



PENN UNDERGRADUATE LAW JOURNAL

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Number 2
Spring 2017

Penn Undergraduate Law Journal

Vol 4.

Spring 2017

No. 2

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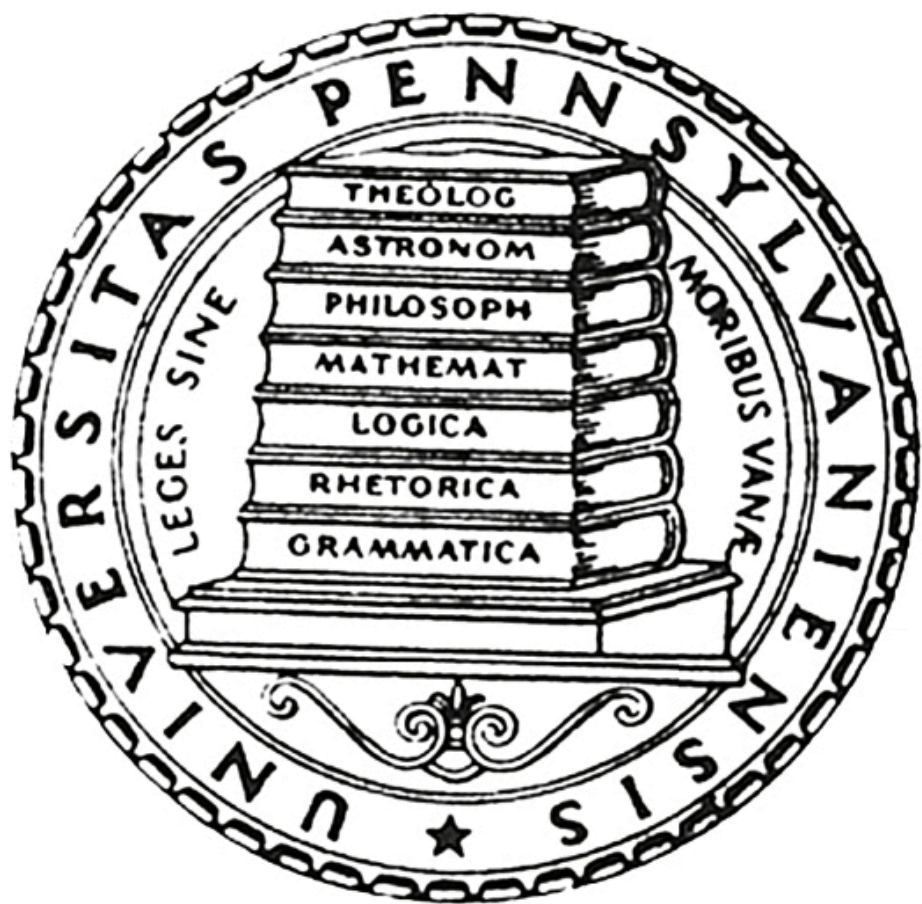
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Volume no. 4, Issue no. 2, 2017.

www.pulj.org



FOREWORD

Enforcing the Animal Cruelty Laws Should Not Be a Charity Case

Penny Conly Ellison

Linda Bruno a/k/a Lin Marie called her cat sanctuary in Allegheny County, Pennsylvania “Tiger Ranch” and liked to refer to it as “the land of milk and tuna.”¹ Thousands of cats were entrusted to her care at the 27-acre ranch. Rescues from other states would send vans full of cats from overcrowded shelters, thrilled to have an alternative to euthanasia. It seemed for a while that Tiger Ranch had achieved the elusive goal of being a high intake, no kill cat rescue. But, over the years, questions were raised about what was going on at Tiger Ranch. In August 2007, a volunteer, horrified by the conditions there which included rampant illnesses, very few adoptions, and, we would later learn, mass graves, reached out for help. After she was rebuffed by a few other organizations, she learned that the Pennsylvania Society for the Prevention of Cruelty to Animals (“PSPCA”) had agreed to pursue the case. The PSPCA organized a raid on March 13, 2008, bringing in mobile veterinary clinics and dozens of people to help catch the hundreds of cats. Approximately 400 living animals were seized along with over 100 dead cats. All of the living animals required critical, immediate veterinary care and had to be housed at a separate facility because of quarantine issues and safety concerns. The medical conditions suffered by the cats included ear infections, skin diseases, Feline Leukemia Virus and Feline Immunodeficiency Virus. The PSPCA, a private nonprofit organization, absorbed the costs of housing and medical care for the cats. Because of the number of animals, their medical conditions and the length of time the prosecution consumed, the resulting financial burden was over \$1,000,000.²

1 See *Cat Sanctuary Owner Sentenced For Animal Abuse* (Pittsburgh Post-Gazette, January 9, 2010) online at <http://www.post-gazette.com/local/north/2010/01/09/Cat-sanctuary-owner-sentenced-for-animal-abuse/stories/201001090129> (visited June 22, 2017).

2 As part of her sentence, Ms. Bruno was required to pay restitution to the PSPCA in the amount of \$200,000 but it is unknown whether any of that amount was ever paid. *Probation May Be Revoked for Tiger Ranch Owner*, (Pittsburgh Post-Gazette, March 17, 2010) online at <http://www.post-gazette.com/local/north/2010/03/17/Probation-may-be-revoked-for-Tiger-Ranch-owner/stories/201003170286paidpaidpaid>. (visited June 22., 2017); See *Legislature Approves Cost of Care*

Animal cruelty is a unique crime for many reasons. The victims cannot speak or testify in court. They are legally considered to be property but they can experience pain and suffering. But there is something else that differentiates the prosecution of crimes committed against animals that carries much more practical weight in determining whether those crimes are investigated and prosecuted. Animal cruelty offenses are generally low level crimes but they require significant expenditure of resources to prosecute. As in the Tiger Ranch case, investigation of large scale animal cruelty often requires the seizure of animals who then need housing and immediate and expensive veterinary care that could continue for many months, if not years. For this reason, among others, investigation and prosecution of crimes against animals is usually delegated to nonprofit organizations with a mission to protect animals. This statutory delegation of authority is not accompanied by any budget line item designated to fund all of the work necessary to prosecute these crimes. Humane societies simply have an unfunded mandate to investigate, charge and prosecute those who neglect to care for their pets or intentionally harm animals. Unfortunately, this means that the law can only be enforced to the extent nonprofit organizations raise sufficient funds to pay all of the expenses necessary to seize, house and provide care for all of the affected animals.

Society wants this work to be done but, without any government funding, it is nearly impossible. I will argue that, when nonprofit organizations are charged with enforcing the criminal law and those organizations are then subjected to liability under the civil rights laws as a state actor, those activities should be considered essential government functions that are funded by the state.³

I. The Authority of Humane Police Officers

The Tenth Amendment grants states all powers not delegated to the Fed-

Bill– Corbett to Sign ,

<http://www.philly.com/philly/blogs/pets/Legislature-approves-cost-of-care-bill-Corbett-to-sign.html?amphtml=y> (visited June 22, 2017).

³ The situation is similar in most states but, for illustration purposes, Pennsylvania law will be used as an example because the issue has been most fully developed in cases arising under Pennsylvania law.

eral Government elsewhere in the Constitution.⁴ Police power is the most basic of state functions. The state exercises that power by passing laws that are rationally related to the legitimate governmental purpose of protecting the health and welfare of its citizens.

As a society, we criminalize behavior that we deem unacceptable. Through the criminal law, we define those acts (and in some cases, failures to act) that are so abhorrent to our collective values that they warrant criminal sanctions. Investigating and prosecuting crimes is a quintessential governmental function. Since the formation of our government, defining, trying and punishing criminal acts has been viewed, quite rightly, as one of the most significant functions of government, a view generally shared by even the most libertarian of thinkers.

In most states, animal cruelty laws, prohibiting all manner of neglect and abuse from failure to provide adequate food or shelter to torturing and killing animals, are enforced by humane officers employed by nonprofit organizations. State statutes usually give humane society police officers (“HSPO’s”) the authority to investigate violations including getting search warrants, filing charges and seizing animals. By way of example, in Pennsylvania, 18 Pa. C.S. § 5511 (i) provides that;

An agent of any society or association for the prevention of cruelty to animals, incorporated under the laws of the Commonwealth, shall have the same powers to initiate criminal proceedings provided for police officers by the Pennsylvania Rules of Criminal Procedure.

The law also provides that “any agent of any society or association for the prevention of cruelty to animals duly incorporated under the laws of this Commonwealth may obtain a search warrant” under the same rules as a police officer and authorizes “the seizure of evidence of the violation including, but not limited to, the animals which were the subject of the violation.”⁵ In addition “where an animal thus seized is found to be ne-

4 U.S. Const. amend. X, (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”)

5 18 Pa. C. S. § 5511(i).

glected or starving, the police officer or agent is authorized to provide such care as is reasonably necessary, and where any animal thus seized is found to be disabled, injured or diseased beyond reasonable hope of recovery, the police officer or agent is authorized to provide for the humane destruction of the animal.”⁶ Just as with any other crime, municipal and state police officers are also empowered to investigate animal cruelty and initiate criminal charges but they usually cede that authority to humane officers who are affiliated with nonprofit shelters or rescues capable of taking in and providing veterinary care to seized animals.

The idea of allowing nonprofits to help with enforcement of animal cruelty laws has a common sense rationale. State and municipal police lack the resources to seize and provide care to animal victims. In Pennsylvania, as well as many other states, government entities generally do not maintain kennels (let alone barns) for the purpose of seizing animals. Most animals in sufficiently unhealthy condition to justify seizure need immediate and extensive veterinary care for which there is no allowance in the police budget. In addition, police and prosecutors are busy and may not give high priority to crimes against animals. Humane societies have a special interest in seeing the law enforced as well as the specialized expertise necessary to bring the animals back to health.

II. The Costs of Prosecuting Crimes Against Animals

In order to carry out their police powers, states and municipalities levy taxes, the proceeds of which pay for the legislative bodies that enact criminal laws, the police who investigate and make arrests, the judges and court staff who conduct the trials and the construction and staffing of prisons. By and large, however, states do not allocate funds to cover the unique expenses associated with prosecuting animal cruelty crimes. Although the crimes are generally classified as only summary offenses or misdemeanors, animal cruelty is an expensive crime to prosecute.

6 Id.

When evidence is seized in other criminal cases, it generally consists of weapons or drugs or other instruments of crime. These items can be put in an evidence locker and generally ignored until the time of trial. Seizures in animal cruelty cases, however, require kennels and barns and veterinarians and many other skilled staff to provide care and feeding of often very sick animals for long periods of time. This not only costs a lot of money but also requires specialized knowledge not possessed by police departments. This is probably the main reason why states statutorily delegate authority to investigate, develop and prosecute animal cruelty cases to humane police officers and/or nonprofit humane societies. In no other area is the investigation and prosecution of crimes left to private citizens dependent on raising their own budget through appeals to the general public. Unlike a government budget which can be expanded with changing needs in a given area, if there is an increase in animal fighting or hoarding or neglect, unless there also happens to be an increase in donations, there simply will not be enough money to pursue all of the cases.

Although in some cases, local or state police will pursue cruelty cases - often when other more serious charges such as drug or weapon offenses are also involved - the financial burden to enforce the cruelty laws now falls almost entirely on nonprofits. There is no state funding for the humane police officers' salaries and benefits, training, vehicles, insurance or to care for seized or surrendered animals involved in cruelty cases. Let us again take Pennsylvania as an example. The Pennsylvania SPCA, funded almost entirely by charitable donations and private grants, has officers sworn in 23 counties in the Commonwealth. Thirty eight other counties have HSPO's sworn to enforce the law and they are affiliated with various SPCA's or private rescues or sanctuaries. Some have no affiliation at all and therefore nowhere to take animals whose conditions warrant seizure. In six Pennsylvania counties, there are no sworn HSPO's at all. In those counties, residents who witness cruelty must contact the local or state police who have no resources to seize and house animals or provide them with necessary veterinary care. So, simply put, the law is not fully enforced. Similarly, even where there is an HSPO sworn in the county, if they have nowhere to take seized animals (which can be particularly challenging when they encounter large scale hoarding, fighting or commercial breeding operations), there will be no enforcement because there are simply no resources allocated to caring for the animals.

Placing the financial burden of enforcement on cash strapped nonprofits necessarily means many cases of animal cruelty go unprosecuted. One might think that some of the costs of enforcing the cruelty laws can be recovered from the defendants themselves. Most convictions for animal cruelty result in the assessment of a fine and often an order that the defendant pay restitution to offset the costs of caring for the animals seized. But, in Pennsylvania and many other states, fines collected go to the state, not the nonprofit that incurred the expense to care for the animals and prosecute the case. Restitution orders are designed to reimburse the shelter for the cost of caring for the animals but those judgments are imposed, if at all, long after the shelter was required to expend the funds. Furthermore, the shelters are rarely able to actually collect the judgments. So, shelters must raise the resources necessary to prosecute animal cruelty crimes and, in almost all cases, will never be reimbursed.

III. Humane Police Officers Are Considered State Actors Under The Law

There is a legal anomaly that renders it even more expensive for nonprofits to carry out animal cruelty prosecutions without the financial support of the state. Humane societies carrying out their duties to enforce the law can be sued by members of the public for violations of state and federal law. Because humane officers are legally authorized to obtain warrants, enter private property and seize animals, their actions implicate the constitutional rights of animal owners. The exercise of these specifically delegated police powers to enforce a criminal statute, seize private property and charge individuals with crimes, subjects humane societies to federal civil rights claims for, among other things, violations of the Fourth Amendment guaranteeing the right to be free from unreasonable searches and seizures and the Fourteenth Amendment right to not be deprived of one's property or liberty without due process of law.

Claims for violations of constitutional rights are brought pursuant to 42 U.S.C. §1983. Because the United States Constitution regulates only the actions of the government, not private parties, a litigant claiming that

his or her constitutional rights have been violated must first establish that the challenged conduct constitutes state action. “[T]o state a claim under 42 U.S.C. § 1983, a plaintiff must allege the violation of a right secured by the Constitution or laws of the United States, and must show that the alleged deprivation was committed by a person acting under color of state law.”⁷ Private actors cannot be liable for violations of constitutional rights unless the conduct can be fairly attributed to the state. So, “constitutional standards are invoked only when it can be said that *the state is responsible for the specific conduct of which the plaintiff complains.*”⁸ Constitutional “liability attaches only to those wrongdoers ‘who carry a badge of authority of [the government] and represent it in some capacity.’”⁹ One way in which a private entity can be held to be a state actor under Section 1983 is when the entity performs a “public function.”¹⁰ Every court that has addressed the issue in the context of humane law enforcement has held that, when enforcing criminal laws, the officers are performing a public function such that their conduct is “fairly attributable” to the state.

In *Allen v. Pennsylvania Society for the Prevention of Cruelty to Animals*,¹¹ the plaintiff brought suit against two humane societies and their individual humane police officers seeking damages under 42 U.S.C. §1983 for allegedly unlawfully seizing his farm animals and charging him with animal cruelty. The court held, without much difficulty, that the defendants “were entities statutorily authorized to enforce Pennsylvania laws pertaining to criminal cruelty-to-animals violations under 18 Pa. C.S. § 5511” and therefore clearly state actors.¹² Other courts have similarly found private agencies that enforce the cruelty laws to be state actors that can be sued for civil rights violations.¹³

7 *West v. Atkins*, 487 U.S. 42, 48 (1988).

8 *Blum v. Yaretsky*, 457 U.S. 991, 1007(1982) (emphasis added).

9 *National Collegiate Athletic Assn. v. Tarkanian*, 488 U.S. 179, 191 (1988), quoting *Monroe v. Pape*, 365 U.S. 167, 172(1961).

10 *Fabrikant v. French*, 691 F.3d 193, 207 (2d Cir. 2012).

11 488 F. Supp.2d 450 (M.D. 2007).

12 *Id.* at 462.

13 *Fabrikant*, 691 F.3d at 208 *Brunette v. Humane Society*, 294 F.3d 1205, 1208 (9th Cir. 2002); *Willard v. Pennsylvania Society for the Prevention of Cruelty to Animals*, 2012 WL 1392657 (E.D. Pa. 2012); *Kauffman v. Pennsylvania Society for the Prevention of Cruelty to Animals*, 766 F. Supp.2d 555, (E.D. Pa. 2011)

The Supreme Court has recognized that a party acts under color of state law when he exercises power “possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.”¹⁴ Courts have found the Pennsylvania SPCA was acting under color of state law for section 1983 purposes when it seized and later euthanized plaintiff’s dogs.¹⁵ In *Giaconia v. Delaware County Society for the Prevention of Cruelty to Animals*¹⁶, the court distinguished those cases because they “involved police powers granted to Humane Society Police Officers.” In contrast, *Giaconia* only alleged that her cat was lost and the SPCA wrongfully euthanized her. Thus, when animal shelters are performing services not connected with the enforcement of criminal anti cruelty laws, they may not be considered state actors. But, when they are acting to enforce the criminal law, they are clearly considered state actors and subject to liability for civil rights violations as such. Since courts are capable of distinguishing when humane societies are engaged in state action such that the state can be said to be responsible for their actions, the legislature should similarly be able to make that determination and provide funding when these nonprofit entities are providing resources necessary to carry out duties that are part of the core responsibilities of state government.

Making things even more inequitable, state agencies and police departments subject to liability for claims of wrongful seizure or arrest are protected by both sovereign immunity and qualified immunity, limiting their financial exposure. But, because they are not governmental entities, private nonprofits are often not protected by governmental immunity. In *Snead v. Pennsylvania SPCA*, the Supreme Court of Pennsylvania ruled that the SPCA was not entitled to the defense of sovereign immunity as a protection against claims that the plaintiff animals for wrongly euthanized. In order to be afforded the protection of sovereign immunity, the SPCA

14 *Polk County v. Dodson*, 454 U.S. 312, 317 (1981) (quoting *United States v. Classic*, 313 U.S. 299, 326 (1941))

15 *Snead v. Pennsylvania Society for the Prevention of Cruelty to Animals*, 929 A.2d 1169, 1180 (Pa. Super. 2007). The *Snead* Court noted the possibility that a defendant could be acting under color of state law for section 1983 purposes and yet not be a government party for immunity purposes. This happens on occasion with other private entities but, with humane law enforcement officers whose sole duty is to enforce the criminal law, it happens every day. This anomaly supports the idea that states should be obliged to fund enforcement of animal cruelty laws.

16 2008 WL 4442632 (E.D. Pa. 2008).

would have to qualify as a Commonwealth agency. Because it operates as an independent nonprofit and, most importantly, because it receives no state funds, the SPCA could not “point to any Commonwealth assets that would be at risk from any judgment against it; Commonwealth resources would not be imperiled if the SPCA is exposed to legal liability.”¹⁷ This anomaly renders it even more expensive for private nonprofits to enforce the law than it would be for state or local police. In addition, civil rights liability for state actors is particularly expensive, as opposed to liability under state tort law for trespass or conversion of property, because the statute provides for recovery of attorney’s fees and costs in addition to compensatory and punitive damages.¹⁸

So, private nonprofits are expected to perform an essential government function with neither government funding nor the protection of sovereign immunity. Enforcement of the criminal law prohibiting because Courts have determined that the agency is performing a public function usually reserved exclusively for the state, therefore, the state should provide funding so that those laws can be fully enforced and the cost of caring for the animals and dealing with lawsuits arising out of that responsibility should not depend on charitable fundraising.

Why is animal cruelty somehow in a separate category – society strongly condemns it and criminalizes it¹⁹ but full enforcement is left to the private sector. Governmental entities are free to contract with private entities to perform public functions but are they free to abdicate responsibility to fund the essential government function of enforcing the criminal law? I posit that they are not.

17 *Snead*, 929 A.2d at 1178. In *Kauffman v. Pennsylvania Society for the Prevention of Cruelty to Animals*, 766 F. Supp.2d 555 E.D. Pa. 12011), the court identified the question of whether the defense of qualified immunity was available to the SPCA and its humane society police officers as an issue of first impression. In holding that qualified immunity is generally not available to officers of humane societies unless they are working under the supervision of the state at the time, the court relied on the fact that qualified immunity did not exist for humane societies at common law in 1871 citing to the United States Supreme Court decision in *Wyatt v. Cole*, 504 U. S. 158 (1992).

18 42 U.S.C. § 1988(b).

19 It should be noted that animal cruelty statutes certainly do not bar all animal cruelty. Most have broad exceptions for agricultural animals and animal used in research and testing, among others.

This is not to say that the state must fund all of the functions performed by animal shelters. Animal shelters that employ humane law enforcement officers usually also take in unwanted animals, provide resources to low-income pet owners and offer humane education. Applying the established rubric of state action, the state would only be responsible for funding expenses related to the delegation of the enforcement of criminal laws. The court in *Fabrikant* considered whether the SPCA and its employees/agents acted under color of law when they arranged to have surgery performed on seized pets against the owner's wishes or without his/her knowledge. After a detailed analysis of the state action requirement under Section 1983, the court concluded, contrary to the findings of the district court, that the SPCA defendants were exercising "powers traditionally exclusively reserved to the State" when they operated on the plaintiff's dogs.²⁰ Even the spaying and neutering of the seized animals was state action because "the only reason defendants had the opportunity to spay and neuter the dogs was that defendants had already seized them by exercising investigatory and law-enforcement powers—**powers that indisputably constitute state action**. The spaying and neutering flowed from, and are inexorably tied to, defendants' investigative and enforcement activities."²¹ By this logic, all of the costs associated with caring for animals seized in cruelty cases are incurred through the exercise of state action and should be funded by the state.

IV. States Should Fund The Enforcement Of Criminal Anti Cruelty Laws

Enforcement of criminal laws is a quintessential government function and indeed a source of revenue for municipal governments. HSPO's and the shelters and rescues they work with are performing a core state function delegated to them by statute. They incur not only the direct expenses associated with investigating criminal activity and seizing and caring for the animals affected but also subject themselves to civil rights liability as state actors. The state is not responsible for funding all activity that can give rise to liability for civil rights violations but, when a shelter's

20 691 F.3d at 208 (quoting *Jackson v. Metropolitan Edison Co.*, 419 U.S. 245, 352 (1974)).

21 691 F.3d at 208 (emphasis added).

liability arises from an express delegation of authority to perform the core government function of prosecuting criminals, funding should go hand in hand with such responsibility. Indeed, the only function HSPO's usually perform is enforcement of the state anti-cruelty law.

Although we love our pets and believe that those who neglect and abuse animals should be punished, the funding mechanisms are not set up to fully enforce the laws. Reliance on charitable funding for enforcement of a criminal statute, particularly one with such broad application that is so expensive to enforce, is clearly not ideal for animals or the people who love them. While it may not be the state's responsibility to fund all of the functions performed by animal shelters, the law enforcement function is clearly and ultimately the responsibility of state government and, as such, it should be publicly funded.

ARTICLE

**From Locke to Louboutin:
Justifying Fashion Legal Protection with Philosophical Property
Theories**

Camille Edwards

ABSTRACT

This paper explores the legal history of fashion intellectual property law from 1954 to 2011. It first describes the current discourses on fashion law, justifications for fashion protection, and philosophical property theories that explain those justifications. Then, it explains three separate theories of property ownership – John Locke’s labor theory, Georg Wilhelm Friedrich Hegel’s personality theory, and Michael Foucault’s author theory – and how each theory relates to intellectual property law. It then applies those theories to a collection of fashion copyright and trademark cases to illustrate how the courts have used labor, personality, and author theories to justify legal protection for fashion designs. This paper argues that the courts first applied labor and personality property theories to emphasize the importance of the designers. Then, the courts applied an author theory to focus on the perception of the consumer. Finally, the courts used the personality theory to allude to the personality of the consumer. Recent court opinions implied that consumers, like designers, express themselves through the vocabulary of designs and styles available to them. The shift from the designer’s personality to the consumer’s perception to the consumer’s personality nearly paralleled larger shifts occurring in American political and economic thought.

INTRODUCTION



Figure 1: Shoe Designer Christian Laouboutin holds his signature stiletto shoe. Photographed by Mathieu Cesar for Designboom interview.

In 2011, Christian Louboutin, a famous designer of luxury shoes, sued Yves Saint Laurent, another high-end French couture brand. Christian Louboutin claimed that Yves Saint Laurent infringed on his trademark, which protected the use of the color red on the bottom of heels.¹ A “battle over suede stilettos” between two famous fashion companies, *Christian Louboutin v Yves Saint Laurent* considered a profound legal question of whether a color can be trademarked in the fashion industry, galvanizing international attention.² Questions regarding the realm of attributes that trademark law protects began percolating throughout the entire fashion community, including fashion lawyers. “Can you trademark the color red?” asked fashion lawyer Jeannie Suk, a professor at Harvard Law School.³ This case provoked other inquiries: to what extent should fashion designs be protected? How are designs currently protected under intellectual property laws? Is Christian Louboutin’s trademark valid? With these questions in mind, the whole fashion community watched to see how the court would rule on this peculiar and highly-publicized case.

1 See Cesar Mathieu, Christian Louboutin Photograph (Designboom, May 21, 2014), archived at <http://www.designboom.com/design/interview-shoe-designer-christian-louboutin-05-21-2014/>.

