and I can tell you that it happened only because the Supreme Court had focused the country’s attention on the injustice of racism. The process started then went on in the next decade to the passage of the Voting Rights Act and the transformation of the South.

Just as the courts led the way to the end of official racism, so have they played an irreplaceable part in making this country the freest on earth in what we may think and speak and write. We were not blessed by nature with an open society. Episodes of repression run through American history. Think of what happened to a group of radicals who in 1919 threw leaflets from rooftops in New York protesting President Wilson’s dispatch of troops to Russia after the Bolshevik Revolution. They were convicted of sedition and sentenced to twenty years in prison. The Supreme Court rejected their appeal. But the case produced the first Supreme Court opinion, ever, that treated free speech as a fundamental constitutional value: Holmes’s dissent, joined by Justice Brandeis. Holmes called, famously, for “free trade in ideas” and said “the best test of truth is the power of the thought to get itself accepted in the competition of the market.”

Through the 1920s Holmes and Brandeis dissented from decisions
suppressing speech. Gradually, their words convinced the Court, and the
country. We are free now to use rancid hyperbole, to mock preachers,
even to criticize judges. Race and speech came together in 1964 when the
Supreme Court blocked an ingenious Alabama attempt to use punitive
libel judgments to intimidate the national press out of covering the civil
rights movement. The very critics who attacked the New Jersey decision
requiring the Boy Scouts to stop excluding gays now look to the Supreme
Court to hold that it would violate the free speech rights of the scout
organization to make it effectively express a view it does not hold.

Years ago I was at a seminar of lawyers and judges and journalists
that Justice Potter Stewart had agreed to attend—on condition that he
not be asked to speak. But as one journalist after another complained
that judges were not holding the rights of the press inviolate in every
case, Justice Stewart could stand it no longer. “You complain about these
terrible judges not protecting your rights,” he said. “Where do you think
those rights came from? The stork didn’t bring them! The judges did.”
Exactly—to the press and the rest of us.

Why are courts better-equipped than politicians to deal with such
issues as freedom of expression and racial discrimination? The question
takes us back to Justice Barak of Israel and his argument for constitu-
tional limits enforced by judges.

In political life there is always a risk that majorities will suppress mi-
norities and insulate themselves from criticism. A group that holds power
may—often will—try to keep it, as state legislators from depopulated rural
areas did by refusing to redistrict until the Supreme Court forced a
change. Judges, if they adhere to their commissions, can be more de-
tached from such interests—can, at least, if they are not subject to elec-
tion: a point to which I shall return. They have more mental space, more
distance from public prejudices and fears. There were Southern politicians
who knew that racism was wrong, but they dared not say so. Federal judges
could.

Criticism of judicial power is not unique to our time. Every age has
had its critics, from Jefferson on. The criticism generally depends on whose
ox is being gored. An American politician tried to stop a protest march.
When a federal court allowed the march to go ahead, he called it “impe-
rial.” When his appeal was rejected, he said federal judges “think they
were put here by God.” Was that Governor George Wallace of Alabama?
No, it was Mayor Rudolph Giuliani of New York.

When the Supreme Court was under attack from the left in the 1930s
and Roosevelt proposed his Court-packing plan, a conservative columnist
of the day, David Lawrence, wrote: "To say that this tribunal of nine men shall not henceforth declare the supreme law of the land is to say in effect that we must change our form of government and substitute the rule of passion for the rule of reason."

O tempora! O mores! Today conservatives are the attackers. And the attack is of a different order from the past episodic criticism of the courts. It is more determined, more sustained, more menacing. It is not a regional phenomenon, like the denunciations of the Warren Court over the Brown case. It engages think tanks and lobbying groups and politicians. And its weapons are not only words.

In recent years Congress has several times responded to judicial decisions it disliked by stripping the federal courts of jurisdiction to consider those issues. There is a precedent for that step in our history, an unhappy one. During the Reconstruction period after the Civil War, the Radical Republicans in Congress removed the Supreme Court's jurisdiction to hear a category of cases in which the Court seemed likely to hold unconstitutional harsh features of military rule in the South. The Supreme Court upheld Congress's power to do so in Ex Parte McCardle, a decision much questioned. I had thought the episode was so universally regarded as ignoble that it would not happen again. I was wrong.

In the Anti-Terrorism Act of 1996 Congress drastically limited the ability of state prisoners to challenge the constitutionality of their convictions and sentences in federal habeas corpus proceedings. The reason was irritation that such collateral attacks had delayed the execution of prisoners sentenced to death. The result was to cripple an important method of preventing injustice. A movie now in theaters celebrates the case of Rubin Hurricane Carter, who was freed on federal habeas corpus after being wrongfully convicted of murder in New Jersey. If the new statute had been in effect, he would still be in prison.

The Immigration Act of 1996 bars judicial review of many decisions of the Immigration and Naturalization Service. What the INS decides may have severe consequences, depriving people, in Brandeis's phrase of "all that makes life worth living." Judicial scrutiny of its work seems to me especially necessary. But the members of Congress who changed the law thought the courts were deciding too many cases against the Government. President Clinton signed the legislation without objection, as he did the bill gutting habeas corpus.

Representative Tom DeLay of Texas, the House majority whip, has called for impeachment investigation of several sitting federal judges because they had decided cases in a way that he did not like. When he
was accused of trying to intimidate judges, he said they “need to be intimidated. If they don’t behave, we’re going to go after them in a big way.”

Impeaching judges because of their decisions is, like selectively revoking their jurisdiction, an idea that was tried long ago, and we thought abandoned. In 1804 the majority Jeffersonians in the House of Representatives impeached Justice Samuel Chase of the Supreme Court because of the Federalist political views he had expressed from the bench. But he was acquitted by the Senate, an outcome that Chief Justice Rehnquist has said assured the independence of federal judges. Today we have to wonder whether it really did.

State judges who are subject to elections face pressures of a different order. They have lost elections because they have displeased particular interests: by deciding to set aside capital sentences, for example, or deciding in favor of plaintiffs in tort cases. (Think what might have happened to Justice Cardozo if there had been an effective tort defendants’ lobby when MacPherson v. Buick was decided.) A recent Bill Moyers television documentary described the pressure put on a member of the Louisiana Supreme Court—effective pressure, it seems—after a lawsuit stopped a chemical company from building a plant in a heavily-polluted area.

The different manifestations of antagonism to judges—denouncing them as imperial elitists, stripping away their jurisdiction, threatening their tenure—have a common effect. It is to challenge the independence of the courts, to challenge the legitimacy of the role they perform.

If the American people were asked squarely whether they wanted to do away with judicial independence and the constitutional role of judges, I am sure the answer would be no. In 1937, the Supreme Court had held a series of popular New Deal measures unconstitutional. President Roosevelt had just won re-election in a landslide. Yet when he moved against the Court, the public rallied to its defense.

After the Court-packing episode, Justice Robert H. Jackson wrote: “Public opinion...seems always to sustain the power of the Court, even against attack by popular executives and even though the public more than once has repudiated particular decisions....The people have seemed to feel that the Supreme Court, whatever its defects, is still the most detached, dispassionate and trustworthy custodian that our system affords for the translation of abstract into concrete constitutional commands.”

That remains a fair statement, I think, of the way many of us feel. We have no illusions that judges are any more perfect than the rest of us. One does not have to go back to Dred Scott to find terrible mistakes by the
Supreme Court: the decisions, for example, that economic regulation denied due process of law. Or the decision that the pathetic remnants of the American Communist Party in 1951 presented a sufficiently clear and present danger of something to override the First Amendment. Or, for me, the present majority’s outlandish expansion of state sovereign immunity. But with all that, we still trust the Supreme Court more than legislators and executives to make the ultimate constitutional judgments.

Can anyone who really faces the choice think that alternative constitutional arrangements would be preferable? We could be like Peru, and have the President simply remove judges who thwart his wishes. Or we could adopt Hong Kong’s system. Decisions of the territory’s highest court on the meaning of its basic law can be, and have been, overturned by a committee of the National People’s Congress.

I do not think those alternatives would commend themselves to the American people. The trouble—the danger—is that the issue is not being put to the public squarely, and will not be. Instead, the attackers are undercutting the courts in ways that attract little attention. When Congress crippled federal habeas corpus, there were few meaningful reports in the press, much less on television. The same was true when Congress eviscerated the role of the courts in immigration cases. Those statutes dealt only with prisoners and immigrants, after all; who cares about them? As Pastor Niemoeller said.

The danger is serious, ladies and gentlemen. There are forces in this country that are impatient with the constraints of law. In politics, the power of money is dominant. The question is whether the third branch, the courts, can preserve their fragile independence.

The answer is up to all of us. We cannot look to a Congress that is increasingly partisan and headstrong to support the judges against rising pressures. I wish I believed that the President of the United States would speak up for the independence of the courts, as President Mandela did in South Africa. But recent experience gives me little hope of that.

Lawyers are going to have to lead the fight. The integrity of the courts should be the prime rallying cry of the organized bar everywhere. When the attackers make their hateful statements, lawyers should answer. When a critic says we should let Congress overrule what judges decide, lawyers should point out what that would mean to all of us. When Congress considers proposals to strip courts of their jurisdiction, lawyers should make sure the press pays attention. And I think judges, understandably reluctant to respond to even the most ignorant attacks, are going to have to begin speaking out.
The idea of constitutionalism—making governments stay within limits—has been the great American contribution to governance. More and more of the world is copying our model. If we understand the threat, I cannot believe that we will permit the destruction of our constitutional faith.
Orison S. Marden Memorial Lecture

Adjudicative Justice in a Diverse Mass Society

Jack B. Weinstein, Senior Judge, United States District Court, Eastern District of New York, delivered the Orison S. Marden Memorial Lecture, January 13, at the Association.

EDWIN J. WESELY

When the Committee determined back in the summer of last year that the first Marden lecturer in the new millennium should be Jack Weinstein, I was the Committee member deputized to obtain his consent. I went over to Brooklyn and we talked and, of course, his Honor consented.

As I was about to leave he said, "Wait a minute, Ed. I want to tell you a tale of ancient Poland"—please bear in mind that Judge Weinstein is 77-years-old—and he tells me the following story: "The Count summoned the Chief Rabbi from the ghetto to the Castle. And he said ‘Rabbi, tomorrow is my birthday.’ So the Rabbi said ‘Happy Birthday, Count.’ And the Count said, ‘For my birthday, Rabbi, I want you to teach my dog how to sing Happy Birthday to me. And if you don’t, you will see the worst pogrom there ever was in Poland.’ So the Rabbi goes home and he tells this to his wife who says, ‘No, no, no! That’s impossible. Go back and talk to the Count.’ So he goes back to the Count and returns home absolutely elated and his wife says, ‘Well, what did the Count say?’ And the Rabbi says, ‘Well, the Count said ‘Maybe I was a little arbitrary. It’s OK if you teach my dog to sing Happy Birthday to me for my next birthday.’ And
his wife says, ‘What’s so good about that?’ And the Rabbi says, ‘Well, between now and then the Count may die. Between now and then I may die. Between now and then the dog may die. And maybe between now and then I’ll teach the dog to sing Happy Birthday.’ ”

This was his Honor’s way of saying, “Yes, I accept to deliver the Marden Lecture, but you better have a backup.” Thank God he’s here.


How do you introduce someone who has been United States District Judge for more than 32 years, issued thousands of rulings, well more than 600 published decisions, mostly exhaustive opinions, and presided at well over 1,000 trials; an innovator, a quintessential activist; a man of infinite compassion? How do you introduce someone who has authored 57 books, some of them 7 volumes long? I don’t know. How do you introduce someone who has turned out a law review piece every two weeks or so? How do you introduce someone who has gained the admiration of thousands of law students—idolized by many—who has sat on the boards of humanitarian organizations and on important national panels? How do you introduce someone who has received 14 recorded awards, medals, and honorary degrees? I don’t know. And he is about to receive another one on January 26th.

How do you introduce someone who has done everything I have told you and grew up as a Depression-era kid in Bensonhurst, whose gifted mother and father were not permitted to go beyond grade school because at 12 years of age they had to work to help support their families; a man who toiled on the Brooklyn docks for seven years to put himself through Brooklyn College at night, publicly acclaiming the men with whom he worked who covered for him from time to time so that he could get to class on time?

How do you introduce someone who as a full lieutenant in the United States Navy tutored a black messman in trigonometry? I don’t know. I do know that in World War II the highest rank to which a black man could aspire in the U.S. Navy was messman.

And how a man of his height walking around a submarine for four years came out of the Navy with his head intact, I don’t know.

How do you introduce someone who never gets more than four hours of sleep a night, who wakes up his wonderful and extraordinarily tolerant wife, Evie, at 4:00 or 5:00 A.M. to try out his latest brainstorm.
How has one man, in one lifetime, accomplished these mighty and enormous achievements? I don’t know.

Professor Kaufman says that he spent forty years researching and writing his biography of Judge Cardozo. For his Honor’s biographer, we better recruit a teenager.

All I do know, distinguished gentlemen and gentlewomen, is that it is the highest privilege to introduce to you a giant of a judge, a giant of a scholar, a giant of a teacher. I stand in absolute awe at The Honorable Jack B. Weinstein.

Your Honor has enlightened us, inspired us, directed us in new ways that we may be of public service. Your Honor is and continues to be a powerful beacon for how we may be—each of us—a contributor to a better world in this new millennium.
I. PRELIMINARY

I need hardly tell you how overwhelming is this honor of delivering an Orison S. Marden Lecture, particularly after being introduced by Ed Wesely. Ed’s leadership of United States and International CARE and other organizations has improved the lives of millions of people around the world. In our court his long chairmanship of the Lawyers Advisory Committee has enormously elevated our ability to conduct efficiently civil and criminal litigations. As a young professor at Columbia, I was relieved to have him take over my clinic for Public Service and Legal Aid organizations.

Ed reminds me of Harry Tweed. Tweed—whose paean to lawyers is inscribed in gilt on this podium—headed a Commission in the fifties to reorganize New York’s courts. When Tweed spun me off to work on what became the New York C.P.L.R., he gave me a medallion, scratching his initials on the back. I take this occasion to pass on to Ed Wesely the Tweed Medal with gratitude and affection.

Fifty years ago when I clerked for Judge Stanley Fuld, he suggested that I join this Association. Here I was taught the rule for the lawyer who
wants to live an exciting and fruitful professional life: Seek the opportunities for public service, almost always the most satisfying aspect of a legal career.

I have been asked to speak on adjudicative justice in a diverse mass society as it affects the poor. This has been a particularly difficult lecture for me to prepare. Partly, I think, because I am in awe of so many of you who have achieved so much in protecting the less advantaged, often at considerable sacrifice to your own financial and familial responsibilities.

For litigators and judges our most important obligation is to ensure that all people have an equal opportunity to protect their substantive rights fairly and well—through formal court adjudications when necessary. Equality of substantive law and of opportunity outside the courtroom is not a problem I will directly address tonight.

I will focus on the advantage and limits of different models that we use to equalize procedures in enforcing the rights of those whom I will call “the poor.” This group encompasses an enormous diversity of persons and conditions. Some are able and aggressive. Some are passive. Some have such emotional and other problems that they almost defy help.

Partly because of the tremendous reductions in public funding for legal assistance, many who need help are unable to obtain adequate legal representation. Lawyers are not present when and where they are needed. Even if they are provided, they often lack the financial incentive to put in the necessary work. Chief Justice Rehnquist recently decried the low level of pay that appointed defense counsel receive. And New York Chief Judge Judith Kaye has just called for higher fees for these individuals. It is a shocking aspect of our present system that the public treasury, so profuse in building prisons, is so miserly in providing legal services.

II. WHY EQUALITY?

What is the rationale for our concern with equalizing opportunities in adjudication? Under the First Amendment, pure religious doctrine is not an adequate foundation for our secular courts’ policies of equality.

A more acceptable legal reason for our obligation to help the poor procedurally is based upon constitutional and other legal developments since the Declaration of Independence. Strong support for equality exists in the various post-Civil War amendments and post-World War II constitutional, statutory and case-law developments.

Apart from specific legal requirements, each of us must recognize the enormous debt that we owe to prior generations, upon whose shoulders
we stand. Everything—from developing fire to computer technology, from methods of organizing large groups of people to developing the rule of law—provides a foundation for the present wealth and well-being of each of us. No one of us has added more than a minuscule amount to the total human capital that we live on. Each of us is entitled to share in our joint inheritance, particularly in the rule of law and our system for protecting rights.

The public courts are paid for by all citizens and are kept in trust for all of us. Each person is entitled to equal access to this communal asset as well as to all the other alternative means for delivering this public service enforcing substantive rights. As beneficiaries of a near monopoly, we lawyers must provide access to this glorious public good—the law—for all.

III. THE FIVE MODELS

We utilize five models in our attempt to achieve this ideal of procedural equality. They are:

- First, entrepreneurial contingency fees and profits to lawyers.
- Second, pro bono assistance by individual lawyers and by lawyers doing legal aid and like work for relatively low compensation.
- Third, judicial balancing, that is direct action by judges.
- Fourth, mass litigations in which the poor are treated in the same way as the well-to-do through devices such as class actions.
- Fifth, administrative protections such as payments to the disabled through Social Security.

Ours is a complex, tripartite, free-enterprise-welfare-philanthropic system, and so too is our justice system. My remarks will focus on the final two models, but I will touch upon the first three.

A. The First Three Models

1. Entrepreneurial

One important technique is entrepreneurial. Those who arguably have a claim that is likely to result in a profit to a lawyer will be protected—with the lawyer even advancing costs of discovery and fees.

Lawyers advertise in newspapers, on TV and in the subways. They remind everyone of their power to litigate and enforce their rights. If you
have a problem and some initiative and if there is a good possibility of
the attorney earning a substantial contingency fee, the case will probably
be prosecuted with skill and energy. A poor person who has been hit by a
car and seriously hurt or has been harassed because of gender on the job
can get a lawyer. But if you are poor with an immigration problem or
have been denied welfare or are being abused in a nursing home, you
better have some money to pay a lawyer up-front—Catch 22! While this
system protects (and sometimes overprotects) individuals with limited types
of claims, it provides virtually no remedy for those impoverished folk who
have the law on their side but lack the possibility of a financial windfall.

2. Pro Bono

Second is the pro bono model utilized, for example, in such diverse
areas as landlord-tenant or immigration disputes or major civil rights cases.
There are two main divisions: First, are the contributions of many indi-
vidual lawyers, large and small law firms, and law school clinics. They devote
enormous effort to poor persons’ cases without hope of compensation.

This work serves to energize the bar as a whole and has been strongly
couraged by bar associations. It provides us with a sense of our own
dignity in upholding the grandeur of the law. In a sense, it ennobles all
in the legal profession.

Second is the large contribution that is made by those who work for
far less than they would be able to earn in other forms of private practice.
They are employed in organizations such as Legal Aid, Nassau-Suffolk
Legal Services, the NAACP Legal Defense Fund, Neighborhood Law Offices
and even governmental agencies. They are subsidizing the poor by their
relatively low salaries.

The law schools are beginning to recognize the subsidy contributed
by many of our young colleagues. Schools like Columbia and Yale are
assisting them by reducing the heavy load of debts incurred for law school
tuition so they can afford to work for the poor.

Volunteers such as the national- and state-funded ombudservice pro-
tect the aged and infirm in nursing and adult homes. These and other
volunteer services, often advised by pro bono lawyers, enormously aid in
protecting substantive rights of those who cannot help themselves.

3. Judicial Intervention

The third system of equalizing is through judicial intervention or
balancing.

There are severe limits on judges’ attempts to level the playing field.
The technique seems contrary to our conception of blind justice carrying
a scale without a thumb on it. To have the judge lean toward one side or another offends our sense of impartiality of justice.

Sometimes, however, the court properly intervenes, as by appointing an attorney from a panel of lawyers, particularly in social security, habeas corpus and civil rights cases.

Frequently, particularly in the area of sentencing, it is essential that the judge step in to balance the power and cruelty of a particular prosecutor or of our present system of excessive and rigid sentencing.

The rich youngster can have psychiatric and other help which will give some assurance of rehabilitation. The poor generally lack that system of private support. Increasingly, I think we have to consider providing defendants with a realistic chance to prove they can be rehabilitated. We may need to subsidize the cost of education and medical treatment—including that for mental disabilities—of poorer defendants for a year or two in society while they await sentence, so that they can show that they have been rehabilitated.

B. Mass Actions

I turn now to mass actions. I have presided over the Agent Orange, Asbestos, Breast Implants, Repetitive Stress Syndrome, and DES cases, as well as many civil rights, education, and prisoner cases. Some say class actions deprive people of due process. I think they are wrong.

The main advantage of such mass actions is that one litigation protects the rights of many. Persons who would otherwise have claims that are too small to warrant the attention of entrepreneurial lawyers or who simply do not know that their rights have been violated can be protected. Such suits can result in a questionable form of equalization: They tend to elevate the recovery of those with the most modest claims above what might have been obtained in individual trials while reducing recoveries for those with the most potent claims. That problem is largely obviated by the fact that the people with the best claims can opt-out and litigate on their own behalf, although this is something they seldom do.

Class actions also offer a great advantage to defendants, enabling them to bring to a close complex disputes so that they can get on with their affairs and avoid the continuing drain and transactional costs of long-drawn-out litigation. Typically, even large settlements result in an increase in stock market value of corporate defendants. Prison and education authorities also often welcome an authoritative, face-saving decree; class actions are then a force for advocacy of social gain.
Increasingly, in our integrated global-electronic-communication society, we find people from all over the world using our almost unique procedures for class actions to meet worldwide tort and other problems of the oppressed. Already, we have entertained actions against foreign tyrants from the Philippines to Paraguay, as well multinational corporations, banks and large institutions that cheated and abused individuals during and following the Nazi regime.

