

PENN UNDERGRADUATE LAW JOURNAL

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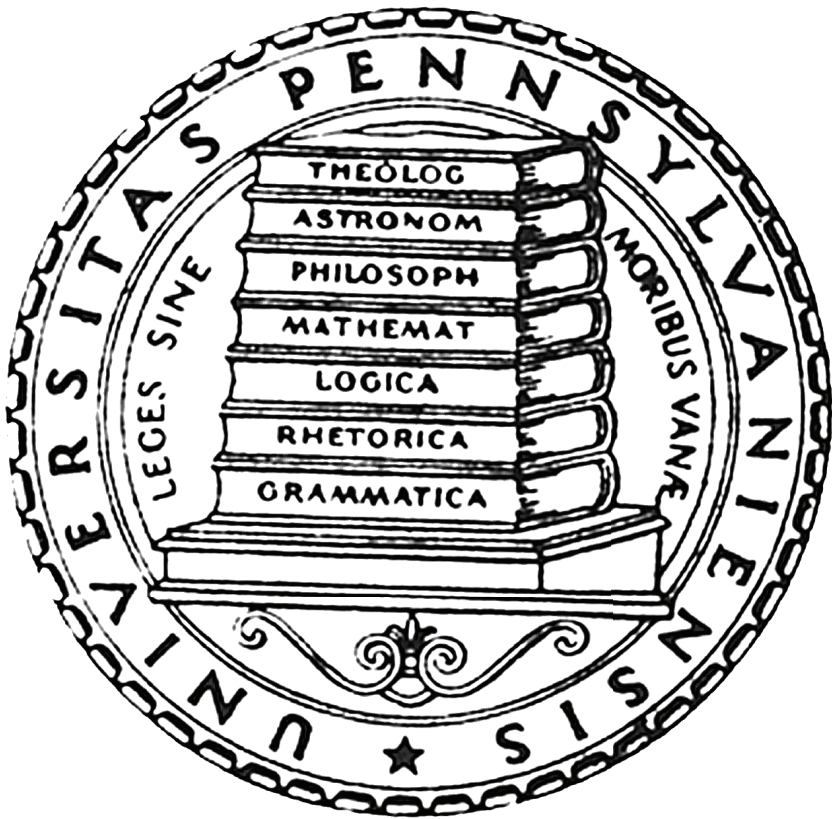
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Letter from the Editors

Dear Reader,

Though it seems it was only yesterday we gathered to inaugurate the first issue of PULJ, we are proud to welcome you to the second chapter of what we hope will become an enduring legacy. In the pages to follow, you will find a discussion of crowdfunding as it relates to South African securities law, a historical exposé of the broad judicial scope of the Star Chamber Court – a famously tyrannical royal English court, and finally, an examination of the European Union’s (EU) legal autonomy following the decision to cede authority on cases regarding fundamental human rights to the European Convention of Human Rights (ECtHR).

Authored by a student from Johannesburg, the first piece is an analysis of crowdfunding and its place in South African securities legislation. With a largely investment-oriented analysis of crowd finance and its growing role in small to medium business creation, the piece first contrasts crowdfunding in South Africa with its peer market in the United States before moving into a discussion on how such investment is currently regulated and addressed by legislative bodies. Through an extensive analysis of the legislative concerns at hand, the author walks through some of the strengths and disadvantages of this novel funding platform.

The second paper is historically oriented – a look at the Star Chamber Court of 17th century England and its tyrannical judicial reign over the nation. Originally instituted as an alternative to the common law courts of the time and as a legal protection against civil unrest, the court’s jurisdictional powers expanded until its closure. The piece traces the court’s origin and history, discussing the reasons for its creation as well as the arguments for its abolition. The author also dissects the court’s actions through case studies on its rulings on riot and defamation before closing on a discussion of how and why the court was abolished.

The EU recently made a landmark decision to adhere to a basic set of human rights as delineated by the ECtHR, a contentious ruling which brings the EU’s legal powers into question and is assessed in the last paper. Ceding control on issues of human rights to the ECtHR effectively grants the latter powers to externally review each of the EU’s constituent institutions. After a discussion of human rights within the domain of the EU and the significance of autonomy given the current relationship between the EU and the ECtHR, the author moves into a discussion of the EU’s accession to the ECtHR and contends that this is unlikely to detract from its autonomy as a legal entity.

In selecting pieces for an issue, we strive to maintain article variety while adhering to some unifying thread – in this case, international scope. As a result, this issue attempts to present an international perspective on laws and legal systems. We are confident the caliber of papers featured within will impress with their

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sharp analysis and ready insight.

We would like to extend a sincere thank you to our Sponsors and Faculty Advisory Board for their guidance and ongoing contributions, as well as professor Sanjay K. Chhablani for his elegant introduction. It is The Editorial Board's distinct honor to present the second issue of the Penn Undergraduate Law Journal.

Thank you,

A handwritten signature in black ink, appearing to read 'Tomas E. Piedrahita', with a stylized flourish at the end.

Tomas E. Piedrahita

A handwritten signature in black ink, appearing to read 'Gautam Narasimhan', with a long, sweeping flourish extending to the right.

Gautam Narasimhan

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INTRODUCTION

BAD MOON RISING: THE EXECUTION OF WALLACE FUGATE

Professor Sanjay K. Chhablani¹

I. INTRODUCTION

I first met Wallace “Buck” Fugate a couple of years after joining the Southern Center for Human Rights.² Walking through the barred doors at the Georgia Diagnostic and Classification Prison, an oddly named facility that houses Georgia’s death row, I saw an unassuming, thin, middle-aged man. Looking at my bespectacled client, whose thick, dark-rimmed glasses were a throwback to yesteryear, I found it difficult to understand the State of Georgia’s rush to extinguish his life.

The proceedings that led to Buck’s death sentence, after all, were fundamentally tarnished by significant errors. The entire trial had lasted less than two days, during which his lawyers raised no objections - not one. Their muted advocacy resulted in repeated failures to bring important information to the jury’s attention. These court-appointed attorneys were ignorant about capital punishment jurisprudence and lacked training. Not surprisingly, their entire presentation of mitigating evidence – the heart of most death penalty cases – lasted less than 27 minutes. The opportunity to bring to the jury all facets of a man’s life was reduced to less than the time Domino’s Pizza guaranteed delivery.

About a year after my visit with Buck, he was dead. Since his execution on August 16, 2002, I have thought much about Buck. And about the law.