2 See Katherine Boyle, Christian Louboutin sues Yves Saint Laurent Over Red Soles on Heels (Washington Post, Apr 14, 2011), archived at https://www.washingtonpost.com/lifestyle/style/christian-louboutin-sues-yves-saint-laurent-over-red-soles-on-heels/2011/04/14/AFV2Z4eD_story.html?utm_term=.2a58ec2ee692

3 See Jeannie Suk, Little Red (Litigious Shoes) (New York Times, Jan 21, 2011), archived at <http://www.nytimes.com/2012/01/22/opinion/sunday/louboutin-and-the-little-red-litigious-shoes.html>.

In its opinion, the Court of Appeals shocked its awaiting audience by ruling in favor of Louboutin. However, the court only granted protection of the red sole when it contrasted against a non-red shoe body. The court's decision that color, a vital instrument of design in the fashion industry, can be trademarked and owned by an individual designer inflamed an already heated controversy over how fashion designs should be protected. While many fashion lawyers recognized that consumers depend on the red shoe sole to identify the shoe as a Louboutin, others highlighted the obvious: "But red; it's a color."⁴ Many fashion lawyers believe that legal protection over things such as color is too monopolizing and paralyzes innovation in the fashion industry.⁵ Some even contend that copying and knock-offs benefit the designer whose work is being copied.⁶ Others affirm that limited protection of signature marks and designs encourages other designers to create their own unique expressions.⁷ The court's opinion in *Christian Louboutin* both placed intellectual property law at the forefront of the fashion community and intensified an already tense debate amongst intellectual property lawyers.

While the court's ruling in *Christian Louboutin* established a unique precedent by permitting protection over a color on heels, a history of fashion intellectual property lawsuits emerged long before Louboutin's 2011 lawsuit. *Christian Louboutin* resembled a contemporary example of the fashion legal pursuits that have persisted for almost a century. French haute couture designers began to seek legal protection for their designs in the early 1900's in Paris.⁸ At this time, fashion designers protected their works from copyists with both informal and formal measures. Designers such as Poriet fended off copyists by increasing the complexity of his designs so that copies of his work would become more challenging to create.⁹ Other designers, such as Vionnet, sought legal protections from close copies by patenting their technical innovations, such as the process of "weaving beading into fabrics."¹⁰ Despite the legal faculties available to designers, design copyists frequently infringed on the work of haute couture designers with little to no consequences.¹¹

4 *Id*

5 Kal Raustiala and Christopher Sprigman, *The Piracy Paradox: Innovation and Intellectual Property in Fashion Design*, 92 *Virginia Law Review* 1687, 1687-1777 (2006).

6 *Id*

7 Scott Hemphill and Jeannie Suk, *The Law, Culture and Economics of Fashion*, 61 *Stanford Law Review* 1147, 1160 (2009).

8 Mary Stewart, *Copying and Copyrighting Haute Couture: Democratizing Fashion, 1900-1930s*, 28 *Duke University Press* 103, 102-130 (2005).

9 *Id* at 104.

10 *Id* at 118.

11 *Id*.

Prominent French designers in the luxury market such as Coco Chanel joined Vionnet in his legal efforts from 1930 to 1931 in order to establish legal protection for their designs.¹² While Vionnet and other French designers strived to combat the development of close copies and design imitations through legal intervention, some scholars argue that “legal intervention had to be swifter and fines higher to be effective” during this era.¹³ Today, France has established a system of regulations for protecting the work of fashion designers that surpasses the regulations of most Western countries, including the United States. More contemporary cases such as *Yves Saint Laurent v Ralph Lauren* illustrate the success that designers have achieved in the French courts in obtaining protection for their designs.¹⁴

The emergence of fashion legal protections in the United States echoed that of France. Soon after French haute couture began flourishing in Europe, those French designers expanded their sales into the American landscape, bringing design copyists with them. Designers including Paul Poiret saw their luxury, refined works being copied at “cut-rates” throughout the United States.¹⁵ Ultimately, Poiret decided to contract an exchange where he would be financially compensated for the copies and in turn, those copies could bear his label.¹⁶ In doing so, Poiret’s works highlight the early stages of fashion licensing and protection in the United States.

While designers in France currently enjoy fashion legal protection, the United States has yet to pass a bill to specifically protect fashion designs.¹⁷ Despite lobbying efforts from the Fashion Originator’s Guild and other organizations, lawmakers have eclipsed fashion from the language of intellectual property law statutes.¹⁸ The lack of legislative instruction from Congress has left it to the courts to determine how the fashion industry fits into the standing trademark,

12 *Id* at 129.

13 Stewart, 28 Duke University Press at 130 (cited in note 8).

14 Brandon Scruggs, Should Fashion Design Be Copyrightable?, 6 Northwestern Journal of Technology and Intellectual Property 122, 122-137 (2007); Emily Day, Double-Edged Scissor: Legal Protection for Fashion Design, 86 North Carolina Law Review 237, 237-273 (2007); Julie Tsai, Fashioning Protection: A Note on the Protection of Fashion Designs in the United States, 9 Lewis and Clark Law Review 447, 447-468 (2005); MC Miller, Copyrighting the “Useful Art” of Couture: Expanding Intellectual Property Protection for Fashion Designers, 55 William and Mary Law Review 1617, 1617-1646 (2014); Hemphill Suk, 61 Stanford Law Review at 1160 (cited in note 7); Susan Scafidi, Intellectual Property and Fashion Design, 115 Intellectual Property and Information Wealth 115, 115-131 (2006).

15 Nancy Troy, The Logic of Fashion, 1 The Journal of the Decorative Arts Society 1850 – the Present 1, 3-4 (1995).

16 Troy, 1 The Journal of the Decorative Arts Society 1850 – the Present at 7 (cited in note 15); Gloria Fenner, Consumerism in the Clothing Industry 108 (Praeger Publishers 1980).

17 Suk, Little Red (Litigious Shoes) (cited in note 3).

18 Day, 86 North Carolina Law Review (cited in note 14); Raustiala and Sprigman, 92 Virginia Law Review (cited in note 5); Tsai, 9 Lewis and Clark Law Review (cited in note 14).

copyright, and patent laws. By muddling through those statutes, the courts have established several different tests for determining when fashion designs merit legal protection, with many inconsistencies and contradictions imbedded within them.

Webbed throughout the court justifications for those fashion cases are elements of various philosophical property theories. Scholars have identified John Locke's labor theory, George Friedrich Hegel's personality theory, and Michael Foucault's author theory in the intellectual property law cases, but not specifically to fashion cases. Applying Locke's, Hegel's, and Foucault's theories to evaluate fashion protection cases will help illuminate the developments that have emerged in the recent history of fashion copyright and trademark law.

Many scholars have examined the individual threads of fashion, intellectual property law, and philosophical property theories without considering how they lace together collectively. No scholars have answered the following question: From early fashion protection cases to *Christian Louboutin*, how have the justifications that courts have used in fashion intellectual property law cases evolved to illustrate philosophical theories of property?

In the historiography section of my paper, I detail how other scholars have interrogated the threads of fashion, law, and philosophical property theories. I then describe the sources I use to answer my research questions. In the narrative and analysis section, I first provide a short overview of what Hegelian, Lockean, and Foucauldian property theories argue, followed by an evaluation of fashion copyright and trademark cases that exemplify property theories. I pull from some of the analyses provided by other scholars to illustrate how these philosophical property theories connect to intellectual property law.¹⁹ I then examine the fashion case law history from 1954 to 2011. I first detail the developments in copyright law for fashion protection. Then, I explore how trademark protections have expanded on the precedent of copyright case law and evolved on their own. In order to explore the evolution of justifications for fashion in these two areas, I analyze a collection of cases that significantly impact, both directly and indirectly, the fashion industry.

Through my analyses of these cases, I illuminate how the courts illustrate the philosophical property theories authored by Hegel, Locke, and Foucault in order to justify fashion protection. In my analysis, I identify three phases in the courts' justifications for protection: the first phase considers the personality and labor of the designer, the second phase emphasizes the recognition and perception of the consumer, while the third phase focuses on the interests and personality of

19 Daniel Stengel, *Intellectual Property in Philosophy*, 90 *Archives for Philosophy and Law and Social Philosophy*, 20, 20-50 (2004); Justin Hughes, *The Philosophy of Intellectual Property*, 77 *Georgetown University Law Center and Law Journal* 1, 1-51 (1998); Robert Merges, *Justifying Intellectual Property* (Harvard University Press 2011).

the consumer. My analysis reveals how these three phases in the legal history of fashion nearly paralleled larger political and economic trends in the United States during this time frame. Following my analysis and narrative, I consider what implications and conclusions my research has for other scholars exploring similar areas.

HISTORIOGRAPHY

Debates over fashion, intellectual property law, and philosophical property theories have erupted throughout various academic schools of thought. The legal instruments that protect originality and diversity in the fashion industry galvanize interest from various scholars. Some interrogate the current legal protections offered to designers, some focus on the tensions and contradictions within the law and the courts' interpretations of the law, and others analyze the legal protections available for intellectual property through the lenses of various philosophical property theories. Each cluster of scholars focuses on a different strand that constitutes the intersection of fashion, law, and philosophy, which is the very intersection that I examine in my own research.

Current Legal Protections for Fashion: Copyright and Trademark

Scholars paint a fragmented sketch of the current legal protections afforded to designers.²⁰ These protections fall into three main categories: trademark, copyright, and patent protection. Because fashion designers most actively seek protection through copyright and trademark law, I will focus on those two categories throughout my research and detail how other scholars consider them below.

Copyright Protection

Many scholars explore the legal nature of copyright protection for fash-

20 Sarah Kaufman, *Trend Forecast: Imitation is a Legal Form of Flattery – Louis Vuitton Malletier V. Dooney and Bourke, Inc.*, 23 *Cardozo Arts and Entertainment* 531, 531-566 (2005); Buong Nguyen, *Opting for Flexibility: How the Existence of a Design Patent Should Shape Evidentiary Burdens in Litigation over Trade Dress Protection for the Same Features*, 82 *The University of Chicago Law Review* 2249, 2249-2291 (2015); Scruggs, 6 *Northwestern Journal of Technology and Intellectual Property* (cited in note 14); Lauren Howard, *An Uningenious Paradox: Intellectual Property Protection for Fashion Designers*, 32 *Columbia Journal of Law and the Arts* 333, 333-363 (2009); Tsai, 9 *Lewis and Clark Law Review* (cited in note 14); Bianka Kadian-Dodov, *Fashion Police: Intellectual Property in the Fashion Industry*, 5 *Seton Hall Law* 1, 1-30 (2013); Lois Herzeca, *Fashion and Retail Law 2016: Trends and Developments* (Practicing Law Institute 2016); Raustiala and Sprigman, 92 *Virginia Law Review* (cited in note 5); Guillermo Jimenez and Barbara Kolsun, *Fashion Law: A Guide for Designers Fashion Executives, and Attorneys* (Bloomsbury Publishing 2014).

ion designs.²¹ Lawyer MC Miller details the copyright protection accessible for designers.²² Miller references the United States Copyright Act, which states that “copyright protection extends to original works of authorship fixed in any tangible medium.”²³ In other words, copyright protection applies to designs, songs, or any non-functional creations. It does not, however, apply to the functional aspect of a product, only those parts that have no utilitarian purpose. Because clothing is both artistic and functional, designs must pass the “separability test,” which is described in the Copyright Act as follows: “the design of a useful article...shall be considered a pictorial, graphic, or sculptural work [and thus afforded copyright protection] only if [...] such design incorporates pictorial, graphic, or sculptural features that can be identified separately from [...] the utilitarian aspects of the article.”²⁴ In regards to fashion, while the aesthetic design of a jacket is copyrightable, the zipper and functional aspects are not.

Trademark Protection

In addition to copyright law, many lawyers also detail the range of protection that trademark law offers. Guillermo Jiminez and Barbara Kolsun paint the contemporary landscape of trademark, trade dress, and trade design protections.²⁵ They define “trademark” as a physical mark that is used to identify a product.²⁶ When one sees the symbol of a polo player in the corner of a shirt, for example, she recognizes that shirt as a Ralph Lauren. The consumer’s dependency on the symbol of the polo player to identify the shirt as a Ralph Lauren permits the designer to legally own that mark. Trade dress and trade design are not physical marks, but other attributes communicate the brand of a particular product. For example, Christian Louboutin’s use of the color red on the sole of a stiletto falls under trade dress.²⁷ It is not a physical mark, but it is a particular display of color that communicates the brand of the shoe.²⁸

21 Miller MC, 55 William and Mary Law Review (cited in note 14); Hemphill and Suk, 61 Stanford Law Review (cited in note 7).

22 Miller MC, 55 William and Mary Law Review (cited in note 14).

23 *Id*

24 Scruggs, 6 Northwestern Journal of Technology and Intellectual Property (cited in note 14).

25 Jiminez and Kolsun, Fashion Law: A Guide for Designers Fashion Executives, and Attorneys (cited in note 20).

26 *Id*

27 Mathieu, Christian Louboutin Photograph (cited in note 1).

28 This case is cited repeatedly throughout the literature. See Jiminez and Kolsun, Fashion Law: A Guide for Designers Fashion Executives, and Attorneys (cited in note 20); Nguyen 82 The University of Chicago Law Review (cited in note 20); Herzeca, Fashion and Retail Law 2016 (cited in note 20); Margot Parmenter, Louboutins and Legal Loopholes: Aesthetic Functionality and Fashion, 40 Pepperdine Law Review 1039, 1039-1102 (2013).

NC L Rev, 237, (2007-2008). See also Julie Tsai, Fashioning Protection: A Note on the Protection of Fashion Designs in the United States, 9 Lew C L Rev, 447, (2005).

Debate Over The Current Legal Protections for Fashion

The copyright and trademark protections afforded to designers have sparked a heated debate between fashion lawyers. On one side stand the scholars who adamantly argue in favor of fashion legal protection, many calling for its expansion. On the other side, scholars argue against fashion legal protection. Rather than position these arguments against one another, I will detail the most profound and popular claims regarding fashion and the law that surface on both sides of the debate.

Fashion and Originality

An undeniable tension between imitation and originality exists within the fashion industry. Designers often draw inspiration from previous works in order to create unique and original expressions. In their publication, Scott Hemphill and Jeannie Suk examine the tension between imitation and creativity in the fashion industry, drawing a sharp distinction between interpretations of trends and close copies of designs. While “designers draw freely upon ideas, themes, and styles available in the general culture,” Hemphill and Suk emphasize that “interpretations are different from copies.”²⁹ Hemphill and Suk celebrate the inspiration and influence that designers find in one another. However, they also affirm that close copies pose a significant detriment to original designers as they allow virtually the same product to be sold at lower rates and rob the original designers of the fruits of their labor.³⁰ While Hemphill and Suk lead this argument, many other theorists echo their analysis.³¹

Kal Raustiala and Christopher Sprigman present a description regarding the nature of copying in the fashion industry, which disrupts the image sketched by Hemphill and Suk.³² Raustiala and Sprigman argue that all designers partake in the culture of copying, not just companies like Forever 21. Quoting Tom Ford, who said that “‘appropriation and sampling in every fashion field has been rampant,” Raustiala and Sprigman demonstrate how all fashion designers, both for luxury and knock-off brands, participate in the culture of copying and imitation.³³

In addition to offering an alternative depiction, Raustiala and Sprigman advance their core argument that although “copying [in the fashion industry]

29 Hemphill and Suk, 61 *Stanford Law Review* (cited in note 7).

30 *Id*

31 See also Lauren Howard, *An Uningenious Paradox: Intellectual Property Protections for Fashion Designs*, 32 *Colum. J L & Arts*, 333, (2008). See also M.C Miller, *Copyrighting the Useful Art of Couture: Expanding Intellectual Property Protection for Fashion Designs*, 55 *Wm & Mary L Rev*, 1617, (2013). See also Emily Day, *Double-Edged Scissor: Legal Protection for Fashion Design*, 86 *NC L Rev*, 237, (2007-2008). See also Julie Tsai, *Fashioning Protection: A Note on the Protection of Fashion Designs in the United States*, 9 *Lew C L Rev*, 447, (2005).

32 Kal Raustiala and Christopher Sprigman. *The Piracy Paradox: Innovation and Intellectual Property in Fashion Design*, 92 *Va L Rev*, 1687, 1777, (2006).

33 *Id* at 1716.

is rampant,” “competition, innovation, and investment [...] remain vibrant,” illustrating that a lack of protection does not stifle creativity in the fashion industry.³⁴ This is what Raustiala and Sprigman label the “piracy paradox.” Raustiala and Sprigman contend that the practice of copying actually *benefits* the original designers. Even with limited legal protections, American designers such as Tom Ford consistently produce new designs and reap significant profits for their efforts.³⁵ Other scholars echo Raustiala and Sprigman’s claim that because copying benefits both the copyist and the designer of the original, additional legal protection is unnecessary for the fashion.³⁶

Fashion is a Functional Art

Scholars present a diverse range of opinions regarding the tension between fashion as both a functional object and an artistic expression. Some scholars value the aesthetic part of fashion over the function and contend that fashion is an art, deserving of the same legal protections as paintings and sculptures receive. Julia Tsai asserts that “fashion designers are artists and the medium that they work with is clothing” and therefore they should receive the same copyright protection that artists, musicians, and authors enjoy.³⁷ In her analysis, Tsai references the fashion exhibit displayed in the foremost museums in the world.³⁸ In doing so, Tsai sketches the growing recognition of fashion as not simply a functional good, but also as an artistic expression, an argument supported by many other scholars.³⁹

While some scholars agree with Tsai’s analysis, others claim that fashion is not artistic, but strictly a functional good. Raustiala and Sprigman highlight how the global fashion industry generates over \$750 billion each year, a revenue

34 Id at 1689.

35 Id at 1691.

36 Elizabeth Rosenblatt labels the fashion industry as a “negative space.” Rosenblatt defines “negative space” as areas where creation and innovation thrive without significant formal intellectual property protection. See also Elizabeth Rosenblatt, *Intellectual Property’s Negative Space: Beyond the Utilitarian*, 40 Fla St U L Rev, 441-86, (2013) For another scholar who agrees that fashion benefits from copying and does not need extensive legal protection, see also Bianka Kadian-Dodov, *Fashion Police: Intellectual Property in the Fashion Industry*, Seton Hall L Rev, (May 2013)

37 Julie Tsai, *Fashioning Protection: A Note on the Protection of Fashion Designs in the United States*, 9 Lew C L Rev, 461-62, (2005).

38 Tsai cites the The Guggenheim Museum in New York, which unveiled a collection of Giorgio Armani works ,and the Metropolitan Museum of Art’s Jacqueline Kennedy fashion exhibit, cited in note 38.

39 See also Brandon Scruggs, *Should Fashion Design Be Copyrightable?*, 6 NW J Tech & IP, (2007). See also Scott Hemphill and Jeannie Suk, *The Law, Culture and Economics of Fashion*, 61 Stan L Rev, (2009). See also Lauren Howard, *An Uningenious Paradox: Intellectual Property Protections for Fashion Designs*, 32 Colum. J L & Arts, 333, (2008). See also M.C Miller, *Copyrighting the Useful Art of Couture: Expanding Intellectual Property Protection for Fashion Designs*, 55 Wm & Mary L Rev, 1617, (2013).

much greater than the revenues generated by the music or publishing industries.⁴⁰ Raustiala and Sprigman highlight these numbers to draw distinctions between fashion and other creative industries to emphasize that fashion is a necessary commodity, unlike the other two. Raustiala and Sprigman further argue that fashion is functional by comparing it to food. They claim that fashion, like food, can be artistically and creatively arranged, but ultimately possesses functional aspects and is undeserving of intellectual property protection.⁴¹

As some scholars stand on either end of the spectrum of fashion as purely an art or purely function, others recognize how fashion can be artistic as well as functional. While Tsai contends that fashion is comparable to museum artwork and Raustiala and Sprigman counter that fashion is the same as food, Miller validates that fashion is both an art and a necessity. As a consequence of its unique and somewhat paradoxical nature, Miller argues that it poses complicated legal questions for designers who seek patent and or copyright protection. Miller articulates that “while fashion designs deemed primarily utilitarian in nature can never escape their artistic potential in order to receive relevant design patent [protection], fashion designs deemed artistic in nature can never escape their potentially utilitarian functions in order to receive copyright protection.”⁴² Miller argues that since patents protect functional innovations and copyrights protect artistic expressions, designers often fail to receive either protection as their designs cannot fit neatly into either protection category.⁴³

Fashion is a Vocabulary for Self-Expression

While many scholars focus on how fashion illustrates the personality and originality of the designer, others recognize how consumers also depend on fashion as a vocabulary for self-expression. Hemphill and Suk argue that “fashion

40 The 2002 Economic Census reports that the book publishing generates \$27 billion and the music industry generates \$12 billion. U.S. Census Bureau, 2003 formation Sector Services, Tbl. 3.0.1 (2003), archived at census.gov/svsd/www/sas51, qtd. in Kal Raustiala and Christopher Sprigman. “The Piracy Paradox: Innovation and Intellectual Property in Fashion Design” pp. 1689. For fashion industry statistic, see Safia A. Nurbhai, *Style Piracy Revisited*, 10 J.L. & Pol’y 489, 489 (2002). qtd. in Kal Raustiala and Christopher Sprigman. *The Piracy Paradox: Innovation and Intellectual Property in Fashion Design*, 1687, 1693, (2006).

41 *Id* at 1765

42 M.C Miller, *Copyrighting the Useful Art of Couture: Expanding Intellectual Property Protection for Fashion Designs*, 55 Wm & Mary L Rev, 1617, 1633-34, (2013).

43 Miller also draws a comparison between fashion protection and architectural protection, as both clothing and buildings serve functional as well as aesthetic purposes. By illustrating how architecture receives much stronger copyright protection than fashion, Miller advances her claim that fashion protection should mirror architecture protection. For Miller’s architectural argument, See M.C Miller, *Copyrighting the Useful Art of Couture: Expanding Intellectual Property Protection for Fashion Designs*, 55 Wm & Mary L Rev, 1617, 1621-22, (2013). For other scholars who discuss fashion as functional and aesthetic, See also Margot Parmenter. *Louboutins and Legal Loopholes: Aesthetic Functionality and Fashion*, 40 Pepperdine L Rev, (2012-2013).

communicates meanings that have individual and social significance.”⁴⁴ Innovation in fashion creates vocabularies for self-expression that relate individuals to social worlds.⁴⁵ Hemphill and Suk affirm that when designers express originality in their designs, they create a vocabulary, or instrument, through which consumers can express their own identities.

Susan Scafidi echoes Hemphill and Suk’s theory.⁴⁶ Scafidi considers fashion as a form of technology that communicates information about the wearer. Beginning with ancient jewelry, Scafidi details how fashion has communicated social identity.⁴⁷ Scafidi describes fashion as an “identity-bearing commodity available to consumers,” similar to an individual’s car or apartment building.⁴⁸ While Scafidi recognizes that consumers do not always “deliberately engag[e] in crafting an individual aesthetic statement on a daily basis,” all consumers, to varying extents, depend on fashion to illustrate some aspects of their personalities.⁴⁹

Case Law Analysis of Fashion Protection

Scholars articulate strong arguments both to defend and oppose the expansion of intellectual property protection for fashion designs. While these scholars debate the moral imperatives of the current intellectual property statutes, other scholars have examined the court interpretations of those statutes and expose the ambiguities and contradictions embedded within them.⁵⁰

Case Law Analysis: Copyright Protection

Legal scholars analyze copyright cases and laws that impact the fashion industry. Brandon Scruggs describes how court rulings in copyright cases have affected the fashion industry.⁵¹ Through his analysis of copyright cases, including *Mazer v Stein*, Scruggs illustrates the ambiguities and tensions laced throughout the opinions issued by courts regarding intellectual property disputes.⁵² In

44 Scott Hemphill and Jeannie Suk, *The Law, Culture and Economics of Fashion*, 61 *Stan L Rev*, 1147, 1151 (2009).

45 *Id*

46 Susan Scafidi, *F.I.T.: Fashion As Information Technology*, 59 *Syracuse L Rev*, 60, 69-90, (2008).

47 *Id* at 75-76

48 *Id* at 81

49 *Id*.

50 Brandon Scruggs, *Should Fashion Design Be Copyrightable?*, 6 *NW J Tech & IP*, (2007). Mitchell Wong, *The Aesthetic Functionality Doctrine and The Law of Trade-Dress Protection*, 83 *Cornell L Rev*, 1116, 1116-7, (1997-1998). Ingrida Berzins, *The Emerging Circuit Split over Secondary Meaning in Trade Dress Law*, 5 *U Pa L Rev* 152, 1661,1661-95, (May 2004).

51 *Mazer v Stein*, 347 U.S. 201 (1954); *Whimsicality, Inc v Rubie’s Costumes Co Inc*, 721 F. Supp. 1566 (NY App 1989)

52 Brandon Scruggs, *Should Fashion Design Be Copyrightable?*, 6 *NW J Tech & IP*, at 23 (cited in note 14).

Mazer v Stein, Stein designed a collection of lamps that incorporated statues of nude figures as the lamp base.⁵³ The Supreme Court held that although the lamps served a functional purpose, the artistic element of the sculptures was protected under copyright legislation, demonstrating that works that are both aesthetic and functional can receive copyright protection.⁵⁴ Through his case law analysis, Scruggs concludes that the interpretations of the courts “are ridiculous” and fail to establish consistency in how they interpret copyright statutes, setting an impossible standard for fashion companies to understand and follow.⁵⁵

Case Law Analysis: Trademark Protection

In addition to copyright cases, lawyers have also analyzed the rulings in a collection of trademark cases that have impacted and amended the protections offered to fashion designers.⁵⁶ Margot Parmenter analyzes trademark cases *Qualitex v Jacobson Products*, *Walmart Stores v Samara Brothers*, the infamous *Christian Louboutin v Yves Saint Laurent* and many others.⁵⁷ Her analysis echoes Scruggs’ argument that the courts have established several inconsistent methods for evaluating whether fashion trademark protection should be granted.