Expanded bases for in personam jurisdiction may now be utilized by our courts although, ultimately, statutes or treaties will be required to control such cases. Choice of law issues and federalism problems raise other difficulties. Even with all of these complexities, mass actions have remained a potent and effective device for protecting individuals.

Yet, there is a growing antipathy, particularly in the appellate courts and in legislatures, to mass actions that will protect the rights of many of those outside the mainstream of our society.

Some justification for this opposition to class actions and other forms of consolidation does exist. They can be powerful clubs against defendants who may be overwhelmed by the risks involved in opposing them. They can be used to craft collusive settlements for the benefit of plaintiffs' attorneys and defendants. But such risks and other problems can be met by strict and strong judicial control.

C. The Administrative Model

Governmental administrative regulation is a pervasive and often effective method of enforcing substantive rights.

In many instances this is the most desirable and effective technique although it has been under attack by free-market, anti-government ideologues.

Administrative units of the government protect all of society. Examples are the worker protecting Office of Health and Safety Administration (OSHA) regulations and those enforcing automobile, aircraft, consumer products, pharmaceuticals and meat packing controls that are designed to avoid injury to everyone, rich or poor. Fixed payment worker compensation insurance programs fall into this group as well.

Administrative agencies sometimes have authority to fine as well as to investigate and regulate. This power to deter redounds to the benefit of all who need protection of their substantive rights. It is useful in such diverse areas as child vaccines, black lung disease, workers' compensation for on-the-job injuries and the like.

Problems do exist with this model. The administrative technique lacks
the independent guarantees of the entrepreneurial. There is a tendency of administrative agencies to be captured by the groups that they are regulating. Legislatures may cut the available resources if the administrative agency becomes too effective in controlling favored groups.

IV. FUSING MASS TORT AND ADMINISTRATIVE PROCEEDINGS

While the mass tort and administrative models have strengths and weaknesses when standing alone, the fusion of the two models offers several advantages. This can occur when the two systems work in unison, for example, by having claimants before an administrative agency act as a class. The two systems can also act in opposition, as by having potential unfairness in the administrative system dealt with through a class action suit.

One problem with multiple models is that they can make duplicative action necessary. An example of this is occurring in a case currently before me. I am presiding over a criminal prosecution for stock fraud; in Washington, there is an SEC court action against the same individual; and, in the Southern District, there is a class action by the defrauded investors. All three must fix and distribute a monetary penalty for the same act.

In order to avoid this waste of judicial resources and to ensure that those injured are fully compensated, it would be desirable to meld the administrative and criminal law power with mass action techniques. For example, the government could distribute any money it received to those injured in the form of fines or restitution, obviating the need for a separate class action. This change could also avoid the problems associated with excessive multiple punitive damages.

I have followed this “French” model in a number of criminal cases, using restitution orders as part of the sentence.

Another illustration of how mass tort actions and administrative controls are related is illustrated by the repetitive stress injury cases. Appellate courts had a jaundiced view of this litigation, designed to recover for workers in areas as diverse as meat packing and office computers. Tort consolidation or class action techniques might have been useful in dealing with the risks associated with failure to protect against such injuries.

Although the litigation system failed in its role as an interim stopgap, OSHA did ultimately become concerned. It is in the process of issuing regulations that should reduce considerably the repetitive stress syndrome injuries in our factories and offices.

Class actions also provide a potent device through which the court
system can monitor administrative agencies to ensure fairness. One of the most pervasive and important administrative programs is the Social Security Disability system.

This system generally works well—though delays because of routine denials at the lower bureaucratic levels are common. Problems result from the fact that poorer claimants sometimes do not have adequate medical-treatment histories. They have been served in clinics or not at all. The middle and upper classes generally have had fee-for-service doctors who have full records and who will support their patients. Medical service inequalities outside the law make it more likely that inequalities will exist in the law. There is always this interplay between the lack of resources and status in substantive areas and the carry-over into adjudicative inequality. Sometimes we allocate money from our privately supported Eastern District Litigation Fund to hire consulting physicians for claimants in these social security cases.

This Social Security Disability program has not always worked to the advantage of beneficiaries. When system-wide failures occur, the class action model has been of assistance.

Some years ago, I presided over an action brought on behalf of a group of mentally ill individuals, most of whom were schizophrenic. To help balance the federal budget, the Social Security Administration had illegally and surreptitiously followed a rule assuring that severely mentally disabled claimants were found to be able to work. Evidence adduced at trial demonstrated the existence of this clandestine policy, enforced by lying psychiatrists and bureaucrats. Class-wide relief was ordered.

When a court merely acts on a case-by-case basis, it may not be able to recognize or respond to a system-wide deprivation within an administrative agency. At this point, class actions may be useful.

V. CONCLUSION: WHAT IMPULSE MUST DRIVE US?

Finally, we come to the core of our identity as lawyers: What should be the attitude of the good lawyer, the good judge, and the good legal system in adjudicating the rights of the poor?

Any empathic approach necessarily forces us to reconsider an ethical relationship to the world outside the law. How can people be expected to consider the needs of others?

This inquiry brings us around full circle.

We know, for example, that unless there is a good deal of love and affection for youngsters in a secure family life, the probability of their
growing up imbued with altruism and a sense of responsibility for fellows is substantially reduced. We have to be careful, for example, in sentencing or in enforcing our laws on the homeless to avoid separating parents from children who depend upon them for love and affection. We want to reduce the likelihood of a new generation of criminals or homeless.

Although I undertook to limit my remarks to adjudicative equality, necessarily, the obligation of lawyers must be set in the context of a fair and just society.

It is only a just society that will, over the long run, permit lawyers to guarantee equality inside of our courtrooms and our administrative and mediation organizations. It is only a just and good people who can provide a just society. To meet our high responsibilities then, we must try to improve the lives of our fellows inside and outside the adjudicative process, and in our own hearts. Contrariwise, by elevating our ethical stance for the poor in adjudication we provide a model for all society.
The English Patient or the Spanish Prisoner?
Reflections on the Pinochet Prosecution, Jurisdiction and the International Criminal Court

The Committee on International Human Rights and the Committee on Inter-American Affairs

INTRODUCTION

On October 17, 1998, Augusto Pinochet, Chile's former President and current “Senator for Life,” was arrested in a London hospital while receiving medical treatment. The arrest was made pursuant to a warrant issued in the United Kingdom to extradite Pinochet to Spain to stand trial in a domestic Spanish court for crimes committed primarily in Chile between January 1976 and March 1990, while Pinochet was Chile's head of state. A few of the charges had links with Spain, but most did not. On March 24, 1999, the Law Lords, the U.K.'s highest tribunal, held that Pinochet was not immune from prosecution and could be extradited, but only for a fraction of the crimes alleged—torture and conspiracy to commit torture.
occurring after December 8, 1988, the date that the United Kingdom incorporated the Torture Convention\(^1\) into U.K. law. On October 8, 1999, a U.K. magistrate ruled that all the conditions were in place for extradition to proceed.

Whether or not Pinochet is ultimately prosecuted, the Pinochet case is historically unique: no former head of state has ever been held outside his own country for extradition to another country on charges of human rights violations. Although recent developments suggest that, due to health reasons, Pinochet may never stand trial, the case against him raises a number of significant legal issues for the international community. These include whether former (or current) heads of state enjoy immunity from prosecution and, if not, in which jurisdictions prosecutions against them may be appropriately pursued. Questions have been raised, for example, as to whether human rights prosecutions should occur in a domestic court of a country, such as Spain, with only a limited nexus to the events at issue, or whether it would be preferable to have a Chilean court (were that practicable), or an international tribunal (were there one with jurisdiction), hear the case. Particularly in light of the limited connection that Spain has to the abuses that Pinochet is alleged to have carried out during the period of his rule in Chile, and the historic unwillingness of the Chilean judiciary to prosecute him effectively, the Pinochet case has placed the spotlight, once again, on whether there is a need for an international tribunal with jurisdiction to hear such cases.

In Part I of this report, we set out briefly the factual background to the Pinochet case: Pinochet’s years in power in Chile, his transition from power, his immunity grant under Chilean law, and the proceedings lodged against him in both Chile and Spain. In Part II, we discuss the proceedings to extradite him from the U.K. to Spain and the Law Lords’ historic March 24, 1999 decision. In Part III, we review some of the challenging issues that the case has posed. While not purporting to offer definitive answers, we conclude that:

- The Law Lords were right to hold that Pinochet is not immune from prosecution for torture, notwithstanding his status as a former head of state, and their decision is a valuable precedent in the field of international law;

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\(^1\) The “Torture Convention” refers to the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, 23 I.L.M. 1027 (Dec. 10, 1984), as modified, 24 I.L.M. 535 (1985).
Because the Torture Convention, as well as other human rights instruments, specifically authorize decisions by national courts, and because there is as yet no international criminal court, courts of third-party states are likely to exercise jurisdiction over foreign nationals, potentially including former and even current heads of state;

- Spain’s exercise of jurisdiction in the Pinochet case is amply supported under international law. In addition, prosecutions in third-party states can serve an important role in ensuring that gross violators of international human rights standards do not escape punishment. Nevertheless, the legitimacy of these efforts and the more consistent application and principled development of international law would be better secured if, in the absence of action by the defendant’s own state, prosecutions of the kind against Pinochet were handled by a single international tribunal; and

- The Pinochet case should cause the United States to reconsider its current hostility to the statute designed to create an international criminal court—the Rome Statute—\(^2\) in part because the case demonstrates that prosecutions of U.S. nationals abroad may go forward even if no such tribunal exists.

I. FACTUAL BACKGROUND: PINOCHET’S YEARS IN POWER, HIS GRANT OF IMMUNITY AND PROCEEDINGS AGAINST HIM IN CHILE AND SPAIN

A. Pinochet’s Regime

On September 11, 1973, a military coup led by Augusto Pinochet overthrew the democratically-elected government of President Salvador Allende, ushering in a 17-year military dictatorship. The Chilean military quickly established control over the country, ruling through a Junta del Gobierno. It declared a state of emergency and suspended most constitutional guarantees. General Pinochet became President of the Junta in 1973 and was named President of the Republic in 1976. Pinochet not only ruled the country as head of the Junta, but also commanded the army and security forces.

According to an official report issued after Chile’s return to democ-

racy in 1990,³ government agents during the period of Pinochet’s rule engaged in the pervasive use of torture and committed thousands of summary executions and “disappearances” of suspected opponents of the military regime. The victims of these human rights violations included clergy and religious workers, politicians, public employees, trade unionists, students, artists, intellectuals, professionals, and hundreds of persons who were not members of any political party or organization. The report describes organized, pervasive, and brutal acts of torture followed by death or disappearance, including the parilla (electricity applied while prisoners were tied to a metal bed); prolonged suspension of the victim by wrists or knees; the submarino (repeated submersion of head in liquid, generally mixed with feces or urine, until the moment of near-suffocation); breaking of bones or aggravation of existing wounds by, for example, driving a vehicle over the victim’s limbs; and rape and sexual abuse, which in some interrogation centers was practiced regularly. Notably, the Chilean judiciary, and particularly the Supreme Court, failed to act as an effective check against the Junta’s abuses. According to a study conducted by the Inter-American Human Rights Commission of the Organization of American States, only a tiny fraction of the thousands of habeas corpus petitions presented to Chilean courts between 1973 and 1983 were granted.

In April 1978, the military Junta lifted the state of emergency and issued an amnesty for all acts committed in an official capacity between the date of the coup and March 10, 1978 (Decree 2191 of April 18, 1978). At the urging of the United States, a single exception was made for the 1976 car-bombing assassination in Washington, D.C. of former Chilean Foreign Minister Orlando Letelier and his aide, U.S. citizen Ronni Moffit.⁴

In anticipation of an eventual return to civilian rule, the military proposed and adopted a new constitution in 1980. Among other things, that constitution provided that a former president who had served a six-year term would become a “Senator for Life” upon retirement and thus enjoy legislative immunity. As intended, the sole beneficiary of this provision was Pinochet. During the mid-1980s, negotiations for a transition to civilian rule intensified. In 1988, Pinochet lost a referendum on whether he should continue his rule or call open elections. Pinochet agreed to

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⁴. For a recent discussion of the CIA’s knowledge of atrocities committed under the Pinochet regime, see Philip Shenon, U.S. Releases Files on Abuses in Pinochet Era, N.Y. Times, Jul. 1, 1999, at A12.
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abide by the results of that election but only on condition that he retain
his position as commander-in-chief of the armed forces until March 1998
and then become a “Senator for Life” as provided by the 1980 constitu-
tion.

Patricio Aylwin was elected President of Chile in 1990. One of his first
acts was to appoint the National Commission on Truth and Reconcilia-
tion (the “Rettig Commission”) to investigate human rights abuses under
the Pinochet regime. After hearing testimony from thousands of persons,
the Rettig Commission issued a comprehensive report in 1991. The Com-
misson criticized the Chilean armed forces for refusing to provide infor-
mation and for destroying documentary evidence. It also recommended
that the Chilean government provide reparations to victims and their
families. The government responded by creating in 1992 the National
Corporation of Reparation and Reconciliation. A report issued by this
entity in 1996 officially recognized that more than 3,000 persons suffered
extrajudicial execution or disappearance during the period of military rule.
The report addressed cases of torture if they were followed by death or
disappearance, but did not address the thousands of other cases where
people were tortured but survived.

Although the Rettig Commission revealed the names of thousands of
victims and detailed the violations committed against them, the pub-
lished version of its report did not identify the suspected perpetrators of
these crimes. In a confidential submission to the courts, the Commission
did furnish a list of persons suspected of having committed each viola-
tion; however, ninety percent of the cases cited by the Rettig Commission
involved violations that took place before 1978, and thus were within the
period covered by the amnesty decree.

With the notable exception of the convictions of Manuel Contreras,
the head of Chile’s security organization, the National Intelligence Direc-
torate (“DINA”), and Pedro Espinoza for the assassinations of Orlando
Letelier and Ronni Moffit,⁵ efforts to prosecute human rights violations
in Chile had been unsuccessful until recently. The Chilean Supreme Court
routinely directed most cases of alleged human rights abuses to the mili-
tary courts. The military courts, in turn, relied on the amnesty decree to
close cases before meaningful investigation. In addition, the Chilean Su-
preme Court upheld the constitutionality of the amnesty decree and in-

⁵. These convictions were achieved only after heavy pressure from the United States.
Clifford Kraus, Chilean Military Faces Reckoning For Its Dark Past, N.Y. Times, Oct. 3, 1999,
at A1.
interpreted that decree to strip courts of the power to investigate, prosecute or punish acts that took place during the amnesty period.

Since Pinochet's detention in the U.K., however, the Chilean judiciary has been far more receptive to human rights prosecutions: by October 11, 1999, forty officers had been arrested on charges of human rights violations. In a significant departure from its prior rulings, Chile's Supreme Court upheld the indictments of two members of the Chilean military, one of them a former junta member and chief of the DINA. The Supreme Court also upheld a lower court decision holding that the amnesty decree did not apply to cases of unresolved disappearances on the theory that disappearances constitute "continuing crimes"—a decision that opens the possibility of additional arrests and human rights prosecutions in Chile.7

B. Attempts To Proceed Against Pinochet In Chile

As of late January, 2000, fifty-six criminal cases had been filed against Pinochet in Chile.8 Whether these cases will ever result in the prosecution or punishment of Pinochet in Chile remains unclear. Although the amnesty decree may no longer shield Pinochet from prosecution for cases of unresolved disappearances, Pinochet still enjoys immunity as "Senator for Life." The Chilean Supreme Court has the power, in theory, to strip Pinochet of that protection, but many observers have doubted that it would ever do so. Even if Pinochet lost his senatorial immunity, military tribunals could assert jurisdiction over cases brought against him for acts committed while he was Chile's commander-in-chief.9 Significantly, after Pinochet's arrest, and despite the claim of many officials that Chile should be the arbiter of justice in his case, the Government of Chile did not file any extradition request with the United Kingdom seeking to put Pinochet on trial in Chile. The recent election of Socialist candidate Ricardo Lagos as President of Chile may, however, increase the likelihood of Pinochet's prosecution in his home country; during his campaign, Lagos stated that the Chilean judiciary could try Pinochet for human rights violations if the United Kingdom sent him back to Chile.10

7. See id.
9. Only the appointment of a Chilean Supreme Court justice to hear the case directly could prevent such a result, but the Supreme Court specifically declined to take such a step in late 1998.
C. Proceedings Against Pinochet In Spain

Faced with the difficulties of prosecuting Pinochet in their home country, Chilean exiles living in Spain turned to the Spanish courts for redress. Proceedings against Pinochet commenced in Spain in July 1996. A federal prosecutor filed complaints ("denuncias") before the National Criminal Court of Spain (the “Audiencia Nacional”) alleging that former members of the military juntas in Argentina (1976-83) and Chile (1973-90), including General Pinochet, organized and committed genocide, terrorism, and other crimes against humanity in violation of Spanish and international law. Judge Baltazar Garzon Real was assigned to handle allegations concerning Argentina, and Judge Manuel Garcia Castellon was assigned to handle allegations concerning Chile. Each judge accepted jurisdiction and began an investigation ("diligencias").

On October 16, 1998, upon learning that General Pinochet was in London for back surgery, Judge Garzon—before whom both the Argentine and Chilean cases had by then been consolidated—issued an order seeking General Pinochet’s arrest based on charges of genocide and terrorism. He later issued a second order expanding the charges. In a unanimous decision on November 5, 1998, an en banc panel of the Audiencia Nacional confirmed the Spanish court’s jurisdiction to proceed with the investigation and to adjudicate criminal charges against Pinochet. On December 10, 1998, Judge Garzon issued an order finding probable cause to proceed with Pinochet’s trial in Spain (“auto de procesamiento”).

II. ATTEMPTS TO EXTRADITE PINOCHET FROM THE UNITED KINGDOM AND THE LAW LORDS’ DECISION

Based on an international warrant issued by Judge Garzon, a London magistrate issued a provisional warrant for Pinochet’s arrest. On October 17, 1998, Pinochet was apprehended. A second provisional warrant was issued the next day, which included allegations of torture, conspiracy to commit torture, hostage taking, conspiracy to take hostages, and...
and conspiracy to commit murder.\textsuperscript{13} On October 28, 1998, a Divisional Court quashed both warrants, holding that Pinochet, as a former head of state, was immune from prosecution.\textsuperscript{14}

Shortly thereafter, the Government of Spain submitted a formal Request for Extradition and expanded the list of crimes to include allegations of a widespread conspiracy to take over the Government of Chile by a coup and thereafter to reduce the country to submission by committing genocide, murder, torture, and hostage taking.\textsuperscript{15} On November 25, 1998, after an appeal to the House of Lords, the United Kingdom's highest court, the Law Lords, held, in a 3-2 decision, that Pinochet was not entitled to immunity against prosecution for crimes under international law.\textsuperscript{16} On December 9, 1998, Home Secretary Jack Straw issued to the magistrate an "authority to proceed" under the Extradition Act, on all charges except for the charge of genocide (which was thereafter dropped from the case).\textsuperscript{17} On January 15, 1999, however, the initial Law Lords' decision was set aside due to the failure of one of the Lords to disclose an association with Amnesty International (which had participated extensively in the case), and the case was set for re-argument before a new panel, this time composed of seven members.

\textbf{A. The Law Lords' March 24, 1999 Ruling}

On March 24, 1999, the Law Lords held that (1) certain of the crimes alleged against Pinochet were crimes for which he could be extradited to Spain, and (2) despite his status as Chile's former head of state, Pinochet was not immune from prosecution.

\textbf{i. No Extradition For Acts Not Criminal Under U.K. Law At The Time They Were Committed}

The Law Lords held that under the U.K.'s Extradition Act of 1989, a person may only be extradited based on an "extradition crime," which is a crime that satisfies the so-called "double criminality rule"—i.e., the alleged crime must constitute an offense under U.K. law as well as the law of the country requesting extradition.\textsuperscript{18} Lord Brown-Wilkinson explained

\begin{enumerate}
\item \textsuperscript{13} Id.
\item \textsuperscript{14} Id. at 835.
\item \textsuperscript{15} Id.
\item \textsuperscript{16} Regina v. Bartle and Commissioner of Police for the Metropolis and others Ex Parte Pinochet, [1998] 3 W.L.R. 1455.
\item \textsuperscript{17} Regina v. Bow Street Metropolitan Stipendiary Magistrate, [1999] 2 W.L.R. at 835.
\item \textsuperscript{18} Id. at 832-33, 836-37.
\end{enumerate}
that the relevant date for determining whether the double criminality rule was satisfied was the date the alleged offense was committed, not the date of the extradition request. 19 Thus, unless the crimes of which Pinochet stood accused were crimes under U.K. law when committed, Pinochet could not be extradited for them.