Part I of this foreword discusses the notion of relative culpability in capital punishment jurisprudence and provides the contextual framework for examining some of the procedural flaws in Buck’s case.³ Part II explores defense counsel’s deficient performance with respect to the narrative presented to the jury about the underlying events in this tragic case. Part III continues the discussion of ineffec-

¹ Professor of Law, Syracuse University College of Law. I am grateful to Gautam Narasimhan and Tomas Piedrahita for inviting me to submit this introduction.

² Over the years, Buck was represented by several lawyers from the Southern Center, primarily Chris Johnson, Stephen Bright and Palmer Singleton. A documentary film about the Southern Center – *Fighting for Life in the Death-Belt* – captured the litigation unfolding during the last few months of Buck’s life.

³ There were many significant errors in Buck’s trial and much can be said about how the appellate courts reviewed these errors. However, due to space constraints, and because of the nature of this foreword, I have limited discussion to one trial issue (ineffective assistance of counsel) and one appellate issue (proportionality review).

tive assistance of counsel, providing an abbreviated look at some of the mitigating evidence about Buck's life that the jury was precluded from consideration due to the lawyers' ineffectiveness. Finally, Part IV discusses the deficient proportionality review conducted by the appellate court.

II. RELATIVE CULPABILITY

Some narratives about the death penalty are relatively easy for audiences to engage with. Cases where capital defendants are morally blameless present a context in which observers are more readily willing to take a critical look at problems that may have arisen. For example, John Thompson's case – a case where an innocent man spent almost two decades on death row, and came within weeks of execution, before a private investigator uncovered exculpatory blood evidence⁴ – proved to be a ready lens for a needed conversation about prosecutorial ethics and the need for a vigilant judiciary that ensures prosecutorial compliance with fundamental constitutional norms.⁵

Other narratives, far more common in occurrence,⁶ are more challenging for audiences to engage with. When a capital defendant has engaged in indefensible, morally condemnable conduct, for some in the audience any meaningful inquiry into underlying problems appears foreclosed. For example, while many around the country recoiled in horror at the tortured death of Clayton Lockett – a case where a botched execution attempt left the defendant writhing in pain for a seemingly interminable amount of time, followed by a fatal heart attack – others could not have cared less

s.⁷ Lockett's clear guilt – he kidnapped, brutally beat and shot a nineteen year old young woman, and then buried her alive, and repeatedly raped another

⁴ See Raad Cawthon, *Lawyers' Digging Earns Death-Row Inmate a Reprieve*, PHILADELPHIA INQUIRER, June 7, 1999, at A1.

⁵ See Sanjay K. Chhablani, *Beyond Brady: An Eighth Amendment Right to Discovery in Capital Cases*, 38 NYU REVIEW OF LAW & SOCIAL CHANGE (2014); Samuel R. Wiseman, *Brady, Trust, and Error*, 13 LOY. J. PUB. INT. L 447 (2012).

⁶ While an unacceptably large number of capital cases involve defendants who are innocent, the vast majority of cases involve defendants who arguably are not. See Samuel R. Gross, Barbara O'Brien, Chen Hu & Edward H. Kennedy, *Rate of False Conviction of Criminal Defendants who are Sentenced to Death*, PROCEEDINGS OF THE NATIONAL ACADEMY OF SCIENCES OF THE UNITED STATES OF AMERICA, April 28, 2014

(available at <http://www.pnas.org/content/early/2014/04/23/1306417111.full.pdf+html?sid=498f93e6-6d68-4a95-b4a1-9b444f4f66cf>, last visited on May 12, 2014) (conservatively estimating that 4.1% of inmates sentenced to death may be innocent).

⁷ One commentator wrote, "Lockett deserved to die for what he did. Everything else amounts to changing the subject, and it won't convince me otherwise." See Jonah Goldberg, *Clayton Lockett: A Just Execution, Regardless*, L.A. TIMES, May 5, 2014.

woman⁸ – led them to wash their hands of the matter.⁹

Buck's case, while not involving conduct comparable to Lockett's, falls in this latter category of narratives: those that can be challenging to engage with. This case arose out of an altercation between Buck and his ex-wife, Pattie, a few months after their divorce had ended a marriage of over twenty years. On a Saturday morning, having been told that his teenage son Mark's car had mechanical problems, Buck went to his former house to fix the car. He did not expect Pattie or Mark to be there that day because Pattie had told him they would be in South Carolina for the weekend. However, Pattie and Mark, whose plans had changed, came home shortly before 5:30 p.m. to pick up clothes before heading out to South Carolina. After seeing Mark's car with its hood up, a charger hooked up to a new battery, they found Buck in the house and an argument quickly escalated into a physical altercation between Buck and Pattie. During their struggle, Buck's gun accidentally discharged twice. The first shot went into a floor in the house; the second resulted in the fatal wound to Pattie. Buck drove off and turned himself into the police shortly afterwards.¹⁰

While there were significant problems with the prosecution's theory that Buck's shooting of Pattie was a planned, deliberate, execution-style killing (discussed in Part II below), there is no denying that Buck's conduct was wrong and that he was morally blameworthy. He violated a restraining order by going to his former home. While he went there with good intentions, that is, to fix Mark's car, it was nevertheless wrong for him to be there. While he thought that Pattie and Mark were going to be out of town that day, once they arrived at the house, his failure to leave immediately also was wrong - just as it undeniably was wrong for him to fight with Pattie and drag her from the house to the car. It was completely irrational for him to try to force her to go to the Sherriff's Office with him instead of calling for officers to come to the house and resolve the situation between Buck and Pattie. And though the gun accidentally discharged, having a loaded gun during an altercation, especially one that had already accidentally discharged once, was reckless.

While these latter narratives, including Buck's, are more challenging to

⁸ Erik Eckholm, *One Execution Botched, State Delays the Next*, N.Y. TIMES, Apr. 30, 2014, at A1.

⁹ See Katie Zezima, *Clayton Lockett Execution: Oklahomans Left Stunned at Criticism of Botched Execution*, INDEPENDENT ONLINE, May 4, 2014 ("But for . . . many other Oklahomans, Lockett . . . got exactly what he deserved. "It's like the Lord said: 'You reap what you sow'," said one customer who had just finished eating at a diner in Checotah, Oklahoma.")