Ingrida Berzins describes the inconsistencies in the trademark case law more extensively by interrogating a vast collection of case rulings, including the *Walmart* case.⁵⁸ Berzins focuses on the element of secondary meaning that, since the *Walmart* case, has become a necessary element for receiving trade dress protection. Although Berzins Shepardizes a wide selection of cases, she concentrates her analysis around the repercussions of the *Walmart* case. The case fundamentally changed the legal requirements for trade dress protection, shifting emphasis from the designer’s efforts to the public’s perception. Berzins follows the conclusion articulated by both Scruggs and Parmenter, arguing that court rulings have fostered “growing inconsistencies in the factors by which [they use to] evaluate secondary meaning.”⁵⁹

Connecting Fashion Laws with Philosophical Property Theories

From the intellectual property statutes to the courts’ rulings, the legal

53 Brandon Scruggs, *Should Fashion Design Be Copyrightable?*, 6 NW J Tech & IP, at 23 (cited in note 14).

54 *Id*

55 *Id* at 129

56 Margot Parmenter. *Louboutins and Legal Loopholes: Aesthetic Functionality and Fashion*, 40 Pepperdine L Rev, (2012-2013).

57 *Id*

58 Ingrida Berzins, *The Emerging Circuit Split over Secondary Meaning in Trade Dress Law*, 152 U Pa L Rev, 1661, 1661-95 (2004)

59 *Id* at. 1692. Margot Parmenter. *Louboutins and Legal Loopholes: Aesthetic Functionality and Fashion*, 40 Pepperdine L Rev, (2012-2013). Brandon Scruggs, *Should Fashion Design Be Copyrightable?*, 6 NW J Tech & IP.

protections for fashion have encouraged an eclectic constellation of arguments, perspectives, and analyses from scholars. While most scholars intrigued by fashion focus on the cultural and legal dimensions of copying in the industry, a few are beginning to sew the multifaceted conversation of fashion protection into the seams of a separate discourse on the philosophical justifications for legal protections in fashion.

Bianka Kadian-Dodov laces the current debate on protection for fashion designs with several philosophical theories, including the labor and personality theories.⁶⁰ The labor theory, introduced by John Locke, offers a theory of justification rooted in labor. Locke's theory articulates that when people cultivate land through their own personal labor, they become entitled to that land as their property.⁶¹ Kadian-Dodov draws a parallel between the Lockean theory of physical property ownership of land to intellectual property ownership of ideas, arguing that "we own our ideas because we create them," the same way that we cultivate land through our labor.⁶²

The personality theory, which Kadian-Dodov attributes to George Wilhelm Friedrich Hegel, offers a different justification organized around identity and personality. Hegel argues that because our creations are extensions of ourselves, we must have legal protection over them.⁶³ Kadian-Dodov illustrates how Enlightenment theories of property can inform the current landscape of intellectual property protections, specifically those afforded to fashion designers.⁶⁴

Property Theories in Current Intellectual Property Laws

While Kadian-Dodov sketches the legal connections between fashion protection and philosophical property, other scholars analyze intellectual property law more generally and its connection to philosophical property in greater depth. Justin Hughes interrogates the opinions issued in a series of Supreme Court cases in order to argue that John Locke's labor theory of property and Hegel's

60 Kadian-Dodov also explores a utilitarian property theory, which has useful insights but is not directly relevant to this research paper. See for example Bianka Kadian-Dodov, *Fashion Police: Intellectual Property in the Fashion Industry*, Seton Hall L Rev, (May, 2013).

61 Bianka Kadian-Dodov. "Fashion Police: Intellectual Property in the Fashion Industry" pp. 12
62 *Id.*

63 *Id.* at 11. Lawrence Becker. *Deserving to Own Intellectual Property*, 68 Chi Kent L Rev at 609-29, (1993)

64 As several scholars have pulled from various philosophical schools to justify intellectual property, others demonstrate the lack of intellectual property protection in certain industries. Lawyer Elizabeth Rosenblatt proceeds to argue that the labor and personality theories can justify the lack of protection in those negative spaces, including fashion. See also Elizabeth Rosenblatt, *Intellectual Property's Negative Space: Beyond the Utilitarian*, 40 Fla St U L Rev, at 446, (cited in note 36). For other scholars who support her argument, see also Lawrence, *Deserving to Own Intellectual Property*, 68 Chi Kent L Rev (cited in note 63). Edwin Hettinger, *Justifying Intellectual Property*, 18 Philosophy & Pub Aff, 31, 31-52, (1989).

personality theory, when woven together, justify our intellectual property protections.⁶⁵ Several other scholars have drawn this connection between Hegelian and Lockean property theories and the legal protections offered for intellectual property.⁶⁶

Daniel Stengel reaffirms the labor and personality theories presented by other scholars as well as introduces the Foucauldian theory of authorship to evaluate intellectual property protection.⁶⁷ Stengel argues that Foucault's author theory, which Stengel interprets as allowing "society [to define] what intellectual property is," can determine the legal owner of intellectual property. Stengel argues that if society recognizes a particular designer or author as the creator of a particular work, then that designer possesses legal ownership of that item. For example, if society sees the symbol of a Polo player and recognizes that shirt as a Ralph Lauren shirt, then Ralph Lauren can claim legal ownership of the symbol on that shirt.⁶⁸ Stengel creates a unique combination of property theories to narrate the current state of intellectual property laws.

How My Research Bridges a Gap in the Literature

With the exception of a few scholars, the current debate on whether the law should expand or retract its protection over fashion and the conversation that ties philosophical property theories with intellectual property law in the abstract exist completely separate from one another, creating a gaping divide. This is the very gap I bridge in my research by answering the following question: How have court justifications in fashion cases evolved from 1954 to 2011 to illustrate different philosophical property theories? This question naturally leads to other inquiries such as: Do certain property theories appear more frequently than others? What are the implications of each theory? Do the justifications that courts use parallel larger political and economic trends in the United States? In my research, I directly examine the protections offered in fashion copyright and trademark cases from mid-twentieth to the early twenty-first century to illuminate Lockean, Hegelian, and Foucauldian property theories in the legal protections for fashion. While other scholars examine intellectual property law and philosophical property theories, no one has specifically examined the history of court opinions in fashion cases to illustrate the connection between property theories and fashion law.

65 Justin Hughes, *The Philosophy of Intellectual Property*, 77 Georgetown U L Center & L J, (1988).

66 Ibid at 51. Daniel Stengel, *Intellectual Property in Philosophy*, 90 Archives for Phil L & Soc Phil, 20, 20-50, (2004). Laura Biron. *Two Challenges to the Idea of Intellectual Property*, 93 The Monist, 382, 382-394, (2010). Robert Merges, *Justifying Intellectual Property*, (Harvard 2011)..

67 Daniel Stengel, *Intellectual Property in Philosophy*, 90 Archives for Phil L & Soc Phil, 20, 47, (2004).

68 *Id* at 47

Archives For My Research

In order to answer my research question, I have pulled from a variety of archives. Some archives illustrate the justifications used in fashion cases, some define the legal statutes used in those fashion cases, some explain the philosophical property theories that I have used to evaluate those cases, and others map out the broader political and economic landscape that parallel those court decisions.

For the case law research and court opinions that demonstrate how the courts justified fashion protection, I have used LexisNexis, SCOTUS Blog, and the Public Information Office at the Supreme Court. These archives have provided most of my sources, as most of my analysis examined how courts justify copyright and trademark protection in fashion cases. The cases that I have examined in my narrative and analysis section include the following: *Mazer v Stein*, *Peter Pan Fabrics v Puritan Dress Co*, *Cynthia Designs v Robert Zentall*, *Knitwaves v Lollytogs*, *Qualitex v Jacobson Products*, *Walmart v Samara Brothers Inc*, *Abercrombie and Fitch v American Eagle Outfitters*, and *Christian Louboutin v Yves Saint Laurent Inc*.⁶⁹ Some of these cases have surfaced frequently throughout the current discourse on fashion law and the others are either Shepardized by those frequently discussed cases or surfaced in my own case law research.⁷⁰ While these cases constitute the narrative and analysis section of my paper, I have researched a much broader collection of cases in order to arrive at these eight.⁷¹

69 *Mazer v Stein*, 347 U.S. 201 (1954), *Peter Pan Fabrics Inc v Puritan Dress Co Inc*, 207 F Supp. 563 (SDNY 1962). *Cynthia Designs Inc v SJM Jewelry Corp*, 416 F. Supp 510 (SDNY 1976). *Knitwaves Inc v Lollytogs Ltd*, 71 F3d 996 (2D Cir 1995). *Qualitex Co v Jacobson Products Co*, 514 US 159 (1995). *Walmart Stores Inc v Samara Brothers Inc*, 529 US 205 (2000). *Abercrombie & Fitch Stores Inc v American Eagle Outfitters Inc.*, 280 F3d 619 (6 Cir 2002). *Christian Louboutin SA. et al v Yves Saint Laurent America Holding Inc et al*, 11-3303-cv (2d Cir 2012).

70 See also Ingrida Berzins, *The Emerging Circuit Split over Secondary Meaning in Trade Dress Law*, 5 U Pa L Rev 152, 1661,1661-95, (May 2004). See also Lois Herzeca, *Fashion and Retail Law 2016: Trends and Developments*, (Practising Law Institute 2013). See also Justin Hughes, *The Philosophy of Intellectual Property*, 77 Georgetown U L Center & L J, (cited in note 65). Sarah Kaufman, *Trend Forecast: Imitation is a Legal Form of Flattery*, Yeshiva Uni Cardozo Arts & Entertainment L J, (2005). See also Julie Tsai, *Fashioning Protection: A Note on the Protection of Fashion Designs in the United States*, 9 Lew C L Rev, (cited in note 14). See also Brandon Scruggs, *Should Fashion Design Be Copyrightable?*, 6 NW J Tech & IP, (cited in note 14). See also Mitchell Wong, *The Aesthetic Functionality Doctrine and The Law of Trade-Dress Protection*, 83 Cornell L Rev, (cited in note 50). See also Kal Raustiala and Christopher Sprigman. *The Piracy Paradox: Innovation and Intellectual Property in Fashion Design*, 92 Va L Rev, (cited in note 5). See also Scott Hemphill and Jeannie Suk, *The Law, Culture and Economics of Fashion*, 61 Stan L Rev, (cited in note 7). See also *Wal-Mart Stores Inc v Samara Brothers Inc*, 529 US 205 (2d 2000). See also *Louis Vuitton Malletier v Dooney & Bourke*, 454 F3d 108 (2d Cir 2006).

71 Here is a complete list: *Abercrombie & Fitch Stores, Inc v American Eagle Outfitters, Inc*, 280 F3d 619, (6th Cir 2002); *Anna Sui Corp v Forever 21, Inc*, 2009 US Dist LEXIS 33044, (SDNY); Brief for Tiffany & Co, Adidas AG, and Jenny Yoo Collection, Inc, as Amici Curiae in Support of Respondents, *Samsung Electronics Co v Apple, Inc*, No 15-777, (S Ct filed Aug 5, 2016); Chanel,

Exploring the justifications that the courts use to grant or deny legal protection has allowed me to understand which property theories are best illustrated in the legal protections for fashion.

Throughout their opinions, the courts often cited and quoted from the federal copyright and trademark statutes that constitute intellectual property protection. I relied on the Library of Congress for these statutes and legislative documents. From this archive, I have referred to: the United States Constitution, Article 1, Section 8, Clause 8; The Copyright Act of 1909, The Patent Act of 1938, The Lanham Act of 1946, Copyright Act of 1976, The Federal Trademark Dilution Act of 1996, and The Trademark Dilution Revision Act of 2006.⁷² I only examined these statutes in the context that they appeared in fashion copyright and trademark cases. By understanding the language of these legislative documents, I developed a comprehensive understanding of the legal context in which the courts have justified granting or denying fashion legal protection.

For the political theories that I used to evaluate fashion protection cases, I utilized the Cornell Library. While these theories are not primary sources, they provided important theoretical lenses. The Cornell Library provided Locke's *Second Treatise of Government*, Hegel's *Outline of the Philosophy of Right*, and Foucault's *Aesthetics, Method, and Epistemology* all of which I used to develop the labor, personality, and author theory justifications of intellectual property law

Inc v Ladawn Banks, 2010 US Dist LEXIS 135374, (D MD); Chosun International, Inc v Chrisha Creations, Ltd, 413 F3d 324, (2d Cir 2005); Christian Louboutin v Yves Saint Laurent America, 696 F3d 206, (2d Cir 2012); Coach, Inc v We Care Trading Co, 2001 US Dist LEXIS 9879, (SDNY); Coach, Inc v Peters, 386 F Supp 2d 495, (SDNY 2005); Cynthia Designs, Inc v Ronert Zentall, Inc, 416 F Supp 510, (SDNY 1976); Estee Lauder, Inc v The Gap, Inc, 932 F Supp 595, (SDNY 1996); Folio Impressions, Inc v Byer California, 937 F2d 763, (2d Cir 1991); Fruit of the Loom, Inc v Girouard, 994 F2d 1359, (9th Cir 1993); Jovani Fashion, Ltd v Cinderella Divine, Inc, 808 F Supp 2d 542, (SDNY 2011); Kieselstein-Cord v Accessories by Pearl, Inc, 632 F2d 989, 993 (2d Cir 1980); Knitwaves, Inc v Lollytogs, Ltd, 71 F3d 996, (2d Cir 1995); LeSportsac, Inc v K Mart Corp, 754 F2d 71, 74 (2d Cir 1985); Levi Strauss & Co v Blue Bell, Inc, 778 F2d 1352, (9th Cir 1985); Louis Vuitton Malletier SA v Haute Diggity Dog, LLC, 507 F3d 252, (4th Cir 2007); Louis Vuitton Malletier v Dooney & Bourke, Inc, 454 F3d 108, (2d Cir 2006); Masquerade Novelty, Inc v Unique Indus, 921 F2d 663, (3d Cir 1990); Mazer v Stein, 347 US 201, (1954); Paul Morelli Design, Inc v Tiffany and Co, 200 F Supp 2d 482, (E D Pa 2002); Peter Pan Fabrics, Inc v Puritan Dress Co, 207 F Supp 563, (SDNY 1962); Qualitex Co v Jacobson Products Co, 514 US 159, (1995); Regal Jewelry Co v Kingsbridge International, Inc, 999 F Supp 477, (SDNY 1998); Soptra Fabrics Corp v Stafford Knitting Mills, Inc, 490 F2d 1092, (2d Cir 1974); Sweet People Apparel, Inc v Fame of NY, Inc, 2011 WL 2937360, (D NJ); Urban Outfitters, Inc v BCBG Max Azria Group, Inc, 2009 US App LEXIS 6586, (3d Cir); Walmart Stores, Inc v Samara Brothers, Inc, 529 US 205, (2000); Whimsicality, Inc v Rubie's Costume Co, 891 F2d 452, (2d Cir 1989). US Const Art I, § 8, cl 8. Copyright Act of 1909, Pub L No 60-349, 35 Stat 1075 (1909), codified at 17 USC §§ 501–13. Patent Act of 1938, 35 USC § 271 (1938). Lanham Trademark Act, 15 USC §§ 1091–1129 (1946). Copyright Act of 1976, 17 USC §§ 101–22 (1976). Federal Trademark Dilution Act of 1995, 15 USC § 1125 (1995).

72 Trademark Dilution Revision Act of 2006, 15 USC § 1125 (2006).

in the fashion industry.⁷³ By pulling sources from these main archives, I have comprehensively investigated my topic.

In addition to court cases, trademark and copyright statutes, and philosophical property theories, I examined legal policy initiatives that occurred within the time frame of my research. From the United States Printing Office, I collected consumer rights initiatives proposed by the Kennedy, Nixon, and Clinton Administrations that contextualize my case law analysis, as all three administrations served within my research time frame of 1954 to 2011.⁷⁴ Additionally, I have examined a collection of journal articles and books that discuss the impact of consumerism on the economic, political, and legal structures within the United States.⁷⁵

NARRATIVE AND ANALYSIS

Locke's Labor Theory

John Locke's labor theory acts as one of the first to justify the origins of property ownership. In his chapter on "Property" in his larger work, *The Second Treatise of Civil Government*, Locke offers a theory of property ownership anchored in the belief that through labor, one can appropriate something into her private domain. According to Locke, everything originally existed "in common," meaning that, in the state of nature, no one inherently owned anything.⁷⁶ Locke describes how "once an individual removes out of the state that what nature hath provided, and left it in, he hath mixed his *labor* with it and enjoined to it something that is his own, and thereby makes it his property."⁷⁷ Because Locke believes that each individual is entitled to the fruits of her labor, by mixing what

73 John Locke, *Second Treatise of Government* (Harlan Davidson 1982); George Wilhelm Friedrich Hegel, *Outlines of the Philosophy of Right* (Oxford 2008); Michael Foucault, *Aesthetics, Method, and Epistemology* (New 1998) (Robert Hurley et al, trans) (James D. Faubion, ed).

74 Here is a complete list: John F. Kennedy, Special message to the Congress on protecting the consumer interest, 1962 Pub Papers, 235; Richard M. Nixon, Special message to the Congress on consumer protection, 1969 Pub Papers, 883; William J. Clinton, Proclamation 6748-National Consumers Week, 30 Weekly Comp Pres Doc 2149, (Oct 24, 1994).

75 Here is a complete list: Charles Barngrover, *The Service Industries in Economic Development: A Note*, 22 *The American Journal of Economics and Sociology* 331, 1963; Gloria Fenner, *Consumerism in the United States* (Praeger 1980); James Donovan, *Greater Economic Role of Service Industries*, 19 *Financial Analysts Journal* 89, 1963; James Quinn, *Serving the Service Industry*, 5 *Issues in Science and Technology* 74, 1989; James Turner, *The Consumer Interest in the 1990s and Beyond*, 29 *The Journal of Consumer Affairs* 310, 1995; Martin Dauntton and Matthew Hilton, eds, *The Politics of Consumption: Material Culture and Citizenship in Europe and America* (Berg 2001); Robert J. Lampman and Robin A. Douthitt, *The Consumer Bill of Rights: Thirty-Five Years Later*, 9 *Advancing the Consumer Interest* 4, 1997; T.H. Breen, *The Marketplace of Revolution: How Consumer Politics Shaped American Independence* (Oxford 2004).

76 John Locke. *Second Treatise of Government*.

77 *Id* at 111-112

is held in common with her own labor, one appropriates what was once in “common” into her own private property.

After arguing that one deserves the fruits of her labor, Locke offers a second reason for why labor should establish private ownership: the cultivation of land and what is in common benefits not only the person who owns that property, but also the entire community. Because Locke believes that nature and land “[are] almost worthless in their raw condition,” labor becomes the mechanism through which land and resources acquire value.⁷⁸ But labor does not only enhance the value of that which is labored, it “affects the value of everything.”⁷⁹ Locke believes that cultivated land and resources benefit everyone, as raw, inaccessible goods provide little good for the public.⁸⁰

Because Locke’s theory is so centered around physical property, many philosophers have criticized those who connect it to intellectual property theory.⁸¹ Others, however, have departed from the physical examples that Locke offers and have applied his argument that one should receive the fruits of her labor to intellectual property.⁸² If someone labors and cultivates the idea for a necklace, for example, one could argue that because of her labor, she should own that design. Using Locke’s line of reasoning, permitting one to claim ownership and legal protection of her work will encourage others to create their own unique ideas and benefit everyone by creating diversity and innovation in the market.⁸³

Hegel’s Personality Theory

Many scholars highlight the presence of a personality theory of property in the justifications and rationale for intellectual property law, which they commonly attribute to Georg Wilhelm Friedrich Hegel. In *The Outline of the Philosophy of Right*, Hegel advances a personality theory to describe how humans appropriate, or acquire, property. Hegel anchors his theory of property ownership around the “concepts of human will, personality, and freedom.”⁸⁴ Hegel writes that “[p]ersonality is that which struggles to lift itself above this restriction and

78 *Id* at 113

79 *Id* at 117

80 *Id.*

81 Christopher Sprigman, interview by Camille Edwards, October 17th, 2016; Lawrence Becker. “Deserving to Own Intellectual Property.”

82 *Ibid.*; Justin Hughes. “The Philosophy of Intellectual Property; Robert Merges. *Justifying Intellectual Property*; Daniel Stengel. “Intellectual Property in Philosophy.”

83 Hughes, 77 Georgetown L J at 292 (cited in note 82) (“Furthermore, intellectual property may be a liberal influence on society inasmuch as coming to own intellectual property is often tied to being well-educated. If people become increasingly progressive with increasing education, intellectual property confers economic power on men and women of talent who generally tend to reform society.”).

84 Justin Hughes. “The Philosophy of Intellectual Property” pp. 28

to give itself reality, or in other words, to claim that external world as its own.”⁸⁵ According to Hegel, the will constantly seeks to “actualize” or manifest itself through ideas.⁸⁶ When the will of a person manifests itself in ideas, her personality is unveiled.⁸⁷

Hegel uses this concept of personality expression to outline the process of acquiring property. Hegel writes that “by expressing” an art, talent, or erudition, one may “embody them in something external and alienate them and in this way they are put into the category of ‘things.’”⁸⁸ Because talents, arts, and eruditions are part of one’s personality, if a person can express those talents into something physical, e.g. a clothing design, she can claim ownership over that physical object. Hegel continues to write that by “putting [one’s] will into any and every thing,” one can make something her own.⁸⁹ Be it a song or an article of clothing, if one’s physical creation is expressive of her personality, that creation becomes hers.

Interestingly, the process of actualizing one’s will requires labor, resembling parts of a Lockean labor theory. However, it is rooted in the idea that property ownership is tied to the expression of one’s will. The personality theory stresses the identity and personality of the individual while the labor theory does not depend on how an individual’s identity will be expressed or resembled in their work, but only the physical and or mental exertion that she contributes to it.

After describing the process of expressing one’s personality so that it can be legally owned, Hegel considers how one should protect her property.⁹⁰ Hegel writes that if “[one has] an idea of a thing and mean[s] that the thing as a whole is [hers],” then one has to “[mark] it as [hers].”⁹¹ In order to protect her property, one should mark her work so that the public recognizes that it belongs to her. The personality theory’s consideration for marking one’s work distinguishes it from the labor theory, which does not consider this aspect.

While the labor and personality theories share a consideration for the labor and efforts of the designer, the personality theory sharply differs from the labor theory in two respects. First, it emphasizes the identity and personality of the designer.⁹² Second, Hegel underscores the importance of marking one’s work so that society understands it as hers. Recognizing the distinctions between

85 *Id* at 29

86 *Id* at 28

87 *Id*

88 Hegel, *Outlines of the Philosophy of Right* at 59 (cited in note 73).

89 *Id* at 60

90 *Id* at 59, 67.

91 *Id* at 67

92 The personality theory does not necessarily have to stress the personality of the designer. As will be illustrated in the more recent fashion protection cases, the personality theory can also justify protection by considering the personal identity of the consumer. See *Abercrombie & Fitch*, 280 F3d; *Christian Louboutin SA*, 696 F3d.

the labor theory and the personality theory is not to say that they are mutually exclusive or incompatible. The differences between the two theories simply offer different methods to justify property ownership. As will become apparent in the following cases, the courts often depend on both theories to justify protection.

Political philosophers who examine intellectual property law frequently reference Hegel's theory of property ownership, which they commonly refer to as a personality theory. While scholars have yet to apply Hegel's theory specifically to fashion case law, some have conceded that "the personality justification is best applied to the arts" and other creative industries.⁹³

Foucault's Author Theory

In his essay "What is an Author?" Michael Foucault introduces a theory that partly considers a process for determining the author of a creative work.⁹⁴ In his essay, Foucault argues that the author label is constructed through public recognition.⁹⁵ In Daniel Stengel's article "Intellectual Property in Philosophy," he elaborates on Foucault's theory to illustrate how Foucault's method of determining the author of a work can be used to determine the legal owner of a work. Building off of Foucault's theory, Stengel argues that "it is not the author who creates his own work, but [rather] the society."⁹⁶ Stengel interprets Foucault's theory to mean that if the public associates a specific person or, in the context of fashion, a particular designer, with a writing or creative expression, then that person owns that particular work. If the public does not attribute a specific person to the work, then the creator does not own it as her property. Unlike the labor theory, which focuses exclusively on physical property, Foucault's author theory is designed for intellectual and intangible forms of property, strengthening its relevancy to fashion intellectual property law.

According to the author theory, in order for one to have property ownership of an expression or a concept, society must recognize that expression belongs to that individual. For example, if the public sees two overlapping G's and recognizes it as the mark of the Gucci brand, then Gucci can claim ownership of that mark. However, if the public sees the overlapping G's and the identity of the Gucci brand does not come to mind, then Gucci cannot claim legal possession of that mark.