Based on this analysis, the Law Lords concluded that the principal crimes that satisfied the double criminality rule were charges of torture and conspiracy to commit torture alleged to have occurred after Britain incorporated the Torture Convention into British law, thereby criminalizing for the first time in the United Kingdom the commission of torture "wherever committed world-wide." 20

ii. No Entitlement To Immunity As Former Head Of State

The next issue addressed by the Law Lords was whether Pinochet was entitled to immunity as a former head of state. They held six to one that he was not. Two of the Law Lords reasoned that international law had progressed to the point that traditional notions of immunity simply did not apply. Four of the Law Lords made a narrower point, noting the absence of any such immunity provision in the Torture Convention itself. The dissenting Lord held that an abrogation of the traditional immunity rule must be explicit, and concluded that there was no such explicit abrogation in the Torture Convention. 21

Responding to the dissent, Lord Browne-Wilkinson (one of the four Lords holding the majority view) explained that at common law, a head of state or former head of state was immune from suit regarding acts done in the performance of functions while in office. 22 The Torture Convention created universal jurisdiction, however, and required that all member states ban and outlaw torture. Lord Browne-Wilkinson reasoned: "How can it be for international law purposes an official function to do something which international law itself prohibits and

19. Id. at 837-40.

20. Id. at 832-33. The charges regarding hostage-taking were held not to constitute crimes under the U.K.'s Taking of Hostages Act of 1982, and thus did not satisfy the double criminality rule. Id. at 839-40. Although charges of murder and conspiracy to commit murder survived the double criminality rule, traditional immunity rules prevented their prosecution. Id. at 848.

21. He observed: "the fact that 116 states have become party to the Torture Convention reinforces the strong impression that none of them appreciated that, by signing the convention, each of them would silently agree to the exclusion of state immunity ratione materiae." Id. at 863.

22. Id. at 842-44.
criminalizes?”23 He also reasoned that because torture is committed “by or with the acquiescence of a public official or other person acting in an official capacity,” if former heads of state were immune, “the man most responsible will escape liability while his inferiors (the chiefs of police, junior army officers) who carried out his orders will be liable.”24 And, if torture were treated as “official business” for former heads of state, it would be treated similarly for inferiors; in effect, the entire purpose of the Torture Convention would be frustrated.25 Accordingly, he concluded that any continued immunity for ex-heads of state charged with torture would be inconsistent with the Torture Convention.26 Thus, Pinochet could be extradited for acts of torture and conspiracy to commit torture occurring after December 8, 1988.

B. Subsequent Proceedings

After the Law Lords’ March 24, 1999 decision, Pinochet’s lawyers filed a challenge to the earlier decision by U.K. Home Secretary Jack Straw to allow extradition to proceed. Once again, however, the Home Secretary ruled that extradition could proceed. Although Pinochet filed a request for permission to appeal Straw’s second decision, permission was denied.27 Committal proceedings on the extradition charges commenced before a U.K. magistrate on September 27, 1999, and, on October 8, 1999, the magistrate ruled that all the conditions for extradition were in place. On October 22, 1999, Pinochet’s lawyers appealed that decision, and another hearing was scheduled for March 20, 2000.28

23. Id. at 847.
24. Id.
25. Id.
26. Id. at 848.
27. On April 23, 1999, Chile announced that it would request that Spain and the United Kingdom arbitrate the issue of which country should try Pinochet, and, if no agreement could be reached, suggested that Chile would take that dispute to the International Court of Justice in the Hague. President Frei Discusses Pinochet Situation With Spain’s Premier Aznar, BBC Summary of World Broadcast, May 22, 1999. Chile was apparently invoking Article 30 of the Torture Convention, which provides that the International Court of Justice is responsible for resolving conflicts between countries regarding the Convention. Chile apparently contended that under the Torture Convention, only Chilean courts have the power to try Pinochet. Gustavo Gonzalez, Rights-Chile: Spain Eyes Arbitration in Pinochet Case, Inter Press Service, Jul. 9, 1999. On September 14, 1999, the Spanish government rejected Chile’s request for international arbitration. Spain Rejects Arbitration in Pinochet Case, Reuters News Service, Madrid, Spain, Sept. 14, 1999.
28. Ironically, Pinochet would serve no time in jail even if he were convicted in Spain.
More recently, on January 11 of this year, Home Secretary Straw stated that, based on the results of several medical evaluations, he “was minded” to “take the view that no purpose would be served by continuing” the extradition proceeding. Subsequently, Belgium and various human rights organizations sought judicial review of the Home Secretary’s initial determination not to extradite Pinochet, arguing, among other things, that the medical evidence on which it was based should be made publicly available and subjected to judicial scrutiny. Following one ruling rejecting these challenges, the High Court decided on February 8 to entertain the appeals and, as a result, Pinochet’s eventual extradition remains in doubt.

Regardless of the ultimate determination regarding Pinochet’s fitness to stand trial, the Spanish effort to prosecute Pinochet and the Law Lords’ decision have contributed substantially to the law of immunity, and have profoundly affected the manner in which prosecutions of government leaders will be viewed.

III. ISSUES RAISED BY THE PINOCHET PROSECUTION

A. Is There Precedent For A Foreign National Court Trying A Former Head Of State?

On limited occasions, senior government officials have been tried for human rights or humanitarian offenses outside their own national borders, but it is almost unprecedented to try a former head of state in these circumstances. The few prosecutions that have occurred were mostly against senior officials who were tried primarily before ad hoc tribunals established because, as a matter of Spanish law, Spain does not incarcerate persons over the age of seventy-five. Kevin Cullen, Pinochet Is Defiant As He Faces Magistrate, The Boston Globe, Dec. 12, 1998, at A6; Alan Travis, Double Jeopardy Argument To Block Norwood Trial: The Law BBC Interview Leaves Court Door Ajar, The Guardian (London), Sept. 14, 1999, at 8.


31. Research reveals only two twentieth-century prosecutions under international law against someone who was a head of state outside his national courts. In late January of this year, Senegal commenced proceedings against Hissene Habre, the former head of Chad, on charges of torture. N.Y. Times, Jan. 28, 2000, at A6. Admiral Karl Dönitz, who succeeded Hitler as the de jure leader of Germany for a total of seven days, was convicted before the International Military Tribunal at Nuremberg and sentenced to 10 years in prison. William L. Shirer, The Rise And Fall Of The Third Reich, 1137, 1143 (1960 ed.). In addition, General Hideki Tojo was prosecuted and sentenced to death for his war-time offenses; Tojo, however, was not Japan’s head of state, but rather its Prime Minister. See n. 33, below.
lished to address particular situations—the Nuremberg\textsuperscript{32} and Tokyo\textsuperscript{33} tribunals established after World War II, and, more recently, the tribunals created by the U.N. Security Council in 1993 and 1994 regarding the former Yugoslavia\textsuperscript{34} and Rwanda.\textsuperscript{35}

On rare occasions, prosecutions for human rights crimes committed in one state have gone forward in the domestic courts of another.

\textsuperscript{32} In August of 1945, the Nuremberg Tribunal was established by a treaty signed by the victorious allies. Only three categories of crime were punishable: crimes against peace, war crimes, and crimes against humanity. The tribunal tried 22 defendants (one in absentia), of whom 19 were convicted. Leila Sedat Wexler, The Interpretation Of The Nuremberg Principles By The French Court of Cassation: From Touvier To Barbie And Back Again, 32 Colum. J. Transnat’l L. 289, 306-07 (1994).

\textsuperscript{33} General Douglas MacArthur appointed military tribunals to try Japanese leaders accused of aggression, war crimes, and crimes against humanity. All of the accused were found guilty and seven were sentenced to hang. Benjamin B. Ferencz, International Criminal Courts: The Legacy of Nuremberg, 10 Pace Int’l L. Rev. 203, 216 (1998).

\textsuperscript{34} The International Criminal Tribunal for the former Yugoslavia ("the Yugoslav Tribunal") was established by the U.N. Security Council pursuant to Chapter VII of the United Nations Charter on May 25, 1993 to track down those guilty of war crimes in the former Yugoslavia. The Tribunal’s jurisdiction encompasses: (1) grave breaches of the Geneva Convention of 1949; (2) violations of the laws or customs of war; (3) genocide; and (4) crimes against humanity. Those indicted by the Yugoslav Tribunal include Bosnian Serb wartime leader Radovan Karadzic and current Yugoslav president Slobodan Milosevic. As of October 1999, the Yugoslav Tribunal had issued guilty verdicts against eight individuals and acquitted one, and had a total of thirty civilians in custody. David Jenkins, Mark Dodd, Bernard Lagan and Simon Mann, Blood on Their Hands, Sydney Morning Herald, Oct. 2, 1999. In addition, on January 14, 2000, the Yugoslav Tribunal found five Bosnian Croats guilty, and acquitted one, of crimes against humanity. Philip Blenkinsop, War Crimes Judge Sentences 5 Bosnian Croats, Reuters, Jan. 14, 2000.

\textsuperscript{35} Acting both on the basis of Chapter VII of the U.N. Charter and pursuant to a request by the Government of Rwanda, the Security Council adopted a Statute for the International Tribunal for Rwanda in November 1994 (the "Rwanda Tribunal"). The Rwanda Tribunal has jurisdiction over (1) genocide; (2) crimes against humanity; and (3) violations of Article 3 of the Geneva Convention. In contrast to the Yugoslav Tribunal, which treats the conflicts in the former Yugoslavia as international, the Rwanda Tribunal was established on the assumption that the conflict in Rwanda is a non-international armed conflict. Theodor Meron, International Criminalization of Internal Atrocities, 89 Am. J. Int’l L. 554 (1995). Like the Yugoslav Tribunal, the Rwanda Tribunal is an ad hoc tribunal with limited temporal and territorial jurisdiction. As of October 1999, twenty-eight indictments had been handed down against forty-eight individuals, with thirty-eight persons in custody. Blood on Their Hands, Sydney Morning Herald, Oct. 2, 1999. In addition, five people had been convicted, including Rwanda’s former Prime Minister, who was sentenced to life imprisonment, the tribunal’s maximum penalty. Three Top Rwanda Genocide Suspects to Stand Trial, Reuters News Service, Aug. 3, 1999.
state.\textsuperscript{36} Examples include the 1962 prosecution of Adolf Eichmann in Israel, the trial in Turkey of those accused of having committed genocide against the Armenians in 1921,\textsuperscript{37} the trial in Italy of Erich Priebke, who was accused of a mass shooting of prisoners in 1944,\textsuperscript{38} and the French prosecution of a Rwandan, Wenceslas Munyeshyaka, for torture and genocide.\textsuperscript{39} These cases are perhaps the closest precedent to the Pinochet case. Nonetheless, significant differences exist between these cases and the Pinochet case; most obviously, none of the cases involves a former head of state.\textsuperscript{40}

\textbf{B. Should A Current Or Former Head Of State Have Immunity From Prosecution?}

Perhaps the most significant aspect of the Law Lords’ decision is its holding that a former head of state is not immune from prosecution for international crimes committed while in office. That holding, and the recent indictment by the Yugoslav Tribunal of current Yugoslav President Slobodan Milosevic, reflect a growing tendency to hold former and even current heads of state accountable for their actions.

Traditionally, customary international law provides for immunity for a head of state. As Lord Brown-Wilkinson explained, “[i]t is a basic principle of international law that one sovereign state (the forum state) does not adjudicate on the conduct of a foreign state.” He also ex-
plained that "the head of state is entitled to the same immunity as the state itself." The immunity of the state arose as a matter of "comity of nations" to avoid having states suing each other. Immunity of the head of state also traditionally extended at common law to a former head of state regarding acts performed in his or her capacity as head of state. The Law Lords, however, concluded—albeit through differing analyses—that these traditional notions of immunity have begun to erode, as exemplified in part by the Torture Convention, which, they held, abrogated the traditional rule of immunity at least with respect to a former head of state.

We believe that a former head of state should lack immunity for universally recognized crimes committed during his or her regime, and thus that the Law Lords' decision is correct and should be applauded. First, the Law Lords' decision is necessary if prosecutions of human rights crimes under international law are to be pursued seriously, and if such government-sanctioned crimes are to be effectively deterred. As Lord Brown-Wilkerson observed in the Pinochet ruling, if former heads of state were immune, "the man most responsible will escape liability while his inferiors (the chiefs of police, junior army officers) who carried out his orders will be liable." Indeed, in light of some of the most barbaric crimes of the twentieth century that were carried out as official government policy, it is no longer conceivable that heads of state would or should escape punishment when their knowledge or control is sufficiently established. For example, had Hitler been before the International Military Tribunal at Nuremberg, no one can seriously contend that he would have been able successfully to invoke head of state immunity. Similarly, were Pol Pot alive, few persons would advocate for his immunity. (Nor does the United States seem to be protesting the indictment of Slobodan Milosevic.)

Second, the Law Lords' decision is explicitly in line with the most recent pronouncement on the topic: the statute designed to establish an international criminal court—the Rome Statute (discussed further below). That Statute (signed by ninety-two countries as of January 2000) specifically provides that a person is not exempted from criminal responsibility.

44. See Part II A ii supra.
or even eligible for a reduced sentence, based on any claim that the person’s actions were taken in an official capacity, as a “Head of State or Government” or otherwise.46

This is not to say that all head of state immunity ought to be nullified for all purposes. Obviously, the crimes of which Pinochet and Milosevic stand accused (and of which Pol Pot would stand accused) are crimes that have been universally condemned and defined in international treaties. Not every civil case (or even every criminal case) will fall within these stringent definitions or merit disregarding traditional notions of immunity.47 International jurisprudence must clearly identify the core crimes that are subject to prosecution so that heads of state and others are put on notice when they have stepped beyond the protections of their office. This may not be an easy task, especially when decisions of this nature are made by national courts in multiple jurisdictions, as is currently contemplated by the Torture Convention (discussed below). Indeed, if individual states are to become involved in holding foreign heads of state and officials accountable for gross human rights abuses, there is widespread concern that political considerations may influence the process and that appropriate procedural safeguards will not be observed. These are precisely the concerns we believe would be minimized if prosecutions before a single international tribunal were an available alternative.

46. Rome Statute, Article 27.

47. United States courts recognize the concept of head of state immunity in most situations, although the immunity may be waived by the country where the person was head of state, and does not apply to acts committed in a personal capacity. Alicog v. Kingdom of Saudi Arabia, 860 F. Supp. 379 (S.D. Tex. 1994) (King Fahd of Saudi Arabia immune from civil suit) aff’d, 79 F.3d 1145 (5th Cir. 1996); LaFontant v. Aristide, 844 F. Supp. 128 (E.D.N.Y. 1994) (Jean-Bertrand Aristide, recognized by the United States as head of state of Haiti, immune from suit); Saltany v. Reagan, 702 F. Supp. 319, 320 (D.D.C. 1988) (Prime Minister Margaret Thatcher immune from suit by residents of Libya, as were President Reagan, United States civilian and military officials, the United States and the United Kingdom); Radić v. Karadžić, 70 F.3d 232, 248 (2d Cir. 1995) (Radovan Karadžić lacked head-of-state immunity from civil suit because not recognized as such by the Executive Branch); Paul v. Avril, 812 F. Supp. 207 (S.D. Fla.1992) (former Haitian President Prosper Avril not immune from civil suit because Haiti waived his immunity); In re Grand Jury Proceedings, 817 F.2d 1108, 111 (4th Cir.), cert. denied sub nom. Marcos v. United States, 484 U.S. 890 (1987) (former Philippine president Ferdinand Marcos and his wife Imelda not immune from civil liability for failing to comply with grand jury subpoenas where Philippine President Aquino waived their immunity); but see U.S. v. Noriega, 117 F.3d 1206, 1212 (11th Cir. 1997) (Manuel Noriega not immune from charges of cocaine trafficking because he never served as the constitutional leader of Panama, Panama did not seek Noriega’s immunity, and the charges related to his private enrichment), cert. denied, ___U.S.____, 118 S. Ct. 1389 (1998).
C. Was There A Basis For Spain's Assertion Of Jurisdiction Over Pinochet?

Judge Garzon's jurisdiction to investigate the Pinochet case has been the subject of substantial debate in Spain (and elsewhere), and was even challenged by Spain's attorney general. However, both the Torture Convention and the Convention on the Prevention and Punishment of the Crime of Genocide ("Genocide Convention")\(^\text{48}\) not only support, but arguably require, Spain's exercise of jurisdiction.

Spain has upheld its jurisdiction to prosecute Pinochet for both genocide and torture. In a September 1998 ruling (prior to the Law Lords' decision restricting Pinochet's prosecution to crimes of torture and conspiracy to commit torture), Judge Garzon held that he had the power to adjudicate Pinochet's alleged crimes pursuant to Article 23.4 of Spain's Judiciary Law. That law, adopted in 1985, allows Spanish courts to assert jurisdiction over certain enumerated crimes, including "genocide," "terrorism," and any other crime that may be prosecuted under an international treaty.\(^\text{49}\)

Before Spain's Audiencia Nacional—Spain's highest criminal court—Spain's Attorney General advanced several arguments against the assertion of jurisdiction. First, he argued that Article VI of the Genocide Convention limits the prosecution of genocide to an international tribunal or a domestic court where the alleged genocide took place. Rejecting this argument, the Audiencia Nacional found that the Genocide Convention contains no such limitation, and that any national court can assert universal jurisdiction over genocide.\(^\text{50}\) Spain's Attorney General also argued that Spain's 1985 Judiciary Law, which expressly asserts universal jurisdiction over acts of genocide and terrorism, should not be applied retroactively. The Audiencia Nacional concluded, however, that the Judiciary Law is merely a procedural statute, and that genocide and terrorism have been crimes under Spanish law for decades. Because torture was treated by Judge Garzon as only one of the means by which Pinochet was alleged to have committed genocide and terrorism, the Audiencia Nacional did not squarely decide whether Spain could properly assert universal jurisdiction over torture offenses. In dicta, however, it assumed that Spain could assert such jurisdiction, regardless of the nationality of the victim, pursuant to Article 23.4 of the Spanish Judiciary Law and Article 5 of the Torture Convention.

\(^{49}\) Auto De Juez Del Juzgado Central De Instrucción Numero Seis, Sumario 1/98-J (Sept. 15, 1998).
\(^{50}\) Rollo de Apelación 173/98 (Nov. 5, 1998).
In April 1999, after the Law Lords’ March 1999 decision narrowed the grounds for extradition to torture offenses, Judge Garzon issued another ruling addressing jurisdiction.51 In this ruling, he held that the “disappearances” at issue in the Pinochet case (which include cases involving Spanish citizens) constitute cases of continuing torture, and thus are subject to the Law Lords’ extradition decision. In September 1999, the Audiencia Nacional again upheld Judge Garzon’s jurisdiction, emphasizing that the issue had been “expressly resolved” in its prior ruling.52 The Spanish court decision, however, did not satisfactorily explain Spain’s basis for jurisdiction. Once the Law Lords’ March 24, 1999 decision had been rendered, only charges of torture remained as a basis for extradition. Contrary to what it stated in its September 1999 decision, the Audiencia Nacional had not explicitly addressed in its earlier ruling the applicability of Spanish law regarding torture to Pinochet’s alleged crimes, nor had it resolved whether the victims of torture must be Spanish nationals.

In any event, the highest criminal appeals court in Spain has ruled twice that Pinochet’s case may properly proceed in Spain. Although the wisdom and legal correctness of those decisions have been debated within and outside of Spain, and the grounds under domestic Spanish law adopted by the Spanish courts for asserting jurisdiction over Pinochet are not as clear as they might be, the assertion by Spain of jurisdiction to prosecute Pinochet appears amply supported under international law.

The Torture Convention requires or allows State Parties53 to assert jurisdiction in five situations: (a) when the alleged crimes are “committed in any territory under [the] jurisdiction” of a State Party; (b) when “the alleged offender is a national of that State;” (c) when “the victim is a national of that State if that State considers it appropriate;”54 (d) when “the alleged offender is present in any territory under [the] jurisdiction and it does not extradite him;”55 and (e) when provided by

55. Torture Convention, Article 5.2. Article 6.1 provides that any State Party “in whose territory a person alleged to have committed [torture] is present shall take him into custody or
the internal laws of the State Party. Accordingly, the Torture Convention authorizes Spain to exercise jurisdiction to the extent its nationals are victims and to the extent provided by its internal laws whether or not its nationals are victims. Thus, by (i) including “disappearance” as a form of torture, and (ii) holding, in essence, that Spanish law asserts universal jurisdiction over torturers regardless of the nationality of the victim, Spain appears to satisfy the jurisdictional provisions of the Torture Convention. (Moreover, even if Spanish law did not support jurisdiction over Pinochet, under the Torture Convention, Pinochet’s presence in the United Kingdom expressly accords jurisdiction and obligates the United Kingdom to try Pinochet if it does not extradite him. Accordingly, in the absence of an extradition request by Chile, or Pinochet’s release on medical grounds, there can be no question that Pinochet would be subject to trial in some foreign court pursuant to the Torture Convention.)

In addition, Article VI of the Genocide Convention states that persons charged with genocide “shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.” The Article, however, has been interpreted as establishing only the minimum required for the mandatory exercise of jurisdiction, and not the outer limits of permissive jurisdiction. Leading commentators have concluded that genocide is subject to universal jurisdiction. In addition, the Genocide Con-

56. Specifically, Article 5.3 states that “[t]his Convention does not exclude any criminal jurisdiction exercised in accordance with internal law,” and Article 4 requires that “[e]ach State Party shall ensure that all acts of torture are offenses under its criminal law.”
Relections on the Pinochet Prosecution

The convention has been interpreted to impose a duty to either extradite or to prosecute those who commit genocide. In sum, we believe that Spain was fully entitled as a matter of international law to proceed in this case, and that the United Kingdom has acted properly by processing Spain’s extradition request.