¹⁰ The tragedy of Pattie's killing was compounded by Mark's senseless murder a year and a half later. In November 1993, Mark was bludgeoned to death by acquaintances who wanted to rob him, particularly of his car. See *Cross v. State*, 271 Ga. 427 (1999). The jury rejected the death penalty for Mark's killer, sentencing him to life without parole. *Id.*

Mark's death was a great source of trauma for Buck. I was talking with Buck once about his appeals. He told me that for him it was not about avoiding the death penalty. He said he was already dead on the inside – the day Mark died, he lost any desire to live. For him, the appeals were entirely about clearing his name so that it was known that he had not wanted to kill Pattie.

engage with, society at large, and legal actors in particular, are obligated to critically evaluate and rectify any significant errors that may have arisen in those cases. In part, this is because process matters. Justice, particularly in the context of American constitutional criminal procedure, is not just about the ends; it is as much, if not more, about the means.¹¹ Our failure to do what the law requires us to do¹² undermines the rule of law.¹³

Moreover, we are all defined by more than the worst thing we have done and we are all entitled to be treated with basic dignity.¹⁴ Applying the law fairly even to those maligned as being “the least” amongst our ranks is a mark of a decent, law-abiding and humane society.¹⁵

Finally, the constitutional framework of the modern death penalty in America requires a critical evaluation of cases even where defendants have engaged in blameworthy conduct. In a landmark decision in 1972, the Court had held that Georgia’s use of the death penalty violated the Eighth Amendment’s prohibition against cruel and unusual punishments.¹⁶ While each of the Justices in the majority wrote a separate opinion, each “based his decision at least in part on the arbitrary results of [Georgia’s] capital punishment system”¹⁷ Four years later, when the Court revisited the constitutionality of the death penalty, while the Court accepted

¹¹ I have explored this idea in more depth in my prior work. See Sanjay K. Chhablani, *Disentangling the Sixth Amendment*.

¹² As one commentator explained with regard to Lockett’s death,

One of the arguments . . . goes this way: Lockett deserved to suffer; his victim certainly did But the law doesn’t really care that some people want death row inmates to suffer horrible brutal deaths. The law bars cruel and unusual punishment. When untested secret drug protocols are tried out on gasping, jerking prisoners, that is the definition of cruel and unusual. That is engaging in torture

Dahlia Lithwick, *When the Death Penalty Turns Into Torture*, SLATE, Apr. 30, 2014.

¹³ In the context of Lockett’s botched execution, another commentator observed that “[u]ntil those blinds are raised, until this process becomes transparent in Oklahoma and everywhere else, it is unworthy of a nation that teaches its children about civilization and a rule of law.” Andrew Cohen, *How Oklahoma’s Botched Execution Affects the Death-Penalty Debate*, THE ATLANTIC, Apr. 30, 2014.

¹⁴ As Bryan Stevenson explained,

I believe each person in our society is more than the worst thing they’ve ever done I believe if you tell a lie, you’re not just a liar. If you take something that doesn’t belong to you, you’re not just a thief. And I believe even if you kill someone, you are not just a killer. There is a basic human dignity that deserves to be protected.

William M. Bowen, Jr., *A Former Alabama Appellate Judge’s Perspective on the Mitigation Function in Capital Cases*, 36 Hofstra L. Rev. 805, 807-08 n.13 (2008) (citation omitted).

¹⁵ See Stephen B. Bright, *Neither Equal Nor Just: The Rationing and Denial of Legal Services to the Poor when Life and Liberty are at Stake*, 1997 ANN. SURV. AM. L. 783, 834 (1997) (“[T]hose accused of crimes are neither “animals” nor “subhuman,” but human beings who are more than the worst thing they did in their lives.”). Sister Helen Prejean also has eloquently voiced the same perspective. See Michael E. Tigar, *Missing McVeigh*, 112 MICH. L. REV. 1091, 1108-09 (2014).

¹⁶ *Furman v. Georgia*, 408 U.S. 238, 239-40 (1972) (per curiam).

¹⁷ Corinna Barrett Lain, *Furman Fundamentals*, 82 WASH. L. REV. 1, 15 (2007).

some subsequently revised death penalty statutes,¹⁸ the Court struck down the two state statutes that imposed a mandatory death penalty.¹⁹

Even though on its surface it appeared that imposing a mandatory death penalty would address the concerns about arbitrariness, the Court rejected these statutes in part because they imposed punishment solely based on the defendant's conduct. The Court observed that imposing punishment without taking into account one's character "treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death."²⁰ The Court explained that mandatorily imposing the "ultimate punishment of death" would not take into account "the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind."²¹

Over the next three decades, this right to individualized sentencing has become the "pillar of a fundamentally different capital system."²² Being faithful to it requires us to engage even with the narratives of capital defendants who have engaged in morally blameworthy conduct.

III. A TWO-DAY TRIAL

"[T]he most fundamental right to the interests of defendants in the Sixth Amendment, and indeed in the Bill of Rights, is the right to counsel and, of course, effective counsel."²³ This is all the more so in capital cases, where the difference between a defendant who gets life in prison and one who gets death often comes down to the quality of counsel.²⁴

Despite the broad recognition of the importance of the right to counsel, there is a widespread problem with the quality of counsel provided to indigent

¹⁸ *Gregg v. Georgia*, 428 U.S. 153 (1976) (upholding Georgia's statute); *Proffitt v. Florida*, 428 U.S. 242 (1976) (upholding Florida's statute); *Jurek v. Texas*, 428 U.S. 262 (1976) (upholding Texas' statute).

¹⁹ *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Roberts v. Louisiana*, 428 U.S. 325 (1976).

²⁰ *Woodson*, 428 U.S. at 304.

²¹ *Id.*

²² Carol S. Steiker & Jordan M. Steiker, *Miller v. Alabama: Is Death (Still) Different?*, 11 OHIO ST. J. CRIM. L. 37, 42 (2013).

²³ Robert P. Mosteller, *The Sixth Amendment Rights to Fairness: The Touchstones of Effectiveness and Pragmatism*, 45 TEX. TECH L. REV. 1, 30 (2012).

²⁴ See Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime But for the Worst Lawyer*, 103 YALE L.J. 1835 (1994).

defendants.²⁵ Buck's death sentence illustrates the consequences of the criminal justice system's failure to ensure adequate representation by counsel.