The author theory as detailed by Foucault and expanded on by Stengel shares some similarities with the personality theory but does contrast in some key areas. Both theories stress the importance of marking one's work so that society identifies it as belonging to an individual. However, with the author theory, a

93 Hughes, 77 Georgetown L J at 330 (cited in note 82).

94 Foucault, *Aesthetics, Method, and Epistemology* at 209 (cited in note 73).

95 *Id* at 213

96 Stengel, 90 Archives for Philosophy of Law and Social Philosophy at 47 (cited in note 82).

person can only claim ownership if society associates it with a particular brand. With the author theory, it is irrelevant if a designer infuses her personality into a design if the public does not associate that particular expression with that particular designer. On the contrary, for the personality theory, the presence of one's personality in a work is central for claiming legal ownership. In this regard, the two theories sharply contrast, with the personality theory focusing on the identity of the creator and the author theory focusing on the perception of the consumer. While the labor, personality, and author theories all overlap in several areas, the author theory distinguishes itself more sharply from the other two as it shifts the focus from the creator of the design to the society that wears it.

Copyright History

Mazer v Stein, 1954



Figure 2: Sculptural base of Stein from Mazer v Stein case.

The Supreme Court opinion in *Mazer v Stein* set the stage for how the courts justify protection in fashion copyright cases. Stein sued Mazer for copyright infringement of lamps and was successful in the lower courts, causing Mazer to appeal to the Supreme Court to reverse that decision.⁹⁷ These lamps, while serving a utilitarian purpose of producing light, contained mini sculptures “in the form of human figures” at the base.⁹⁸ In *Mazer*, the Court answered the following question: Can copyright laws protect the unique and original designs of a functional product, such as a lamp? While this case involved copyright infringement for lamps, the arguments in this case have surfaced in following cases that involve fashion products. Clothing, like a lamp, is functional but also has artistic, maybe even copyrightable, elements. The decision of the Court in *Mazer* to grant or deny protection on a product that is partially artistic, partially functional directly affected copyright protection in the fashion industry.

Before answering the primary question presented in the case, the Court contextualized its opinion with a brief history of copyright legislation. After describing the Copyright Act of 1909, the Court wrote that:

The legislative history of the 1909 Act and the practice of the Copyright Office unite to

⁹⁷ *Mazer v. Stein*, 347 U.S. 201 (1954)

⁹⁸ See Figure 2, appears in *Lamps, Belts Buckles, and Hookas – The Limits of Copyright Protection* (Lipton, Weinberger, and Husick, Jan 21, 2014), archived at <https://perma.cc/8XHV-QHPL>.

show that “works of art” and “reproductions of works of art” are terms that were intended by Congress to include the authority to copyright these statuettes. Individual perception of the beautiful is too varied a power to permit a narrow or rigid concept of art.⁹⁹

The Court’s loose interpretation of the act to include the base of lamps as a “work of art” significantly expanded copyright protection, which became relevant to later courts that ruled on cases involving fashion. As it placed no specific limits on what is considered to be art and therefore what copyright laws can protect, this decision implied that the aesthetic and artistic elements of clothing can also benefit from copyright protection even if they also serve a functional purpose.

After expressing a loose interpretation of what constitutes art that carved space for items such as lamps and clothing, the Court offered an opinion strongly infused with a Hegelian personality theory. First, the Court wrote that “copyright [...] protection is given [...] to the expression of an idea.”¹⁰⁰ Referencing the opinion in a past case, the Court writes:

By writings in that clause is meant the literary productions of those authors, and Congress very properly has declared these to include all forms of writing, printing, engraving, etching, &c., by which the ideas in the mind of the author are given visible expression.¹⁰¹

By stating that copyrights protect the expression of an idea that is originally formed in the mind, the Court’s opinion invoked strong Hegelian language.

The Court’s opinion even more explicitly illustrated a personality theory when it wrote that “personality always contains something unique. It expresses its singularity even in handwriting, and a very modest grade of art has in it something irreducible, which is one man’s alone.”¹⁰² By arguing that one’s personality is illustrated in her work, the Court’s justification for protection profoundly illustrated the Hegelian personality property theory. By saying that the statuettes expressed the personality of the creator and therefore should receive protection, whether intentionally or not, the Court drew its justification from various portions of a personality theory.

The Court complimented its strong invocation of a Hegelian justification with pieces of a Lockean labor theory. After defining “writings” to include “writing, printing, engraving, etching, &c.,” the Court wrote that “the writings which are to be protected are *the fruits of intellectual labor*, embodied in the form of books, prints, engravings, and the like.”¹⁰³ This phrase reflected one of Locke’s core arguments that one should always receive the fruits, or profits, of her own

99 Mazer, 347 US at 213–14, quoting Copyright Act of 1909 § 5, 35 Stat at 1077 (1909).

100 *Id*

101 *Id*

102 *Id*

103 *Id*

labor and toil.¹⁰⁴ While other scholars have connected the *Mazer* opinion to a Lockean property theory, none have referenced this specific language to illustrate the connection.¹⁰⁵ By writing that legal copyright protection is justified because it protects “the fruits of intellectual labor,” the Court clearly invoked Lockean language to justify copyright protection. While other political philosophers have incorporated this phrase into their own theories, “fruits of our labor” first emerged in Locke’s *Second Treatise of Civil Government*.

In its *Mazer* opinion, the Supreme Court used language that exemplified both Hegelian and Lockean property theories in its justification for granting copyright protection. The opinion anchored more of its justification around Hegel’s theory as well as illustrated aspects of a labor theory attributable to Locke. While these theories are distinct from one another, they are not necessarily mutually exclusive. The Court’s use of both theories attested to their compatibility. In fact, many of the opinions that follow have pulled from both theories to justify granting or denying protection.

The Court’s opinion interlaced a personality and labor theory, in order to emphasize the designer’s role in determining if protection should be granted. The Court demonstrated how the designer infused her personality into the lamps as well as the labor she exerted. Rarely, if at all, did the Court consider how protection of the design would impact the market for consumers. The Court’s emphasis on the labor and personality of the designer in order to justify protection represented the first of three phases in the legal history of fashion, which prioritized the designer over the consumer. In this phase, the courts argued for protection through claims that consider the labor and personality of the consumer. Because subsequent fashion copyright cases frequently Shepardized the Court’s opinion in *Mazer*, the justifications for granting fashion copyright protection have expanded on the language from this case. Consequently, both Hegelian and Lockean property theories as well as a focus on the designer will surface in following court opinions that consider copyright protection for fashion.

The Court’s justification, which prioritized the designer, nearly paralleled larger trends and longstanding traditions in American political and economic thought regarding the fashion industry and the relationship between the designer and consumer. In the early twentieth century, “fashion designers were not confronted with complaints about their control over styles from any consumer groups.”¹⁰⁶ During the time that the Court issued its ruling in *Mazer*, the consumer’s voice was eclipsed from conversations regarding the production of clothing and design products nationwide.¹⁰⁷ Thus, the Court’s consideration for the de-

104 John Locke. *Second Treatise of Government* (cited in note 73).

105 See Hughes, 77 Georgetown L J (cited in note 82).

106 Fenner, Consumerism in the United States at 91 (cited in note 75).

107 *Id.*

signer in *Mazer* mirrored a larger trend prevalent in the clothing industry during this era.¹⁰⁸

Peter Pan Fabrics v Puritan Dress Co, 1962

A few years after the Supreme Court issued its *Mazer* ruling, a copyrighting case involving fabric designs arose in the lower courts.¹⁰⁹ In *Peter Pan Fabrics v Puritan Dress Co.*, plaintiff Peter Pan Fabrics copyrighted a design inspired by Byzantium patterns observed on a trip to Istanbul.¹¹⁰ In this case, the court answered the following question: Can designs inspired by other works receive copyright protection?

The court ruled that the copyright was valid. In the opinion, the Southern District Court of New York ruled that:

While the basis of the sketches appears to have been suggested by or perhaps taken faithfully from ancient art forms, their incorporation into a combined design by the Parisian designer is clearly and sufficiently original to satisfy the originality requirement of copyright law.¹¹¹

The court held that one can reinterpret a previous design in order to express her own original idea. Similar to *Mazer*, this opinion illustrated aspects of Hegel's personality theory. In a personal interview, fashion lawyer Christopher Sprigman explained how Hegel's personality theory allows for one to reinterpret a previously created work in order to express her own identity.¹¹² If someone infuses "her will" into a craving for Star Trek, for example, Sprigman explains that Hegel's theory would permit her to own her particular expression or characterization of Star Trek.¹¹³ Although she drew her inspiration from a previously created work, her interpretation is an expression of her personality, and therefore is her own.¹¹⁴ While Sprigman illustrates Hegel's argument through a Star Trek example, the same principle applies to fashion. While everything in fashion recycles the same vocabulary of colors, prints, patterns, and themes, each designer expresses her unique personality through her own designs that draw inspiration from previous ones.

The Southern District Court of New York, by declaring the plaintiff's reinterpreted design as original and therefore copyrightable, illustrated Sprigman's interpretation of Hegel's theory. Although the plaintiff reworked a previously created design, the plaintiff properly infused "her will" into that design so that

108 In fact, many scholars have noted that since the American colonies first emerged, the American economy "privileged . . . the manufacturers." Breen, *The Marketplace of Revolution* at 88 (cited in note 75).

109 *Peter Pan Fabrics, Inc v Puritan Dress Co*, 207 F Supp 563, (SDNY 1962).

110 *Id*

111 *Id*

112 Christopher Sprigman, interview by Camille Edwards, October 17th, 2016.

113 *Id*

114 *Id*

it was expressive of her personality, allowing it to receive copyright protection. Despite the prevalence of imitation amongst artists and designers, the court held that, if a certain level of originality is present, one can own her expressive interpretations. Similar to *Mazer*, the court's ruling in *Peter Pan Fabrics* reaffirmed a focus on the designer and how an expression of the designer's personality merits copyright protection without placing significant emphasis on the consumer and market competition. At the time of the *Peter Pan Fabrics* ruling, the political and economic landscape of the country remained roughly the same as in *Mazer*, illustrating somewhat of a parallel between the national economy and the courts' justifications.

Cynthia Designs v Robert Zentall, 1976

In *Cynthia Designs v Robert Zentall*, the court justified copyright protection with a rationale that echoed that of past cases and reaffirmed the centrality of the designer. In *Cynthia Designs*, plaintiff Cynthia sued Robert Zentall for copyright infringement on a necklace, which included a distinct, T-shirt shaped pendant.¹¹⁵ The defendant argued that one cannot copyright the generic shape of a T-shirt and that the court should declare the copyright invalid. In this case, the Southern District Court of New York ruled that while a "T-shirt is an article in the public domain," because this design "required the exercise of 'artistic craftsmanship' and the pendant contains 'distinguishable variations' from ordinary T-shirts in the public domain," it is copyrightable.¹¹⁶

The court's use of the word "craftsmanship" emphasized a level of creativity on the part of the designer. In fact, the court specified that, "in order to be acceptable as a work of art, [the design] must embody some creative authorship."¹¹⁷ With a reference to creativity, the courts use of the word "craftsmanship" alluded to aspects of a personality theory, where originality and creativity are essential components. Thus, the court's justification in *Cynthia Designs* built off the precedent of *Mazer*, resembling aspects of a personality theory and reaffirming the centrality of the designer when determining if protection should be granted. The court's justification shadowed an economic tradition of prioritizing the designer. When policy initiatives at the executive level began to depart from this tradition however, the courts began to seek new justifications that paralleled those national shifts.

Knitwaves v Lollytogs, 1995

In the 1995 copyright case *Knitwaves v Lollytogs*, the court's justification depended partly on a labor theory and new aspects of the Hegelian property theory, but it also unveiled a third property theory – the Foucauldian author theory.

115 See *Cynthia Designs Inc. v SJM Jewelry Corp*, 416 F. Supp. 510 (US Dist. 1976).

116 *Ibid*.

117 See, Copyright Act of 1909, 17 U.S. Code § 501-513 .10(b)

In *Knitwaves*, plaintiff Knitwaves sued Lollytogs for infringement of a design copyright on children's sweaters.¹¹⁸ The court began the opinion by detailing the amount of money that Knitwaves spent on its designs.¹¹⁹ The court also described the resulting lost profits for Knitwaves because of the design confusion between the two companies.¹²⁰ After focusing on the labor and lost capital Knitwaves endured, the court argued that, as a result of Knitwaves' extensive designs sales, the brand became very recognized.¹²¹ The court then pointed to testimony that proved a likelihood of confusion between each company's sweater designs amongst shoppers.¹²²

The court's emphasis on the time and money the designer has placed into the sweaters represented part of a labor theory to justify the validity of the copyrights. The court's reference to the amount of labor exuded by the plaintiff in order to assess the amount of damages that should be returned to the plaintiff paralleled Locke's argument that one deserves compensation for her efforts and exertion, be it physical or monetary.¹²³ Since Locke claims that the mixture of labor and a resource appropriates that resource from "the common" to a private possession, the court's justification illustrated Lockean language.

Complimenting its reference to a labor theory, the court's opinion illustrated a new piece of Hegel's personality theory not yet revealed in prior opinions. After detailing the process through which one appropriates the expressions of her personality, Hegel writes that if "[one has] an idea of a thing and mean[s] that the thing as a whole is [hers]," then one has to "[mark] it as [hers]."¹²⁴ Hegel urges creators – in order to ensure that an expression of one's personality is protected – to signal that ownership through a mark. Once the expression is marked, society will begin to recognize that that particular expression belongs to someone and society will depend on that mark to identify the owner of the expression. The court's opinion, which specifically referred to the public's recognition and association of the sweater designs with the Knitwaves brand, exemplified this piece of the personality theory. Because the court's process for justifying copyright protection considered how the public understands or recognizes the product, the court justified protection through Hegelian language.

In addition to the labor and personality justifications, the court offered a

118 See *Knitwaves Inc v Lollytogs Ltd* 71 F.3d 996 (2nd Cir. 1995)

119 See "Over \$1 million a year," qtd. in *Ibid.*

120 See \$12,000, qtd. in *Ibid.*

121 See "Knitwaves' designs have resulted in substantial recognition in the clothing trade," qtd. in *ibid.*

122 *Id.*

123 Additionally, by using lost profits to calculate damages, the court adopts Locke's idea that one should always receive the profits, or fruits, of her labor. See "We hold [...] [the] award of \$12,000 in lost profits," qtd. in *Knitwaves v Lollytogs*

124 Georg Wilhelm Friedrich Hegel, *Outlines of the Philosophy of Right* 67 (Oxford 1820).

new theory: the author theory. In its analysis, the court considered the “substantial recognition” that Knitwaves has established in the market.¹²⁵ By highlighting this point, the court illustrated pieces of Hegel’s personality theory. However, it more clearly demonstrated aspects of Foucault’s author theory, which ties property ownership exclusively to societal recognition. As the author theory depends exclusively on the consumer’s perception to determine the author or owner of a work, the court’s justification, which considered the public recognition of the design, appealed to the same reasoning. By allowing consumer recognition to play a central role in justifying property ownership, the court’s emphasis on how the public identifies the sweater with the Knitwaves brand strongly reflected the author theory. From *Mazer* to *Knitwaves*, the courts’ rulings on fashion copyright protection illustrated a constellation of different theories in their opinions in order to justify fashion copyright protection.

While the court’s opinion in *Knitwaves* reflected a diverse set of philosophical property theories, it also marked the transition from the first to the second phase of justification in the legal history. The court began to turn away from the personality and labor of the designer to the recognition and perception of the consumer. In doing so, the justification in *Knitwaves* shifted from the first phase of the legal history, which prioritized the efforts of the designer, to the second phase of the legal history, which prioritized the recognition of the consumer.

Just as the Court’s past rulings reflected larger trends occurring throughout the clothing industry and American economic structures, the court’s justification in *Knitwaves*, which considered the recognition and perception of the consumer, nearly shadowed policies initiated on a national level. Beginning with John F. Kennedy’s “Consumer Bill of Rights” proposal to Congress, which protected consumers from deceptive advertising and labeling of products, the federal government started focusing on consumer interests.¹²⁶ In his proposal, President Kennedy explicitly stated that consumers possess “the right to be heard — to be assured that consumer interests will receive full and sympathetic consideration.”¹²⁷ Contrary to the political landscape of *Mazer* wherein the consumer voice was silenced from the decision-making process, Kennedy stressed the validity of the consumer and amplified her voice. President Nixon expanded on the efforts of Kennedy when he presented his own version of the Consumer Bill of Rights with what he called “Buyer’s Rights.”¹²⁸ Nixon not only called for Congressional action on protecting the consumer, but also judicial action. Nixon explicitly stated that, with his initiative, consumers who have been deceived or

125 *Id* at 67at 67

126 See J. F. Kennedy, (1962, March 15). Special message to the Congress on protecting the consumer interest. In Public Papers of the Presidents of the United States

127 *Id*.

128 R. M. Nixon (1969, Oct. 30). Special message to the Congress on consumer protection. In Public papers of the Presidents of the United States.

misled by producers could now try their grievances in court.¹²⁹ By relying on the consumer's ability to distinguish the two sweaters, the court's justification in *Knitwaves* echoed larger policy initiatives that position the consumer at the center of the political stage.¹³⁰ As *Knitwaves* acted as a precursor to the kinds of justifications that arise in trademark cases, I will now discuss how the courts have justified trademark protection for the fashion industry and how those justifications have developed from the late-twentieth to the early twenty-first century.

TRADEMARK HISTORY

Qualitex v Jacobson Products, 1995

Just as the ruling in *Mazer* significantly shaped the landscape for copyright protection in the fashion industry, a handful of trademark cases have carved out the foundation to justify fashion trademark protection as well. One of those cases is the 1995 Supreme Court case *Qualitex v Jacobson Products*. In this case, petitioner Qualitex sought trademark infringement claims against defendant Jacobson over cleaning products.¹³¹ The trade dress, or brand identifying mark, was a "green gold color on the pads that [Qualitex] made and sol[d] to dry cleaning firms for use on dry cleaning presses."¹³² In this case, the Court addressed a new question: can a color be trademarked? The Court's answer to this question has significantly impacted subsequent fashion cases. While *Qualitex* involved trademarking a color on cleaning products, its precedent has spilled over into the fashion industry, as illustrated by later fashion cases that have cited this opinion when seeking trade dress protection, especially when the protection was for a color.¹³³ Understanding the Court's ruling in *Qualitex* will be imperative when interpreting those subsequent fashion cases.

129 See "[This initiative will] give consumers access to the federal courts for violation of a federal law concerning fraudulent and deceptive practices, without regard to the amount in controversy," Qtd. in *Ibid*.

130 Both Kennedy and Nixon's initiatives responded to an economic shift that began after World War II wherein jobs moved from the manufacturing industry into the service industries, which appeal directly to the consumer. Additionally, as new job growth expanded the middle class, American spending for non-essential products like clothing also increased, augmenting the size of the service industry in the larger economy. For the expansion of the service industry, See Charles Barngrover. "The Service Industries in Economic Development: A Note" pp. 331 and 332; James Donovan. "Greater Economic Role of Service Industries," pp. 89-90; James Quinn. "Serving the Service Industry" pp. 74-75. For increases in the middle class, See Martin Daunton and Matthew Hilton, eds. 2001. *Leisure, Consumption and Culture : The Politics of Consumption*, pp. 210: "Between 1941 and 1944, family income rose by over 24 percent in constant dollars, with the lowest fifth gaining three times more than the highest fifth, essentially doubling the size of the middle class" 210)

131 See *Qualitex Co v Jacobson Products Co.*, 514 US. 159 (1995).

132 *Id*.

133 *Christian Louboutin S.A., et. al v. Yves Saint Laurent America Holding, Inc., et al*, 11-3303-cv (2d Cir. 2012)

In *Qualitex*, the Court opened its opinion by stating what qualifies for trademark protection under the Lanham Act, or The Trademark Act of 1946. The Court concluded that “the language of the Lanham Act describes [the] universe [of protection] in the broadest of terms. It says that trademark ‘include[s] any word, name, symbol, or device, or any combination thereof.’”¹³⁴ Due to the unspecific and broad language of the Lanham Act, the Court found no reason not to grant protection for the specific use of a color if it serves to identify the brand.¹³⁵ Because the green gold pads “developed secondary meaning,” which means that consumers depend on the green gold color to identify the brand, the Court declared the trade dress to be valid.¹³⁶

The court’s consideration of secondary meaning departed from the personality theory illustrated in past copyright cases. Hegel does write that one should mark her work and that society should recognize that mark. However, Hegel only argues this so that the *expression* is protected, the expression which belongs to a larger identity, a larger personality. For example, the symbol of overlapping C’s marks a product as Chanel’s. According to the personality theory, in order for Chanel to legally own the mark, the mark (and the expression that bears it) must exhibit aspects of the personality, or aesthetic of Chanel: Paris sidewalks, luxury French couture, pastels and neutral color palettes. The personality theory permits ownership of the item branded with the Chanel mark because Chanel has infused her personality into that branded item.

With secondary meaning, however, society determines the owner of a trademark or trade design. For example, if one sees the overlapping C’s and does not associate the mark with the Chanel brand – Paris sidewalks, luxury French couture, and pastel color palettes – Chanel cannot claim ownership of the mark. With secondary meaning, it does not matter if Chanel believes that she willed her personality into the product: only when society recognizes the connection can she claim protection. With secondary meaning, the designer only has ownership because the consumer uses that mark or design to identify the creator of the product.

Although secondary meaning does not neatly parallel a personality theory, it is very reflective of an author theory, as it places in the hands of the public the power to determine who owns a particular design or mark. With the author theory, a designer’s personal attachment to a product is irrelevant if the public does not recognize the connection. Recalling the two Chanel examples outlined above, the author theory supports the second theory, wherein Chanel can only legally own the overlapping C’s as a trademark if society thinks of Paris sidewalks,

134 Lanham Act of 1946, 15 U.S. Code § 1091-1129 (1946), qtd. in *Qualitex Co v Jacobson Products Co.*, 514 US. 159 (1995)

135 See “It would seem then, that color alone, at least sometimes, can meet the basic legal requirements for use as a trademark” Qtd. in *Ibid.*

136 *Qualitex Co v Jacobson Products Co.*, 514 US. 159 (1995)

luxury French couture, and pastel color palettes, i.e. the Chanel brand, upon seeing it. An author theory justification requires the consumer to play an active role in constructing the creator of a work. Thus, with its consideration of secondary meaning, the Court's ruling in *Qualitex* illustrated how the courts' continued to depart from the precedent set by *Mazer*, which focused on the personality of the designer, and moved toward a justification that focused more heavily on the recognition and interest of the consumer. This shift almost paralleled the national initiatives presented by various administrations to prioritize and protect the consumer in the American economy.¹³⁷

Walmart v Samara Brothers, 2000

Similar to *Qualitex*, the Supreme Court ruling in *Walmart v Samara Brothers* involved non-fashion parties but significantly impacted fashion trademark protection. Additionally, *Walmart* illustrated how the justifications that focus on the designer continued to fade and those that focus on the consumer developed to constitute the core of the courts' justifications. In this case, Samara Brothers sought trademark infringement claims against Walmart over children's sweaters.¹³⁸ In a unanimous decision, the Court ruled that "design, like color, is not inherently distinctive" and thereby requires secondary meaning in order to be protected under trademark laws.¹³⁹ While the courts were already considering secondary meaning in preceding cases such as *Qualitex*, in *Walmart*, the Court declared that secondary meaning was now a necessary factor in order to receive protection.

The Court's ruling further emphasized the role that the *consumer* plays in determining trademark ownership and protection. By chaining trademark protection to secondary meaning, the Court's opinion, like *Qualitex*, resembled parts of Hegel's personality theory that considers marking one's work, but even more strongly illustrated Foucault's author theory. The Court's decision that designs cannot be inherently distinctive by their uniqueness and originality but must instead establish secondary meaning altered the justifications for fashion protection. Departing even further from past cases such as *Mazer*, that emphasized the originality and uniqueness expressed by the designer, the Court's ruling in *Walmart* concentrated almost exclusively on the consumer. The public's perception, not the designer's craftsmanship, now determined whether or not trademark protection was granted. The Court's definitive language in *Walmart* shadowed the

137 See J. F. Kennedy. (1962, March 15). Special message to the Congress on protecting the consumer interest. In Public papers of the Presidents of the United States; R. M. Nixon. (1969, Oct. 30). Special message to the Congress on consumer protection. In Public papers of the Presidents of the United States; W. J. Clinton, (1994, October 24). Proclamation 6748. National Consumers Week, 1994.

138 See *Walmart Stores Inc. v Samara Brothers, Inc.* 529 U.S. 205 (2000)

139 *Id.*

national initiatives that increased focus on and protected the consumer.¹⁴⁰ The language of this case will reappear in subsequent cases that considered trademark protection for fashion, previewing the shift in focus from the designer to the consumer, which progressed in following cases.

Abercrombie and Fitch v American Eagle Outfitters, 2002

Expanding on the precedent set by the Supreme Court in *Walmart*, the Federal Circuit Court's ruling in *Abercrombie and Fitch Stores v. American Eagle Outfitters* further emphasized the courts' focus on the consumer when justifying whether to grant protection. While the case echoed the pattern established by prior cases, it presented a new consideration regarding how the consumer relates to clothing that had not previously been unveiled.

In *Abercrombie*, plaintiff Abercrombie and Fitch claimed that the defendant infringed upon three aspects of trade design from its company catalog.¹⁴¹ The court decided not to grant protection on those three elements of trade dress on an unfair competition argument. However, the court's opinion focused not on how competition impacts designers, but rather how competition affects consumers. The court argued that "the lack of comparable alternatives to pleasing design features means that granting an injunction would deny consumers the benefits of a competitive market."¹⁴² The court's emphasis on the consumer and how the consumer benefits from a diversity of designs illuminated a new thought: could it be that the court was implying that consumers require a diversity of styles and designs in order to express their own personalities? The courts have already declared in *Cynthia Designs* that designers can draw inspiration from past designs and patterns in order to express their own identities.¹⁴³ Cannot consumers also pair their clothing in such a way that visualizes their own personalities as well?