D. Would Pinochet’s Prosecution Be More Sensibly Pursued Before The Proposed International Criminal Court?

As the victims of Pinochet’s alleged crimes searched for a forum willing to adjudicate their complaints, they had only two options: prosecution in Chile, then an unlikely prospect, or finding another state willing and able to take up jurisdiction, as they found in Spain. Soon, there likely will be a third option, namely, the proposed International Criminal Court (“ICC”). To consider the relative merits of this avenue of proceeding, we address, first, the current status of the ICC; then, whether the ICC could have proceeded in this case; and third, whether it would be preferable for national prosecutions such as Spain’s to yield to the processes of an international tribunal such as the proposed ICC.

i. The Current Status Of The ICC

The Rome Statute was adopted on July 17, 1998 “with a view to finalizing and adopting a convention on the establishment of an international criminal court.” The ICC will come into effect when 60 countries

60. The Convention itself does not explicitly provide for such a principle, but the overall structure of the Convention supports it. Article I, for example, binds parties to the Convention to “undertake to prevent and to punish” the crime of genocide. The Preamble explicitly requires “international co-operation” to prevent and punish genocide. Article IV declares that any person committing genocide, whether public official or private individual, “shall be punished.” Article V requires parties to make the Convention effective in their own countries through implementing legislation and, “in particular, to provide effective penalties for persons guilty of genocide or of any other acts enumerated in [the Convention].” Article VII declares that genocide is not a political crime and that states, therefore, must extradite persons accused of genocide to states having the appropriate jurisdiction. It is arguable, thus, that should prosecution in or extradition to the state with territorial jurisdiction become impossible, the state having custody of the offender must, as a matter of fulfilling its Article I and IV commitments to punish genocide, proceed with a prosecution regardless of the offender’s nationality. See Lee A. Steen, Genocide And The Duty To Extradite Or Prosecute: Why The United States Is In Breach Of Its International Obligations, 39 Va. J. Int’l L. at 460-61.

61. General Assembly Resolution 51/207. For a more extensive discussion about the proposed ICC, see Report On The Proposed International Criminal Court, 52 The Record of the Association of the Bar of the City of New York 79 (1997). As in that earlier Report, and for the additional reasons that follow, the Association continues to recommend that the United States
have ratified the Statute. Ninety-two countries are now signatories to the Statute—with the notable exception of the United States. As of January 20, 2000, however, only six countries—Italy, Senegal, Fiji, San Marino, Ghana and Trinidad and Tobago—had ratified it.\(^62\)

The ICC would have jurisdiction over four categories of international crimes: genocide, crimes against humanity, war crimes, and aggression.\(^63\) Pursuant to the Rome Statute, cases would be referred to the ICC in one of three ways: (1) a state that is a party to the Rome Statute could refer a case to the ICC’s prosecutor; (2) the U.N. Security Council could refer a case to the ICC’s prosecutor; or (3) the ICC’s prosecutor could initiate his or her own investigation.\(^64\)

The United States opposes the Rome Statute in its current form on several grounds, including: (a) the Rome Statute’s provision permitting prosecutions of nationals of non-party states;\(^65\) (b) the lack of a consensus on the definition of crimes of aggression; (c) the lack of a provision permitting signatories to make reservations to the Rome Statute; and, most significantly, (d) the exclusion of a provision permitting the Security Council to halt the ICC’s work.\(^66\) Succinctly put, the United States wants to be able to prevent potential prosecutions against its citizens, and especially its leaders and members of the military, which the United States determines lack adequate basis. As detailed below, however, the fact that the

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\(^{62}\) "Ratification" is the formal act by which a state becomes a party to, and bound by, an international agreement, and in the United States requires the two-thirds vote of the Senate; signature, on the other hand, has no binding effect but is deemed to represent political approval and at least a moral commitment to seek ratification. See Restatement (Third) of the Foreign Relations Law of the United States, § 312, comment d (1990).

\(^{63}\) Rome Statute, Article 5.

\(^{64}\) Id., Article 13.

\(^{65}\) See n. 68 infra.

United States is not a party to the Rome Statute does not guarantee that its citizens will be immune from prosecution by the ICC. In fact, we believe that the best way for the United States to protect its interests is to join the international community in becoming a signatory, and eventually a party, to the Rome Statute.

**ii. Could The ICC Hear A Case Such As Pinochet’s?**

The Rome Statute makes clear that the ICC’s jurisdiction is exclusively forward-looking: only acts committed after the ICC comes into effect could be prosecuted in the International Court. On two levels, then, Pinochet’s case could not be heard by the ICC—the Court is not yet constituted, and when it is, Pinochet’s alleged crimes would not fall within its mandate. Nevertheless, because acts of officially sponsored torture and abuse are likely to arise again, it is useful to imagine how the Pinochet case might have played out had the ICC been created and functioning, and had the alleged crimes occurred after its creation. In doing so, we assume further that Chile has ratified the Rome Statute or accepted the ICC’s jurisdiction in the particular case.

On these assumptions, it seems clear that the ICC would have subject matter jurisdiction over the crimes of which Pinochet stands accused. “Torture,” at least when widespread or as part of a systematic pattern of conduct directed toward civilians, is specifically encompassed within the Rome Statute’s definition of “crimes against humanity.” Even more clearly,

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68. States that are parties to the Rome Statute would automatically accept the ICC’s jurisdiction; states that are not parties may accept the ICC’s jurisdiction on a case-by-case basis. Id., Article 12(1) and (3). If a case were referred to the ICC by a state that is a party or initiated by the ICC prosecutor, jurisdiction would exist if the state where the alleged crime occurred, or of which the accused is a national, had accepted the ICC’s jurisdiction. Id., Articles 12(2), 13(a) and (c). If a case were referred by the Security Council, the ICC would automatically have jurisdiction. Id., Article 13(b).

69. Article 7 defines “crimes against humanity” as:

any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: (a) Murder; (b) Extermination; (c) Enslavement; (d) Deportation or forcible transfer of population; (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; (f) Torture; (g) Rape . . . ; (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender . . . ; (i) Enforced disappearance of persons; . . . (k) Other inhuman acts . . . .

(emphasis added.)
Pinochet’s position as Chile’s former head of state would afford him no immunity or other defense to prosecution. As mentioned above, Article 27 of the Rome Statute is explicit on this score: it provides that a person is not exempted from criminal responsibility, or even eligible for a reduced sentence, based on any claim that the person’s actions were taken in an official capacity, as a “Head of State or Government” or otherwise.70

More problematic is whether the ICC would have to decline jurisdiction out of deference either to any ongoing investigation or prosecution that a country such as Spain (or another country) might have initiated. The Rome Statute embodies the principle of “complementarity”—that is, the ICC would not have exclusive jurisdiction, but would share jurisdiction with the courts of states having jurisdiction, and in some situations defer to the actions of those courts. Specifically, the Rome Statute provides that a case is “inadmissible” if it is being “investigated or prosecuted by a State which has jurisdiction over it” or where such a state has investigated and decided not to prosecute unless that state was “unwilling or unable genuinely to carry out the investigation or prosecution.”71 The Rome Statute does not, however, specify which countries have “jurisdiction” and thus, which countries could supplant the ICC’s own exercise of jurisdiction.

As an example, assume that, prior to its recent Presidential election, Chile (a state with jurisdiction) had investigated the case against Pinochet and declined to prosecute not because of the merits, but because of the political repercussions that would follow. In those circumstances, valid arguments certainly could be made that the ICC’s jurisdiction should not have been supplanted because Chile was “unwilling or unable genuinely to carry out the investigation or prosecution.” The fact that Chile had not prosecuted Pinochet in over twenty-five years would have provided strong support for this argument, as would the fact that Chile granted Pinochet immunity under the title “Senator for Life.”72

As to Spain, however, given the Rome Statute’s failure to define when a state has “jurisdiction,” presumably one would look to Spain’s own interpretation of its courts’ jurisdiction. (This would be true whenever an

70. Rome Statute, Article 27.
71. Id., Article 17(2)(b).
72. See id., Article 17(2)(b) (authorizing the ICC to consider, when determining a country’s willingness to prosecute a particular case, whether “[t]here has been unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice”).
investigation or prosecution is commenced in a state whose laws permit the exercise of jurisdiction.) Because Spanish courts have held that they have jurisdiction (and Spain certainly is not “unwilling or unable” to carry out the investigation or prosecution), Spain’s actions apparently would have rendered the case “inadmissible” before the ICC.

The Rome Statute’s failure to limit the circumstances in which states would have jurisdiction that deprives the ICC of jurisdiction could erode the benefits (discussed below) of having a single international tribunal. The danger is that the ICC’s role might be limited to a court of last resort, only prosecuting cases not brought or investigated by any state. One solution would be to amend the Rome Statute pursuant to Article 121 to limit the situations where states would have jurisdiction that would deprive the ICC of jurisdiction. Alternatively, or additionally, states should be encouraged to defer to the ICC to the extent the ICC pursues, or shows interest in pursuing, prosecution of a particular case.

iii. Would The ICC Be A Preferable Forum?

Because no international court yet exists to adjudicate international crimes, when the House of Lords heard the Pinochet case, it did not face the question of whether Spain was the most appropriate forum to prosecute Pinochet. As one of the Law Lords explained:

It may well be thought that the trial of Senator Pinochet in Spain for offenses all of which related to the state of Chile and most of which occurred in Chile is not calculated to achieve the best justice. But I cannot emphasize too strongly that that is no concern of your Lordships.

Because the Pinochet prosecution probably will not be the last effort by a national court to prosecute a senior foreign official for an alleged violation of international law, we consider whether domestic courts of countries such as Spain ought to be adjudicating such cases, or whether

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73. Article 121 provides a procedure for amending the Rome Statute after seven years from the Statute’s entry into force.
75. See, e.g., Barbara Crossette, Dictators Face the Pinochet Syndrome, N.Y. Times, Aug. 22, 1999, at A3 (discussing filing of a criminal complaint in Austria against Izzat Ibrahim al-Duri, the number two man to Saddam Hussein, while al-Duri was seeking medical treatment there, and concerns of former Indonesian President Suharto who had been expected to seek medical treatment in Germany).
they would be more appropriately brought before an international tribunal, such as the proposed ICC.

First, if human rights prosecutions go forward solely or primarily in various national courts world-wide, and especially if states institute proceedings against current officials or heads of state, the risks increase that international law will serve as a tool for the achievement of primarily political ends. Although we do not believe that prosecutions in national courts should be regarded or presumed to be politically motivated, they might be in the individual case, and certainly many observers are quick to assume that they are politically inspired and criticize them on that ground.76 In addition, such prosecutions also could seriously interfere with the relations between states (as illustrated by the diplomatic tensions that developed between Chile, on the one hand, and the United Kingdom and Spain, on the other). Although a permanent criminal court such as the ICC would not necessarily guarantee a depoliticized forum, it should provide a more neutral forum for trying international crimes that have cross-border ramifications.77

76. Given that adverse diplomatic and/or economic repercussions are likely to follow, we believe the concerns of several commentators that the Pinochet precedent could expose numerous former and current leaders to prosecution by third-party states are exaggerated. For the view expressing concerns in this context, see, e.g., The Long Arm of International Law, Chicago Trib., Jul. 11, 1999, at 16 (mentioning that former British Prime Minister Margaret Thatcher considered curtailing foreign trips out of fear she might be seized abroad and indicted for war crimes, and asking whether “some rogue state” will “try to put Henry Kissinger on trial for American actions in Vietnam, or some other U.S. leader for NATO’s air war against Serbia, including the accidental bombing of the Chinese embassy in Belgrade”); Try Pinochet in Spain, St. Louis Post-Dispatch, Oct. 12, 1999, at B14 (“Some even worry whether Henry Kissinger, or any other former secretary of state, could be slapped in jail on some trumped-up charge while traveling abroad”). For the contrary proposition, see Jerry Fowler, Pinochet Arrest Is A Step Toward World Justice, Nat’l L. J., Feb. 22, 1999, at A26, col. 1 (arguing that such prosecutions will be rare because they are difficult to bring, and noting that the Pinochet case took years of investigation).

77. The composition of the ICC judiciary would appear well suited to guard against politicization of its processes. The Rome Statute requires that the judges who serve on the ICC “be chosen from among persons of high moral character, impartiality and integrity who possess the qualifications required in their respective States for appointment to the highest judicial offices.” Rome Statute, Article 36(3)(a). Nominations for judges could be made by any state that is a party to the Rome Statute, and each state party could put forward one candidate for any given election. Id., Article 36(4). The judges would then be elected by secret ballot at a meeting of the assembly of state parties convened for that purpose. Id., Article 36(6). No two judges could be nationals of the same state, and the Rome Statute requires that state parties take into account the need within the membership of the ICC for: (i) the representation of the principal legal systems of the world; (ii) equitable geographical representation; and (iii) a fair
A second, related concern involves the perceived legitimacy of prosecuting a foreign national in the domestic courts of a state where little or none of the criminal activity is alleged to have occurred, and where the effects of the activity were not experienced. In the Pinochet case, for example, it was the Chileans who were (predominantly) exposed to the junta’s brutal tactics and who suffered most at its hands; it was the Chilean legislature which granted Pinochet amnesty (albeit at a time when it was dominated by Pinochet and the military); and it is the Chileans who thus far have not sought to void that amnesty. Many observers understandably wonder what right Spain has to interfere with the legal and political judgments Chile has made, and will make, in this matter. If, on the other hand, Pinochet were prosecuted by a body such as the ICC, the debate would not be cast as one over interference by one state in the internal affairs of another, but rather as an attempt by the international community to punish acts which, however “local” they might be in commission and effect, nevertheless are agreed to threaten internationally-shared principles of basic human dignity.

Third, decentralized prosecutions in numerous different states pose the risk that due process safeguards may not be adequate or consistently observed. Countries clearly have different procedural laws; many may not have sufficient procedural protections built into their written laws; and in other countries, those formal protections that do exist may not be observed in practice. In the Rome Statute, by contrast, a large number of countries, including those from both civil and common law traditions, have united and reached consensus on a robust set of due process protections. While there is no guarantee that the ICC will apply such safeguards perfectly, at least there would be one set of procedural rules and their application

representation of female and male judges. See, Article 36(7)-(8). Judges elected to the ICC would hold office for nine years, and would not be eligible for re-election. See, Article 36(9). The judges also would be held accountable by various provisions of the Rome Statute that require the independence of judges, and provide means to excuse, disqualify or remove judges. See, Articles 40, 41, 46. The Rome Statute also provides that a judge “who has committed misconduct of a less serious nature than that set out in article 46” may be subject to disciplinary measures. See, Article 47.

78. The people of Chile are divided regarding their views on Pinochet. While a majority believe he should be brought to justice, a portion of the population still regards him as a strong leader who brought economic prosperity. Even among those who support his trial, Chileans disagree as to where it should occur. See Jose Miguel Vivanco, Ready For Justice, N.Y. Times, Oct. 14, 1999, at A31.

79. There is also a concern that if the courts of foreign countries void amnesty deals, persons being urged to relinquish power based on promises of amnesty may be less inclined to do so.
would be subject to intensive scrutiny by the international community.

Fourth, it is questionable whether various domestic courts, with no obligation to follow each other’s precedent, will consistently apply substantive international criminal law. Especially because international criminal law is at an embryonic stage, it seems highly advisable that the development of that law proceed in a consistent and intelligent fashion. Compounding this concern is the reality that domestic court judges may not be well-versed in international law. A single international tribunal, such as the ICC, would have judges trained in international law, and would be more likely to produce a coherent body of well-reasoned precedent on which to base future prosecutions.

In addition, the result of prosecutions in various national courts could be inconsistent determinations, due not only to different conceptions of substantive international law but to factors of wholly domestic legislation. In the Pinochet case itself, for example, the Law Lords’ decision turns in large part on (a) whether the crimes alleged were crimes under United Kingdom law, which turned on when the United Kingdom incorporated the Torture Convention into its domestic law; (b) whether the crimes alleged were crimes under Spanish law; and (c) the extradition laws in place between Spain and the United Kingdom. Had Pinochet been apprehended in a country other than the U.K., and a country other than Spain was attempting to prosecute him, the outcome might have been rather different. When it can be avoided, the prosecution of international human rights offenses should not depend on domestic particularities such as these, or on where a former dictator happens to seek medical treatment.

In sum, then, if prosecutions occur in multiple domestic courts, the potential for (i) politicization; (ii) inconsistent and inadequate application of procedural protections; (iii) inconsistent application of substantive laws; as well as (iv) anomalies as to why certain cases and not others are commenced or successfully maintained, could seriously undermine the perceived effectiveness and legitimacy of prosecuting international human rights offenses outside the state of their commission. If, on the other hand, a permanent international criminal court were created, it could prosecute in a coherent and systematic manner individuals respon-

80. See Rome Statute, Article 36(b)(ii).
81. See J. Fowler, Pinochet Arrest Is A Step Toward World Justice, Nat’l L. J., Feb. 2, 1999, at A26 (col. 1) (questioning why Pinochet is being prosecuted and not Idi Amin or Baby Doc Duvalier, and arguing that this “lurching in fits and starts toward effective international justice” means that “like cases will not be treated in a like manner for some time to come” until there is a permanent international criminal court).
sible for the most egregious human rights violations, which still often go unpunished. It would also serve to develop a body of law from which future cases might be prosecuted justly and efficiently. The existence and vigorous activity of the ICC itself might deter government officials from committing the most egregious human rights crimes.\textsuperscript{82} Finally, crimes such as those allegedly committed by Pinochet are offensive not only to the Chilean people, but to the international community as a whole; it is entirely appropriate that they be tried by the international community and by its collective standards of jurisprudence.

E. Will The United States’ Refusal To Accede To The Rome Statute Protect Its Nationals From Prosecution?

The Pinochet case should cause the United States to re-evaluate its opposition to the ICC, for it reveals an important premise of that opposition to be mistaken. The simple fact is that, just as Spain instituted a prosecution against Pinochet, U.S. nationals could be subject to prosecution abroad today, even absent the creation of an ICC. Such prosecutions could be based, for example, on conventions such as the Torture and Genocide Conventions, as incorporated into the domestic law of a foreign state, or the domestic criminal laws of a foreign state coupled with the requisite laws creating jurisdiction. As of December 1999, there were 118 state parties to the Torture Convention, and 130 state parties to the Genocide Convention,\textsuperscript{83} and, as explained above, the jurisdiction created by these Conventions has been interpreted to be extremely broad.

Indeed, even if the United States never signs or ratifies the Rome Statute, its citizens could also be subject to prosecution before the ICC itself. The Rome Statute provides that if a case were referred to the ICC by a state that is a party or initiated by the ICC prosecutor, jurisdiction would exist if the state of which the accused is a national or the state where the alleged crimes occurred had accepted the ICC’s jurisdiction.\textsuperscript{84} Thus, even if the United States refuses to accept the ICC’s jurisdiction, U.S. citizens would be exposed to prosecution before the ICC for crimes allegedly com-

\textsuperscript{82} The benefits of having a functioning ICC depend, in part, however, on that institution being the principal forum for the prosecution of crimes under international law (other than in the normal case, i.e., prosecution by the state of the defendant’s residence or nationality). The ambiguity of the Rome Statute’s complementarity provisions (see discussion at Part III.D.ii supra) is potentially at odds with the ICC assuming that role, and should be addressed to ensure the ICC becomes the primary forum for such prosecutions.


\textsuperscript{84} See n. 68 supra.
mitted within the territory of another country that had accepted the ICC’s jurisdiction. Although the U.S. currently objects to that provision (among others), those objections will not alter the fact that the Rome Statute—complete with that provision—has been signed by ninety-two countries (as of January 2000), many of which are presumably in the process of ratifying it.

Because U.S. nationals suspected of human rights offenses already are exposed to possible prosecution in the national courts of foreign countries around the world, and because under the Rome Statute foreign countries could refer them for prosecution before the ICC as well, the U.S.’s refusal to sign the Rome Statute cannot ensure that U.S. nationals will not be prosecuted abroad for crimes under international law. Faced with the choice between having our nationals prosecuted in disparate (and potentially hostile) national courts in foreign countries world-wide, or before a single international criminal court, the United States should prefer the latter. Proper procedural safeguards are more likely to be respected, the substantive law is more likely to be applied consistently and even-handedly, and the process may be less politicized than if individual countries attempted to carry out these prosecutions.

The Pinochet case makes very clear that increasing globalization is not limited to the economic sphere; human rights offenses are not the exclusive concern of the country in which they were committed, and the prosecution abroad of international crimes is not only a possibility but a reality. Whether one is motivated by a desire to see justice accomplished in cases of crimes under international law, or to protect a country’s nationals from unfounded prosecutions in potentially hostile foreign courts, we believe the United States should regard the ICC as a desirable mechanism for the prosecution of human rights crimes.

**Conclusion**

The Pinochet case has presented several “firsts” in the annals of international criminal law, and raises broad questions about the continued

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85. See Rome Statute, Articles 12, 13; see also Panel Discussion, Association of American Law Schools Panel On The International Criminal Court, 36 Am. Crim. L. Rev. 223, 257 (1999). The ICC would also automatically have jurisdiction if a case were referred by the Security Council. Rome Statute, Article 13(b).