Prior to Buck's two-day trial, the lawyers assigned to represent him, although members of the Georgia bar, functioned as little more than spectators. These lawyers made no effort to work up the case. They refused to seek funds for an investigator or an expert even when prompted to do so by the trial judge. Indeed, the idea of using an investigator or expert in a case involving an indigent client was not part of their experience.²⁶ (One of the lawyers testified that in his more than forty years of practice, he had never used an investigator, and, while he may have used a doctor once, could not specifically recall ever having an expert witness.) They filed only three pre-trial motions, all boilerplate, only one of which cited a case.

The lawyers' inadequate preparation was reflected in their failure even to try to negotiate a plea bargain. One might have thought that being a former prosecutor would have made Buck's lawyer the perfect actor to negotiate with the District Attorney's office. However, that was not the case for this lawyer. He did not even try to seek a resolution less than death.

The lawyers' lack of meaningful advocacy prior to trial was mirrored by their muted performance at trial. They did not object even one time during the trial.²⁷ Nor did they seem familiar with the evidence in the case. Their lack of preparation and engagement allowed the prosecutor to paint a misleading picture of the events. Instead of seeking death for a killing that occurred during the course of a domestic dispute between two persons whose marriage of twenty years had recently ended, the prosecutor asked the jury to impose death for an execution-style

²⁵ In previous work, I have catalogued the crisis in providing effective assistance of counsel to indigent defendants. See Sanjay K. Chhablani, *Chronically Stricken: A Continuing Legacy of Ineffective Assistance of Counsel*, 28 ST. LOUIS U. PUB. L. REV. 351 (2009). Besides noting the role of inadequate resources, lack of training and crushing workloads, *see id.*, I have also discussed the role of Supreme Court jurisprudence in creating the conditions for this crisis, *see id.*, and have offered an alternate construction of the right to effective assistance of counsel. See Sanjay K. Chhablani, *Disentangling The Right To Effective Assistance Of Counsel*, 60 SYRACUSE L. REV. 1 (2009). The Eleventh Circuit Court of Appeals' approach to effective assistance of counsel claims, *see Chandler v. United States*, 218 F.3d 1305 (11th Cir. 2000) (en banc), is even more doctrinally problematic.

²⁶ Guideline 5.1.1.A.v. of the advisory American Bar Association's Guidelines for the Appointment and Performance of Counsel In Death Penalty Cases in effect at the time of Buck's trial (hereinafter "1989 ABA Guidelines") noted that lead counsel in a capital case should be "familiar with and experienced in the utilization of expert witnesses and evidence, including, but not limited to, psychiatric and forensic evidence." (available at http://www.americanbar.org/groups/committees/death_penalty_representation/resources/guidelines.html) (last visited on May 11, 2014). See also Guideline 11.4.1.D.7. (noting that counsel should secure the assistance of experts when appropriate).

²⁷ Besides the issues discussed in this Foreword, there were numerous other significant errors that should have been objected to by the lawyers. These errors included problematic jury instructions about mitigation evidence. See *Brief of Appellant*, 1993 WL 13035040 (submitted in connection with *Fugate v. State*, 431 S.E.2d 104 (Ga. 1993)).

killing conducted after a premeditated attack by a defendant who lay-in-wait for his victim. The role of defense counsel in failing to correct each of the three components of this misleading narrative is discussed below.

A. Alleged Pre-planned Attack

First, the prosecutor argued that this was a pre-planned attack, with Buck breaking into the house and waiting until Pattie returned later that day. Buck, on the other hand, steadfastly maintained that he did not expect Pattie to be home that day. He explained that she had told him she was going away to South Carolina that weekend and had given him a note with the phone number to the motel where she would be staying.

Buck's version of events was corroborated by two pieces of evidence. First, there was the actual note given to him by Pattie. Buck said that this note was in the pocket of the red flannel shirt he was wearing that day. Second, there were phone records that showed that Buck called the motel in South Carolina from the house.

Faced with this physical evidence, the prosecutor resorted to blatant misrepresentations that went unchallenged by the lawyers. With regard to the note in the pocket of the red flannel shirt, the prosecutor claimed that the red flannel shirt did not exist and was simply a figment of Buck's imagination. Buck, the prosecutor argued, was a "liar" who could sell the "Golden Bridge."

As the prosecutor was making these claims, Buck's lawyers had in their possession the crime scene photos. These photos clearly show a red flannel shirt on the seat of the van Buck was driving. Had the lawyers looked at the photos, they would have been able to challenge the prosecutor's misrepresentation of the evidence and rebut the attacks on their client's credibility.

With respect to the phone records showing calls to the motel in South Carolina, the prosecutor asserted that, rather than getting the number from a note given to him by Pattie, Buck had found the number on a notepad lying by the phone in the house. However, the prosecutor offered no evidence to support the existence of any such notepad. Indeed, the crime scene photographs of the home and its contents failed to show any such notepad. Nonetheless, Buck's lawyers failed to object or point out the lack of evidentiary basis for the prosecution's claim.

B. Alleged Intentional Shooting

Second, to rebut Buck's consistent statement that the gun discharged accidentally, the prosecutor introduced expert testimony to argue that the shooting had to be intentional. The state's expert asserted that the gun could only discharge in one of two circumstances: either it required great pressure on the trigger or it had to be cocked ahead of time. Either way, the prosecutor argued, the shooting would

have been the result of deliberate action.

The jury was thus left with Buck's testimony, on the one hand, and the state's expert testimony on the other. Missing was any defense expert testimony that would have provided a means for testing the state's expert testimony and that would have corroborated Buck's consistent statements (from the moment he turned himself in to the police through his testimony at trial) that the gun discharged accidentally.

This is not because defense expert testimony was not available. Rather, defense counsel's failure to seek funds for an expert, solicit expert opinion, and contact the gun manufacturer left these lawyers with no clue that there was critical information to share with the jury.

Had the lawyers consulted a firearms expert, they would have discovered that the gun had a design defect that often caused it to become unintentionally cocked and subject to accidental discharge. Indeed, they would have learned that the gun manufacturer had taken the extraordinary step of removing the gun from the market because of this defect.

Defense counsel's ignorance of these critical facts about the gun at issue not only left them unable to meaningfully test the opinion offered by the state's expert, but it deprived Buck's testimony of crucial corroboration.

C. Alleged Execution-style Killing

Third, the prosecutor argued that the killing was not accidental as Buck testified, but was the result of an execution. Buck had testified that while he was sitting in the van, Pattie kicked him in the chest, making him fall back and slam his hand into the doorframe, which caused the gun to go off. Mark, on the other hand, testified that he saw his father "grab his mother – hold her by the hair, tilt her head back, put the gun in her face, and pull the trigger."