If a consumer develops a taste for preppy clothing and recycles pieces from Abercrombie, American Eagle, and other brands to create her own preppy look that illustrates her personality, then she, too, is creating her own unique expression through a collection of designs created by someone else. By focusing on how competition in the market benefits consumers, the court's justification for denying protection alluded to the idea that consumers select designs authored by

140 See W. J. Clinton, (1994, October 24). Proclamation 6748. National Consumers Week, 1994; "At the end of the twentieth century, much as at the beginning, citizen and consumer remained permeable categories in political culture. As just one example, the Clinton-Gore National Performance Review Report of 1993 aimed at 'reinventing government', listed among its top goals 'Putting Customers First'", Qtd. in Martin Daunton and Matthew Hilton, eds. 2001. *Leisure, Consumption and Culture: The Politics of Consumption*, pp. 220

141 "1) The designs of the goods themselves, 2) the design of the catalog created to sell its products by, [...] and 3) features of its in-store presentation associated with the sale of its products," qtd. in *Abercrombie & Fitch Stores, Inc. v. American Eagle Outfitters, Inc.*, 280 F.3d 619 U.S. App. (2002) 142 *Id.*

143 See *Cynthia Designs Inc. v. SJM Jewelry Corp.*, 416 F. Supp. 510 (US Dist. 1976)

someone else to express their own identities.

This court's justification signaled the shift into the third phase of the legal history, which transitioned from the recognition of the consumer to the personality of the consumer. The court's implication that the consumer expresses her own personality through her arrangement of clothing mirrored a national shift that also recognized consumption as a means to express identity. While the Kennedy and Nixon Administrations aimed to protect the consumer, the Clinton Administration considered the interests and freedoms of the consumer. In his National Consumers Week Proclamation, Clinton argued that the Federal Government must respond to the "consumer[']s [ever-expanding] needs and desires."¹⁴⁴ By considering the consumer's desires, Clinton implied that the government had an obligation not only to protect the consumer from deceptive advertising, but also to protect the consumer's ability to express her desire and will through consumption.

Clinton departed from Kennedy's and Nixon's characterization of a passive consumer suffering from marketing deception to an active consumer who possesses agency in her consumption. Other scholars have also noted that, toward the end of the twentieth century, politicians recognized that "Americans embraced [new consumer markets], finding in consumer goods not only comfort, convenience, and pleasure, but also new ways of creating personal identity and communicating meanings."¹⁴⁵ The court's opinion, which recognized the interest, desire, and ultimately will of the consumer, transitioned the focus from the protection of the consumer to the personality of the consumer and appears to have mimicked national shifts in American political and social thought.

Christian Louboutin v Yves Saint Laurent, 2011

The most notorious illustration of fashion protection manifested in the 2011 *Christian Louboutin v. Yves Saint Laurent* trademark case. In this case, plaintiff Christian Louboutin trademarked the color of red on the bottom of shoes, which he claimed acted as a brand signifier.¹⁴⁶ Defendant Yves Saint Laurent argued that allowing such a trademark would create unfair competition, as the free use of color is essential to the fashion industry. The court ruled, however, that the trademark was valid – only when the red is *in contrast* to a non-red shoe body.¹⁴⁷

The court granted protection for three reasons. First, the court highlighted how "Louboutin [had] invested substantial amounts of capital building a

144 W. J. Clinton, (1994, October 24). Proclamation 6748. National Consumers Week, 1994.

145 Martin Daunton and Matthew Hilton, eds. 2001. *Leisure, Consumption and Culture : The Politics of Consumption* pp.283

146 See *Christian Louboutin S.A., et. al v. Yves Saint Laurent America Holding, Inc., et al*, 11-3303-cv (September 5 2012), US Court of Appeals for the Second Circuit.

147 See *Id.* "Trademark protection to Louboutin's use of contrasting red lacquered outsoles."

reputation and good will” and that Louboutin has a right “to enjoy the benefits of its effort.”¹⁴⁸ Second, the court argued that the single color red acted as an “expressive and defining quality.”¹⁴⁹ Third, the court cited how consumers depended on the color arrangement in question to identify the shoe as a Louboutin. All three arguments illustrated the pluralistic nature of fashion protection as well as reaffirmed the centrality of the consumer.

First, by emphasizing the labor, time, and capital that Louboutin has invested in the development of his signature brand shoe, the Court alludes to elements of a Lockean justification. Second, the court argued that the color red in contrast with a non-red shoe is expressive, or illustrative, of the artist’s personality, which resembled parts of a Hegelian personality theory. Third, the court emphasized how the color red was a defining element that consumers use to identify the shoe as belonging to Louboutin, pulling in a Foucauldian author theory.¹⁵⁰ The rationale the court used for granting protection reflected a patchwork of reasoning woven from three different property theories.

After providing these three justifications, the court concluded by considering how its ruling would affect competition.¹⁵¹ The court contemplated whether granting protection for this particular use of red would decrease the diversity of styles in the shoe market.¹⁵² By focusing on how it will affect variation in the market, the Court again demonstrated that its concern is not for the amount of creative instruments that will remain accessible to designers, but rather how granting protection over certain instruments will impact the market for consumers.¹⁵³ In its opinion, the court not only paralleled the pluralistic justifications offered in earlier fashion protection cases, it also illustrated the arching shift of focus from the expression of the designer to the expression of the consumer. The opinion of *Christian Louboutin* bore the same implications as *Abercrombie and Fitch*: that competition is required in order for consumers to express their own identities through fashion, echoing the national shifts that implied the same notion.¹⁵⁴

148 *Id.*

149 *Id.*

150 See “As the District Court observed, “[w]hen Hollywood starlets cross red carpets and high fashion models strut down runways, and heads turn and eyes drop to the celebrities’ feet, lacquered red outsoles on *high-heeled, black shoes* flaunt a glamorous statement that pops out at once” as a Louboutin signature shoe.” Qtd. in *Ibid.*

151 See “Would put competitors at a significant non-reputation related disadvantage,” qtd. in *Ibid.*

152 See “Distinctive and arbitrary arrangements of predominately ornamental features that do not hinder potential competitors from entering the same market with differently dressed versions of the same product are non-functional[,] and [are] hence eligible for [trademark protection]” qtd. from *Fabrication Enters. Inc.*, 64 F. 3d. at 59), qtd. in *Ibid.*

153 *Id.*

154 See W. J. Clinton, (1994, October 24). Proclamation 6748. National Consumers Week, 1994; Martin Daunton and Matthew Hilton, eds. 2001. *Leisure, Consumption and Culture : The Politics of*

Conclusions and Implications

After examining the recent history of copyright and trademark protection for fashion designs in the United States, I argue that the justifications that courts used in order to grant or deny protection from 1954 to 2011 illustrated a variety of philosophical property theories, including Locke's labor theory, Hegel's personality theory, and Foucault's author theory.

While these theories often appeared together in opinions, the courts applied the theories to advance different justifications. In earlier cases, the courts drew upon a Lockean labor theory and Hegelian personality theory to emphasize the importance of the designer when determining if protection should be granted. Later, the courts depended on a Foucauldian author theory to stress the recognition and perception of the consumer. Finally, the courts returned to the personality theory to argue that the consumer also expresses her personality through fashion, returning to the personality theory. While the labor, personality, and author theories persisted throughout the fashion legal history from 1954 to 2011, the way in which the courts apply them evolved. In other words, while the same palette of property theories resurfaced throughout each opinion, the application of those theories developed to paint three different phases of justification.

The three phases in court justifications nearly paralleled national economic initiatives and concerns in the time frame that the opinions were issued. The law and economic structures of the mid-twentieth century privileged the designer and producer of goods. Then, as the Kennedy and Nixon Administrations began to prioritize and protect the consumer, the courts began to consider how the consumer perceives and understands the differences in brands in order to determine if protection should be granted. Finally, as the Clinton Administration recognized the need to protect not only the consumer's needs, but also the consumer's desires and purchasing freedom, the courts began to imply that a diversity of markets must be available to the consumer so that she can express her own personality. While I do not argue that the political and economic structures caused the courts to shift their focus through these three phases, I recognize a parallel between the court justifications in the fashion legal history and the American political and economic landscape of the time.

Although the courts have shifted their focus from the designer to the consumer, I do not think that the expression of the designer and the expression of the consumer are mutually exclusive. I believe that both the designer can express her personality into her designs just as the consumer expresses herself through the designs available to her. While most of the courts highlight these processes individually and at different times, I believe that the court's ruling in *Christian Louboutin* illustrated the simultaneous nature of expression on part of both the

designer and the consumer. Ultimately, I argue that expression, like the culture of copying, has no beginning and certainly no end.

My analysis confirms the analysis of other fashion lawyers who argue that fashion acts as an information technology, a creative language for self-expression.¹⁵⁵ Whether the parallel I have identified between court justifications and arguments of fashion lawyers should impact the level of protection designers receive is another debate. However, it is important to recognize that the impact of protection on consumer expression has risen frequently in recent court opinions to determine the validity of fashion protection.

While I have examined these cases through various philosophical property lenses, I am not arguing that these theories can nor should be used to create a contemporary legal system of intellectual property law for fashion, or any other sector. Instead, I intend to highlight that snippets and inklings of them are webbed throughout the collage of cases that constitute fashion intellectual property law. Whether the courts intended to allude to these theorists or properly interpreted them is a conversation left for other scholars. Instead, I intend to illuminate how the justifications used in fashion cases pull from a broad variety of concepts and theories conceived long before the contemporary legal debates in the fashion industry were even conceived.

The tracings of Lockean, Hegelian, and Foucauldian theories that I have identified in the fashion industry may also exist in other American legal histories, such as entertainment, music, or art law. Perhaps identifying the pluralistic nature of the justifications used in fashion cases reaffirms the contradictions and inconsistencies in the law that other scholars have already unveiled.¹⁵⁶ Consequently, recognizing the vast philosophical terrain that these legal justifications expand might encourage policymakers to formulate a more uniform legal system that seeks not to echo all these abstract and theoretical concepts but instead to reflect the legal needs of the twenty-first century.

155 See Brandon Scruggs. "Should Fashion Design Be Copyrightable?" MC Miller. "Copyrighting the "Useful Art" of Couture: Expanding Intellectual Property Protection for Fashion Designers." Susan Scafidi. "F.I.T.: Fashion As Information Technology; Susan Scafidi. "Intellectual Property and Fashion Design." Scott Hemphill and Jeannie Suk. "The Law, Culture and Economics of Fashion." 156 See Ingrida Berzins. "The Emerging Circuit Split over Secondary Meaning in Trade Dress Law"; Mitchell Wong. "The Aesthetic Functionality Doctrine and The Law of Trade-Dress Protection."

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ARTICLE

**A POISONED CHALICE?:
A LEGAL AND HISTORICAL EVALUATION OF THE
NUREMBERG TRIBUNALS AND CRIMES AGAINST
PEACE**

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ABSTRACT

The International Military Tribunal at Nuremberg, commonly referred to as the Nuremberg Tribunal or the IMT, was a previously untried experiment in international law. While commonly thought of as assessing individual responsibility for war crimes and crimes against humanity such as the Holocaust, the IMT actually focused instead on “Crimes Against Peace,” which were charges based off a claim that wars of aggression constituted international crimes. The legal validity of crimes against peace was a subject of much debate during World War II. This paper seeks to reopen this debate, by examining jurisdictional issues surrounding the IMT under both international treaties and under then-existing customary international law. The paper will then turn to an examination of whether international law provided for individual criminal liability for state acts of international aggression. Several procedural issues surrounding the trials will then be examined, and an evaluation of the impact and legacy of the Nuremberg trials will complete the paper.

INTRODUCTION

“We must never forget that the record on which we judge these defendants today is the record on which history will judge us tomorrow. To pass these defendants a poisoned chalice is to put it to our own lips as well.”¹ With these words, Robert H. Jackson, chief prosecutor at the Nuremberg war crimes tribunals, conveyed the seriousness of the responsibility of ensuring that the trials were conducted in a just manner.² But while this master of language pronounced wars of aggression to have “the moral quality of the worst of crimes,” the legality of the trials that brought him fame is still questioned.³ The jurisdiction of the International Military Tribunal at Nuremberg was hotly debated at the time, and while one side clearly prevailed, the passage of time has not settled the debate about the legal merit of the historical arguments. This paper seeks to provide an evaluation of the questions surrounding the legality of the International Military Tribunal’s jurisdiction and examine procedural issues at play during the actual trials which could affect whether the Tribunal acted in a lawful manner.

LITERATURE REVIEW

Legal Literature

1 Benjamin Ferencz, Tribute to Nuremberg Prosecutor Jackson, 16 *Pace Intl L Rev* 365, 367 (2004).

2 *Id.* at 367.

3 *Id.* at 368.

The validity of the International Military Tribunal at Nuremberg was not broadly accepted at first, and documents from that time reveal just how controversial the potential of trying Nazi leaders was among legal and political leaders of the day. The internal political discussions focused primarily upon the practicality of trying Nazi leaders, rather than on the legal questions.⁴ Indeed, during World War II, few in Allied governments beyond American Secretary of War Henry Stimson sought to try Nazi leaders, as most preferred summary execution.⁵ However, as the war neared its conclusion, a significant debate began among jurists and law professors about whether Germany had breached its international legal obligations under treaties or under customary international law, and if so, whether individual German leaders could be prosecuted for those state offenses.

One significant work is Sheldon Glueck's 1946 *The Nuremberg Trial and Aggressive War*.⁶ Glueck was a professor at Harvard Law School who took up the mantle of advocating for criminal prosecutions of Nazi leadership and began publishing writings arguing that German aggression had been a breach of treaty obligations, and that this breach exposed German leaders to individual criminal liability, as will be examined later in the article. Glueck's work provides an excellent evaluation of the arguments that were originally made at the conclusion of World War II to justify the tribunals, as opposed to the arguments developed after the fact to justify actions that had already been taken. He also provides analysis of most of the original arguments against the tribunals, as he attempts to refute those arguments and defend the tribunals.

Many, if not most, contemporary legal scholars support the approach taken to the Nuremberg tribunals⁷. As a result, the majority do not examine (or do not examine in great detail) whether the criminal charges upon which the tribunals were based were supported under international law as it existed at the time. Indeed, perhaps because Nuremberg forms what one author describes as "the foundation stone of a better world for all of mankind," it seems that few are willing to question the fundamental assumption that Nuremberg was indeed valid when it underlies so much of international criminal law today.⁸ Further, many contemporary experts in the field of international criminal law worked on the prosecution team at Nuremberg, such as Benjamin Ferencz and the late Henry T. King, Jr. Others have had significant roles in more recent international war crimes tribunals, such as Theodor Meron, who served as the President of the International Criminal Tribunal for the Former Yugoslavia. Unsurprisingly, a common theme this article will reveal is those who have had participated in an official capacity in war crimes

4 John Laughland, *A History of Political Trials* 113–114 (Peter Lang 2008).

5 Henry T. King Jr, *The Legacy of Nuremberg*, 34 Case W Res Intl L 335, 336 (2002).

6 Sheldon Glueck, *The Nuremberg Trial and Aggressive War* (New York 1946).

7 See King, 34 Case W Res J Intl L at 353 (cited in note 5); Ferencz, *Tribute to Nuremberg Prosecutor Jackson* at 366 (cited in note 1).

8 King, 34 Case W Res J Intl L at 353 (cited in note 5).

tribunals seem extremely unlikely to question the validity of the Nuremberg tribunals under international law.

Ironically, one of the most prominent contemporary critics of the Nuremberg tribunals to come from legal academia is Jonathan Bush, a close personal friend of the late Telford Taylor, one of the lead prosecutors at the tribunal.⁹ Bush is far more skeptical of the legal basis both for arguing that Germany breached binding treaty obligations and for arguing that any such breach would expose national leaders to individual criminal liability.

While examining the text of the treaties in question can assist in interpreting their meaning, doing so can also be misleading, as it presents the temptation to read ideas into the treaty that had not been developed until after the Nuremberg tribunals (and even more recent tribunals). As such, this paper will focus on evaluating the statements of experts in international law at the time of the treaties themselves, to determine what the treaties meant to those who ratified them. In that way, one can avoid the temptation to revise history in favor of the way it ended up. Additionally, evaluating the general practices of nations and the international response (if any) to similar acts of international aggression allows an examination of whether German aggression would have been in contravention of then-existent customary international law.

Historical Literature

In contrast to legal academia, historians have a notable tendency to be less favorable to the legal arguments justifying the Nuremberg tribunal. In part, this may be due to the fact that the spirit surrounding the tribunals was not solidly in favor of them. Indeed, one British social and literary critic noted in 1949 that the tribunals raised the specter of “the spoils of victory” being seized under the justification of an illegal trial, and that “[if], instead, the ostensible legality of the Trial was really fraudulent, the result must be that, not one, but two evils were perpetrated.”¹⁰

Gary Jonathan Bass, professor of politics and international affairs at Princeton University, provides a useful historical examination of the intra-administration conflicts in the United States during and immediately after World War II, which is helpful to understanding the true lack of consensus on how to handle the problem of captured German leaders.¹¹ His examination of the various views of members of Franklin D. Roosevelt’s administration also illustrates domestic policies and the motivation behind them, which is of significant value for determining

9 Jonathan Bush, Review: Nuremberg: The Modern Law of War and its Limitations: The Anatomy of the Nuremberg Trials: A Personal Memoir, 93 Colum L Rev 2022, 2023 (1993).

10 Montgomery Belgium, *Victors’ Justice: A Letter Intended to have been Sent to a Friend Recently in Germany* 15 (Henry Regnery Company 1949).

11 See generally, Gary Jonathan Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* (Princeton 2000).

whether a given restriction on state conduct was viewed as being legally obligatory under customary international law.

Other historians maintain different areas of focus. Some focus primarily on the impact of the Nuremberg tribunals as part of the broader development of international criminal law, rather than attempting to evaluate the merits of each specific legal theory.¹² Still others attempt to provide a complete narrative of the trials themselves.¹³ Each area of focus informs this analysis in a different way. The analysis of the procedural issues in the Nuremberg tribunals will draw heavily upon specific accounts from the trials to illustrate broader themes.

JURISDICTIONAL ISSUES

Chartered Jurisdiction

Under the charter of the International Military Tribunal, the Nuremberg tribunals had jurisdiction over crimes against peace, war crimes, and crimes against humanity.¹⁴ The defendants were charged with one or more of four available counts:¹⁵ Count I, Conspiracy Against Peace; Count II, Crimes Against Peace; Count III, War Crimes; and Count IV, Crimes Against Humanity. Notably, the language of Count IV meant that the crimes against humanity were only prosecuted to the extent that they were part of the “conspiracy to commit crimes against peace,” so crimes against humanity occurring after the outbreak of war on September 1, 1939, were only addressed to the extent that they were evidence of planning to wage a war of aggression.¹⁶ Telford Taylor notes, “It was only because the Prosecution presented crimes against humanity as an integral part of the conspiracy to commit crimes against peace that they were able to prosecute them at all.”¹⁷ In fact, Secretary of War Henry Stimson, one of the few early supporters of bringing the Nazi leadership to trial, argued vehemently against having any way to “try and convict” Nazi leaders “responsible for excesses committed within Germany both before and during the war which have no relation to the conduct of the war;”¹⁸ in other words, he believed the Holocaust should be off-limits.¹⁹ Instead, Nazi leaders were tried for their involvement in the Holocaust in subsequent trials,²⁰ such as the Israeli capture and trial of Adolf Eichmann. Czech representative to the United

12 See generally, Laughland, *A History of Political Trials* (cited in note 4).

13 See generally, Ann Tusa & John Tusa, *The Nuremberg Trial* (Scribner 1984).

14 Constitution of The International Military Tribunal, Art 6 (1945).

15 Laughland, *A History of Political Trials* at 107 (cited in note 4).

16 *Id.* at 115.

17 *Id.* at 114–115.

18 Bass, *Stay the Hand of Vengeance* at 175 (cited in note 12), emphasis original.

19 *Id.*

20 *Id.* at 278.

Nations War Crimes Commission, Dr. Bohuslav Ečer, was one of the first to argue that “all Axis crimes should be examined either as preparatory acts of a criminal plan or as a means of carrying out this criminal plan.”²¹ This view was eventually accepted.²² While the Nuremberg trials are often remembered as being the trial of those who perpetrated the Holocaust, the United States and Britain sought to focus almost exclusively on prosecuting German aggression which sparked the war,²³ which could be considered one of the great ironies of Nuremberg’s legacy.

Criminality of Aggressive War

Three main arguments are typically used to justify the Nuremberg tribunals: that German aggression violated international treaty obligations, that the charter for the International Military Tribunal justified the trials, and that Germany’s pursuit of war violated rules of customary international law against international aggression. This paper will examine each in turn to evaluate each potential justification.

Treaty Obligations

Supporters of the legality of the Nuremberg tribunals argue that Germany violated its obligations under international treaties by waging aggressive war, while opponents generally argue that those treaties were not understood by those who ratified them to actually make wars of aggression an international crime. Four specific treaties are the subject of controversy.

Briand-Kellogg Pact of 1928

The Kellogg-Briand Pact (also known as the Pact of Paris) sought to condemn war as a solution to international disputes.²⁴ Germany was a signatory to the pact, a fact which the Nuremberg tribunal relied heavily upon to establish that Germany had violated its treaty obligations.²⁵ Kellogg-Briand appears to be the most relied upon justification for the Nuremberg tribunals, based not only on the arguments raised at the time, but also on the arguments raised in the intervening

21 Arieh Kochavi, *Prelude to Nuremberg: Allied War Crimes Policy and the Question of Punishment* 97–99 (The University of North Carolina 1998).

22 *Id.* at 97.

23 *Id.* at 99–100; 148–149.

24 Glueck, *The Nuremberg Trial and Aggressive War* at 17 (cited in note 6).

25 Matthew Lippman, *The History, Development, and Decline of Crimes Against Peace*, 36 *Geo Wash Intl L Rev* 957, 1000 (2004). Of course, this argument ignores the fact that mere signatories to treaties are not bound to abide by them—only parties to treaties (which have completed the domestic ratification process) are bound by treaties.

years by both those who participated in the tribunals and by those who have studied the issue extensively but lack personal experience in the tribunals.²⁶ Curiously, though, those who would later be prominent and ardent supporters of reliance on Kellogg-Briand originally did not support using it until William Chanler, a former law partner of Secretary of War Henry Stimson, wrote several memoranda in support of its obligatory character in late November 1944.²⁷ He specifically wrote to Sheldon Glueck, a Harvard Law School professor and noted criminologist, as well as to Philip Jessup, a noted scholar of international law and professor at the Naval School of Military Government and Administration.²⁸ Glueck and Chanler began corresponding, and in a letter on January 15, 1945, Glueck explained that while he was supportive of the idea of criminal trials, he did not believe that Kellogg-Briand could be used to establish the lawfulness of criminal sanctions for aggressive war.²⁹ He also noted that either Kellogg-Briand established criminal liability for individual Nazi leaders, or that they could not be subjected to trials at all.³⁰

Despite Glueck's initial skepticism, by 1946 he had been won over by Chanler's arguments that Kellogg-Briand should be given substantive enforceability. The now-supportive Glueck then turned his attention to justifying the tribunals. His book, *The Nuremberg Trial and Aggressive War*, was his most significant contribution to promoting the legality of the tribunals. In his discussion of Kellogg-Briand, Glueck admits that Kellogg-Briand "failed to make violations of its terms international crimes punishable either by an international tribunal or by national courts."³¹ However, he also noted that a debate over whether Kellogg-Briand criminalized "recourse to war" to resolve international disputes occurred some 12 years before, at the International Law Association's Budapest meeting.³² At this meeting, Jaroslav Zourek argued that because the term "condemnation" was used in the treaty, the "moral judgment of disapprobation" necessarily implied that a penal sanction was available to make it effective.³³ In contrast, though, Austrian jurist Eduard Reut-Nicolussi argued that international law could have no criminal sanctions, so the Pact was merely a political renunciation of war, not a legally enforceable treaty obligation.³⁴ American Frederick Aldrich agreed with Reut-Nicolussi, and quoted then-Secretary of State Henry Stimson in a 1932 speech as saying, "The Briand-Kellogg Pact provides for no sanction of force...."

26 See generally Ferencz, *Tribute to Nuremberg Prosecutor Jackson* at 366 (cited in note 1).

27 Jonathan Bush, "The Supreme... Crime" and its Origins: The Lost Legislative History of the Crime of Aggressive War, 102 Colum L Rev 2324, 2358 (2002).

28 Id at 2360.

29 Id at 2361, 2406–08.

30 Id at 2361–62.

31 Glueck, *The Nuremberg Trial and Aggressive War* at 17 (cited in note 6).

32 Id at 17–19, quotation at 18; See generally, International Law Association, *Report of the Thirty-Eighth Conference Held at Budapest* (Eastern 1935).