86. Furthermore, if the United States wanted to avoid the prosecution of its citizens before the ICC, it still could effectively pre-empt ICC prosecution by seriously investigating and/or prosecuting its nationals in its own courts. See id., Article 17(a)-(b) (providing a case would be “inadmissible” before the ICC if it were being “investigated or prosecuted by a State which has jurisdiction over it”).
vitality of head-of-state immunity. Whether or not Pinochet will ever be tried, the Law Lords' decision is historic in its explicit rejection of traditional immunity rules and their application to a former head of state. Similarly, the decision by Spanish courts to prosecute crimes committed primarily in Chile with a limited nexus to Spain raises interesting issues concerning the Torture (and Genocide) Conventions and their broad-reaching jurisdictional provisions. Because there is no existing international criminal court, and because Chile was doing nothing to bring Pinochet to justice, it is commendable that Spain sought to exercise jurisdiction. Furthermore, in the absence of a functioning ICC, other countries should be encouraged to exercise jurisdiction over universally-recognized crimes under international law. In the longer run, however, we believe that having one international tribunal that exercises jurisdiction over human rights crimes under international law would provide a more successful regime for the prosecution of these offenses.

February 2000
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"Open to the Public": The Effect of Presumptive Public Access to New York State’s Family Courts

The Committee on Communications and Media Law*

Behind the black marble facade looming over Lafayette Street in Lower Manhattan, and in courthouses across the state, New York’s Family Courts hear matters involving the most intimate details of private lives—e.g., whether a baby has been abused or neglected, whether a parent is fit, whether a young boy or girl has been delinquent. In these matters, state power collides with normally private family interests in a way that occurs nowhere else in the court system. These proceedings are at once intensely personal and yet fundamental to the public’s interests in equal justice and the efficient and humane administration of vast bureaucracies charged with protecting child welfare and ensuring juvenile justice. In this clash of personal and public interests, our society’s commitment to open and accessible public institutions has been sorely tested. Yet, in

* The Committee thanks John Maltby of the Libel Defense Resources Center and Daniel Murphy of the Daily News’ Legal Department for assisting in the preparation of this report.
New York at least, tremendous progress has occurred in recent years, ensur-
ing that the Family Courts are open to public access and scrutiny.

Two years ago, after the media was barred from Family Court pro-
cedings concerning the kidnaping and torture of Katie Bears, the abuse and death of Eliza Izquierdo and the custody fight over child movie star Macauley Culkin, New York State’s Chief Judge, Judith S. Kaye, and Chief Administrative Judge Jonathan Lippman promulgated a new rule govern-
ing access to Family Court proceedings. The new rule, 22 NYCRR §205.4, was announced on June 18, 1997, became effective on September 2, 1997, and has, for the first time on a system-wide basis, codified and ensured the Federal constitutional right of public access to court proceedings within the Family Courts of New York State.

The effect of this new rule has been immediate, salutary and appar-
ently universal throughout the court system, changing the Family Courts of this State in three fundamental respects.

First, as a result of the new rule, the practice of New York State’s Fam-
ily Courts with respect to public access to proceedings has become aligned with the Federal constitutional requirements prescribed by the United States Supreme Court in its press access decisions over the past two decades. Prior to Judge Kaye’s promulgation of the new rule, New York’s Family Court Judges, and the appellate panels that review their decisions, repeated-
edly entered court-sealing orders that this Committee and many of the media organizations its members represent believe violated the governing Federal constitutional precepts.

Second, at a time when the problems of New York City’s child welfare system have been the focus of widespread public, governmental and judicial concern, the new access rule for the Family Courts has facilitated press and public scrutiny of the role of the Family Courts concerning the foster care and juvenile justice issues that have captured such widespread civic attention and concern. While the effect of public scrutiny of the Family Courts eludes tangible measurement, if “sunlight is the best disin-
fectant,” as Justice Brandeis instructed, then the new access rule has helped reform the administration of child welfare and juvenile justice law in New York.

Third, the new rule has substantially streamlined the judicial process with respect to access issues in the Family Courts. Before the new rule was promulgated, the Family Courts and the Appellate Divisions that review their decisions were frequently saddled with costly and time-consuming Family Court access litigation. The multiplicity of decisions that ensued left parties to Family Court proceedings, Family Court Judges and the
media without clear and consistent guidance about when public access
would or would not be permitted, and the terms on which it would be
granted or restricted. In contrast, under the new rule, public access to
Family Court proceedings has never been denied in any reported matter,
the implementation of media access to Family Court proceedings has been
conducted with nearly no controversy, and there have been no reported
appeals from Family Court access decisions. As a result of the new rule,
therefore, consistency and consensus have replaced controversy on this
issue, and the burden of one type of satellite litigation ancillary to the
Court system’s mission has been alleviated.

The potential effect to children from having proceedings related to
them open to the public is hard to know with any certainty. Many of the
cases that have engendered press access controversies would have been
extensively publicized and reported regardless of whether press access was
granted or not due to the high-profile nature of the litigants. And, in
cases that the media covers in order to report on systemic child welfare
and juvenile justice issues, as opposed to issues in which the identity of
the litigants or the horror of the particular incidents involved attract
media attention, pseudonyms or other devices to ensure anonymity are
frequently employed.

Accordingly, we have concluded that, during the first two years of
experience under Judge Kaye’s new rule presumptively permitting press
and public access to the Family Courts, the new rule has been a success.
The Family Court access rule is one court reform that appears to have
achieved its objectives, providing a model for other State court systems to
adopt and apply.

BACKGROUND AND HISTORY OF COURTROOM ACCESS

In the landmark case of Richmond Newspapers, Inc. v. Virginia,1 the
United States Supreme Court held that the First Amendment guarantees
the public and press the right of access to criminal trials. Writing for a
plurality of the Court, Chief Judge Warren Burger reasoned that the First
Amendment guarantee of assembly assures the public and press a right of
access to places traditionally open to the public, and that “a trial court-
room... is a public place where the people generally—and representa-
tives of the media—have a right to be present...”2

2. Id. at 578.
Public access, according to the Court, fosters judicial integrity and public confidence:

When a shocking crime occurs, a community reaction of outrage and public protest often follows . . . Thereafter, the open processes of justice serve an important prophylactic purpose, providing an outlet for community concern, hostility and emotion. Without an awareness that society's responses to criminal conduct are underway, natural human reactions of outrage and protest are frustrated and may manifest themselves in some form of vengeful ‘self-help,’ as indeed they did regularly in the activities of vigilante ‘committees’ on our frontiers.

* * *

People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing. When a criminal trial is conducted in the open, there is at least an opportunity both for understanding the system in general and its workings in a particular case...3

Since the Richmond Newspapers decision, the fundamental constitutional right of access to court proceedings has been extended to civil actions,4 including proceedings in Family Court.5

While there is no absolute guarantee of access to judicial proceedings under the First Amendment, the press and public can be barred from the courtroom only under limited circumstances. The presumption of openness may be overcome only by showing that closure is essential to preserve higher values and is narrowly tailored to serve that interest.6

3. Id. at 571 (citations omitted). See also Westchester Rockland Newspapers, Inc. v. Leggett, 48 N.Y.2d 430, 437 (1979) (“public also has interest in seeing that there is justice for the accuser, the police and prosecutors who must enforce the law, and the victims of crime who suffer when the law is not enforced with vigor and impartiality. And when justice has been done, public awareness ‘serves(s) to instill a sense of public trust in our judicial process’” (citations omitted)).


In Globe Newspaper Co. v. Superior Ct. for Norfolk County, the United States Supreme Court struck down as unconstitutional a Massachusetts statute providing for mandatory exclusion of the general public from trials of specified sexual offenses involving minor victims. The Court held that to overcome the presumption of access afforded by the First Amendment, the state would have to show that the closure was "necessitated by a compelling governmental interest" and "narrowly tailored to serve that interest." The Globe Court reasoned that although the state had a legitimate interest in protecting minor victims of sex crimes from further trauma, that interest did not justify a mandatory closure rule because the circumstances of any particular case—such as whether the victim's name had been publicly exposed or whether the victim would suffer injury from the presence of the press or public in the courtroom—could render closure of the courtroom unnecessary. In addition, the Court found that the statute did not effectively advance the state's interest because there was no evidence that it encouraged victims to come forward and testify.

New York has also mandated a presumption that all of its courts will be open to the public. This mandate is codified in § 4 of the Judiciary Law:

The sittings of every court within this state shall be public, and every citizen may freely attend the same, except that in . . . cases for divorce, seduction, abortion, rape, assault with intent to commit rape, sodomy, bastardy or filiation, the court may in its discretion exclude therefrom all persons who are not directly interested therein, excepting witnesses and officers of the court.

Judiciary Law § 4, like the Federal constitutional mandate of freedom of the press, embodies the principle that all organs of government must be accessible and accountable in a democracy. Even in cases involving children, the public must be given the opportunity to assess whether the law is being enforced fairly.

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8. 457 U.S. at 607.
9. Id. at 608-09.
10. Id. at 609-10.
12. Westchester Rockland Newspapers, Inc. v. Leggett, 48 N.Y.2d 430, 442 (1979) (in cases involving minors, hearings should not automatically be closed. Actual evidence of harm to minor must be shown by those who seek closure).
State law affords courts discretion to limit public access in certain types of cases, however, including divorce, rape or sodomy, matrimonial cases and juvenile delinquency proceedings. In these instances, closure of the courtroom is not statutorily mandated; rather, the courts are vested with the discretion to exclude the public from proceedings in appropriate cases. This discretion, however, must be exercised against the strong presumption that all trials should be public in order to protect the public's clear interest in open trials. The public's right of access is no less significant simply because children may be involved. Indeed, the New York Court of Appeals has been vigilant in protecting the public's right to be informed about court proceedings even when children are involved.

While courts in New York and across the nation have long recognized the constitutional imperative of public and press access, especially in adult criminal proceedings, juvenile courts across the country have nevertheless remained largely off limits to on-site reporting and the public scrutiny that it provides. And the United States Supreme Court has not held that juvenile proceedings must be presumptively open to the public.

Lesser access to juvenile courts has developed, in part, as a result of differences in the mission and purpose of juvenile courts as compared to adult criminal courts. Unlike the focus of the adult justice system on ret-

15. Family Court Act § 341.1.
17. See Leggett, 48 N.Y.2d at 441-46 (public has no less interest in learning about matters of public concern merely because children are involved); Capital Newspapers Div. of the Hearst Corp. v. Moynihan, 71 N.Y.2d 263, 272 (1988) (retreating from earlier cases where there was some support for conducting juvenile proceedings in private, the court held that "in both felony cases before us the proceedings were presumptively open to the public, and . . . the trial courts acted improperly in closing them simply because they concerned youthful offenders.").
18. For a summary of the national status of and trends in access to juvenile proceedings, see The 1990s: Juvenile Court Proceedings and Records Continue To Be More Accessible To The Public, posted by The Reporters Committee For Freedom Of The Press at http://www.rcfp.org/juvents/index.html.
19. See In re Gault, 387 U.S. 1 (1967) ("[T]here is no reason why, consistently with due process, a State cannot continue, if it deems it appropriate, to provide and to improve provision for the confidentiality of records of police contacts and court action[s] relating to juveniles.")
ribution and punishment, the juvenile justice system aims primarily to treat and rehabilitate youthful offenders. To that end, individualized handling, procedural informality, and confidentiality are frequently viewed as crucial elements in protecting juvenile offenders from the perceived psychological damage that can accompany publicity. As one court stated, “[c]onfidentiality is essential to the goal of rehabilitation, which is in turn the major purpose of the separate juvenile justice system.”

The desire to protect the privacy interests of youths embroiled in the juvenile court systems has been even greater in proceedings concerning abuse, neglect, and custody. The juvenile subjects of these proceedings are innocent victims, not alleged juvenile delinquents, and state courts across the country have hesitated to extend a First Amendment-based right of access or to recognize the applicability of state open court laws to abuse, neglect and custody proceedings.

These traditions have had staying power, and have been recognized by the United States Supreme Court within its court-access jurisprudence. Under the First Amendment analysis prescribed by the United States Supreme Court in its press access decisions, whether access to court proceedings is to be afforded turns on a two-part inquiry. First, there is a historical inquiry: “whether the place and process have historically been open to the press and general public.” Second, there is a functional inquiry: “whether public access plays a significant positive role in the functioning of the particular process in question.” As one commentator has noted, “[g]iven the juvenile justice system’s overriding concern with protecting the juvenile offender, it is not surprising that claims for a First Amendment-based right of access to delinquency proceedings generally have been unsuccessful.”

The historical inquiry has been a hindrance to advocates of access to juvenile court proceedings. Justice Rehnquist addressed these historical considerations in his concurring opinion in Smith v. Daily Mail Publ’g Co.


where the Court struck down a West Virginia statute criminalizing the publication of names of juvenile offenders without prior judicial approval:

It is a hallmark of our juvenile justice system in the United States that virtually from its inception at the end of the last century its proceedings have been conducted outside of the public's full gaze and the youths brought before our juvenile courts have been shielded from publicity.25

While New York has some tradition of affording some access to certain types of Family Court proceedings,26 its courts have traditionally followed the national trend of more frequently barring the press and the public than generally occurs in other judicial fora, especially in child protection (e.g., abuse and neglect) proceedings.27

ACCESS TO NEW YORK'S FAMILY COURT PROCEEDINGS BEFORE THE NEW RULE

New York's Family Court Act was introduced in 1962, replacing the former Children's Court in New York State. Family Court holds exclusive original jurisdiction over proceedings involving juvenile delinquency, support, paternity, termination of parental rights, persons in need of supervision (PINS), and child abuse and neglect. In addition, the Family Courts have jurisdiction in foster care cases, child custody and visitation issues, court approval of costs with regard to certain disabled children, and domestic relations issues referred from the Supreme Court. Family Court shares jurisdiction over adoptions and guardianships with the State's Surrogate Courts28 and with the New York City Criminal Courts in proceedings involving family offenses (domestic violence).

Since the Court's inception, as a matter of daily practice, most Fam-


26. Unlike some other types of juvenile proceedings, custody trials have traditionally been open to the public in New York's courts. See Brentrup v. Culkin, 166 Misc. 2d 870, 871 (Sup. Ct. N.Y. Co. 1995).

27. In re Katherine B., 189 A.D.2d 443, 449 (2d Dep't 1993) ("Child protective proceedings under Family Court Act article 10 have historically been closed in New York State (see, Besharov, Practice Commentary, McKinney's Cons. Laws of N.Y., Book 25A, Family Ct. Act § 1043, at 380-381; Matter of S. Children, 140 Misc. 2d 980, 988), and public access has never played a significant positive role in the functioning of these proceedings.").

28. Family Court Act § 641 (adoptions); Family Court Act § 661 (guardianships).
ily Court proceedings were closed to the public and all documents filed in Family Court proceedings have been sealed. This remarkable degree of court closure has occurred even though the 1962 Family Court Act, its later amendments, the old Uniform Rules of Court and Judiciary Law § 4 all provided statutory or rule-based authority for court access.

In 1978, the Legislature amended the law to open public access to youthful offender proceedings heard in Supreme Court involving juveniles charged with felonies. The Court of Appeals held that sentencing proceedings for youthful offenders under this provision “are presumptively open to the public and the press,” and cannot be closed simply because juveniles are involved. The Court, however, did not address whether Federal constitutional standards apply in determining if the presumption is overcome, and this openness statute does not apply to juvenile delinquency proceedings heard in Family Court.

In the 1990s, the conflict between the public’s right to know and a child’s right to privacy came to the fore in three well-known cases—Katherine B., Ruben R. and P.B. v. C.C. In each instance, Family Court judges, increasingly concerned with accountability and believing that secret proceedings were not justified by any alleged harm engendered by publicity, opened their courts. They relied on Judiciary Law § 4, the Family Court Act and the discretion available under the pre-amendment Uniform Rules of Family Court. In all three cases, however, the lower courts were reversed on appeal.

THE KATIE BEERS CASE

In the Matter of Katherine B. involved an application by the Department of Social Services, the Law Guardian and the District Attorney to the Suffolk County Family Court seeking to close the courtroom in the child protective proceeding commenced against the mother of Katie Beers,

29. § 205.4(a) of the Uniform Rules of the Family Court (before the recent revision) set forth factors that a judge hearing all types of proceedings in Family Court may consider in exercising his or her discretion as to whether or not to exclude the public from the proceeding. They include whether: “1. the person is causing or is likely to cause a disruption in the proceeding; 2. the presence of a person is objected to by one of the parties; 3. the orderly and sound administration of justice, including the nature of the proceeding and the privacy of the parties, requires that all observers be excluded from the Courtroom.”


32. See Family Court Act § 301.2.

33. 189 A.D.2d 443 (2d Dep’t 1993).
a ten-year-old girl from Bayshore who was abducted by John Esposito, “an adult family friend, and imprisoned in an underground dungeon in his home for approximately sixteen days in December 1992 and January 1993, where he allegedly sexually abused her.” Esposito and the girl’s “godfather,” Salvatore Inghilleri, were indicted on multiple felony counts in connection with the abduction and sexual abuse. From the inception, this crime was the subject of extensive media coverage.

Noting that the Family Court Act does not mandate sealing the courtroom even in abuse and neglect proceedings and that the “statute unequivocally leaves the question of exclusion to the discretion of the presiding judge,” the Family Court granted NBC access to the proceedings.

The Family Court cited three principal considerations in support of its decision. First, the matter was already public, both because “the issues presented here were already extensively aired in public when this matter first came to court,” and because “the court proceedings already conducted have been fully attended by the public, the press as well as radio and television and there has been no disruption and no conflict with court administration.”

Second, the Family Court found not only that coverage of the initial phase of the proceeding had not been detrimental but that it in fact had a salutary effect by limiting the disruption that might otherwise be caused by the media’s search for alternative sources of information:

the court has been impressed that while these proceedings have proceeded over the last six weeks, the media attention has been focused in this judicial forum, which has been and can be controlled, in futuro, rather than in the house, neighborhood, school and other pursuits of the child where disruption of the infant who is involved in these proceedings could occur unfettered by any guideline or limitations.

34. 189 A.D.2d at 445.
35. Id.
36. Nexis cites 410 articles concerning the Katie Beers kidnapping published prior to the March 5, 1993 decision by the Family Court to reject the application to bar media access to the courtroom.
37. Id. at 446.
38. Id. quoting unpublished Family Court order entered March 5, 1993 (“Katherine B. Family Court Order”).
39. Id. quoting Katherine B. Family Court Order.
40. Id. quoting Katherine B. Family Court Order.
Third, again noting that the child’s privacy interest had already been diminished by prior media coverage, the Family Court noted the compelling public interest in opening courts generally to public access:

There is an important public and legislative educational component to proceedings open to public scrutiny which transcends individual uneasiness and perhaps embarrassment in pursuing the truth of discomforting issues in an open court. Enhancing public understanding of the works of its municipal offices is important if there is to be public confidence in court proceedings.41

Following the submission of affidavits by Katie Beers and an expert psychologist, the Family Court denied an application for reargument and the matter was appealed to the Appellate Division, Second Department, which reversed the Family Court and entered an order barring NBC (by then joined by other media organizations as amici curiae) from the courtroom. The Appellate Division’s decision in Katherine B. was blunt, decisive and (we submit) incorrect. The court started by “reject[ing] the contention of NBC and the amici curiae that they have a constitutional right of access to child protective proceedings.” The court based this conclusion on both the historic and function prongs of the Supreme Court’s press access jurisprudence, similar decisions by the courts of other states, and the Family Court Act provision (§ 1043) and the Chief Administrator’s rule (22 NYCRR §205.4) permitting exclusion of the public from Family Court proceedings.42 The Katherine B. court explained that the Chief Administrator’s rule then in effect was “meant to balance the right of access of the public and the press to judicial proceedings against the State’s interest in protecting children from the possible harmful effects of disclosing to the public allegations and evidence of parental abuse and neglect.” 189 A.D.2d at 450. Thus, the court did not recognize the constitutionally and statutorily mandated presumption of openness; it applied a neutral balancing test.