Mark's devastating description of an execution-type killing,²⁸ however, was completely at odds with what he said immediately after the shooting. At that time, Mark told the police, "I peeked around. I heard a shot. I saw my mother's head hit the ground. I could not tell if he held her head back or not."

Defense counsel did not bring Mark's contrary, and more timely, description of the events to the jury's attention. Despite having police reports that included Mark's prior statement, the lawyers made no use of those police reports at trial. The only thing counsel did during cross-examination was to elicit an admission

²⁸ During one conversation I had with Buck, I asked him why he thought Mark had given this different version of events at trial. Buck immediately and emphatically made one thing clear to me – he did not, in any way, blame Mark. He loved Mark and felt terribly guilty for having deprived Mark of both parents by his actions. Whatever guilt Mark may have felt after seeing his mother die in front of him or pressure he may have felt after living with Pattie's family after her death, it was his (Buck's) fault, he told me.

from Mark that he “did not see the bullet hit her face, because I blinked my eyes at that moment when he pulled the trigger.” While this impeachment of Mark’s testimony was a start, it did not dispel the thrust of Mark’s testimony that he allegedly saw Buck pull Pattie’s head back and shoot.

Moreover, defense counsel also did not bring to the jury’s attention the autopsy report that also contradicted Mark’s trial testimony. The medical examiner had expressly stated in the autopsy report that “this is a distant gunshot wound,” and that there was a “distant-type gunshot wound to forehead.”²⁹

Buck’s actions were clearly wrong and he deserved significant punishment.³⁰ But the jury that sentenced him should not have done so based on a gross misrepresentation of what had happened.

IV. LESS THAN 27 MINUTES OF MITIGATION

In capital cases, before the death penalty is imposed, “the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense”³¹ In this context, “[i]t is important to emphasize that mitigating evidence . . . is not intended to excuse, justify, or diminish the significance of what [was] done, but to help explain it, and explain it in a way that has some relevance to the decision capital jurors must make about sentencing.”³²

Given the central role of individualized sentencing and mitigating evidence in the constitutional framework of the modern death penalty, the Supreme Court has held that juries must “not be precluded from considering, as a mitigating factor, any aspect of a defendant’s character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than

²⁹ At trial, the medical examiner testified that the gun was not necessarily “distant.” Defense counsel, who later claimed that this testimony came as a “total surprise,” failed to use the contrary statements in the autopsy report in cross-examining the witness.

³⁰ One year after Buck’s trial, Georgia enacted a statute that allowed defendants to be sentenced to life imprisonment without parole. See Don Plummer, *Tokars Case May Prompt D.A. to Challenge New Law*, ATLANTA JOURNAL CONSTITUTION, June 24, 1993, at C4 (noting that the new law authorizing life without parole went into effect on May 1, 1993). Three jurors submitted signed affidavits during clemency proceedings stating that they would have chosen life without parole as a sentence for Buck instead of the death penalty had they been given that option at the time of Buck’s trial.

³¹ *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (plurality opinion in part) (quoting plurality opinion in *Woodson v. North Carolina*, 438 U.S. 586 (1978)). See also William W. Berry, *The Mandate of Miller*, 51 AM. CRIM. L. REV. 327, 335 (2014).

³² Craig Haney, *The Social Context of Capital Murder: Social Histories and the Logic of Mitigation*, 35 SANTA CLARA L. REV. 547, 560 (1995).

death.”³³ In Buck’s case, while no statute or judicial ruling deprived the jury of an opportunity to consider mitigating evidence, the actions (or rather, omissions) of the court-appointed, state-paid, defense counsel did so.

Buck’s lawyers were shockingly ignorant of the law. While one lawyer professed not to remember case names, the other lawyer testified in post-conviction proceedings that he had never heard of seminal Supreme Court cases about the death penalty.³⁴ In fact, this lawyer could not name any criminal law decision from any court. Their ignorance also extended to the practical skills necessary for a capital sentencing proceeding – neither had attended any training or seminar about how to prepare and present a case in mitigation.³⁵

To compound their ignorance and lack of training, the court-appointed lawyers were confused as to their individual responsibility for contacting witnesses and gathering mitigating evidence. Moreover, they waited until the month of trial to marshal mitigating evidence.³⁶ And when they did start investigating, they largely ignored the list of 34 proposed witnesses that Buck had put together. To the limited extent they attempted to contact witnesses, they did not memorialize in writing anything they learned from the few potential witnesses contacted.

Not surprisingly, then, after waiving opening statement at the sentencing proceeding, the lawyers called only four witnesses, whose cumulative testimony filled less than twenty pages of the transcript. Three of the witnesses were asked only their opinions of Buck’s character and propensity for violence, and the sentence he should receive. One of these witnesses testified that Buck had a “rather well character.” Another testified that Buck was “mighty quiet” and “a mighty hard worker.” The lawyers also called Buck’s mother as a witness, eliciting her conclusions that Buck had been a good, non-violent child, that he had always been employed, that he was a good father, that many of the problems in the marriage were the fault of his wife, and that she did not want him sentenced to death.

The entire penalty phase presentation lasted less than 27 minutes. This

³³ *Id.* at 604. *See also* Eddings v. Oklahoma, 455 U.S. 104, 113-14 (1982) (“Just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, as a matter of law, any relevant mitigating evidence.”). For a discussion of how the Court’s capital sentencing jurisprudence regarding mitigating evidence relates to non-capital sentencing, see Richard A. Bierschbach & Stephanos Bibas, *Constitutionally Tailoring Punishment*, 112 MICH. L. REV. 397 (2013).

³⁴ This lawyer had not heard of *Furman v. Georgia*, 408 U.S. 238 (1972), *Gregg v. Georgia*, 428 U.S. 153 (1976) or *Lockett v. Ohio*, 438 U.S. 586 (1978).

³⁵ 1989 ABA Guideline 5.1.1.A.vi. stated that lead counsel in a capital case should “have attended and successfully completed, within one year of their appointment, a training or educational program on criminal advocacy which focused on the trial of cases in which the death penalty is sought.” *See* 1989 ABA Guidelines, *supra* Note 26.