33 Id at 18.

34 Id.

Instead, it rests upon the sanction of public opinion, which can be made one of the most potent sanctions of the world.”³⁵

The 1934 International Law Association Conference produced the Budapest Articles of Interpretation, which refused to specifically declare that a violation of Kellogg-Briand was an international crime. It only went so far as to note that states which violated the Pact could be held to be liable to pay compensation for damage caused as a result of a violation.³⁶ Even this was an interpretation of Kellogg-Briand as extraordinarily weak, as evidenced by then-Secretary of State Frank Kellogg’s statement that the Pact granted state parties the ability to determine whether their own use of international force was justified: “Every nation is free at all times and regardless of treaty provisions to defend its territory from attack or invasion, and it alone is competent to decide whether circumstances require recourse to war in self-defense.”³⁷

Glueck relies heavily on two French jurists (Frangulis and Scelle), who themselves make questionable assertions; Scelle, for example, claims that legal doctrine is “in general agreement that recourse to a war of aggression constitutes an international crime.”³⁸ Arguments of this sort not only beg the question, but are also cast into doubt by virtue of the fact that the international legal community was engaging in vigorous debates on the subject, and that those supporting criminal sanctions for aggressive war generally found themselves on the losing side of the debate, as the refusal of the Budapest Articles to declare that violations of Kellogg-Briand were criminal acts illustrates.

Two other significant pieces of evidence point to the Kellogg-Briand pact not being generally understood to provide for general criminal sanctions. First, the statements of individuals who were attempting to promote ratification of the Pact serve as representations of what the state parties believed they were ratifying, and those statements make clear that Kellogg-Briand was never intended to promote criminal prosecutions for its violation. Secretary of State Frank Kellogg and others made statements about the proposal on a regular basis, and those concerned about the potential loss of national sovereignty were told “that the treaty was only hortatory, or expressive of national goals and aspirations, or political rather than legal in character.”³⁹ Second, even renowned international legal scholar Hersch Lauterpacht expressed skepticism about the treaty. He suggested that Kellogg-Briand was so broad as to be almost completely unenforceable, to the point that it might not even require nations to pursue a form of amicable dispute settlement.⁴⁰ In the end, political condemnation of certain acts in the international sphere does not

35 *Id* at 17–18.

36 International Law Association, *Report of the Thirty-Eighth Conference* at 68 (cited in note 33).

37 Glueck, *The Nuremberg Trial and Aggressive War* at 20 (cited in note 6), emphasis original.

38 *Id* at 18–19, quotation at 19.

39 Bush, 102 *Colum L Rev* at 2335 (cited in note 28).

40 James L Brierly, *The Judicial Settlement of International Disputes* 227–8 (Oxford 2012).

necessarily mean that the act has been legally criminalized.

Treaty of Versailles

The war guilt articles of the Treaty of Versailles were not generally viewed as a justification per se for the Nuremberg tribunals, but they were seen by a small number to be an example of prior attempts to hold leaders of nations that had engaged in wars of aggression accountable for their actions.⁴¹ Two problems with this argument have resulted in it generally being omitted from most defenses of the legality of the Nuremberg tribunals. First, the formal arraignment of Kaiser Wilhelm II was legally questionable at best, if not outright prohibited by international custom.⁴² Calling for the trial of a specific, named individual through passing a specific law (or, in this case, through ratifying a treaty) is creating a Bill of Attainder, which was (and still is) barred by the domestic law of the majority of nations in the world.⁴³ An act that constituted a violation of law can never serve as precedent for future legal procedure, under the principle of *ex injuria jus non oritur*.⁴⁴ Further, the United States refused to permit Article 227 from being carried into effect, under the idea that heads of state were immune from criminal liability under international law.⁴⁵ Second, the provisions of the Treaty of Versailles which sought trials for those who committed criminal acts against the nationals of one of the Allied powers made no provision for the punishment of crimes against peace.⁴⁶

Hague Convention of 1907

The Hague Convention was one of the earliest attempts to eliminate wars of aggression, but it was of only a voluntary nature and contained no provisions for any coercive measures to ensure compliance, as Glueck concedes.⁴⁷ Its chief sanction was the payment of monetary compensation to the aggrieved state.⁴⁸ As a result, the Preliminary Peace Commission at the end of World War I chose not to describe the actions of Germany or other Central powers as crimes, and specifically noted that a tribunal could not be called to try those actions.⁴⁹ However, this stands in contrast to the Commission's recommendation that those who committed

41 Versailles Treaty, Art 227.

42 Id.

43 Laughland, *A History of Political Trials* at 108 (cited in note 4).

44 Id.

45 Lippman, 36 Geo Wash Intl L Rev at 965 (cited in note 26).

46 Versailles Treaty, Art 229.

47 Glueck, *The Nuremberg Trial and Aggressive War* at 15–17 (cited in note 6).

48 Theodor Meron, *Centennial Essay: Reflections on the Prosecution of War Crimes by International Tribunals*, 100 Am J Intl L 551, 554 (2006).

49 Lippman, 36 Geo Wash Intl L Rev at 961 (cited in note 26).

breaches of humanitarian law or the customs of war be subjected to criminal proceedings.⁵⁰ Thus, the Hague Convention had the net effect of retaining the traditional potential for criminal prosecution for crimes committed in the course of war which constituted violations of international treaty obligations or of the customs of war.

Geneva Protocol of 1924

Glueck and others treat the 1924 Geneva Protocol as significant evidence that German aggression in World War II violated both international legal obligations arising from treaties and rules of customary international law.⁵¹ The Geneva Protocol was an attempt to specifically define aggression and require international arbitration to settle disputes instead of armed conflict.⁵² However, the Geneva Protocol never entered into force, as the required number of states did not ratify it.⁵³ In fact, only one state (Czechoslovakia) ever actually ratified the Protocol.⁵⁴ As such, while the Geneva Protocol may have served to make an optimistic political statement to reflect pro-peace sentiment, it has only limited value for the purposes of customary international law as a largely rejected treaty. As such, it serves more as evidence against international custom than as evidence that German aggression was in violation of international legal obligations.

IMT Charter

A significant argument in favor of the legality of the Nuremberg trials is that they were justified because they stayed within the scope of the charter.⁵⁵ Of course, the problem inherent in this argument is that the question of whether the International Military Tribunal stayed within its chartered authority is a question logically subsequent to the foundational question of whether the charter itself was legally justified. Evaluating whether the trials followed all of the procedural requirements set forth in the charter assumes that the charter was valid, so the question of whether charter for the tribunals were legally justified cannot be answered by looking to the challenged document. This argument essentially allows the tribunals to pull themselves up by their own bootstraps, so there must be some legal justification for the tribunals independent of the charter itself. The charter is only relevant to determine whether the Nuremberg tribunals violated their own

50 *Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties*, Report Presented to the Preliminary Peace Conference, reprinted in 14 Am J Intl Law 95, 121 (1920).

51 Glueck, *The Nuremberg Trial and Aggressive War* at 29 (cited in note 6).

52 Lippman, 36 Geo Wash Intl L Rev at 974 (cited in note 26).

53 *Id* at 975.

54 Laughland, *A History of Political Trials* at 109 (cited in note 4).

55

required structures and processes.

However, to some, the very existence of the charter is sufficient evidence of the legality of the tribunals. Glueck argues, “There is no question but that, as an act of the will of the conqueror, the United Nations had the authority to frame and adopt such a charter.”⁵⁶ However, such an argument is merely a thinly-veiled argument from force. The ultimate irony is that this argument sought to justify a trial Chief Prosecutor Robert H. Jackson called “one of the most significant tributes that Power has ever paid to Reason.”⁵⁷ If the trials are to serve as an example of how to handle future war crimes, a legal justification is needed, not an appeal to force.

CUSTOMARY INTERNATIONAL LAW

To determine whether aggressive war was criminalized under customary international law, four elements must be examined: the duration of the practice, the uniformity and consistency of the practice, the generality of the practice, and whether the *opinio juris* requirement is met.⁵⁸

Duration

No particular duration is required for the establishment of a rule of customary international law, since it is designed to be flexible and respond to new international developments, so duration is actually evidence of the “consistency and generality” of a practice.⁵⁹ No set duration is required, *if* the practice is one which actually exists (and the other elements are satisfied). As such, on this element, supporters of the tribunals raise strong arguments, since the development of the principle of the criminality of wars of aggression had not been in serious development until after World War I.⁶⁰

Uniformity and Consistency

Complete uniformity and consistency of the practice is not required, which is favorable to the tribunals.⁶¹ However, substantial uniformity is required.⁶² When there is a significant amount of uncertainty, contradiction, fluctuation, or inconsistency in the exercise of a practice, it may not be possible to determine a

56 Glueck, *The Nuremberg Trial and Aggressive War* at 25 (cited in note 6).

57 Ferencz, 16 *Pace Intl L Rev* at 365 (cited in note 1)

58 Ian Brownlie, *Principles of Public International Law* 7 (Oxford 6 (2008)).

59 *Id.*

60 Glueck, *The Nuremberg Trial and Aggressive War* at 39 (cited in note 6).

61 Brownlie, *Principles of Public International Law* at 6–12 (cited in note 59).

62 *Id.*

uniform and consistent principle, so this element would not be satisfied.⁶³ In that vein, the fact that there was no solid definition of international aggression strongly suggests that there was no developed international consensus against it.⁶⁴ To determine whether uniformity and consistency are satisfied, it is useful to briefly examine two examples of practice at the time.

First, during the Spanish Civil War, while European nations were nominally “neutral,” Germany, Italy, and the Soviet Union (and soon other nations) provided significant aid to the factions most closely aligned with their own respective ideologies – in spite of the fact that this could easily be considered to be aggression in war.⁶⁵ No notable international action took place to condemn this aggression and intervention in the domestic conflict of Spain, which serves as evidence that any then-existing international consensus against the legality of wars of aggression was not enforced in a uniform and consistent manner. These acts of aggression were not condemned – indeed, many of the nations which would later become embroiled in World War II participated either with military or nonmilitary aid in the Spanish Civil War.

Second, the actions of individual Allied nations during World War II serve to illustrate that if any international consensus existed, it was not uniform and consistent. The United States provided both nonmilitary and military aid to Britain during the war before American entry, in particular through the Lend-Lease Act, which resulted in Britain being lent 50 American destroyers for use by the British Navy.⁶⁶ Since the United States was a neutral nation and had not been attacked, it could be argued to be engaging in military aggression, which would (if a completely consistent interpretation was adopted) result in the United States bearing the same liability as Germany for aggressive war. The Soviet Union also bore a potentially even greater level of culpability under this doctrine than did the United States. Before the outbreak of World War II, Germany and the Soviet Union had signed the secret Nazi-Soviet Pact, which divided Poland between the two nations before the Nazis and Soviets invaded the nation.⁶⁷ This leads one historian to conclude, “The Communists were therefore guilty of exactly the same crimes against peace as the Nazis.”⁶⁸ There was certainly nothing like a near-universal condemnation of violations of the alleged international norm prohibiting wars of aggression. Indeed, the actions of the nations which would become engaged in World War II suggest that there was instead a high level of aggression which was tolerated by the international community, and in which many nations chose to engage.

63 See *Asylum Case (Colombia v. Peru)*, 1950 ICJ Rep 266, 277.

64 Glueck, *The Nuremberg Trial and Aggressive War* at 28–29 (cited in note 6); Laughland, *A History of Political Trials* at 110–111 (cited in note 4).

65 Bush, 102 Colum L Rev at 2336 (cited in note 28).

66 Laughland, *A History of Political Trials* at 110 (cited in note 4).

67 *Id.* at 116.

68 *Id.*

These examples call into question the uniformity and consistency of the claimed practice in international law. If similar acts of aggression were perpetrated by several nations in the years before World War II without a meaningful international response, attempts to argue that later acts of aggression are in violation of international custom are highly suspect. Further, in the exact same war, Allied powers engaged in acts of aggression bearing few legal distinctions from acts for which German leaders stood trial (one particularly striking example of which comes from the trial of Admirals Erich Raeder and Karl Donitz, which is examined later).

Generality

The generality of the practice is designed to complement the evaluation of uniformity and consistency, and it goes further by determining the value of abstention from a practice by states.⁶⁹ In this instance, the abstention in question is clearly not from lack of interest, since two of the four victorious nations involved in the Nuremberg tribunals directly contravened the practice alleged to be a rule of customary international law at the same time and immediately after the alleged rule was violated by German acts of aggression. Further, the overwhelming decision of the international community not to ratify the Geneva Protocol of 1924, which would have been an excellent expression of international will to take steps to criminalize wars of aggression, suggests that nations made a conscious choice not to ratify the treaty and refrain from making a formal statement of their position.⁷⁰ As such, an evaluation of the generality of the practice shows more clearly that the practice was not generally and widely accepted.

Opinio Juris

Analysis of *opinio juris* seeks to determine whether a general practice has indeed been accepted as law by the nations which have modified their conduct – in other words, *opinio juris* is a psychological element that seeks to determine whether state behavior is motivated by a sense of actual legal obligation or by something else.⁷¹ The prohibition on aggressive war fails on two counts. First, as established above in the analysis of uniformity and consistency, an alleged rule of customary international law cannot be considered to rise to the level of a general practice when it is frequently and flagrantly violated, including by the nations relying on the principle to justify their own subsequent actions. Second, there is no evidence of a psychological element leading nations to abstain from engaging in wars of ag-

69 Brownlie, *Principles of Public International Law* at 8–9 (cited in note 59).

70 Lippman, 36 *Geo Wash Intl L Rev* at 975 (cited in note 26).

71 Brownlie, *Principles of Public International Law* at 9–10 (cited in note 59).

gression because of a sense of legal obligation. In fact, it is significant to note that as late as 1944, the United Nations War Crimes Commission's legal committee agreed with a report drafted by British representative Sir Arnold McNair, who argued that while wars of aggression were certainly morally impermissible, they did not constitute a crime under international law.⁷² As such, the fact that the position of the official representative of the British government was that aggressive war was not an international crime strongly suggests that any compliance on the part of Britain was not motivated out of any sense of international legal obligation. As such, with affirmative evidence that three out of the four primary nations engaged in the Nuremberg prosecutions did not view the prohibition as creating a legal obligation to abstain from certain conduct.

Individual Criminal Liability

Even if aggressive war was in fact prohibited under either international treaty obligations or customary international law, it does not necessarily follow that individual criminal liability flows out of the criminality of the actions of the state.⁷³ We now turn to examine whether, if aggressive war constituted an international crime, national leaders could be held criminally liable as individuals for the actions of the state as a whole, first under the relevant international treaties, and then under customary international law.

Under International Treaties

Traditionally, state violation of international obligations has resulted in some form of reparations or compensation being provided to the aggrieved state, rather than prosecuting and punishing individuals.⁷⁴ This is why the International Law Association's Budapest Articles of Interpretation noted that a nation which violated Kellogg-Briand could potentially subject itself to liability to pay compensation for damages caused to foreign nationals by wars of aggression.⁷⁵ However, while the debate in the late 1920s and early 1930s about whether Kellogg-Briand actually criminalized any state actions raged on, one thing was notably absent: discussion of individual criminal liability. No writers of the time even mentioned the possibility that individual leaders might be singled out for criminal trials for state violations of Kellogg-Briand.⁷⁶ In 1935, the influential Hersch Lauterpacht saw no indication that the treaty would permit individual criminal trials for national aggression, writing that other than payment of reparations, "No other

⁷² Kochavi, *Prelude to Nuremberg: Allied War Crimes Policy and the Question of Punishment* at 97–98 (cited in note 22).

⁷³ Glueck, *The Nuremberg Trial and Aggressive War* at 21–23 (cited in note 6).

⁷⁴ *Id.* at 22.

⁷⁵ International Law Association, *Report of the Thirty-Eighth Conference* at 68 (cited in note 33).

⁷⁶ Bush, 102 *Colum L Rev* at 2335 (cited in note 28).

express sanction is provided in the Pact itself or intended by it.”⁷⁷ It is significant to note that this is the only edition of Lauterpacht’s treatise published in the period between the treaty and the outbreak of World War II.⁷⁸

Another argument raised against the tribunals was based off the fact that Kellogg-Briand never provided a “clear, unambiguous definition of aggression,” which thereby prevented it from having the force of law (or, in American terminology, rendering the treaty void for vagueness).⁷⁹ This argument echoes the point made by Hersch Lauterpacht in 1935, when he noted that Kellogg-Briand was so broad as to be practically unenforceable.⁸⁰ The problem some raised is that a firm definition of the prohibited act is essential to a criminal prohibition having the force of law, so because Kellogg-Briand had no such firm definition, it was not legally enforceable. Other critics noted that the pact never even proposed any tribunals to try those accused of crimes against peace because their nation waged a war of aggression.⁸¹ Because it did not provide for institutions to adjudicate questions of law and of fact (and obviously never set forth any specific individual penalties), these critics argued that Kellogg-Briand could not justify individual criminal liability.

An often cited example of an attempt to impose criminal liability on individual national leaders for waging a war of aggression comes from the Treaty of Versailles’s indictment of Kaiser Wilhelm II, which is examined in greater detail above. At this point, it is sufficient to remind the reader of the principle of *ex injuria jus non oritur*, which means that a violation of law can never serve as precedent for future legal procedure.⁸² Just as the war guilt articles do not support the criminalization of aggressive war, they do not support the concept of individual criminal liability for state action.

A key fact sometimes overlooked in discussions of the Nuremberg tribunals is that there is a significant distinction between prosecution of individuals for the commission of specific war crimes and prosecution of individuals for aiding their state’s involvement in wars of aggression.⁸³ This can be seen in the wake of World War I, where the investigating commission recommended in favor of trying individuals responsible for individual violations of the customs of war or of humanitarian laws.⁸⁴ Further, in contrast to Nuremberg’s narrow focus on the prosecution of aggressive war, other specific war crimes were prosecuted separately. Telford Taylor calculated that by the spring of 1948, some 3,500 Germans

77 Hersch Lauterpacht, *International Law: A Treatise* 161 (London 2d ed 1935).

78 Bush, 102 Colum L Rev at 2335 (cited in note 28).

79 Tusa and Tusa, *The Nuremberg Trial* at 59 (cited in note 14).

80 Hersch Lauterpacht, *The Judicial Settlement of International Disputes* 227 (Cambridge 2004).

81 Tusa and Tusa, *The Nuremberg Trial* at 59 (cited in note 14).

82 Laughland, *A History of Political Trials* at 108 (cited in note 4).

83 Bass, *Stay the Hand of Vengeance* at 148 (cited in note 12).

84 Meron, 100 Am J Intl L at 551, 554 (cited in note 49), *supra*.

and 2,800 Japanese had been tried individually for specific violations of the laws governing armed conflict.⁸⁵ One can certainly support trying those who commit war crimes while also still believing that prosecuting individuals for crimes against peace lacked adequate support in international law to permit the Nuremberg tribunals.

UNDER CUSTOMARY INTERNATIONAL LAW

The argument that individual criminal liability could not be directly derived merely from the criminality of the conduct in question was challenged by Vladimir Milanovic, the Yugoslav representative to the United Nations War Crimes Commission, who argued that while penal sanctions had not been explicitly provided for in any treaties, international custom required that any criminal act must be punishable.⁸⁶ Accordingly, the Nuremberg tribunals must be justifiable by virtue of the fact that the international community had reached a consensus against wars of aggression.⁸⁷ However, this idea was largely rejected by the Commission.⁸⁸ To properly evaluate Milanovic's argument, however, the potential for justifying individual criminal liability must be examined under customary international law.

Putting individual leaders on trial for engaging in aggressive war was completely unprecedented.⁸⁹ As such, the charges of crimes against peace were defended as being "novel but necessary."⁹⁰ Every prior example pointed to by advocates of the tribunals was distinct, in that they all involved prosecution for a specific crime under the laws governing armed conflict, not the nebulous crime of waging an "aggressive" war. Even as late as September 1944, the majority report of the UNWCC⁹¹ concluded, "[A]cts committed by individuals merely for the purpose of preparing for and launching aggressive war, are, *lege lata*⁹², not 'war crimes.'⁹³ This conclusion from the majority of international legal experts working on the matter that international law did not provide for individual criminal liability for crimes against peace is strong evidence against customary international law providing for such liability.

85 Bass, *Stay the Hand of Vengeance* at 159 (cited in note 12).

86 Kochavi, *Prelude to Nuremberg: Allied War Crimes Policy and the Question of Punishment* at 99 (cited in note 22).

87 *Id.*

88 *Id.* at 99–100.

89 Bush, 102 Colum L Rev at 2326 (cited in note 28).

90 *Id.* at 2326–27.

91 United Nations War Crimes Commission.

92 *Lit.*, "the law as it exists."

93 Kochavi, *Prelude to Nuremberg: Allied War Crimes Policy and the Question of Punishment* at 98 (cited in note 22).

PROCEDURAL ISSUES

The majority of the questions surrounding the Nuremberg tribunals deal with questions of whether the International Military Tribunal was legally permissible under then-existing international law, which is fundamentally a question of jurisdiction, rather than of procedure. While the tribunals made significant attempts to ensure that the court's actions would be above question, such is unfortunately not the case. This paper's examination of procedural issues will be divided into three main categories, based on the specific type of procedural problem that is raised.

Level Playing Field?

As part of preparation for the Nuremberg trials, the charter for the International Military Tribunal was signed in London on August 8, 1945.⁹⁴ Chief Prosecutor for the United States Robert H. Jackson was the main architect of this charter, and signed the charter on behalf of the United States government.⁹⁵ This itself suggests that the prosecution had an inherent advantage over the defense, because the prosecution was able to determine the rules of procedure and what evidence would be admissible, leading one historian to describe the Nuremberg trials as being characterized by "highly irregular collusion between the Prosecution and the bench."⁹⁶ For example, the so-called "*tu quoque*"⁹⁷ rule specifically excluded evidence of the conduct of Allied nations.⁹⁸ As Jackson said at the London conference on the IMT charter, "I don't want to be in a position where the United States is obliged to enter into a discussion at this trial of the acts or policies of our allies."⁹⁹ To accommodate this desire, the charter specifically limited the IMT's jurisdiction to issues related to trying "the major war criminals of the European Axis countries," rather than any broader language.¹⁰⁰

The result of this exclusion was twofold. First, evidence relevant to determining the guilt or innocence of the accused on the charges of waging a war of aggression was excluded, such as the fact that Britain and France declared war on Germany before Germany declared war on, or took military action directly against, either of those nations.¹⁰¹ This is clearly relevant to determining whether the war was indeed a war of aggression, for if World War II was not a war of

94 Ferencz, 16 Pace Intl L Rev at 367 (cited in note 1).

95 Id at 369.

96 Laughland, *A History of Political Trials* at 112 (cited in note 4).

97 Lit., "You also."

98 Alan P. Rems, *Götterdämmerung: German Admirals on Trial*, 29 Naval History 38, 44 (2015).

99 Laughland, *A History of Political Trials* at 112 (cited in note 4).

100 Const of the Intl Milit Tribunal Art 6.

101 Laughland, *A History of Political Trials* at 112 (cited in note 4).

aggression on the part of Germany, the defendants would be innocent of crimes against peace.¹⁰²

Second, in specific instances, other relevant evidence was excluded that led to German leaders being charged with war crimes for taking actions identical to those taken by Allied leaders. In the trial of Admirals Erich Raeder and Karl Donitz for waging unrestricted submarine warfare, Raeder's defense counsel's request to examine the records of the British Admiralty was denied under the tu quoque rule, concealing any potentially exculpatory evidence from the defense.¹⁰³ Further, evidence regarding the fact that American Admiral Chester Nimitz had issued an order to wage unrestricted submarine warfare against Japanese shipping was excluded.¹⁰⁴ The American judge on the panel, Francis Biddle, recognized the hypocrisy of the charges, and asserted personal privilege to unilaterally force through interrogatories to Admiral Nimitz as to the American policy on unrestricted submarine warfare.¹⁰⁵ When Nimitz responded, Taylor later wrote, "[I]t was as clear as clear could be that if Dönitz and Raeder deserved to hang for sinking ships without warning, so did Nimitz."¹⁰⁶ Accordingly, while both were of course convicted, neither was sentenced to death – Raeder was sentenced to life imprisonment and Donitz was sentenced to 10 years' imprisonment.¹⁰⁷ The Nuremberg trials lacked any basic idea of a discovery process to mandate that evidence favorable to the defense be turned over, which was most clearly revealed in the trials of Raeder and Donitz, leading Telford Taylor to later condemn the "lamentable concealment of evidence" in these cases.¹⁰⁸

Further evidence of how the prosecution was able to ensure that the procedures were predetermined to be extraordinarily favorable to the prosecution is the conspiracy charges brought against the defendants. While conspiracy charges were largely unknown in continental Europe, leading the French to argue vigorously against them, American representatives insisted on the inclusion of conspiracy charges, which are notoriously elastic.¹⁰⁹ As a result, defense attorneys had to deal with an unfamiliar charge in addition to the other procedural issues in the trials.

102 This is not to suggest that the IMT judges would have been required to accept this defense, because it seems unlikely that the defendants could have prevailed on the merits of this argument. However, the defendants were never allowed to present the argument at all. A defense should never need to be affirmatively proven before it is even permitted to be raised.

103 Rems, 29 *Naval History* at 39–40 (cited in note 99).

104 Telford Taylor, *The Anatomy of the Nuremberg Trials* 639 (New York 1992).

105 Rems, 29 *Naval History* at 40 (cited in note 99).

106 Taylor, *The Anatomy of the Nuremberg Trials* at 409 (cited in note 105).

107 Rems, 29 *Naval History* at 43–44 (cited in note 99).

108 Taylor, *The Anatomy of the Nuremberg Trials* at 639 (cited in note 105).

109 Laughland, *A History of Political Trials* at 114–15 (cited in note 4).

Unbiased Proceedings?