THE ELIZA IZQUIERDO CASE

This trend toward court closure under the Chief Administrator’s old rule continued in Ruben R., the child protective proceedings involving the

41. Id. quoting Katherine B. Family Court Order, citing 22 N.Y.C.R.R. § 131.1.
42. 189 A.D.2d at 449-450.
surviving siblings of six-year old Eliza Izquierdo, whose abuse and murder by her mother shocked New Yorkers, attracted nationwide attention and was the direct catalyst to an overhaul of New York City's former Child Welfare Administration. In Ruben R., Family Court Judge Sara P. Schechter granted an application by the City's three daily newspapers to permit press access, noting that “[t]he Family Court, like every other court in New York, is presumptively open to the public and the press.”43 Her decision was rooted in the policy rationale of affording public scrutiny of public institutions and processes:

New York’s child protective system is entirely publicly funded. Thus, the qualifications, diligence, and competence of its personnel are legitimate subjects of public inquiry. Family Court judges, as public officers, of course are subject to public scrutiny. As the public debates issues such as confidentiality of child welfare records and appropriate staffing and funding levels for child protective agencies, they must comprehend the extent to which the Family Court relies upon such agencies for the evidence on which judicial decisions are based. . . .44

In Judge Schechter’s view, closing the courtroom in the post-Eliza environment of concern for and attention to the failures of the child welfare system—especially in the very case involving Eliza’s surviving siblings—would extract a severe toll in terms of public faith in the child protective process. And, she explained, such an erosion in public faith would continue to undermine the ability of the system to meet its mission. As Judge Schechter explained:

In the absence of accurate information about the child protective process, the public mood fluctuates from indignation to apathy. This court must not allow its genuine concern for litigants' privacy to render it a collaborator in complacency. So long as the public imagines that a court can obtain reliable information by ordering child welfare authorities to investigate and supervise, so long as citizens suppose that a judge can make rehabilitative services materialize with the bang of a gavel, our society will come no closer to its proclaimed goal of meaningful child protection.45

44. Id. at 10.
45. Id. at 10.
Yet Judge Schechter carefully and appropriately tempered the legal presumption in favor of openness and the policy grounds for opening this particularly notorious proceeding to public scrutiny with concern for the psychological welfare of the juvenile victims. In this regard, she compared cases reported in the media with uncovered cases and found that the same psychological issues arise regardless of media coverage. She explained that:

Victims of abuse often experience the torment of self-blame. It is one of the saddest consequences of all forms of domestic violence. This sense of guilt arises from within, however, and not from the press. It is common among all victims, including those whose suffering has never been reported. The remedy for this problem lies in supportive caretakers and psychotherapy, not in blanket closure of the courtroom.46

Nevertheless, Judge Schechter credited the psychological testimony concerning the potential ramifications of media coverage of this particular case submitted by the Law Guardian and the Commissioner of Social Services in their opposition to media access:

The psychologist's affidavit submitted by the Law Guardian points out that press reports of the children’s disclosures will complicate and interfere with the children’s progress in psychotherapy by forcing them to confront certain aspects of the case when they are not psychologically ready to do so. Further, they may become less willing to confide in the therapist if they fear their statements might be used to hurt their mother. One child was particularly upset by the “leak” of his Grand Jury testimony.47

Judge Schechter’s inquiry did not end there, however, for she was concerned about entering an order requiring more extensive sealing of the court proceeding than necessary, and she sought instead to craft a narrowly-tailored order reflecting the practical realities of the case. Accordingly, Judge Schechter held that:

With or without the Family Court proceeding, however, details of this family's life have become public and will continue to become public as the criminal proceedings progress, and any

46. Id. at 8.
47. Id. at 8-9.
punishment which may be meted out to Mrs. Lopez will result from that proceeding rather than from this court’s child protective proceeding. Nevertheless, in the Family Court hearing this court will entertain an application to exclude the press for those brief portions of testimony that may pertain to especially sensitive details not already in the public domain. 48

The Appellate Division, First Department reversed Judge Schechter and ordered that the entire child protective proceeding concerning Eliza Izquierdo’s surviving siblings be closed to the media and the public. In its decision, the Appellate Division relied heavily on the one phrase of Family Court Act § 1043 providing that the public “may be excluded” from Family Court proceedings at the court’s discretion and the factors to be considered with respect to court sealing inquiries enumerated in the court rules. 49 Despite noting the Federal constitutional presumption in favor of court access, and New York’s open courts policy codified in § 4 of the Judiciary Law, the Appellate Division nevertheless construed Family Court Act § 1043 as evidencing the Legislature’s “clear intent . . . to safeguard the privacy of the children, as well as the parents, who are involved in these proceedings, from the stigma of a public hearing.” 50 Based on this statutory construction, its view that the Family Court’s commitment to entertain sealing applications on a fact-by-fact basis would be disruptive of the proceeding and its reliance on the decision in Katherine B, “[t]he only appellate decision in this State which addresses the issue of coverage by the media of an Article 10 [child protective] proceeding,” 51 the Appellate Division, First Department held that the proceedings in Ruben R. were to be closed in their entirety to the press and public.

In rendering its decision, the Appellate Division, First Department reserved its strongest critical language for the policy rationale for opening the proceeding that had been articulated by the Family Court. The Appellate Division found that the Family Court “gave undue consideration to the societal interest in understanding the workings of the Family Court and the child welfare system,” 52 and disregarded Judge Schechter’s policy

48. Id. at 9.
49. 22 NYCRR § 205.4. These enumerated criteria have been retained and revised in the new rule promulgated in 1997, as discussed below at pp. 27-28.
51. Id. at 126.
52. Id. at 124.
concerns in its holding that “the [Family] court, rather remarkably, seemed to indicate that the underlying tragedy, and the ensuing public debate, provided an appropriate opportunity to educate the public as to the ‘essential role of the Family Court in the child protective process’, which, thereby, overrode any potential, long-term damage that would result to the children.”

The Court of Appeals denied a motion by the City’s daily newspapers for leave to appeal the sealing order entered by the Appellate Division, First Department, the public and press were barred from the proceedings, and members of the press were relegated to gathering facts from second-hand sources. Ironically, it was this case that ultimately became a catalyst for legislative change (i.e., Eliza’s Law) in favor of more public access to and scrutiny of government agencies charged with protecting children.

THE MACAULEY CULKIN CASE

The final case of the trio, P.B. v. C.C., also resulted in an order by the Appellate Division, First Department closing the proceeding below. Unlike Katherine B. and Ruben R., however, the proceeding appealed from was not a child protective proceeding in the Family Court but a custody proceeding in Supreme Court, New York County, concerning the child actor Macauley Culkin and his siblings. The trial and appellate courts ascribed different significance to this distinction, leading to diametrically opposed applications of the law in this case.

Justice David B. Saxe, who heard the matter below and opened his courtroom upon an application by the Associated Press, CBS, the Daily News and the Post, began his analysis with the historic fact that “the custody trials held in the New York State Supreme Court have historically been open to the public.” Like Judge Schechter in Ruben R., Justice Saxe also emphasized the “significant positive role” played by public access to

53. Id. at 121.
55. Indeed, the Appellate Division, First Department granted an application by the law guardians for the children barring the press and public from its courtroom during legal arguments concerning whether the press had a right to be present in the Family Court proceedings. The law guardians also sought to bar counsel for the press applicants from being present, but the Appellate Division denied that unusual request.
court proceedings, noting that "public scrutiny of a custody trial indeed can 'promote fairness and due process and tends to prevent perjury, misconduct and biased results.'" 57

As in Ruben R., Justice Saxe took note of the fact that the press and, through it, the public, already had their noses under the tent of the Culkin custody dispute, and sealing the courtroom would not in fact prevent the public dissemination of the facts of the case. This rationale for affording access to the court proceedings was especially acute, in Justice Saxe's analysis, because of the nature of the family involved and its long-held practice of seeking media attention:

As to the harm resulting from the media exposure of the private lives of the Culkin children, it must be recognized that these are not ordinary children. This is a family of professional actors, the most famous of whom is known internationally and has been called the best-known child actor since Shirley Temple. If the younger children, who are not currently actors, display the necessary ability, they will also undoubtedly be directed into the field of acting. This family is by definition in the limelight, and all are the equivalent of public figures. Coverage in the media, is a fundamental part of their lives, and must necessarily include negative as well as positive, press-release style information. While it is unpleasant to read, or have others read about negative elements of one's family relationships, that unpleasantness alone does not demonstrate harm. 58

As in Ruben R., Justice Saxe acknowledged the possibility that particular pieces of new, non-public information could be presented at trial that would warrant a limited confidentiality order to prevent harmful public dissemination of those specific facts. Accordingly, he held that:

it may well be that testimony will be taken, which might be personally humiliating to some of the children: for instance, if the testimony of the forensic psychiatrist will include psychological diagnoses, evaluations of maladjustment or other assertions likely to humiliate a child. If that is the case, I will entertain in camera offers of proof and upon an appropriate show-

57. Id. at 871 quoting Matter of Douglas, N.Y.L.J., March 31, 1995 at 37, col. 2 (Surr. Ct. Westchester Co.).
58. Id. at 873.
ing, will close the courtroom for that portion of the trial. With 
the assistance of counsel in monitoring the expected testimony, 
the court should be able to avoid the publicizing of any hu-
militating information regarding the children.59

Again, though, the Appellate Division, First Department objected to 
this procedure, and reversed the trial court’s order permitting media ac-
access to the courtroom. In analyzing the facts of P.B. v. C.C., in the wake of 
its prior decision in Ruben R. and the Second Department decision in 
Katherine B., the appellate court began as Justice Saxe did by considering 
the significance of the fact that this case involved a Supreme Court cus-
tody trial as opposed to Family Court child protective proceedings. With-
out even noting Justice Saxe’s finding that custody trials have tradition-
ally been open to the public in New York, a fact that was surely of consti-
tutional significance under the historic inquiry branch of the inquiry 
prescribed by the United States Supreme Court in Press Enterprise II, the 
Appellate Division, First Department held that there is a lesser public in-
terest in custody proceedings than in child protective proceedings because “there is no governmental entity involved here.”60

The Appellate Division, First Department also reached the opposite 
conclusion from Justice Saxe concerning the significance of the fact that 
the public already had its nose far under the tent in the Culkin dispute 
and that “[n]umerous press reports concerning this case have already re-
vealed allegations of alcohol and drug abuse and domestic violence.”61
Rather than concluding, as Justice Saxe had, that the court could not 
control the dissemination of already public information, the Appellate 
Division, First Department instead emphasized the contentions of the 
guardian ad litem that further media coverage would only lend additional 
pressure to the lives of the Culkin children. The court made no effort, 
however, to state how further press coverage of this already widely-cov-
ered dispute would be prevented by a court-sealing order.

Finally, as in Ruben R., the Appellate Division rejected the trial judge’s 
offer to entertain confidentiality applications on a fact-by-fact basis dur-
ing trial, concluding that “[t]he best efforts of a well-intentioned judge

59. Id. at 874.
60. P.B. v. C.C., 223 A.D. 2d 294, 297 (1st Dep’t 1996). The fact that the Supreme Court 
itself, where the Culkin custody trial was to be held, is itself a governmental entity apparently 
escaped the court’s consideration.
61. Id. at 296.
cannot adequately protect against devastating revelations or allegations which may be adduced in the course of rapidly unfolding examination and cross-examination in a hotly-contested and acrimonious litigation."\(^{62}\)

In P.B. v. C.C., unlike the prior cases, one Appellate Division Justice, Theodore B. Kupferman, dissented, emphasizing the already public nature of the proceeding:

> Under the circumstances, where life has meant full-blast press and publicity for the parties involved, they cannot simply turn off the spigot of newsflow. . . . For this Court to equate the parties in the instant action with those in the two child protective proceedings is, by analogy, to consider the tiger and the kitten in the same class. They both may be members of the family Felidae and, therefore, distant relatives, but the striped Asiatic carnivore (Leo tigris), the largest member of the family, is not at all like the furry mouser (Felis catus), the smallest. When one analyzes the matter this way the presumption in favor of public access becomes overwhelming.\(^{63}\)

Notwithstanding Justice Kupferman's dissent, and after initially granting a stay to consider the matter,\(^{64}\) the Court of Appeals again denied a motion for leave to appeal\(^{65}\) filed by the media intervenors who argued that the First Department’s holding that trial courts must be closed on request of any party where potentially embarrassing information may be revealed in a proceeding amounted to a constructive closure of the courts in violation of the Supreme Court's decision in Globe Newspapers Co.\(^{66}\)

The immediate impact of these three Appellate Division decisions was clear in the Family Courts. They conveyed an undeniable message that closed courtrooms were now legally mandated in virtually every case. For instance, in In re C.V.,\(^{67}\) a garden variety custody case, Judge Bogacz gave no serious consideration to a press application to be present in the courtroom over the Law Guardian’s objection, notwithstanding the lack of

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\(^{62}\) Id. at 297-98 (citation omitted).

\(^{63}\) Id. at 297.

\(^{64}\) Order of the Court of Appeals signed by Judge Simons on October 26, 1996.

\(^{65}\) In re P.B. v. C.C., 89 N.Y.2d 808 (1997).

\(^{66}\) See Notice of Motion For Leave To Appeal, For Stay Of The Trial Below Pending Appeal For Expedited Decision On Both Motions With Statement Pursuant To Rule 500.11 In Support Thereof, dated October 7, 1996.

\(^{67}\) Decision And Order dated May 28, 1996.
opposition by the mother seeking custody.\footnote{There was also an abuse and neglect petition filed in this case. The press did not seek access to this portion of the case and the attorney for the child's mother joined the other parties in seeking closure in those portions of the case.} Equally troubling, Judge Bogacz denied the press application for reporters to be present while their counsel made legal arguments for access to the custody proceedings.\footnote{Decision And Order dated May 28, 1996 at 3-4 ("The court further notes that in the Matter of [Ruben R.]... the arguments before the Appellate Division were closed to the press").}

Likewise, in In re the Lockwood Children, Judge Ruth Zuckerman relied heavily on Katherine B., Ruben R. and P.B. v. C.C. to deny access to the press for the entirety of the protective proceedings, even though much of the testimony did not involve the children and would be identical to that which would be heard in the public criminal case against the children's mother.

\section*{THE PENDULUM SWINGS: THE NEW RULE OPENING NEW YORK'S FAMILY COURTS}

In the wake of the closure of the courtrooms in the Katie Beers, Eliza Izquierdo and Macauley Culkin matters, and the trend toward closure that those high-profile Appellate Division decisions caused throughout the Family Courts, Chief Judge Judith Kaye and Chief Administrative Judge Jonathan Lippman convened a committee to focus on Family Court access issues and to establish guidelines to help judges decide these cases. The committee was chaired by Judge Michael Gage, Administrative Judge of the New York City Family Court.\footnote{The other members of the committee were Jane Spinack, Director, Juvenile Rights Division, Legal Aid Society, Charles Hollander, Deputy General Counsel, Administration for Children's Services, and Eve Burton, Vice President and Deputy General Counsel, New York Daily News.} Following extensive committee discussions, consultations and recommendations, the Chief Judge and Chief Administrative Judge announced a new set of rules governing public access, including access by the media, to proceedings in New York State Family Court on June 18, 1997.

The new rule governing access to Family Court proceedings cut through the clutter of prior law and lore concerning public access by instituting a clear and simple presumption in favor of public access.

The rule that Chief Judge Kaye and Chief Administrative Judge Lippman
adopted for the State court system begins with a bold and declarative legal mandate and policy directive: “The Family Court is open to the public.”

To make clear the breadth of this pronouncement, the new rule emphasizes that openness is to apply to all aspects of the operation of the Family Courts and all visitors, including the press, by providing that:

Members of the public, including the news media, shall have access to all courtrooms, lobbies, public waiting places and other common areas of the Family Court otherwise open to individuals having business before the court.

Like all legal presumptions, however, the new Family Court access rule permits judges to reverse the presumption of openness “on a case-by-case basis based upon supporting evidence “as a matter of the court’s” inherent and statutory discretion.”

The new rule enumerated four non-exclusive factors that judges may consider when deciding access issues that are an evolution from the previous rule and that reflect the factors that advocates had previously argued and that courts had typically noted in prior decisions. These factors are whether:

1. the person [to be excluded] is causing or is likely to cause a disruption in the proceedings;
2. the presence of the person is objected to by one of the parties, including the law guardian, for a compelling reason;
3. the orderly and sound administration of justice, including the nature of the proceeding, the privacy interests before the court, and the need for protection of the litigants, in particular, children, from harm that requires that some or all observers be excluded from the courtroom;
4. Less restrictive alternatives to exclusion are unavailable or inappropriate to the circumstances of the particular case.

These factors, familiar to those who follow press access law, are help-
ful signposts to New York Family Court judges called on to apply the United States Supreme Court's access directives in their own courts.  

The new rule also retained from the old rule the requirement that a court enter findings before ordering any exclusion from a Family Court proceeding. This decisional requirement is incorporated into the rule as follows:

Whenever the judge exercises discretion to exclude any person or the general public from a proceeding or part of a proceeding in Family Court, the judge shall make findings prior to ordering exclusion.  

As the reported case law decided under the new rule (described below) demonstrates, this requirement that the presumption of openness can be overcome only if and when the court enters specific findings has added real strength to the court system's pronouncement that "[t]he Family Court is open to the public."

OPENNESS IN ACTION: THE COURT SYSTEM ADAPTS TO THE NEW RULE

Chief Judge Kaye and Chief Administrative Judge Lippman announced the new rule governing access to Family Court on June 18, 1997. It was scheduled to take effect on September 2, 1997 and was quickly implemented. But, in fact, judges treated the new rule as law from its announcement, even before it actually went into effect.

At the time Chief Judge Kaye and Chief Administrative Judge Lippman promulgated the new rule, the Family Court, Westchester County, was hearing the juvenile delinquency matter of twelve-year-old Malcolm Shabazz, the grandson and namesake of Malcolm X, who was accused of the arson that ultimately led to the death of his grandmother, Malcolm X’s widow, Dr. Betty Shabazz. The Shabazz case, In re Malcolm S., afforded the first opportunity for the courts to reconsider the issue of media access to Family Court proceedings following announcement of the new rule. Indeed, on the application of the Daily News and the Post, the presiding Family Court Judge, Howard Spitz, noted that the matter arose “at a time when

75. These factors were an expansion and elaboration of three similar factors that had been included in the old Family Court access rule. The new rule added the “compelling reason” clause in (2), the words “some or” before “all observers be excluded from the courtroom” in (3), and (4) in its entirety.

76. 22 NYCRR § 205.4(b).
there is heightened concern about increased juvenile and domestic violence and a perception that Family Court proceedings are veiled in secrecy.” 77

Judge Spitz himself noted that the Shabazz case differed from the recent troika of media access cases—Katherine B., Ruben R., and P.B. v. C.C.—because it was a delinquency proceeding as opposed to a child protective or custody proceeding where “the guidelines might more appropriately be applied to mandate exclusion since the minor in such a case is an innocent victim . . . [and n]ew victimization may result in such cases because of public exposition of the allegations. 78 How Judge Spitz would have ruled if Shabazz had been “an innocent victim” is unknowable, of course, but the logic of his opinion opening the courtroom nevertheless embraced the presumption and the purpose of openness embodied in Judge Kaye’s new rule.

Like the Family Court Judges who decided Katherine B., Ruben R. and Justice Saxe in P.B. v. C.C., Judge Spitz cited the lack of disruption caused by the initial open proceedings in Shabazz, the extensive media coverage the matter had already received and would continue to receive and the proposition, rooted in constitutional doctrine, that “[t]he public, as represented by the press, has a right to know that the Court is meeting its responsibility toward the community.” 79

Buttressed by the new rule and the emphasis on the need for specific findings of harm before the presumption of access can be overcome, 80 Judge Spitz found that:

While much has been said about the potential trauma and harm to the Respondent if the press is granted access to these proceedings, little has been offered in support of that contention other than speculation, conjecture and assumption.81

On this basis, Judge Spitz opened his courtroom to the media for the balance of the Shabazz proceedings.

77. In the Matter of an Application for News Media Coverage in the Matter of Malcolm Shabazz, Decision and Order, dated July 1, 1997 (the “Shabazz Family Court Decision”) at 1 (emphasis added).
78. Id. at 4.
79. Id. at 5.
80. In rendering his decision, Judge Spitz noted that he had “carefully considered the factors articulated in Section 205.4(a) of the Family Court Rules . . .”. Shabazz Family Court Decision at 7.
81. Shabazz Family Court Decision at 5.
This time, the Appellate Division, Second Department affirmed. The only factor the Appellate Division cited in its one paragraph per curiam Decision And Order, in which it expressly noted its contrary decisions in Katherine B. and the First Department's contrary decisions in Ruben R. and P.B. v. C.C., was the absence of any finding that press access would detrimentally effect Malcolm Shabazz. It held:

The record before the Family Court presently lacks evidence indicating that the presence of the press would potentially have detrimental effects on the juvenile's well-being.82

In support of this holding, the Appellate Division, Second Department cited, among other things, the new rule, 22 NYCRR § 205.4.83

Since the Shabazz case, there is no reported case in which the public has been barred from any Family Court proceeding. In the first decision clearly based on Chief Judge Kaye's new rule for Family Court, The Matter of Augustus C.,84 the press gained access to a protective proceeding in which a mother was accused of neglect when she left her son in a park while she was working. Judge Susan Larabee reasoned that “Family Court proceedings are presumptively open” based on “newly promulgated revised Rule 205.4 of the Uniform Rules of the Family Court.”85 Echoing Judge Spitz's decision in Shabazz, Judge Larabee focused on the Law Guardian's inability to demonstrate that press coverage would be harmful to the child:

[T]he Law Guardian's assertion of harm to the subject child are not supported by the minimal evidence she presented. The social worker proffered what can only be seen as vague, unsupported speculation about the impact media coverage of the proceedings would have upon the subject child . . . . The Court finds no credible proof in the record whatsoever regarding the effects media access would have on the child.86

UNRESOLVED ISSUES UNDER THE NEW RULE

While the new rule appears to have guaranteed the constitutional mandate of open proceedings in New York's Family Courts, a number of

83. Id.
84. Decision And Order dated July 11, 1997.
85. Id., Decision And Order at 5.
86. Id., Decision And Order at 7-8.
implementation issues have arisen as the court system adapts to life under the new rule. Most notably, Family Court Judges have routinely issued orders that predicate access to the courtroom on an agreement by the press that the names and identifying details of the children not be printed or broadcast. While this may be reasonable in certain unusual circumstances, it has become almost routine.

Even in a case like Augustus C., which on its face was a clear victory for press and public access, the press was faced with numerous conditions:

[All] press reporting of this matter is subject to the following restrictions: (1) the subject child's current address, whereabouts and schedule are not to be reported in any account of the proceedings; (2) the name, address or schedule of the child’s foster parent(s) is not to be published in any account of the proceedings; (3) there is to be no attempt to contact the subject child during the pendency of this child protective proceeding; (4) the specific address of the Non-Respondent Father, as well as the name of the street upon which he lives, is not to be reported; and (5) no confidential medical, psychiatric, psychological or other reports concerning the child are to be published, broadcast or reproduced in any form. It is to be understood that this Court will hold both the individual reporter present in the courtroom and his or her news organization responsible for violations of any of these restrictions. Any violations of any of these restrictions will be punishable as contempts of court.