³⁶ 1989 ABA Guideline 11.4.1.A. stated that “[c]ounsel should conduct independent investigations relating to the guilt/innocence phase and to the penalty phase of a capital trial. Both investigations should begin immediately upon counsel’s entry into the case and should be pursued expeditiously.” *See id.*

included the reading of the guilt phase verdicts. Counsel's presentation of evidence was so cursory that, when counsel started to talk about Buck's work history in his closing argument, the judge sustained the prosecutor's objection that defense counsel was referring to matters not in evidence.

As a result, the brief and conclusory opinion testimony provided the jurors little meaningful information about Buck's life and background from which they could form their own opinions about who Buck was as a person. Had the lawyers investigated and presented a proper mitigation case, they would have found a compelling narrative to dispel the notion that Buck needed to be executed.³⁷

Here is an abbreviated account of some of the information kept from the sentencing jury by the lawyers' ineffectiveness:

Buck was born in Iowa on November 26, 1949 to Gladys and Wallace Marvin Fugate Jr. and was the fourth of six siblings in a close-knit family. The family had moved to Iowa when Buck's father, who made a living as a farm laborer, had struggled to make ends meet by raising tobacco in Kentucky. Buck's father had hoped that things would be better on Iowa's potato and corn farms. Their struggles continued and, when Buck was four years old, his family moved to Ohio, living and working on farms.

During these formative years, Buck helped his parents work the farm. After returning home from school, he would help milk and feed cows, hogs, sheep, and horses. The end of the school year brought even more work since farming was a seasonal occupation: the summers were taken up by the additional work of harvesting numerous fields of wheat and corn, putting up bales of hay, putting feed for the animals up in the silos, and canning and preserving the family's own food supply.

Shortly after his last year in high school, Buck moved to Georgia where he worked until he joined the United States Navy in 1968. After leaving the Navy, he moved to Macon, Georgia, where he met Pattie Nelson, marrying her in 1970.

Buck and Pattie had a son in 1975, Wallace Marvin Fugate, IV, whom they nicknamed Mark. Mark, the only child the Fugates was the center of his parents' attention.

Several neighbors, all of whom were very close to the family, remembered Buck and Pattie fondly and were shocked at the events that led to Pattie's death.

One neighbor who formed a close relationship with Buck and Pattie, Christine Mimbs, often invited them over to use her swimming pool and remembered them being together, playing and having fun with Mark. She also saw the Fugates work closely together on projects, including building their house, and it was clear to her that Buck really loved Pattie. Mrs. Mimbs could also tell that Buck

³⁷ 1989 ABA Guideline 11.8.6.B. listed the following as topics counsel should consider presenting in mitigation: family and social history, employment and training history, and lack of criminal record. *See id.*

and Mark had a very loving relationship. Buck did everything he could for Mark. He taught Mark how to swim and she saw Buck and Mark working together on projects in the backyard, such as the pontoon boat they used for rafting trips on which she often joined them.

Another neighbor, Jack Deason, also forged a very close connection to them. He saw Buck and Pattie work closely together to raise money for the volunteer fire department and believed that they had a close relationship, having never seen Buck lose his temper with his wife. He remembered Buck as very generous, bringing Mr. Deason's family vegetables from his garden and helping them fix things whenever they needed to. He also remembered Buck as a very good worker, one who could fix everything from a washing machine to an air conditioner to a car and. Like a Good Samaritan, Buck never asked for anything in return for helping his neighbors. Mr. Deason also got to know Pattie very well and considered her a friend. He remembers that Buck treated Pattie very well during their marriage.

It was not just neighbors who formed close relationships with the Fugates during their marriage. Over the course of almost two decades, several employers and co-workers also got to know them well.

Milton Brown, the Executive Vice President of Georgia Steel, worked with Buck for at least ten years. Mr. Brown used to supervise Buck's supervisors and in that capacity learned that Buck was a "great worker and a good mechanic. He was always on the ball and always on the job." Buck always got along well with his co-workers, with no one ever having reported any problems while working with him.

Mr. Brown also developed a close relationship with Buck outside work. While Mr. Brown visited the Fugates at their house four or five times, Buck used to take Pattie and Mark over to Mr. Brown's house much more often so that Pattie could ride Mr. Brown's horses. Mr. Brown, who remembered Buck taking care of Mark while Pattie rode the horses, could see that Buck was always affectionate toward Mark and truly loved him. Mr. Brown also saw that Buck loved Pattie, often going out of his way to do things to make her happy.

As the years passed, Buck honed his skills as a carpenter and started working for a number of people in town. At that time, Pattie was working as a reporter for the Eatonton paper. It was through her work that they met Darryl and David Aldridge in the late 1980s and started working for them at their housing development by Lake Oconee. During this time, the Aldridges interacted with Buck two to three times a week and found that Buck was not only able to do all the woodwork in a house, including putting in hardwood floors and building spiral staircases, but was also able to do other things on the cabins, such as the electrical work. They found Buck to be an extremely hard worker, a man who would always get to the job site early in the morning and who would only stop working late in the evening. The Aldridges also remembered Buck as detail-oriented, taking pride in his work, and demonstrating initiative by doing things beyond the demands of his job.

Among the witnesses who could have shed light about Buck's life as his marriage with Pattie was ending were Mr. and Mrs. Woodall. Buck met the Woodalls, who lived next door to Buck's father, toward the end of the 1980s. Mrs. Woodall, who used to work at Warner Robins Air Force Base, got to know Buck well and felt that he "was the type of person who would give you the shirt off his back." Mr. Woodall began to see Buck and Mark when they spent time at Buck's father's house. He saw Buck taking the time and effort to build a house for Pattie and buy a four-wheeler for his son, and could tell that Buck was very family-oriented and loved his wife and son. Mr. Woodall also observed that Mark was very close to his father. Mark used to go to Mr. Woodall's house to ride go-carts with Mr. Woodall's children and always talked about his father.

So, when Buck and Pattie separated, Mr. Woodall was not surprised that Buck seemed to be a different person. Whenever Mr. Woodall saw Buck at his father's house after the separation, Buck seemed depressed. He did not want to talk about family anymore and also stopped going to Mr. Woodall's house. Buck's depression got serious enough to worry Mr. Woodall, who believed that Buck was reacting to the separation from his wife just as Mr. Woodall had reacted when he had lost his wife – Buck stopped caring about himself.