There are many specific instances that suggest that the outcome of the trials was never seriously in doubt. But beyond specific instances of conduct which suggest that, the attitude pervading the entire prosecution was one of a frantic frenzy to convict the defendants – to the point that the Allies accidentally indicted Gustav Krupp when they meant to indict his son Alfried.¹¹⁰ Once they realized their mistake, it was too late to amend the indictment, and Gustav Krupp was found to be senile and unfit for trial.¹¹¹

Soviet judge General Ioan Timofeevich Nikitchenko had no doubts about the outcome of the trials. He noted at the London conference on July 19, 1945, about three weeks before the signing of the IMT's charter, "The fact that the Nazi leaders are criminals has already been established."¹¹² While Jackson attempted to maintain the appearance of impartiality of the trials, even he was forced to admit, "There could be but one decision in this case, that we are bound to concede."¹¹³ Any other result would undermine the message that Jackson had already decided would be the result of the trial and conviction of the German leaders, which would be to "cultivate in the world the idea that aggressive war-making is the way to the prisoner's dock rather than to honours."¹¹⁴ The ultimate irony is that Jackson, in spite of knowing that the only acceptable outcome of the tribunals was conviction of the defendants, attempted to maintain the illusion of impartiality. He told the American Society of International Law:

You must put no man on trial before anything that is called a court...under the forms of judicial proceedings, if you are not willing to see him freed if not proven guilty. If you are determined to execute a man in any case, there is no occasion for a trial; the world yields no respect to courts that are organized merely to convict.¹¹⁵

Unfortunately, the statements and actions of Jackson and other judges and prosecutors suggest that Nuremberg was just such a court.

Perhaps the single most disturbing anecdote that serves as evidence of bias in the proceedings comes from the actions of Andrei Yanuarevich Vyshinsky,¹¹⁶ the prosecutor general of the Soviet Union and organizer of the famous

110 Id at 104.

111 Id at 104–05.

112 Id at 111.

113 Laughland, *A History of Political Trials* at 111 (cited in note 4).

114 Tusa and Tusa, *The Nuremberg Trial* at 86 (cited in note 14).

115 Robert H. Jackson, *Address to the American Society of International Law* 31 ABA J, 290 (1945).

116 Taylor spells the name as Vishinsky, while Laughland spells it as Vyshinskii. After consulting with Russian speakers, I have elected to utilize Vyshinsky, as it is the most widely accepted Anglicized spelling of the original Cyrillic.

Moscow show trials of the 1930s.¹¹⁷ At a dinner for the Nuremberg prosecutors and judges (itself an indication of the uncomfortably close relationship between the prosecution and the supposedly impartial judges), he toasted to the swift death of the defendants.¹¹⁸ The group drank to the toast.¹¹⁹

Incidents and attitudes such as revealed here call into question the validity of the discretionary decisions made during the course of the trials. At one point during the trial of Alfred Rosenberg, defense counsel sought to challenge evidence as it was introduced to prevent it from creating an indelible impression upon its hearers, such as by reading the full context of documents the defense believed had been selectively edited to remove information from its proper context.¹²⁰ This attempt was prevented, as the court determined that the defense would have to wait until after the prosecution had finished presenting its case to challenge the context of these documents.¹²¹ While this in itself is not proof of wrongdoing, as such evidentiary decisions are within the discretion of the court, the collective combination of procedural issues of this sort and other highly irregular actions is further evidence of the trials being structured to produce the desired result. When bias is present on the part of an international tribunal, all of its discretionary decisions are called into question.

Glueck, writing during the trials, makes an extremely concerning argument. He suggests that any complaints against the procedure followed at the trial should be given no weight, because all of the Nuremberg defendants could have simply been summarily executed without any judicial process whatsoever.¹²² This argument essentially holds that the trials were justified by mere virtue of the fact that they occurred at all. This idea would in all likelihood be supported by the Soviet participants in the trial, but would likely be too far for Jackson to accept. He noted, “To pass these defendants a poisoned chalice is to put it to our own lips as well.”¹²³ Extreme justifications of the Nuremberg tribunals such as Glueck’s ultimately fall short because they fail to recognize that justice is something deeper than merely the will of the conqueror. If justice is merely force, then there would be no moral basis for condemning the actions of the Nazis had they been victorious.

Improper External Influence?

117 Laughland, *A History of Political Trials* at 113 (cited in note 4).

118 Taylor, *The Anatomy of the Nuremberg Trials* at 211 (cited in note 105). He translates Vyshinsky’s toast as, “I propose a toast to the defendants. May their paths lead straight from the courthouse to the grave!”

119 *Id.* Taylor notes that some from the American delegation drank before the translation of the toast was completed, and some of the Americans were “troubled” once they learned what they had drunk to. Of course, this does not excuse those (including Taylor himself) who spoke Russian.

120 Tusa and Tusa, *The Nuremberg Trial* at 212 (cited in note 14).

121 *Id.*

122 Glueck, *The Nuremberg Trial and Aggressive War* at 8 (cited in note 6).

123 Ferencz, 16 *Pace Intl L Rev* at 367 (cited in note 1).

Other than procedural issues of the types already examined, the International Military Tribunal took efforts to minimize improper external influence on the proceedings. For example, on February 2, 1946, the newspaper *Berliner Zeitung* published an article criticizing Dr. Hanns Marx, the defense attorney for Julius Streicher, claiming he had engaged in improper procedure when cross-examining a witness and threatening him with “complete ostracism in the future.”¹²⁴ In response, British judge Sir Geoffrey Lawrence condemned the article in open court, declaring that intimidation of defense attorneys was unlawful and would not be permitted.¹²⁵ Additionally, in one instance, the Soviet Union took exception to statements made by Sir Hartley Shawcross, the lead British prosecutor, when he referenced the Nazi-Soviet Pact to divide Poland.¹²⁶ The Soviet Union sought to have the official transcript of the proceedings altered to strike the offending passages from the record, which the court refused to do.¹²⁷ Of course, the mere fact that the IMT sought to minimize external influence during the proceedings is not proof that those proceedings were generally unbiased or otherwise free from procedural errors, as established above.

CONCLUSION

Was There Any Other Way?

At first glance, it might seem that no matter how flawed the Nuremberg proceedings might have been, that any judicial proceedings would be superior to the summary execution of German leaders proposed by many even in the United States.¹²⁸ However, the unacceptability of one option does not necessarily mean that the other is morally correct, and that line of reasoning ultimately presents a false dichotomy. There was another option available to the victorious Allies: Prosecute war crimes and crimes against humanity, but not crimes against peace. The unique structure of the Nuremberg tribunals was designed so that war crimes and crimes against humanity were prosecuted not as crimes in themselves, but rather as evidence of a defendant’s participation in a conspiracy to wage a war of aggression.¹²⁹ Individual criminal liability for violations of the laws and customs of war was well established under both international treaties and under customary international law prior to the outbreak of World War II.¹³⁰ In contrast, the criminality

124 Tusa and Tusa, *The Nuremberg Trial* at 213 (cited in note 14).

125 *Id.*

126 *Id.* at 179.

127 *Id.* at 179–80.

128 King, 34 *Case W Res J Intl L* at 336 (cited in note 5).

129 Taylor, *The Anatomy of the Nuremberg Trials* at 583 (cited in note 18).

130 See, for example, *Commission on the Responsibility of the Authors of the War* (cited in note 51).

of wars of aggression under international treaties was in question throughout the proceedings, and those who ratified the treaties in question gave no indication that they believed that treaties like Kellogg-Briand actually served to make waging an aggressive war a crime under international law, in part because those international treaties were billed as not being legally enforceable.¹³¹ Further, under customary international law, no consensus existed to justify the charges of crimes against peace, and the actions of the Allied powers themselves were in direct conflict with the claimed rules of customary international law, meaning that the alleged rules were not viewed as having the character of legal obligations.¹³²

Beyond the issue of whether the acts in question were actually crimes under international law, the further problem of individual criminal liability inevitably arises. The leading international legal scholar of the day, Hersch Lauterpacht, saw no reason to believe that the leading treaty on the subject (Kellogg-Briand) made any provision for national leaders to be singled out for individual criminal trials.¹³³ Further, while individual trials had taken place before for the commission of specific violations of the laws of armed conflict, no trial had ever before taken place for the commission of crimes against peace, so the Nuremberg tribunals could not be justified under customary international law.

Finally, the arguments from force, that as the victorious parties the Allies could impose the will of the conqueror upon their subjugated adversaries, is utterly opposed to any notion of rule by law and not force.¹³⁴ Justice is more than merely meting out some form of punishment to those guilty of crimes – it requires that the punishment be carried out following just processes by a lawful authority with competence to decide the matter, and that the punishment be targeted to a specific crime. Unfortunately, the horrors of the Holocaust have resulted in some incorrectly assuming that the Nuremberg tribunals dealt with the genocide committed by the Nazi regime.¹³⁵ One can obviously oppose the targeted execution of political and racial minorities, as well as the indiscriminate slaughter of millions of innocent civilians during the war, and even support prosecutions for those clear violations of international law without believing that the charges of Crimes Against Peace at the Nuremberg tribunals were legally permissible. The validity of criminal charges against those who perpetrated the Holocaust for those specific crimes is almost entirely beyond question, but the validity of individual criminal charges for waging aggressive war is seriously questionable.

Nuremberg's Legacy

131 Bush, 102 Colum L Rev at 2335 (cited in note 28).

132 See the above examinations of the Lend-Lease Act, the Nazi-Soviet Pact, and American unrestricted submarine warfare.

133 Lauterpacht, *International Law: A Treatise* at 161 (cited in note 78).

134 See Glueck, *The Nuremberg Trial and Aggressive War* at 25 (cited in note 6).

135 Bass, *Stay the Hand of Vengeance* at 148 (cited in note 12).

In the years since Nuremberg, many other international tribunals have been formed to address international crimes during times of war. Two specific examples illustrate how the international community has implemented lessons learned from Nuremberg's great experiment. In 1993, the United Nations Security Council established The Hague Tribunal to prosecute alleged war criminals in the former Yugoslavia and Rwanda.¹³⁶ Second, the Rome Statute of the International Criminal Court was approved in 1998, creating another international body to address war crimes.¹³⁷ Both The Hague Tribunal and the ICC are significantly more protective of the rights of defendants than was the Nuremberg International Military Tribunal.¹³⁸ Additionally, these newer tribunals have more limited authority to prosecute defendants. The resolution authorizing The Hague's proceedings does not provide for criminal liability for aggressive war.¹³⁹ The ICC's charter likewise does not currently provide for charges of aggressive war, though it allows for the possibility of such charges if certain conditions are met.¹⁴⁰

The outcome of the Nuremberg trials was never seriously in doubt, as Jackson's own statements conceded.¹⁴¹ This, combined with the numerous procedural issues that occurred throughout the tribunals, strongly suggests that International Military Tribunal was less than impartial. Even assuming that the trials were themselves legal, this raises a serious question: Were the trials just? The philosophy underlying the very concept of due process and protection of the rights of the accused makes clear that justice is more than merely ensuring the correct outcome – justice requires a just outcome pursued through just procedure. Even the most ardent defender of the tribunals should be concerned by the procedural irregularities that plagued the trials, but the possibility of those responsible for massive atrocities escaping punishment is equally distasteful. Perhaps one author is correct when he suggests, "We can accept the verdicts as providing a measure of justice for the morally abhorrent acts of Nazi leadership, while still believing that the trials themselves were of questionable legality."¹⁴² While Nuremberg's legacy is mixed, the international legal community can learn from its shortcomings to create a better system for future prosecutions of international criminals. The lessons of Nuremberg have been applied before, but only by continuously remembering its failures can these lessons be preserved for the future.

136 King, 34 Case W Res J Intl L at 349 (cited in note 5).

137 Id at 351. See also id at note 42.

138 Id at 351.

139 Id at 349.

140 King, 34 Case W Res J Intl L at 351 (cited in note 5).

141 Laughland, *A History of Political Trials* at 111 (cited in note 4).

142 Id at 107.

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ARTICLE

THE ORPHAN DRUG ACT: INCENTIVE OR INHIBITOR TO RARE DISEASE RESEARCH?

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ABSTRACT

This paper evaluates the efficacy of the Orphan Drug Act by discussing its statutory language, real-world successes, and common criticisms regarding its use in industry practice. The paper concludes by summarizing strategies to improve the Orphan Drug Act, both through mitigating misuse and incentivizing additional research into more neglected areas of orphan product development.

OVERVIEW OF THE ORPHAN DRUG ACT (ODA) AND ORPHAN DRUG DESIGNATION

Historical Context Leading to the Orphan Drug Act

Nearly 30 million Americans suffer from a rare disease, yet only four percent of rare diseases have an approved treatment.¹ In the United States, a “rare disease” is defined as a disease that affects less than 200,000 people.² The Orphan Drug Act, signed into law President Ronald Reagan in 1983 and made permanent in 1997, aimed to expand upon prior efforts to promote research and development for critical health care innovations by incentivizing the creation of medications to treat rare diseases in the United States.^{3,4} The creation and passage of this act stemmed from two pressures. The first pressure was criticism from the National Organization for Rare Diseases (NORD), which believed that the government lacked the expertise and resources to produce orphan drug inno-

1 EY at i Impact of the Orphan Drug Tax Credit on treatments for rare diseases (BIO Jun 17 2015), available at <https://www.bio.org/sites/default/files/EY%20BIO%20Orphan%20Drug%20Tax%20Credit%20Report%202015%2006%2016.pdf>.

2 Developing Orphan Drug Products: FDA and Rare Disease Day (US Food and Drug Administration, Feb 28 2011), available at <http://www.fda.gov/ForIndustry/DevelopingProductsforRareDiseasesConditions/ucm239698.htm>.

3 Alexander Korniaikov, et al, The Orphan Drug and Research Tax Credits: The ‘Substantial All’ Rule (The Tax Adviser Oct 1 2014), available at <http://www.thetaxadviser.com/issues/2014/oct/korniaikov-oct14.html>.

ventions. The second pressure stemmed from an episode of the TV show *Quincy, M.E.*, which raised awareness about Tourette's Syndrome (a rare disease) and the proposed orphan drugs legislation.⁵

This bill brought tremendous advantages to entities that qualified for orphan drug designation with the Food and Drug Administration (FDA). Today, the ODA not only allows entities to deduct 50 percent of qualified clinical research costs—compared to only 20 percent under general research and development incentive plans—but it also provides a waiver of prescription drug user fees, market exclusivity for seven years, FDA and National Institutes of Health (NIH) accelerated drug approval, and the potential to obtain research funds through grant programs run by the Office of Orphan Products Development (OOPD).^{6, 7} Further, orphan drug designation is transferrable, allowing for the transfer of “ownership of or any beneficial interest in the orphan-drug designation of a drug to a new sponsor.”⁸

Qualifying as an Orphan Product Sponsor

In order to qualify for the Orphan Drug Tax Credit and other incentives associated with the ODA, an entity (the “sponsor”) must fulfill the requirements to obtain orphan drug designation as set out in 21 Code of Federal Regulations Part 316 Subpart C. Basic requirements include a description of the drug, the disease it seeks to treat, and documentation that this disease fulfills the definition of a rare disease, i.e., a disease that “affects fewer than 200,000 people in the United States or, if the drug is a vaccine, diagnostic drug, or preventive drug, the persons to whom the drug will be administered in the United States are fewer than 200,000 per year.”⁹

Beyond these basic requirements, the statute also states that a sponsor seeking orphan drug designation for “a drug that is otherwise the same drug as an already approved drug . . . for the same rare disease or condition, [must provide] an explanation of why the proposed variation may be clinically superior to the first drug.”¹⁰ This variation might be as simple as releasing a new dosage of the drug.¹¹ The statute also requires that a sponsor requesting orphan drug designa-

5 Barbara Andraka-Cristou, Policy process lessons from the Orphan Drug Act: applications for health policy advocates at 279 (*Journal of Entrepreneurship and Public Policy* vol. 4 no. 3 2015).

6 Developing Orphan Drug Products (cited in note 2).

7 Korniaikov, *The Orphan Drug and Research Tax Credits* (cited in note 3).

8 Electronic Code of Federal Regulations (e-CFR) (US Government Publishing Office, 30), §316.27(a)

9 *Id.* at §316.20(b)(8)(i).

10 *Id.* at §316.20(b)(5).

11 Alexander Gaffney, FDA Finalizes Changes to Orphan Drug Regulation, With Emphasis on Clarifying Existing Policies (*Regulatory Affairs Professionals Society* June 11 2013), available at <http://www.raps.org/focus-online/news/news-article-view/article/3608/>.

tion for “a drug for only a subset of persons with a particular disease or condition that otherwise affects 200,000 or more people (‘orphan subset’)” must demonstrate that, “due to one or more properties of the drug, the remaining persons with such disease or condition would not be appropriate candidates for use of the drug.”¹² However, the FDA recently clarified that, even if the drug can treat other patient groups totaling more than 200,000 people, the drug can still qualify for orphan status as long as each patient group is no more than 200,000 people.¹³ In other words, sponsors that provide appropriate documentation can obtain orphan drug designations for variations on already-approved drugs, as well as for drugs to treat multiple groups of orphan and non-rare diseases.

The statute states that the FDA retains the right to refuse to grant orphan drug designation if the sponsor fails to provide sufficient and truthful evidence that the proposed drug fulfills these requirements.¹⁴ With regard to “orphan subsets” in particular, the statute states that the FDA can refuse to provide orphan drug designation if the sponsor has “failed to demonstrate that there is no reasonable expectation that development and production costs will be recovered from sales of the drug for such disease or condition in the United States.”¹⁵ This is a particularly controversial aspect of the ODA that this paper will address in greater depth.

SUCCESSSES OF THE ODA

The Importance of the Orphan Drug Tax Credit (ODTC)

Prior to the enactment of the ODA, many developers were hesitant to invest in research for treatments for rare diseases due to high development costs, which can total thousands of dollars per person diagnosed with the disease, as well as the relatively small market associated with rare diseases that would make it difficult to recoup these losses.¹⁶ The following diagram shows average out-of-pocket costs per approved drug, totaling \$658 million over 12.5 years.¹⁷

12e-CFR (§316.20(b)(6)) (cited in note 8).

13Gaffney, FDA Finalizes Changes to Orphan Drug Regulation (cited in note 11).

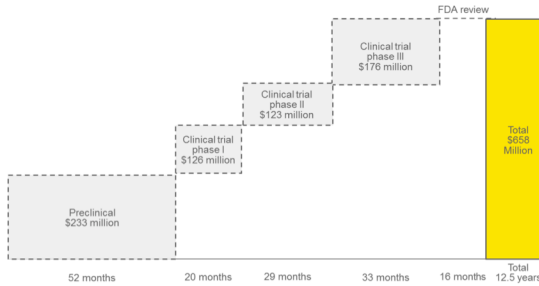
14e-CFR §316.25 (cited in note 8).

15e-CFR §316.25(a)(1)(ii) (cited in note 8).

16EY at i (cited in note 1).

17 Id at 12.

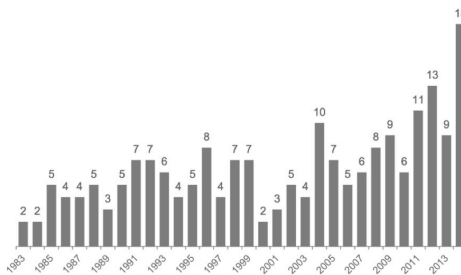
Figure 6. Average out-of-pocket costs per approved drug (in 2014 dollars)



Source: Joseph A. DiMasi and Henry G. Grabowski, "The cost of biopharmaceutical R&D: is biotech different?" *Managerial and Decision Economics*, (John Wiley & Sons, Ltd, 2007), EY analysis.

Since the law's enactment in 1983, 486 orphan products, including more than 200 new orphan drugs, have been approved, compared to only thirty-two orphan drug approvals before the enactment of the ODA.¹⁸ Five years after the ODA was enacted, an NIH study revealed that 14 research-intensive pharmaceutical manufacturers reported having invested nearly \$200 million on orphan drug-related research.¹⁹ The figure below demonstrates this increase in orphan drug approvals since the ODA.²⁰

Figure 4. New orphan drug approvals since ODA enactment



Note: Orphan drug approvals include both new molecular entities (NMEs) and new biologic license applications (BLAs).

Source: Drug Approval Reports, Food and Drug Administration, various years; EY analysis.

One of the key provisions of the ODA that contributed to this quick rise in orphan drug research was the ODTTC, which lowers development costs.²¹ Although in 2009, Heemstra et al. found that the rise in publications related to a specific cohort of rare diseases was not statistically different from the rise in scientific publications overall during the period, most analyses find that the ODA

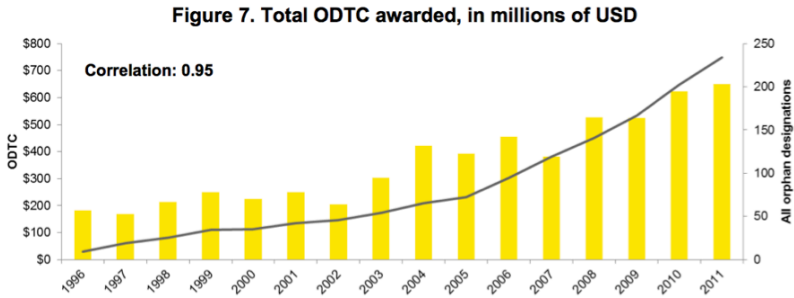
18 Id at i.

19 Aaron S. Kesselheim, An Empirical Review of Major Legislation Affecting Drug Development: Past Experiences, Effects, and Unintended Consequences at 465 (The Milbank Quarterly, vol. 89, no. 3 2011).

20 EY at 10 (cited in note 1).

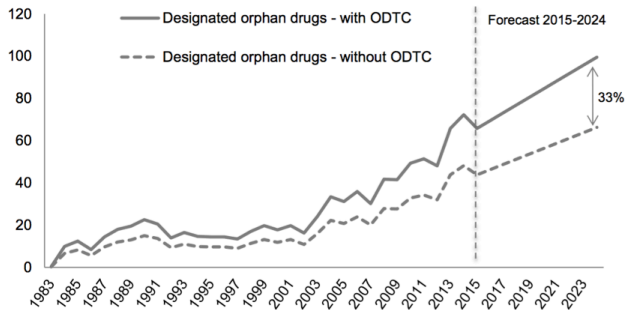
21 Id at i.

has increased orphan drug development overall²²



The figure above graphs the increase over time in the number of ODTC approvals between 1996 and 2011.²³ In the absence of the ODTC, 67 orphan drugs (33 percent) would likely not have been developed over the past thirty years.²⁴ It is estimated that if the ODTC were repealed completely, 57, (or 33 percent), fewer new orphan drugs would be approved over the next ten years, as shown in the figure below.²⁵

Figure 10. Estimated impact of potential ODTC repeal on the orphan drug pipeline



Note: Projection beyond 2014 is based on the annual average change in orphan drug NME and new BLA approvals from 2004 to 2014 with and without the ODTC.
 Source: Drug Approval Reports, Food and Drug Administration, various years; EY analysis.

22 Kesselheim, An Empirical Review of Major Legislation Affecting Drug Development at 466 (cited in note 19).

23 EY at 13 (cited in note 1).

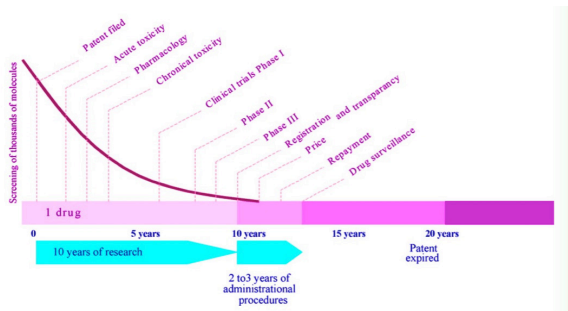
24 Kesselheim, An Empirical Review of Major Legislation Affecting Drug Development at 466 (cited in note 19).

25 Id.

Impact of Other Provisions in the ODA

In the United States, where pharmaceutical companies may set prices for drugs, the ODA's seven year promise of exclusivity is especially influential and allows pharmaceutical companies to sell rare disease treatments at unregulated prices, with no risk of competition for at least seven years. For this reason, orphan drugs tend to be very expensive; in fact, the eleven top-selling orphan drugs all earned more than \$200 million.²⁶ The lucrative nature of these products is due to a combination of market exclusivity and the difficulty associated with replicating many orphan drugs, which thereby garner much less generic competition than non-orphan drugs.²⁷ This is especially true for biological drugs, which are resistant to generic competition due to the challenges associated with producing biosimilars, and hence have an economic value that extends beyond their patent expiration.^{28, 29}

Market exclusivity, paired with an accelerated approval process, facilitates the recouping of expenses from research and development. Notably, the orphan drug approval process is quite short compared to the approval process for common drug development, which normally takes ten to twelve years from the start of research to market approval; the diagram below illustrates this disparity in development timelines.³⁰



26 Id.

27 Id.

28 Ashish K. Kakkar and Neha Dahiya, *The Evolving Drug Development Landscape: From Blockbusters to Niche Busters in the Orphan Drug Space at 3* (Drug Development Research, vol. 75 2014).

29 Thomson Reuters, *The Economic Power of Orphan Drugs* (Thomson Reuters 2012), available at <http://thomsonreuters.com/content/dam/openweb/documents/pdf/pharma-life-sciences/white-paper/1001450.pdf>.