In re Everett, a case involving custody of the children of New York Mets outfielder Carl Everett, New York daily newspapers challenged a similar conditional order, arguing that these restrictions reach far beyond the information obtained from the courtroom and prohibit, in advance,
publication of information that may have been learned from another source, thereby constituting an unconstitutional prior restraint. Following an extended dialogue with newspaper lawyers, the Everett court acceded to an interpretation of its conditional order that permitted media reports based on information obtained outside the court proceeding and thereby avoided litigating the issue.89

ACCESS TO TRANSCRIPTS AND OTHER COURT DOCUMENTS

Another issue left unresolved by the new rule involves access to the transcripts of Family Court proceedings. Apparently in conflict with the changes to § 205.4, Family Court Act § 166 provides:

The records of any proceeding in the Family Court shall not be open to indiscriminate public inspection. However, the court in its discretion in any case may permit the inspection of any papers or records . . . .

In addition, § 205.5 of the Uniform Rules of the Family Court only indicates who must be permitted access to family court records. While the rule in no way restricts access to those specified as being granted access, or limits the discretion otherwise granted to the Family Court in § 166, § 205.5 could arguably suggest that courtroom transcripts are not to be made public. Such a rule would greatly impede the media's ability to fairly and accurately report court proceedings. The media's coverage of court proceedings would be greatly diminished if it was necessary to be physically present to learn the substance of a particular hearing.

In the handful of cases which have addressed the issue since the rule change, however, the courts have granted access to the transcripts of court proceedings, and have often relied on the changes in § 205.4 for support. In In re Sabrina Green,90 for instance, the Daily News sought access to the transcripts and an investigative report involved in a March 1997 decision granting the petition of Yvette Green to be appointed the guardian of her younger sister, Sabrina Green. Sabrina was found dead eight months later, and Yvette was charged with the crime. Opposing the Daily News' application for access to the Family Court transcripts and investigative reports submitted in the case, Green argued that the Family Court lacked

90. Decision And Order dated March 9, 1998.
jurisdiction to decide the application, that while access to the proceedings was covered by § 205.4, access to records was not, that release of the transcripts and reports would violate her privacy interests and right to a fair trial, and that the revised § 205.4 of the Uniform Rules for the Family Court has no retroactive effect.

Judge Terrence J. McElrath rejected each of Green’s contentions. Most importantly, the court held that the presumption of openness in Family Court does not end with access to the proceedings, but rather applies to transcripts as well. Quoting United States v. Antar:

It would be an odd result indeed were we to declare that our courtrooms must be open, but that transcripts of the proceedings occurring there may be closed, for what exists of the right of access if it extends only to those who can squeeze through the door.

Judge McEtrath continued to note that:

[A] reporter's ability to accurately report on proceedings before the Family Court similarly should not be dependent upon either his or her ability to recall or their ability to take verbatim notes. Inherent in the right to be present is the right to obtain transcripts.

Similarly, in In re Monique Bangura, the Daily News was granted access to the transcript of the arraignment of a fifteen-year-old girl charged with assault with a razor. The court rejected the argument that release of the transcript would violate the court’s obligation to protect the privacy and psychological well-being of the minor, finding that she had “not made the required showing of specific harm that would result from disclosure.” The court also rejected the contention that the newspaper “waived its right to access to the details of the initial appearance by its failure to actually appear at the arraignment,” by relying on United States v. Antar and In re Sabrina Green.

91. 38 F.3d 1348, 1360 (3d Cir. 1994).
92. Decision And Order at 3.
94. Id., Decision And Order at 3.
95. Id., Decision And Order at 4.
CONCLUSION

The experience of the New York State court system during the first two years of presumptive openness of Family Court proceedings under the new rule promulgated by Chief Judge Kaye and Chief Administrative Judge Lippman has been highly positive. Public access to Family Court proceedings has been assured consistent with Federal constitutional mandates without disruption to the court system. The result of this regime is that all reported cases subsequent to promulgation of the rules have provided for open proceedings.

Whether openness, and the public and media scrutiny of the judicial process that it affords, ultimately fosters greater responsiveness and accountability in the child welfare and juvenile justice systems remains to be seen, of course, and depends on the vigilance of the media, the public, and the bar over time. Child welfare issues tend to grab press and public attention at crisis moments and then recede into the background when there is no high-profile death or controversy but rather the day-in, day-out grind of a system charged with protecting and prosecuting the children of New York’s vast and seemingly intractable economic and racial ghettos. Access to the Family Court is no longer an impediment to reform, however, and the media and others must now use the access tool that Chief Judge Kaye has ensured to spotlight and change the painful problems that parade through Family Court every day.

January 2000
The Committee on Communications and Media Law

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The Minimum Age of Military Service in Connection with the Proposed Optional Protocol to the International Convention on the Rights of the Child

The Committee on Military Affairs and Justice

I. INTRODUCTION

Background

Children in war present morally compelling and emotionally wrenching images. In all wars, especially recent ones, children, along with the elderly, have suffered as the most vulnerable civilian victims of ethnic cleansing, starvation and “collateral damage.” Wars are causing a stunning increase in the percentage of civilian casualties; perhaps 5% of all

1. This report uses the terms “war,” “hostilities” and “armed conflict” interchangeably to refer to all types of armed conflict, international and internal, with or without declaration of war or other legal characterization. Although the type of conflict may be determinative of the applicability of certain treaties, such as the Protocols referred to in note 13, such distinctions do not influence the conclusions of this report.
Casualties were civilian in World War I, a figure which grew to some 48% in World War II and to as much as 90% in contemporary civil wars. Children bear a disproportionate share of this bloody civilian toll, particularly because of their participation in hostilities, both directly and indirectly. According to the findings of a Congressional resolution, “contemporary armed conflict has caused the deaths of 2,000,000 minors in the last decade alone, and has left an estimated 6,000,000 children seriously injured or permanently disabled.”

As if those horrors were not enough, children have been discovered as useful adjuncts to irregular armies. They are cheap, trusting, and—even when malnourished—strong enough to carry and to fire the automatic light infantry weapons of our time. According to reports of Ambassador Olara A. Otunnu, the United Nations Secretary General’s Special Representative for Children and Armed Conflict, very young children, some as young as 7, serve as soldiers, cooks, sexual slaves and suicide commandos. The “lucky” ones who survive the fighting with their bodies more or less intact emerge psychologically and educationally handicapped for normal roles in family and community life.

No defense of these atrocities has been articulated, for there is none. The urgency of the matter has been created by the shocking realization of how young these combatants really are.

The solution is far less clear than the problem. The worst actors are rogue states or stateless forces little impressed by either international law or world opinion. Even as the legality of humanitarian intervention is debated among legal scholars, greater and lesser powers are reluctant for many reasons to expend the political, monetary and manpower resources necessary to reverse the widespread state of violence and maltreatment of civilian populations, let alone deal with the sub-set of child soldier victims. When the international community does intervene, it is usually after terrible damage has already been done.

International and humanitarian organizations seek to redress that

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2. Goodwin-Gill, Guy and Cohn, Ilene, Child Soldiers, The Role of Children in Armed Conflicts (1994) at 9, and see sources cited at note 14 therein.


past harm through rehabilitation programs and efforts to forestall future abuse through stronger international law, notably through the movement against “child soldiers.” This movement's major international law initiative has been to seek to increase the minimum age for all kinds of military service to 18 worldwide, primarily through the proposed Optional Protocol to the 1989 United Nations Convention on the Rights of the Child (the “CRC”) on the Involvement of Children in Armed Conflict (the “Optional Protocol”). The Optional Protocol and its effect on the United States' armed forces is the focus of this Report.

**Terminology:** “Child Soldiers”

The term “child soldier” is commonly used for the good reason that the involvement of young children in war has created a humanitarian problem of crisis proportions. However, as applied to the specific controversy over the proposed minimum age of 18 for military service, to use the “child soldier” label is in fact to prejudge the controversy. This resonant term lumps the plight of very young, even pre-teen, children with much less clear questions involving high school seniors and even college freshmen who would not likely be seen by any American lay person as children or “child soldiers.” In any case, such older teenagers are clearly not in the same category with pre-teen children of 7 or 8, or even young teens of 13 or 14 years of age, all of which age groups participate in various hostilities in Third World conflicts. Although the word “child” is accepted internationally to identify persons below the age of full legal capacity, called “minors” in American law or “infants” at common law, this Report is concerned with the threshold age for particular purposes rather than with the “child” label with its emotional connotations or the concept of legal capacity generally.

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5. The Optional Protocol is being drafted under the aegis of the UN Economic and Social Council (ECOSOC) and its Committee on Human Rights, which in turn established the working group on involvement of children in armed conflict.

6. Official reports and advocacy literature alike call attention to the worst abuses affecting young children, but tend to report statistics only for persons under 18 as a single category and to recommend solutions addressing only that single category. While reaching the same conclusions, Goodwin-Gill and Cohn, op. cit. at 9 are exceptional in recognizing that 15 to 18 year olds with rapidly developing physical and intellectual maturity might be given a different label than “children.”

7. **Black’s Law Dictionary** (4th ed. 1951) at 917, 1149. At common law, full legal capacity was attained at age 21, which remained in effect until state law changes in the 1960s and 70s reduced the age of majority to 18 for most, but not all, purposes.
Further, this Report concentrates on the domestic military ramifications of the Optional Protocol while taking account of international implications. In fact, while the Optional Protocol is aimed at a crisis in developing countries, as in the African Great Lakes, if adopted it may turn out to have its greatest real impact in developed countries, and one not necessarily intended. This is because young people in developed countries tend to make career and life-shaping decisions as they approach the age of completing mandatory education and high school graduation. In the United States, the school leaving age is typically 17 to 18 years of age. Thus, how the Optional Protocol might change the interaction of young people aged 17 years old with the U.S. military is also our concern.

Status of The Optional Protocol
The movement to raise the international standard for the minimum age of military service from the current limit of age 15 through the proposed Optional Protocol will reach its climax in January 2000, which is the date of the next, and possibly final, meeting of the United Nation’s working group on the Optional Protocol. The draft of the Optional Protocol that emerged from the fourth meeting of the working group in 1998 (unchanged at the 1999 meeting), will serve as the starting point in the January 2000 meeting in Geneva.

That draft actually contains bracketed, alternative minimum ages for participation in hostilities (17 or 18) and for voluntary recruitment (16, 17 or 18), which are proposed choices for adoption in the final document. Aside from the provision on compulsory recruitment (conscrip-
tion), which sets a minimum age of 18 and is the one point on which an international consensus exists, no other ages are yet determined, although age 18 is widely being considered for all military purposes.

The position taken by the United States in prior working group sessions on the Optional Protocol—that is, that its current military practices will remain unchanged and that it will, in fact, oppose efforts to adopt the Optional Protocol with minimum ages inconsistent with U.S. practice even while it has not ratified the underlying CRC—has become extremely controversial. This is particularly so in the context of American rejection on asserted national security grounds of other recent attempts to advance humanitarian causes through the establishment of international legal norms, such as treaties regarding the land mine treaty,11 the International Criminal Court12 and, most recently, the Comprehensive Nuclear Test-Ban Treaty.13

II. STATE OF INTERNATIONAL AND DOMESTIC LAW

International Law

Until 1999, age limitations on child involvement in military matters and war were set at 15 years of age for all purposes: conscription, recruitment and participation in hostilities. These limitations began with Article 77 of the 1977 Additional Protocol I to the 1949 Geneva Conventions relating to the Protection of Victims of International Armed Conflicts14 (the “1977 Geneva Protocol”), as follows:

Article 2

1. States parties shall ensure that persons who have not attained the age of 18 years are not compulsorily recruited into their armed forces.

2. States parties shall ensure that persons who have not attained the age of 16 [17] [18] years are not voluntarily recruited into their armed forces.”
Article 77- Protection of Children. 2. The Parties to the conflict shall take all feasible measures in order that children who have not attained the age of fifteen years do not take a direct part in hostilities and, in particular, they shall refrain from recruiting them into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years the Parties to the conflict shall endeavor to give priority to those who are oldest. (Emphasis added.)

Further, there is the nearly identical provision in Article 38 of the CRC adopted in 1989:

Article 38...2. States Parties shall take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities.

3. States Parties shall refrain from recruiting any person who has not attained the age of fifteen years into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, States Parties shall endeavor to give priority to those who are oldest. (Emphasis added.)

Unlike the 1977 Geneva Protocol, the CRC does not contain a clause permitting derogation by state parties in times of emergency. Moreover, the CRC is more widely accepted, having been ratified by all UN member states other than Somalia and the United States. 15

The 1999 Rome Statute of the International Criminal Court (the “ICC”) provides jurisdiction over child-specific crimes, and determines that “conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities” in both international and internal armed conflict is an international war crime.
Once that tribunal becomes effective, with or without U.S. participation, there will be an international criminal enforcement mechanism to penalize those responsible for the worst abuses, that is, with respect to children under age 15. Nonetheless, violation of the Optional Protocol’s proposed higher minimum age standards (even by states that elect to sign and ratify the Optional Protocol, much less non-party states) would not constitute a crime within the jurisdiction of the ICC.

Existing International Law As Applied by the U.S.

The United States is not a party to the 1977 Geneva Protocol and, although it signed the CRC in February 1995, the Senate Foreign Relations Committee has not released that treaty for ratification by the Senate. Further, the United States has determined not to become a party to the Rome Statute establishing the International Criminal Court. Nonetheless, the United States recognizes age 15 as the established norm of international law, essentially as expressed in those treaties. 17

New Developments: Raising the Bar from 15 to 18.

The 1977 Geneva Protocol and the CRC’s prohibitions on military service below age 15, would, if respected, eliminate the most horrendous abuses of child combatants. Unfortunately, these treaties have had little impact on those who violate even that low standard. Faced with the inability to enforce the age 15 standard, and without waiting for the International Criminal Court to provide an enforcement mechanism for the standard, a number of national governments, regional African and Latin American organizations, UNICEF and other arms of the United Nations and many non-governmental organizations have sought to raise the international age standard for all military purposes to 18.

That movement has progressed on multiple fronts. Regional organizations and conferences have already adopted age 18 standards. The African Charter on the Rights and Welfare of the Child of the Organization of African Unity and the Maputo Declaration on the Use of Children as


17. Committee interview with Dr. James A. Schear, Deputy Assistant Secretary of Defense for Peacekeeping and Humanitarian Assistance, October 29, 1999.
Soldiers set or advocate an age 18 minimum for conscription, recruitment and use in armed conflict. The Montevideo Declaration on the Use of Children as Soldiers (the “Montevideo Declaration”) does likewise for Latin America.

Meanwhile, in 1999 the International Labor Organization sponsored the ILO Convention Concerning the Prohibition and Immediate Elimination of the Worst Forms of Child Labor (the “ILO Convention”), which treats military conscription as a form of forced labor and imposes a minimum age of 18 on such compulsory service. Because that limitation coincides exactly with domestic U.S. law (after successful U.S. efforts to prevent the ILO Convention from applying the same age 18 limit to voluntary service), the Senate ratified it on November 5, 1999, making the United States one of the first countries, in fact, to so ratify the ILO Convention.

III. THE TERMS OF THE OPTIONAL PROTOCOL

The most important effort to raise the age threshold to 18 has been directed at working within the context of the widely accepted CRC through the Optional Protocol. The Protocol is “optional” in the sense that a state party to CRC need not accept the Optional Protocol.

The goal of the Optional Protocol is a simple and absolute rule of age 18 for all military purposes: voluntary recruiting, conscription and service in hostilities, without exceptions. In addition to the moral force of an uncompromising international standard, proponents assert that a higher minimum age would facilitate enforcement, as a 13 year old, say, may physically pass for 15, but would probably not for 18. It should be noted, however, that this higher standard would not be enforceable before the ICC as a criminal law, since the Court’s statute specifically defines war crimes as including the use in hostilities of children below age 15. “Enforcement,” therefore, would thus rely upon moral suasion alone.

Age for Military Recruitment

A major controversy within the Optional Protocol working group has been the age for “recruitment,” a key term actually not defined in the

18. July 7, 1990 and April 22, 1999, respectively.
19. July 8, 1999
21. See note 16 supra. Nonetheless, Ambassador Otunnu, for example, claims such moral suasion may be useful in the international effort to keep young children out of hostilities.
Optional Protocol or in the prior international conventions which use the term. The lack of such an important definition is a serious and damaging omission, since the term is susceptible of several subtle but important variations. Clearly, the term is intended to include enlistment as a member of the armed forces, but it might also include (i) a commitment to enlist at a later date (referred to as deferred entry); or (ii) the marketing process of contacting, informing and persuading potential recruits to enlist. One guide to interpretation is that the Rome Statute, which purports to restate in a criminal context the content of established international law, uses the term “enlistment.” If “enlistment” with its connotation of actual enrollment and commencement of service were declarative of the legal standard, it would seem that “recruitment” should also be understood in its narrower sense, that is, without the marketing aspects. Such an interpretation is not, however, conclusive.

To further illustrate the danger of leaving key terms undefined, we note that the Optional Protocol provides a controverted exclusion from the otherwise applicable age prohibitions for enrollment in education and training in establishments operated or controlled by the armed forces in accordance with educational provisions of the CRC. However, it is doubtful, though not clear, that this exception is intended to apply where a student at such an establishment actually joins the armed forces, as do American cadets and midshipmen in the national military academies and at varying times during college ROTC depending on the program. On the other hand, Junior ROTC (a high school program not involving membership in the armed forces) is probably not affected, but, again, the Optional Protocol is unclear. This “education exclusion,” if it is indeed an exception, is viewed by some countries as a loophole within the generally tight prohibitions within the Optional Protocol. 22

**Age for Participation in Hostilities**

With respect to participation in hostilities, the Optional Protocol has generated negotiation over whether the age minimum should be 17 or 18, and also over whether the provision applies only to “direct” participation in hostilities or otherwise. 23 Regarding this latter point, nego-

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22. As a comparison, the Montevideo Declaration permits military schools and academies for children without any age limit within “a culture of peace” and if offering an education not allowed to be “militarized.”

23. The two 1977 Geneva Protocols differ on this point. Protocol I forbids only direct participation in hostilities below the set age, while Protocol II omits the qualifier. See note 14 supra.
tiators for the U.S. and some other countries fear that use of the word “participation” without a qualifier (such as “direct”) would include within its meaning all sorts of indirect participation quite removed from combat, e.g., participation in logistical services, that the Optional Protocol arguably should not reach.

On the other hand, however, in the Gulf War, U.S. rear echelon units hundreds of miles from the front were subject to Scud missile attacks that made them participants in hostilities, and non-combat medical rescue and evacuation aircraft were not only fired upon but were hit and their occupants even captured. Participation in hostilities may thus be a condition imposed by an enemy regardless of the intent of the deploying force once personnel are placed within range of hostile fire. As applied to naval forces, for example, would shipboard personnel on a supply ship servicing combat vessels or entering a war zone be deemed to “participate in hostilities”? If the criterion were a ship’s potential exposure to air, surface or submarine attack in the course of its duties, would it even be possible to define that exposure in advance of an attack?

It has been argued that a definition of hostilities extending beyond “direct”—say, “intended participation in hostilities”—might effectively prevent developing country forces from any deployment of “underage” persons in or near theaters of operations or on naval vessels at all, and therefore unduly restrict operational flexibility of nations whose armed forces cannot afford such restrictions.

Whatever the situation in developed countries, however, in the abusive situations of greatest concern, use of young children in support roles has nonetheless removed them from their homes, victimized them as forced labor and most likely exposed them to great danger, as recent combat has shown. Further, because much of the hostilities the world confronts today includes non-traditional forms—that is, hostilities other than static, set-piece battles between regular armies—the difference between the front lines and the rear support areas is often a difference without a distinction.

Therefore, we believe that indirect participation in hostilities by young children is clearly as opprobrious as direct participation, and if the Optional Protocol is to increase effectively the minimum age for participation in hostilities, it must define hostilities to include both forms. If this means by extension that underage personnel cannot be efficiently used in operational theaters or at sea, then the solution would be to organize personnel so that these members are not deployed in the first place, a solution more fully discussed below.
IV. THE U.S. POSITION ON THE OPTIONAL PROTOCOL AND ITS MERITS

The U.S. Government, in particular, the Department of Defense (“DoD”), has vigorously resisted such increase in the ages for recruiting and participation in hostilities, while embracing an age 18 limit for conscription. This comports with long-standing U.S. practice. In addition, the U.S. has declined to cooperate in the consensus-driven process to adopt a blanket age 18 protocol, where even a minority position can be a blocking one.

Domestic Law and Policy

The U.S. position on the Optional Protocol follows its existing domestic law. The United States’ military practice, embodied in statute since 1917,24 allows 17 year old teenagers to enlist voluntarily only with parental consent. Without parental consent, an enlistee must be 18 years of age or older. Conscription, now dormant, would commence at age 18 ½.25

DoD interprets those minimum ages of 18 for conscription and, with parental consent, 17 for enlistment, to apply both to enlistment and to entering into a binding commitment to enlist at a later date. Notably, there is no minimum age at which the recruitment process in its broadest sense of marketing and pre-enlistment processing can begin, including the taking of qualifying tests, nor, once a person is enlisted, is there any minimum age for assignment to units, deployment to operational theaters or participation in hostilities.