Mrs. Woodall echoed Mr. Woodall's perception about the effect of the separation on Buck. After his separation from Pattie, Buck appeared to Mrs. Woodall to be a different person. He was extremely depressed and shut himself off from everyone, becoming reluctant to talk anymore. It was as if all of a sudden Buck didn't know anyone. Mrs. Woodall felt that, particularly during the last couple of weeks before Pattie was killed, Buck appeared to be "out of it." When she heard about Pattie's death, Mrs. Woodall was extremely shocked that Buck had hurt anyone, particularly in his family. She had always known him to be a person who cared deeply about the people in his life and who made an effort to do good things.

Finally, there was Connie Jo Roach and her girls. Buck and Pattie had first befriended Mrs. Roach, who used to work as a used car salesperson, in the mid-1980s; they became good friends with Mrs. Roach after she had sold them several cars. Over time, due to Mrs. Roach's marriage drifting apart around the same time as the Fugates were getting separated, Mrs. Roach became much closer to Buck. She vividly remembered how good Buck was to her two young daughters, helping them with their homework and insisting that they finish their schoolwork before watching any TV. Buck played with the girls in the yard and Mrs. Roach also remembered the times he played cards with her and her daughters until it was time for the girls to go to bed. All four of them often played outdoors in the creek and went together to pick strawberries. In fact, over the course of this time, Buck became a father figure for Mrs. Roach's daughters. As he was losing one family, he was becoming part of another.

Rather than being the "worst of the worst," even this abbreviated history of Buck's life, shows that he was:

a man who had no criminal conviction until these tragic events;
a simple man of humble beginnings;
a man who deeply loved his wife and built a happy life with her before
their marriage unraveled;
a man who cherished his son and raised him with a father's dotting love;
a man whose neighbors remembered his kindness, generosity and
friendship;
a man whose employers and co-workers remembered his hard work, skill
and collegiality; and
a man who fell into a deep depression as his twenty-year marriage
unraveled in acrimony.

None of the above diminishes the aggravating nature of Buck's conduct. But, in a legal context where one's conduct does not mandatorily lead to the death penalty, the jurors were entitled to know the tapestry of Buck's life before they condemned him to die, not just the gloss from the conclusory opinion testimony of a few character witnesses offered by the court-appointed lawyers at trial.³⁸

V. PROPORTIONALITY REVIEW

When the Supreme Court in 1976 held that Georgia's newly enacted death penalty statute did not violate the Eighth Amendment's prohibition against Cruel and Unusual Punishment, the Court pointed to several features of the statute that helped protect against the arbitrary imposition of the death penalty.³⁹ One of these features was proportionality review: the statute required the Georgia Supreme Court to determine on appeal whether the death penalty imposed in the specific case "is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant."⁴⁰

In some senses, the notion of proportionality review appears unseemly. After all, every human life is equal. However, not every killing results in the death

³⁸ Three jurors submitted signed affidavits during clemency proceedings attesting to the fact that they would not have imposed death had they known all the facts developed after trial.

³⁹ *Gregg v. Georgia*, 428 U.S. 153 (1976).

⁴⁰ *Id.* at 167; *id.* at 198 (terming the proportionality review requirement as "an important additional safeguard against arbitrariness and caprice"). See also *Zant v. Stephens*, 462 U.S. 862, 876, 880 (1983).

penalty. In fact, only about two percent of murderers are punished by death.⁴¹ Given the Supreme Court's concern about the arbitrary infliction of the death penalty, proportionality review can be a key tool in ensuring that the few defendants who are marked for death are the ones most deserving of that punishment.⁴²

In keeping with the statutory scheme, the Georgia Supreme Court at first evaluated the proportionality of a death sentence by comparing the case at hand to three sets of cases: (1) cases in which the death penalty was imposed; (2) cases in which the death penalty was sought by the prosecutor but not imposed by the jury; and (3) cases in which the prosecutor could have sought the death penalty, but chose not to.⁴³

However, the Georgia Supreme Court changed the way it conducted proportionality analysis around the time the United States Supreme Court rejected a challenge to California's death penalty statute due to its failure to include proportionality review.⁴⁴ In the years leading up to Buck's case, the Georgia Supreme Court only compared the case at hand to cases in which the death penalty was actually imposed.⁴⁵

Justice Stevens recently cautioned that "the likely result of such a truncated review – particularly in conjunction with the remainder of the Georgia scheme . . ." is that the death penalty will be imposed arbitrarily or discriminatorily.⁴⁶ Buck's case proves that point.

Had the Georgia Supreme Court conducted a proper proportionality review, the arbitrariness of Buck's death sentence would have been very evident. Consider just one example. Less than a year before Pattie's death, Brent Farley, who had previously been convicted of manslaughter, killed his girlfriend in an execution-like shooting to her head after his release from prison.⁴⁷ Farley also shot the girlfriend's lover in the head at the same time, but that person survived. Despite dealing with a defendant who had a prior criminal conviction, the same District

⁴¹ See <http://deathpenaltyinfo.org/arbitrariness> (last visited May 11, 2014). For example, in 1991, the year Pattie was killed, there were over 24,000 murders and non-negligent manslaughters across the country. See <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2010/crime-in-the-u.s.-2010/tables/10tbl01.xls> (last visited May 11, 2014). And in 1992, the year Buck was sentenced to death, 265 defendants nationwide received the death penalty. See <http://www.bjs.gov/content/pub/pdf/cp92.pdf> (last visited May 11, 2014).

⁴² See William W. Berry III, *Practicing Proportionality*, 64 FLA. L. REV. 687 (2012).

⁴³ See *Horton v. State*, 295 S.E.2d 281, 289 (Ga. 1982).

⁴⁴ See *Walker v. Georgia*, 129 S.Ct. 453, 456 (2008) (Stevens, J., dissenting from denial of certiorari) (observing that the Georgia Supreme Court's "practice began to change around the time this Court decided *Pulley v. Harris*, 465 U.S. 37 (1984).").

⁴⁵ *Id.*

⁴⁶ *Id.* at 457.

⁴⁷ See *Farley v. Georgia*, 400 S.E.2d 626 (Ga. 1991).

Attorney responsible for Buck's case decided to not even seek the death penalty.⁴⁸ Farley was sentenced to life imprisonment.