30 Ellen H.M. Moors and Jan Faber, *Orphan drugs: Unmet societal need for non-profitable privately supplied new products*, 36 *Research Policy* 336, 340 (2007).

EVALUATING COMMON CRITICISMS OF THE ODA

Despite widespread recognition of the success of the ODA in promoting innovation in treatments for rare diseases, there are several aspects of the legislation that have drawn criticism. Below, this paper evaluates common criticisms of the Orphan Drug Act.

The ODTIC Disproportionately Incentivizes Rare Diseases within US Markets

Many argue that the Orphan Drug Act has surpassed its original intent as a means to subsidize unprofitable orphan drug innovations and instead now serves to make certain types of orphan drugs disproportionately profitable.

Specifically, EvaluatePharma's 2015 Orphan Drug Report found that "Phase III orphan drug development cost half that of non-orphan" and, when the Orphan Drug Tax Credit is taken into account, could potentially cost only a quarter that of non-orphan drug development.³¹ Meanwhile, orphan drugs sell for extremely high prices. Currently, orphan drugs comprise all of the world's top ten most expensive drugs³² and since the passage of the ODA, "the median launch price of orphan drugs for chronic use has doubled every five years."³³ One article observes that "in 2014, the average annual cost per patient for the 100 top-selling orphan drugs in the United States was nearly \$112,000, compared with \$23,000 for non-orphans."³⁴

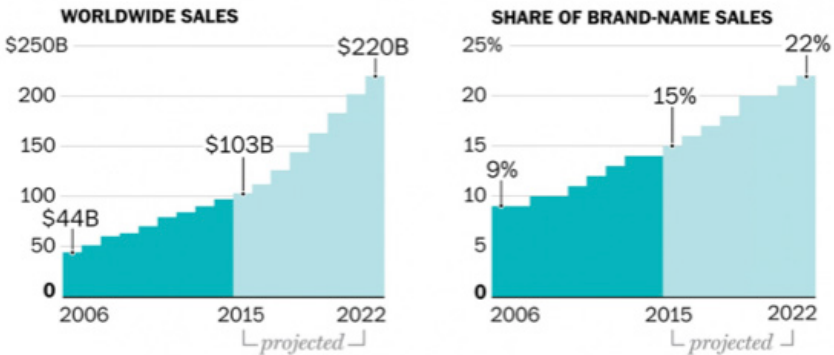
31 Orphan Drug Report 2015 at 6 (EvaluatePharma, 3rd ed, Oct 2015), available at <http://info.evaluategroup.com/rs/607-YGS-364/images/EPOD15.pdf>.

32 Dyfrig A. Hughes and Jannine Poletti-Hughes, Profitability and Market Value of Orphan Drug Companies: A Retrospective, Propensity-Matched Case-Control Study, ed, John Matthew Koomen (PLoS ONE, vol. 11, 2016), available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5074462/>.

33 Carolyn Y. Johnson, High Prices Make Once Neglected 'Orphan' Drugs a Booming Business (Washington Post, Aug 4, 2016), available at https://www.washingtonpost.com/business/economy/high-prices-make-once-neglected-orphan-drugs-a-booming-business/2016/08/04/539d0968-1e10-11e6-9c81-4be1c14fb8c8_story.html?utm_term=.020ace52f60.

34 Id.

Orphan-drug sales on the rise



Sources: EvaluatePharma

CHRIS ALCANTARA/THE WASHINGTON POST

Given these opportunities for vast profits, it is unsurprising that large pharmaceutical companies have adopted orphan drugs as part of product portfolios.³⁵ Current research supports projections that “the compound annual growth rate (CAGR) of launched orphan drugs will outshine that of the non-orphan control drugs over the next 30 years.”^{36, 37} In 2010, orphan drugs represented 30 percent of all New Molecular Entity (NME) approvals by the FDA, and this proportion will only continue to rise.³⁸ These projections have led some to criticize the ODTIC, and the ODA more generally, for encouraging sponsors to neglect research for less profitable, non-rare diseases in favor of more profitable, rare diseases.³⁹ This trend is illustrated in the figure below, which charts orphan and non-orphan drug growth from 2001-10.⁴⁰

35Id.

36 The Economic Power of Orphan Drugs at 6 (cited in note 27)..

37 Kiran N. Meekings, et al, Orphan Drug Development: An Economically Viable Strategy for Biopharma R&D at 661 (Drug Discovery Today, vol. 17, 2012).

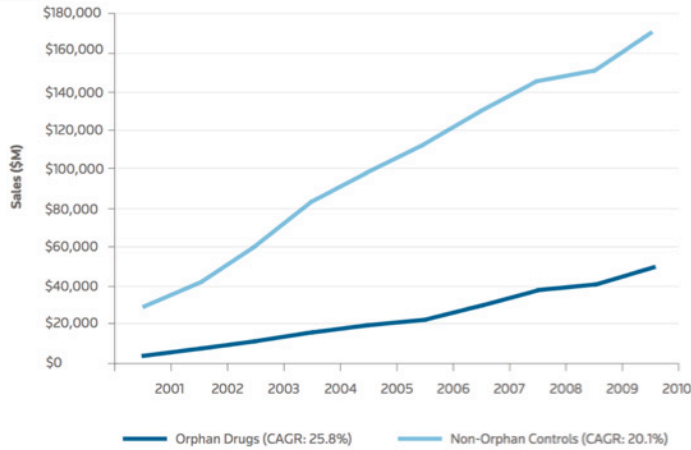
38 Id at 660.

39 Joseph Gulfo, Corrupting the Common Cure (US News, Apr 27, 2015), available at <http://www.usnews.com/opinion/economic-intelligence/2015/04/27/fdas-orphan-drug-designation-warps-medical-research>.

40The Economic Power of Orphan Drugs at 6 (cited in note 33).

GROWTH RATE OF ORPHAN VERSUS NON-ORPHAN DRUGS (2001 - 2010)

FIGURE 2



Source: Thomson Reuters Cortellis

In addition to incentivizing research for orphan drugs over non-orphan drugs, many believe that the ODA “disproportionately encourage the development of drugs with a viable United States market.”⁴¹ As of 2009, “only seven orphan drugs approved in the United States have been intended for use in neglected tropical diseases, five of which were AIDS-related infections.”⁴² Likewise, Heemstra et al. found in 2009 that the ODA has done little to stimulate orphan drug development for diseases with a very low prevalence within the rare disease classification, concluding that “a disease with a prevalence between 10 and 50 per 100,000 had a higher chance of obtaining at least one product with an orphan designation than did a disease with a prevalence of only 0.1-0.9 per 100,000.”^{43, 44}

Although it makes sense that, among rare diseases, companies would tend to pursue treatments for rare diseases that have a larger viable market, this highlights the need to restructure the ODTDC to incentivize drug development for the neglected rare diseases that still lack treatments. This data also casts doubt upon whether the ODTDC is necessary to incentivize the development of highly profitable treatments such as oncological drugs, since, as discussed above, orphan drugs are already priced higher and incur lower development costs than common drugs, even before accounting for the ODTDC.

41 Kesselheim, *An Empirical Review of Major Legislation Affecting Drug Development* at 468 (cited in note 19).

42 *Id.*

43 Joseph Gulfo, *Corrupting the Common Cure* (US News, Apr 27, 2015), available at <http://www.usnews.com/opinion/economic-intelligence/2015/04/27/fdas-orphan-drug-designation-warps-medical-research>.

44 *The Economic Power of Orphan Drugs* at 6 (cited in note 33).

As indicated above, evidence supports that “fewer developers might be willing to invest in research and development if they believed the ODTTC was not permanent.”⁴⁵ However, research for this paper did not yield any data to show how targeted modifications to the ODTTC *short of* complete repeal would affect sponsor investment

Market Exclusivity and Accelerated Approvals Pose a Danger to Patients

A second common criticism of the ODA is that accelerated approvals and market exclusivity can allow drugs with undesirable or dangerous side effects to dominate the market to treat a specific rare disease.

There are two prongs to this argument. First, lower standards for orphan drug approval might diminish orphan drug safety. These lower approval standards are often due in part to limited numbers of disease sufferers to participate in a clinical trial. Notably, these simplified and accelerated trials result in problematic lack of blinding, lack of control groups, and lack of randomization.^{46, 47, 48} Heemstra et al., in a study of 95 orphan drugs approved in the U.S. and European Union between January 2000 and December 2007, found that accelerated approvals may result in a “higher risk” for safety-related regulatory action, alongside oncological, gastrointestinal, and metabolic orphan drug products.⁴⁹

Second, competition for market exclusivity allows the first orphan drug to reach the market to remain the sole treatment for its target population for seven years, even if another competitor might have been safer, more effective, or more affordable.⁵⁰ Beyond the economic issues associated with an oligopolistic orphan drug industry, this raises the concern that lack of competition might threaten patient safety, as well as access to more effective and/or more affordable orphan products. Although this criticism has been less commonly addressed than criticisms of potential safety issues associated with the accelerated approval process, this raises the issue of whether future amendments to the ODA should allow FDA to revoke exclusivity for a treatment of a specific rare disease if a competitor can demonstrate that its product treats the same disease more safely or more effectively.

45 EY at 9 (cited in note 1).

46 Aaron S. Kesselheim, *Ethical Considerations in Orphan Drug Approval and Use* 92 *Clinical Pharmacology and Therapeutics* 153, 154 (2012).

47 Kesselheim, *An Empirical Review of Major Legislation Affecting Drug Development* at 467 (cited in note 19).

48 Moors, 36 *Research Policy* at 341 (cited in note 30).

49 Heemstra, et al, *Safety-Related Regulatory Actions for Orphan Drugs* at 127 (cited in note 46).

50 Yvette Leung, *Funding Orphan Drugs: Pitfalls of the Orphan Drug Act* (Harvard College Global Health Review, Oct 19, 2012), available at <https://www.hcs.harvard.edu/hghr/print/student/orphan-drug-act/>.

Research has yet to demonstrate, “based on the limited data available,” differences in “the nature of safety-related regulatory actions for orphan drugs [compared to non-orphan drugs].”⁵¹ However, this study also emphasizes that low rates of safety-related regulatory action could be due to the low prevalence of rare diseases, and urges doctors and pharmacists to “be vigilant concerning potential safety-related issues for orphan drugs.”⁵²

“Salami Slicing” to Create Orphan Subsets

A significant source of criticism of the ODA is the language in e-CFR §316.25(a)(1)(ii), which allows a sponsor to obtain orphan drug designation for a drug to treat an “orphan subset” of a non-rare disease. In practice, this results in “salami slicing,” a process that allows for drugs that target non-rare diseases to qualify as orphan drugs when they are used to treat a particular subset of disease sufferers.⁵³ For instance, Epogen is an orphan drug that, after it was approved in 1989 to treat anemia linked to end-stage renal disease, became a widely popular treatment for all forms of anemia.⁵⁴

Many of the diseases receiving orphan drug designation under this practice include drugs for certain forms of cancer and AIDS, which are highly profitable even without the incentives associated with the ODA.⁵⁵ The following graph shows the bias towards pursuing oncological drugs—the category of drugs found in a study by Heemstra et al. to have the highest chance of obtaining at least one product with orphan designation—since, among rare diseases, different forms of cancer provide the largest opportunities for profit.^{56,57}

51 Heemstra, et al, Safety-Related Regulatory Actions for Orphan Drugs at 135 (cited in note 46).

52 *Id* at 128.

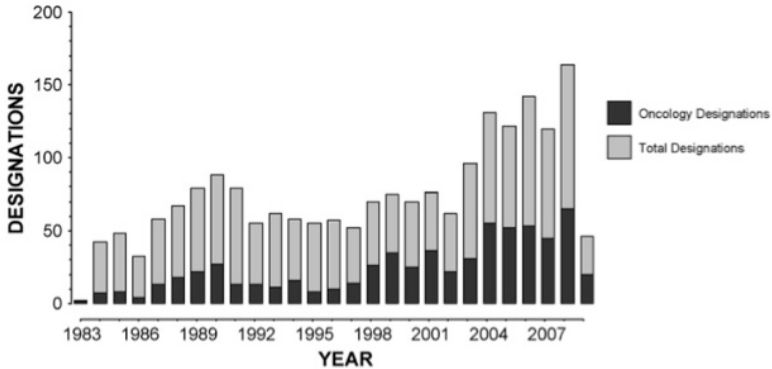
53 Leung, Funding Orphan Drugs (cited in note 47).

54 Matthew Herder, Orphan Drug Incentives in the Pharmacogenomic Context: Policy Responses in the USA and Canada at 158 (*Journal of Law and the Biosciences*, 2016).

55 Leung, Funding Orphan Drugs (cited in note 47).

56 Heemstra, et al, Translation of Rare Disease Research into Orphan Drug Development at 1169 (cited in note 41).

57 Labadie 95 Health Policy at 217 (cited in note 31).



Although the language of the ODA states that orphan drug designation for drugs to treat “orphan subsets” can be denied absent documentation to prove that there is no reasonable expectation to recoup development costs, the profitability in practice of orphan drugs indicate a discontinuity between the ODA’s stated intent and its implementation. Specifically, this discontinuity prompts questions regarding how strictly this aspect of the law is enforced, as well as regarding the type of documentation required to show an inability to recoup losses for purposes of obtaining orphan designation. Specifically, this discontinuity might indicate that sponsors frequently apply for orphan designation using lower price projections and/or more generous cost estimates than actually come to fruition. For instance, the pregnancy drug Makena increased in price from \$20 per dose to almost \$1,500 per dose following its approval for orphan drug designation.^{58, 59} Therefore, an appropriate amendment to the ODTC might require sponsors to abide by price assumptions provided during initial orphan drug designation requests.

Why are pharmaceutical companies receiving incentives for products that, according to the language of the ODA, should not be eligible for orphan drug designation? It seems that either: (a) sponsors are unaware of their potential as a treatment for other sufferers outside the designated orphan subset; (b) sponsor documentation convinces the OOPD that this orphan drug would not be an appropriate treatment for disease sufferers outside the designated orphan subset; or (c) the OOPD does not actually care whether the designated orphan drug can also be used to treat patients outside of the designated orphan subset, and instead believes that the incentive of designation is worthwhile to make sure the drug is created, especially for rare and deadly forms of cancer.

It is mostly likely it is a combination of both (b) and (c), since the ODA

58 Leung, *Funding Orphan Drugs* (cited in note 47).

59 Johnson, *High Prices Make Once Neglected ‘Orphan’ Drugs a Booming Business* (cited in note 30).

also fails to take into account the possibility that patient population can rise sharply.⁶⁰ This missing provision is directly attributable to President George H.W. Bush's decision to veto a congressional amendment that would have revoked orphan drug exclusivity once the drug's target population exceeded 200,000 people.⁶¹ Similarly, two years after this amendment was vetoed, a proposed amendment that would have ended exclusivity once drug sales reached \$200 million annually failed Congress (Johnson).⁶² These successive decisions show that Congress has consciously and consistently chosen not to address these weaker aspects of the ODA.

Designation of Existing Drugs as Orphan Drugs

Perhaps the most contentious aspect of the ODA is the ability for sponsors to obtain new orphan drug designations for existing drugs. This occurs in one of two ways. First, a company may obtain orphan drug designation for a drug that has already been on the market as a non-orphan drug, such as through the "salami-slicing" techniques discussed above.⁶³ Second, a company may obtain renewed orphan designation for orphan drugs that are essentially the same as previously-approved orphan drugs; this occurs through variations as minor as changing an inactive ingredient or releasing a new children's or extra-strength dosage.^{64, 65} The following graph measures the sources of "new" orphan drug designations between 1983 and 2009.⁶⁶

60 Leung, *Funding Orphan Drugs* (cited in note 47).

61 Johnson, *High Prices Make Once Neglected 'Orphan' Drugs a Booming Business* (cited in note 30).

62 *Id.*

63 *Id.*

64 EY at i (cited in note 1).

65 Alexander Gaffney, *FDA Finalizes Changes to Orphan Drug Regulation, With Emphasis on Clarifying Existing Policies* (Regulatory Affairs Professionals Society, Jun 11, 2013), available at <http://www.raps.org/focus-online/news/news-article-view/article/3608/>.

66 Aaron S. Kesselheim, *Innovation and the Orphan Drug Act, 1983-2009: Regulatory and Clinical Characteristics of Approved Orphan Drugs* at 291-308 (The National Academies, 2010).

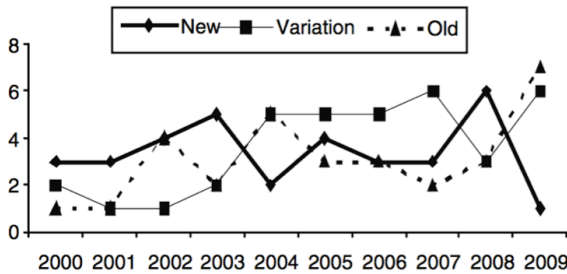


FIGURE B-1 Annual orphan drug approvals by “newness.” The thick line represents number of orphan drugs approved each year where the molecular structure is completely new. The dotted line represents the number of orphan approvals each year for drugs previously available on the market in the United States or elsewhere. The thin line represents the number of orphan drugs approved each year that were variations or members of the same class of previously approved drugs.

As discussed previously, the FDA has already indicated that these are acceptable methods to obtain orphan drug designations so long as (a) patient groups outside of the targeted “orphan subset” are less than 200,000 each and (b) the sponsor can show that some slight variation in the “new” orphan product.⁶⁷ Since it would not be difficult to divide people into groups of 200,000 or less based on arbitrary differences in subsets or co-morbidities, this could allow creative sponsors to obtain designation quite easily. Indeed, approvals are increasing: in 2015, the FDA designated a record 354 orphan drugs among 472 requests, a 22 percent increase over 2014.⁶⁸

This is due to a number of factors, including pressure to approve additional treatments for rare diseases, payer willingness to absorb high prices, and the sheer volume of orphan drug designation requests that could result in less scrutiny per request.⁶⁹ This is not to say that orphan drugs are approved frivolously. Between 1983 and 2009, a total of 2,112 orphan designations were assigned by the OOPD, and of those designations, FDA approved only 16 percent as of the end of 2009.⁷⁰ However, the approval rates for orphan drugs are still higher than average.⁷¹

67 Gaffney, FDA Finalizes Changes (cited in note 64).

68 Ed Silverman, FDA Designated a Record Number of Orphan Drugs Last Year (STAT, Feb 11, 2016), available at <https://www.statnews.com/pharmalot/2016/02/11/fda-designates-record-number-of-orphan-drugs/>.

69 Id.

70 Kesselheim, Innovation and the Orphan Drug Act (cited in note 65).

71 Ruth J. Hickman, Orphan Drugs Have Higher Rates of FDA Approval (Rare Disease Report, May 26, 2016), available at <http://www.raredr.com/news/orphan-approval>.

CONCLUDING RECOMMENDATIONS

Require Companies to Abide by Prices Within a Range of Those Used in Initial Orphan Drug Designation Documentation

The Orphan Drug Act states that orphan drug sponsors must be able to “demonstrate that there is no reasonable expectation that development and production costs will be recovered from sales of the drug for such disease or condition in the United States.”⁷² The fact that sponsors may change prices following receipt of orphan designation contributes to the designation of orphan drugs that are ultimately too profitable to qualify.

Although profitability is necessary to motivate sponsorship of orphan drug research, there must be limits on how much prices can change under, essentially, a government-enforced monopoly. Vast markups not only place a burden on payers and patients, but also demonstrate that the current Orphan Drug Act is highly vulnerable to allowing monopolistic and predatory drug pricing for sufferers of rare diseases who are, in most cases, a captive audience. Granted, entirely disallowing drug price changes might discourage sponsors from pursuing orphan drug research. Therefore, legislators should consider imposing a set percentage or dollar amount by which sponsors are limited in changing prices after orphan drug designation

Limit Designation of Existing Drugs

Another primary issue with the current Orphan Drug Act is its liberal granting of orphan drug designation based on arbitrarily defined “orphan subsets” and negligible changes to formula or dosage. In certain cases, it might be reasonable to argue that protecting incentives to produce new orphan products is more urgent than ensuring the product will benefit is less than 200,000 people. Yet when it comes to drugs that have already been granted orphan drug status in the past, or drugs that have already been marketed as common drugs, there is no reason why the FDA should grant the incentive of orphan drug designation. As previously successful drugs that, in some cases, have already benefited from seven years of market exclusivity, providing (renewed) exclusivity and other orphan drug incentives should occur only under strict circumstances. Specifically, a common drug known to be effective for multiple diseases should not be afforded designation as an orphan drug through salami slicing. This runs counter to the spirit and stated intent of the law as a method to subsidize drugs that are effective only within a relatively small market.

72 Orphan Drug Act, 21 U.S.C. ch. 9 §316.25(a)(1)(ii).

Likewise, an orphan drug should not be granted new designation for changes as simple as removing or changing an inactive ingredient or releasing a new dosage. To do so would disproportionately favor incumbent orphan drug developers and shut out new innovators from the market. The FDA must reevaluate what it considers to be “clinically superior” in order to incentivize meaningful innovations within the orphan drug industry.⁷³

Encourage Salami Slicing for Safety Purposes

Although market exclusivity is necessary to attract sponsors to the orphan drug market, controlled competition will ensure that patients can choose between different treatments, should one prove more effective than another for patients of different demographics and/or comorbidities. Even if two orphan drugs are intended to treat the same disease, both should receive market exclusivity if they contain different active ingredients or methods of treatment that might benefit certain subsets within a rare disease population. This might include encouraging sponsors to identify “orphan subsets” within rare diseases for which one orphan drug might be more beneficial than another, or even revoking exclusivity for orphan drugs that have been subject to certain safety-related regulatory actions.

As a simple illustration of this proposal, one can look to Tylenol and Advil. Both are over-the-counter pain relievers and fever reducers; however, Tylenol uses acetaminophen while Advil uses ibuprofen, the latter of which serves the additional purpose of an anti-inflammatory medication. For this reason, patients suffering from a combination of pain or fever and swelling might prefer Advil, whereas patients suffering from pain or fever alone might choose Tylenol. Likewise, if two sponsors successfully obtain approval for different orphan drugs meant to treat the same disease, then both should be allowed to enter the market if one has an additional benefit for certain populations over another.

Implement Specialized Incentives for Less Profitable Disease Research

A large challenge associated with the Orphan Drug Act is the inability to incentivize less profitable orphan drug research over orphan drug research for more common and more profitable diseases. As such, reformers of the Orphan Drug Act should implement additional incentives to focus on stimulating the specific needs of rare disease research at disease class level.⁷⁴

For instance, Congress has recently struggled to create incentives that will effectively motivate sponsors to undergo new antibiotic research for use

73 Orphan Drug Act, 21 U.S.C. ch. 9 (§316.20(b)(5)).

74 Heemstra, et al, Translation at 1166 (cited in note 45).

in multidrug-resistant diseases, such as through the current 21st Century Cures Act.⁷⁵ The original bill incorporated similar incentives to those included under the ODA, but met resistance from industry stakeholders. Many viewed the incentives as insufficient, given the small population that will benefit from these last-resort drugs if they are properly conserved to prevent the progression of future drug resistance. The new law, as implemented, retains many similar incentives and safety-related criticisms associated with the ODA.⁷⁶

In the face of this and other challenges, new tax incentive models have been proposed by various parties, including the concept of “delinkage” models that use intermittent monetary rewards to separate profit from units sold and compensate sponsors for supporting antibiotic stewardship efforts.⁷⁷ Furthermore, some groups have argued for an additional tax subsidy or transferable tax credit, which would allow sponsors to receive a lump sum of cash or, similarly, to sell a tax credit for cash to another company seeking to lower their tax liability.^{78, 79}

Conversely, negative reinforcements can encourage investment in less profitable disease research. For instance, rather than providing seven years of exclusivity and a 50 percent tax credit for all orphan drugs, an amendment could allow the FDA to grant these benefits on a sliding scale, providing the greatest benefits to sponsors seeking treatments for the rarest disease classes—potentially a tax credit even greater than 50 percent—and the least benefits to sponsors of orphan products that treat an aggregate of more than 200,000 people in different patient groups.

Through amendments such as the above recommendations, Congress can prevent government funds from disproportionately subsidizing already lucrative research, as well as incentivize more effectively the development of treatments that have yet to be realized due to poor profitability. Although passing such amendments would be extremely difficult in practice and might have certain negative externalities unaccounted for in this paper, it is important to collaborate with industry leaders, patients, and payers to ensure that the ODA incentivizes research to treat even the rarest of rare diseases.

75 21st Century Cures Act, HR 6, 114th Congress, 2nd Sess, in 161 Cong Rec H5083 (Jul 10, 2015).

76 HR 6 Sec. 2123 (cited in note 76).

77 Ellen t’Hoen, Innovation and Access requires ‘Delinkage’, (Delinkage, Sep 13, 2016) available at <http://delinkage.org/innovation-access-requires-delinkage/>.

78 Natalie Chandler, R&D Tax Credit Tweak Spurs New Advice from Accountants (New Orleans City Business, Jul 16, 2015) available at <http://neworleanscitybusiness.com/blog/2015/07/16/louisiana-coastal-board-seeks-39m-for-4-projects-2/>.

79 Josh Goodman, Tax Breaks for Sale: Transferable Tax Credits Explained (The PEW Charitable Trusts, Dec 14, 2012) available at <http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2012/12/14/tax-breaks-for-sale-transferable-tax-credits-explained>.