U.S. Position on the Optional Protocol

Nonetheless, the DoD says “[t]he United States supports an increase in the minimum age for military recruitment and participation in hostilities from the current age of 15.”26 As to what age the U.S. does support as

24. Currently, 10 USC §505. Before the Civil War young children served in various capacities with American forces. Between the Civil War and 1917, American services were more restrictive but continued to enlist boys as young as 13 (officially with parental consent) as “Music Boys” in the Army and Marines (notably John Philip Sousa) and as apprentice sailors in the Navy where they held the specific rank of “Boy.” See generally, Bishop, Eleanor C., Ponies, Patriots and Powder Monkeys: A History of Children in America’s Armed Forces 1776-1916 (1982).

25. Conscription ages above 18 have been preferred in recent history. In World War II, the U.S. draft was applied initially at age 21 and lowered progressively to 18, reflecting a view that somewhat older age groups are more appropriate for mandatory service than are younger groups, subject to manpower availability. The present deferred draft law would permit induction at 18 ½ at the earliest, with preferences for inductees age 19 and above. 50 USC App. §§ 454.455.

26. DoD Fact Sheet delivered to the Committee by the Office of the Deputy Assistant Secretary of Defense for Peacekeeping and Humanitarian Assistance.
the military threshold, the DoD writes that “[a]ge 17 is a more practical minimum age and it offers better hope [than does age 18] for broad international consensus and compliance.”

Moreover, DoD does not consider the Optional Protocol really “optional.” It is concerned that once a minimum age of 18 has been accepted by a large number of countries as the norm under a United Nations treaty, the likely next step will be its extension as an internationally accepted standard binding even on non-parties. Indeed, as if to confirm this fear, some authors already contend that 18 is an internationally accepted norm, at least for participation in hostilities, notwithstanding the specification of age 15 as the minimum in the CRC and the Rome Convention.

DoD defends the U.S. position not to go beyond domestic law as one which is consistent with an improvement in the international standard—by raising the minimum age for all purposes from age 15 to age 17—but avoids serious interference with its recruitment, deployment and operation of U.S. and allied armed forces. In analyzing that rationale, it is important to distinguish between volunteer and conscripted personnel structures.

**Recruiting Volunteer Forces as Opposed to Conscription**

Most countries that rely on conscription, rather than on recruitment of volunteers, to raise their military personnel have no difficulty adopting a minimum age of 18 for this purpose, since the draftee must report

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27. Id.

28. "The general practice of States is not to conscript below the age of eighteen, and not to assign volunteers under eighteen to active service; the exceptions are not so extensive or of such character as to de-rail the emergence of a rule of customary international law." Goodwin-Gill and Cohn, op. cit., at 171.

29. There is a trend amongst European states to move from conscription to volunteer forces. The U.K. and Ireland long ago abandoned conscription, as did Belgium and the Netherlands more recently. France plans to convert to an all-volunteer force by 2002 and Spain to begin conversion that year, while Italy and others are considering conversion. Apart from Germany, which asserts the civic value of its unique blend of military and civilian national service and depends on it for cheap labor in social service and hospitals, the most draft-dependent European countries have distinctive cultural traditions (Finland and Switzerland), a fear of imminent conflict (Greece and Turkey) or are transitioning from Communist states. See "As the Battlegrounds Shift, the Draft Fades in Europe," The New York Times, October 31, 1999. It would not be surprising if European volunteer forces faced the same kinds of recruitment challenges as the U.S. does now in the event of a substantial improvement in the high European unemployment rates, especially if they were unable to recruit at the school leaving age.
for duty when called. Whether the timing of a draft notice is convenient for the draftee's career planning is of no interest to the military.

A volunteer career force is, however, in a different and more difficult position when it comes to age. High school students in the U.S. normally chart the course of their higher education or career in the last year of secondary education or even the prior (junior) year. It is not unusual for these decisions to be made at age 17, whether or not the student turns 18 by graduation. If young people qualified for a sophisticated, modern force are to be recruited, especially in a high employment environment, the armed services must obtain their enlisted personnel at the same time competing employers or other career paths do so; similarly, it must attract its future officer corps to the academies and university officer programs (ROTC) when other choices are available to those students, as well.

Measured by aptitude testing, the U.S. military recruits most of its personnel from a mid to upper sector of the population with virtually none from the lowest scoring 30%. The average DoD aptitude scores of enlistees have risen significantly since 1973, especially among minorities, although the percentage of "high quality" recruits peaked in 1992 and has declined considerably since. It is vital to national security in a time of increasing complexity of weaponry and logistics so vividly demonstrated in the Gulf War and Kosovo operations that the U.S. armed forces continue to include the highest possible level of personnel. Enlisted personnel who maintain Tomahawk missiles, crew AWAC aircraft or perform other technically demanding tasks should come from the highest level of high school graduates which the services can recruit, and to do so, they must be recruited when they are forming their career plans.

Some description of the recruiting process is necessary to understand the significance of age in the end result. Military recruiters, like college

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30. The educational level of the American military compares well with the general population of the same age. As of December 31, 1998, only 2.17% of the enlisted ranks lacked a high school diploma or GED, and 99% of new recruits had a diploma, GED or alternative qualifications compared with 79% of the general population of the same age. In the early days of the volunteer force, these statistics were dramatically lower, with only some 45% high school graduates in the Marines and 60% in the Army.

admissions offices and business personnel departments, make contact with their prospects long before graduation day, often at 17 and frequently at 16. First, there is an information and initial persuasion stage; then those interested take physical and aptitude tests to determine eligibility. Finally, some qualified applicants, about 22% of all recruits, commit to join the military under a “deferred entry” program where they (and, if 17, a parent) sign an enlistment contract to report to active duty at a later date, usually after graduation. Only at this point of signing, the point of legal commitment, must the applicant meet the age requirement.

The age dimension of recruiting becomes clear in the statistics. The fiscal 1997 annual report on Population Representation in the Military Services, published by mandate of the Senate Committee on Armed Services, indicates the ages of potential recruits upon their taking the physical or aptitude tests, their first recorded contact with the military. 32 Nearly one-quarter, 24%, of all the services’ potential recruits began processing at age 17 or younger. Further, the percentage of potential recruits that was contacted informally at that age is undoubtedly much higher. In light of the recruitment crisis discussed below, this important statistic informs an understanding of the reluctance that DoD has to raise the age bar to 18 for recruiting purposes.

However, by the time these 16-17 year old applicants (numbering 97,000 in 1997) qualify, commit to enlist, graduate from school, enlist and finally report for active duty, most had already become 18. In 1997, only some 8,100 personnel were age 17 at enlistment, about 4.3% of all enlistees. And of these 8,100 17-year-old members of the armed forces, the number actually on active duty at any one time was barely one quarter of 1% of all active duty personnel (2,880 out of 1,033,248).

This last statistic is used by the proponents of a flat age 18 minimum to assert that there would be only a “minuscule” effect on military capability 33 were a bar on recruitment established at that age. However, this statistic is out of context of the others presented above and ignores the below-18 age at which military recruiting actually and necessarily begins and the large number of such under-age 18 contacts required to yield the

few recruits it does. Thus, that "minuscule effect" ignores the crux of the military dilemma and, in reality, is not "minuscule."

We believe that preventing the military from recruiting at the most significant time in a young person's career path—by adherence to an age 18 recruitment ban—could seriously aggravate the already very significant recruiting problems now faced by the armed forces. In fact, in fiscal 1999, the United States armed forces actually could not meet their recruiting targets. This is our most significant concern with the Optional Protocol.

These recruitment problems were recently described in an in-depth series on contemporary military issues in the Wall Street Journal as follows:

For the first time since 1979, both the Air Force and the Army can't find enough people to fill the ranks. The Navy came up 7,000 recruits short of its target last year of about 55,000, so it decided to accept a larger number of recruits who didn't graduate from high school to meet this year's goals. Only the Marines, the smallest of the forces, is meeting the relatively modest goals without much trouble. Overall, the Department of Defense is 7% behind its recruitment goals this fiscal year—the largest shortfall in years—leaving it more than 9,000 recruits short and struggling to fulfill its missions with fewer and in some cases less qualified troops.  

While military pay raises and increased recruitment expenditures have had some positive impact as resolving the crisis, money alone is clearly not the solution. The problem begins with numbers of recruits, but it is not just one of quantity; it is also the challenge of reaching the most qualified high school seniors potentially interested in a military career before they commit to one of the many alternative careers available to them. Considering the recruitment crisis, made more acute during a time of high employment in the civilian sector, and heavy burdens on the armed forces through deployment on an exceptional number of active overseas missions, which burdens have resulted in considerable personnel retention problems, the Committee cannot recommend that the United States adopt a prohibition on recruitment of persons under 18 years of age. This is particularly true if "recruitment" were defined in the Optional Protocol to include both enlistments and commitments to enlist, and a fortiori, to include the armed forces' marketing outreach and pre-enlistment processing.

34. Jaffe, Gregg, op. cit.
V. COMPARISON WITH OTHER VOLUNTEER ARMED FORCES

As indicated, the U.S. military is not alone in this predicament. Other volunteer militaries with modern forces, including important allies, are likely to face similar recruitment issues. Interestingly enough, these countries have responded to the Optional Protocol differently than has the U.S. and differently from each other.

No major Western country has taken the same positions as has the U.S. on the ages for both recruitment and service in hostilities. Only Cuba, South Korea, and Pakistan take the same position as does the U.S. that 18 should be the minimum age for participation in hostilities. However, at least 14 countries have agreed on record with the U.S. that age 17 recruitment should be permitted; in fact, the UK and Pakistan both advocate age 16.

Interestingly, some countries would accept an international consensus on an age 18 standard for recruitment even when they do not intend to comply with it. Such is the position taken by our NATO ally Canada, a leader in this and other humanitarian causes. Canada proposes to incorporate in law an age 18 minimum for overseas deployment, which has been the Canadian practice for the last fifty years, and to make unspecified legal changes in the status of trainees under 18 to make them less “military.” Nonetheless, Canada has stated that, while it will continue to begin military training as low as age 16½, it does not oppose an international consensus against recruitment below age 18.

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35. Only four EU Member States have a domestic age 18 limit on recruitment: Belgium, Denmark, Spain and Sweden. However, the European Parliament has recommended such a limit for all EU members. See Res. B4-1078, December 17, 1998.

36. Australia, Austria, Brazil, China, Cuba, Egypt, France, Korea, Italy, the Netherlands, Norway, Pakistan, Portugal, South Africa and Uruguay have favored age 17 recruitment in working group sessions, although some of these countries would not block a consensus for age 18 recruitment. Working Committee Report, E/CN.4/1998/102 (Annex II)

37. A Canadian JAG officer at the Canadian Department of Defence explained in an informal discussion with this Committee his country’s view that (i) neither Canada nor any other Western country is the cause of the “child soldier problem”; (ii) precisely because of that, Canada feels an obligation to provide leadership in solving the problem; (iii) the Canadian military has a positive relationship with its youth, and to get the quality of personnel it needs, its armed forces must recruit at the school leaving age, and (iv) it has no intention of deploying under 18’s and, in any event, training is not completed before 18. He added that until fully trained, recruits are “more dangerous to us than to the enemy.” Like the American position, the Canadian stand preserves its current practice, but Canada is willing to solidify that practice in law and will not oppose an international consensus on a higher recruiting age than it will observe in substance.
broad age 18 minimum applaud the Canadian position that permits the Optional Protocol to go forward despite Canada’s national decision not to comply fully with the minimum age for recruiting, as does the U.S., and argue that the U.S. should similarly join a “consensus” for an age 18 minimum, even if it maintains current practices and does not comply with the consensus standard.

This Committee disagrees both with the concept of characterizing effective military training as somehow less than “military” and with the concept of declaring an illusory consensus at odds with a state’s actual practice. The results would be significant; one can imagine, for example, African warlords signing up young children under a quasi-military legal regime and then justifying their actions by referring to precedents established by developed countries for their 17-year-olds. Moreover, if the Western armies, which are most often and most likely to be engaged in robust humanitarian intervention (and therefore the most internationally conspicuous) do not comply fully with the “international consensus” to be reflected in the Optional Protocol, what argument could they make to developing country armies that violate it in more sinister ways? They could not claim that a morally compelling international standard exists when the standard setters do not themselves comply.

We would not recommend that the U.S. advocate adoption of standards it does not intend to accept, nor should it support the statement of an international consensus with standards not practiced by the major volunteer militaries. The U.S., in fact, has stated it will not do so. Nor do we favor the development of legal loopholes, such as by using the educational institution exception, within which the military can appear to comply while continuing the substance of its real practices. This Committee finds

38. A distinction should be made between observer, trip wire and small-unit peacekeeping forces traditionally provided by small nations and “robust” forces that can only be provided by the major military powers, albeit with valued participation and burden sharing by smaller countries. The former type of intervention can be best effected by teams hand-picked for the mission from experienced active duty or reserve personnel, much like a military Peace Corps. Maturity is highly desirable for such soldiers, while the numbers are low enough to permit such tailoring; in fact, the UN mandates a minimum age of 18 for peacekeeping forces and prefers troops of at least 21. Military monitors must be at least 25.

By contrast, robust intervention requires a response on a different scale and tempo, especially in urgent situations. The most proximate unit is likely to be deployed in its as-is condition. It must be equipped, trained and manned for deployment on short notice without personnel changes. In the Kosovo crisis, for example, only countries with high-quality volunteer forces were able to respond as required; their comparative advantage over the conscripted armies would have been even greater in a ground campaign.
it more desirable to form a real consensus with which the major volunteer armed forces could comply while still raising the minimum age above the presently unacceptable age of 15.

VI. THE U.S. CAN MODIFY ITS POSITION ON AGE LIMITS WITHOUT HARMING NATIONAL SECURITY

The U.S. can and should relax its position on the Optional Protocol without doing harm to national security. The solution is found in the positions of a great number of other developed countries, many with volunteer forces, and is expressed in the non-binding policy of the U.S. Congress described below. That solution is to support an age 17 minimum for actual enlistment and/or entering into a binding commitment to enlist (while permitting pre-enlistment/commitment contacts at earlier ages), but, nonetheless, to accept an age 18 minimum for participation in hostilities, both direct and indirect.

Age 17 Minimum Age for Recruiting

A minimum age of 17 for U.S. military recruiting would (i) raise the international moral standard above the inadequate age 15 now in effect, a change already endorsed by the United States, (ii) be adopted by most major volunteer forces (including those engaged in UN and other peacekeeping operations), and (iii) permit viable volunteer recruiting consistent with the school leaving age and the employment patterns in the United States and other developed countries. Finally, a policy embracing an age 17 recruiting standard would have far better prospects of ratification in the Senate than would a standard which exacerbates the U.S. recruitment crisis. Congress has, in fact, already urged the President and the Secretary of State in a Sense of Congress Resolution “not (to) block efforts to establish age 18 as the minimum age for participation in conflict through the optional protocol to the Convention on the Rights of the Child.”39 Notably, that Resolution omitted any reference to the age for voluntary recruitment.

Of course, this two-prong standard would not conform to the overall age 18 threshold used otherwise throughout the CRC for non-military purposes. However, this Committee does not see how sacrificing practicality for consistency would improve the lives of “child soldiers” at all, and

39. See note 3 supra. A pending bill, H.Con.Res 209, favors an age 18 minimum for both recruiting and participation in hostilities, with which this Committee disagrees and which, it submits, would be unlikely to achieve a domestic political consensus.
certainly not to a degree offsetting the real detriment to the U.S. armed forces and other volunteer peacekeeping militaries.

**Age 18 Minimum Age for Deployment and Participation in Hostilities**

The age for participation in hostilities or deployment to areas of possible hostility, direct or indirect, is in the Committee's view, a different matter than recruitment, although in connection with the issues addressed by the Optional Protocol U.S. diplomats have followed DoD's policy to oppose any restriction of options for the use of military personnel. DoD argues, on the assumption that 17-year-olds must not only be recruited and trained but also available for assignment to active duty units, that a ban on participation in hostilities below age 18 would then force it to withdraw 17-year-olds from their Army or Air Force units on the eve of hostilities, thereby disrupting the small unit teamwork in which the armed forces take much pride or, in the case of the shipboard Marines and sailors, require mid-ocean transfers of under-age personnel or even return of ships to permit disembarkation of the under-age personnel.

Certainly, were this the only and likely outcome of a ban, one could understand the Defense Department's opposition. However, to this Committee DoD's argument exaggerates a minimal problem.

First, here the small numbers involved do matter. As noted above, the number of 17-year-olds actually entering the U.S. armed forces is less than one-quarter of 1% of all active duty personnel, as opposed to the large number of under-17-year-olds sought to be recruited or actually committed to enlistment through delayed entry contracts. That small number of enlistees who are age 17 on their first day of duty becomes much smaller, perhaps nearly non-existent, after they complete training some 26 weeks later, which is the average length of training time for the various services.

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40. An example often given is of a tank crew of commander, gunner, loader and driver, who rehearse their split-second coordination of various drills for planned and emergency actions. Removing an "under-age" member of the team on the eve of battle would admittedly reduce the crew's effectiveness and endanger them (and other friendly forces) in combat. The answer, as discussed in text, is not to assign the under-age soldier to the team: the justification is that a tiny percentage of soldiers is under-age when ready for unit assignment.

41. 10 USC §671 requires 12 weeks training before assignment on land outside the United States, even in war or national emergency, excepting certain medical professionals. In practice enlistees are trained for an average of 24 weeks, including basic training for all recruits and advanced training by specialization. Actual training might take up to a year for technical specialties. Further, additional time is consumed for leave (30 days annually with customary leaves on completion of training cycles), travel time between stations, and time permitted to prepare for long-term assignments.
Second, the few-to-zero enlistees that would remain 17 years of age after that normal one-half year training period could be transformed into 18 year olds prior to their becoming eligible for regular unit assignment (and potential combat duty) either through delayed entry arrangements so that training could begin not earlier than 17 ½ (which then effectively eliminates the issue given the 26-week average training period); through extended training periods (which are required already for certain specialties); or through short-term alternative assignments other than regular unit assignment for a period of time which, by mathematical definition, need not exceed six months and would most likely be much shorter. Any of these alternatives, given the minuscule number of active duty personnel involved, would seem to us palatable, non-disruptive compromises in the service of an international consensus on an age 18 threshold for participation in hostilities.

The sole remaining consideration in setting such an age-18 threshold is that in a national emergency the military might desperately require every last recruit as soon as possible, whether age 18 or 17. In that instance, the Pentagon might hypothetically reduce training periods, as it did during the Vietnam conflict, closer to the 12-week statutory minimum.

However, the Committee believes the reality would be somewhat different in such an emergency. The ever-growing sophistication of U.S. weaponry and logistical systems makes accelerated training problematical for practical reasons. Moreover, in such a national security crisis, the only viable means of maintaining force levels would be to call up the national reserves, which are already intimately integrated into all war planning and without which even major regional conflicts (such as the Gulf War or Kosovo) cannot be fought. In the extreme, it would be necessary, of course, to activate the somnolent draft. Indeed, there are strong policy reasons why the nation should not engage in a major conflict unless the political will exists to call up reserves and, ultimately, to resume the draft.42

At the risk of some over-simplification, the various positions on the age of service for recruitment, participation in hostilities and conscription are essentially as follows:

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42. We note that by statute, 50 USC App. §453, every 18-year-old male is still required to register for the draft, and a manpower mobilization office is maintained by DoD in order to make possible its restoration in a relatively short period.

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VII. SUMMARY OF RECOMMENDATIONS

The Committee recommends that the United States adopt the following positions:

1. The U.S. should engage in the Optional Protocol working group, negotiate and, in the event it elects to sign the International Convention on the Rights of the Child, sign an Optional Protocol to the CRC on the following basis:

   A. The age for recruitment should be limited to 17;
   B. The age for conscription and participation in hostilities should be limited to 18;
   C. “Recruitment” should be defined in the Optional Protocol, and that definition should be in terms of actual enlistment or a binding commitment to enlist. However, the definition should exclude the process of contacting, informing and persuading potential recruits to enlist. Further, the definition should exclude service in military academies or educational programs, even where the student joins the armed force in the process, provided the students of the institution are not susceptible to call-up to active duty until the completion of the program or attaining the minimum age;
D. “Hostilities” should be defined in the Optional Protocol without limitation to “direct” participation in hostilities, that is, the definition of hostilities should include service in positions either likely to be in combat (intentionally or otherwise) or which are at risk because of combat.

2. In the event the United States elects to remain outside the CRC itself, on which this Committee takes no position, it should work toward and not oppose the foregoing standards. It should announce that it is the position of the United States that it will adhere to the age requirements of the Optional Protocol if such standards are indeed adopted, whereupon the Congress should enact those into law.

3. The United States armed forces should thereupon develop such programs—e.g., deferred entry, extended training and/or alternative-to-operational assignments—for the very few under-18 year old enrollees for the very short period of time that they will remain under age.

December 1999
The Committee on Military Affairs and Justice

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Patricia J. Murphy, Secretary

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Miles P. Fischer*
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### NON RESIDENT

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<td>University of Oregon Law School</td>
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<tr>
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<td>108 Hart Road</td>
<td>Gaithersburg MD</td>
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### SUBURBAN

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<td>Frank W. Giordano</td>
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<td>Lowen K. Hankin</td>
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### RECENT LAW GRADUATE

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<td>Ivette M. Zelaya</td>
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### Law School Student

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by Ronald I. Mirvis and Eva S. Wolf

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