Similarly, had the Georgia Supreme Court conducted a proper proportionality review as initially envisioned, it would have found that Georgia had not resorted to the death penalty in numerous cases far more aggravated than Buck's. Such cases included the killing of a child where that child was violently sexually assaulted prior to being killed; the killing of multiple victims; the killing of a victim who was violently beaten with hand-held implements; the killing of a victim where the defendant wanted to mimic the movie, "Natural Born Killers"; a killing where the defendant was motivated out of racial animus; a killing where the defendant was motivated by a desire to avoid being captured by law enforcement personnel; and a killing where the defendant subsequently went on a crime spree.

Moreover, even the proportionality review that the Georgia Supreme Court actually conducted was deeply flawed. The Court compared Buck's case to seven others, none of which were similar to his.⁴⁹ Two cases involved multiple murders with multiple gunshot wounds. One case involved the execution-style killing of an informant in a drug ring, while another involved the killing and mutilation of a stranger in the course of a robbery. While one case involved the murder of a girlfriend – she was shot once in the face, shot again, and finally, after being put in the trunk and driven away, shot a third time – the defendant had been involved in a crime spree that included the murder of another woman two days later. Another case, involving the killing of a relative of the defendant's estranged wife, involved the torture of the victim, along with the rape and kidnapping of the defendant's

⁴⁸ Absent a statement by that District Attorney, it is impossible to ascertain his motive for seeking death in Buck's case but not in Farley's case. However, there are background circumstances that raise at least an appearance of impropriety. In the time between Farley's trial and Buck's trial, the Eleventh Circuit Court of Appeals reversed the denial of habeas corpus relief in a capital case involving that same District Attorney. See *Horton v. Zant*, 941 F.2d 1449 (11th Cir. 1991). In that case, the Court expressly found that, in addition to Horton's trial, the District Attorney had engaged in racially discriminatory behavior in at least two other instances, including being "the author of a now infamous memo designed to underrepresent blacks, women and all individuals 18-24 years old on Putnam County's grand and traverse juries." *Id.* at 1455-56 (citing *Amadeo v. Zant*, 486 U.S. 214 (1988)).

It was on the heels of this rare public shaming, that the District Attorney obtained a death sentence for Buck (a white defendant) after having refused to even seek the death penalty for Farley (an African American defendant). There is an appearance that this choice – seeking death against a white man when an African American committing a similar crime was spared – served to defuse the charge that the District Attorney was racially motivated in discharging his duties.

The bottom line is that, while there are no means to ascertain the District Attorney's motives, the Georgia Supreme Court did not even consider the possibility that such arbitrariness may have affected the decision to seek the death penalty for Buck. Despite being made aware of Farley's case, see *Brief of Appellant*, 1993 WL 13035040 (submitted in connection with *Fugate v. State*, 431 S.E.2d 104 (Ga. 1993)), it chose to limit its proportionality review to cases where the death penalty was actually imposed.

⁴⁹ See *Fugate v. State*, 431 S.E.2d 104 (1993).

wife. In another case, the defendant premeditatedly killed his wife for insurance money.

The arbitrariness of Buck's resulting death sentence is in keeping with the arbitrariness that is all too common in the administration of the death penalty across the country.⁵⁰

V. CONCLUSION

The week of Buck's scheduled execution, the litigation once again led to long nights at the office for everyone. I used to speak with Buck late most evenings, filling him in on the latest developments and then just talking in general. We talked about life, mostly his and Pattie's and Mark's.

It occurred to me one day that, rather than just hearing my voice on the other end of the line, he might prefer listening to some music. When I rushed home for a quick shower the next morning, I grabbed whatever "old" music I could find that I thought he might like. One CD was *Chronicle* by Creedence Clearwater Revival (CCR), a collection of their 20 greatest hits. With some of CCR's most popular songs having been released around the time Buck and Pattie first met and when they got married, I thought it might bring back good memories.

That evening, after I had finished bringing Buck up to speed on the latest developments in his case, I plugged in the CCR CD. It played in the background for a while. Then Buck stopped me mid-sentence. He said, "That's not a good omen, is it." Playing was *Bad Moon Rising*.

I had not paid close attention to the lyrics before, but as soon as Buck mentioned it, my heart froze.

*I hear hurricanes a blowing,
I know the end is coming soon.
I fear rivers overflowing,
I hear the voice of rage and ruin.*

*Well don't go 'round tonight,
It's bound to take your life,
There's a bad moon on the rise.*

*Hope you got your things together,
Hope you are quite prepared to die.*

⁵⁰ See Russell D. Covey, *Death in Prison: The Right Death Penalty Compromise*, 28 GA. ST. U. L. REV. 1085, 1091 (2012) ("Study after study concludes that the class of persons sentenced to death, and the class of persons actually executed, is not distinguishable, in terms of blameworthiness of the offenders or egregiousness of the crimes committed, from the class of persons sentenced to life without parole or who receive death sentences but are never executed.")

*Looks like we're in for nasty weather.
One eye is taken for an eye.*

The song went on. After some quiet moments, we picked up our conversation. Our mood was somber. I think we both understood that the end was near.

Two days later, Buck was dead. Strapped to a gurney, the State of Georgia extinguished his life.

As I think back on those days, my mind often wanders to Bad Moon Rising. I have come to see it not just as an omen of Buck's impending death, but also as an omen for where we are headed. When we are blinded by someone's misdeeds and allow him to be executed despite a trial plagued with fundamental infirmities, we all are the lesser for it. The conversation changes from what Buck did to who we are becoming.

ARTICLE

**THE LAW OF CROWDFUNDING:
CHALLENGES TO THE SOUTH AFRICAN
SECURITIES LAW - A COMPARATIVE PERSPECTIVE**

Philip de Beer

ABSTRACT

Investment crowdfunding is on the rise. In developing countries such as South Africa, this development has the potential to redress the exclusionary nature of access to entrepreneurial or venture capital. However, this can only be achieved if there is legal clarity on what is offered through these crowdfunding platforms. In this paper, I explore how investment crowdfunding might fit into the regulatory regime of South African securities. First, the various forms which these offers assume is considered. Second, a comparative analysis of benchmark jurisdiction is made and certain policy underpinnings flowing from that analysis are discussed. Third, I explore the possible regulatory ramifications of investment crowdfunding in South Africa. In sum, the activation of statutory regulation hinges on whether the offer is a security or not; this paper also offers guidance on how to make such determinations.

I. INTRODUCTION

There is in South Africa a need for entrepreneurial development, innovation and rapid capital formation to stimulate economic growth and stability. The emergent phenomenon of crowdfunding offers a valuable avenue for allowing entrepreneurs without access to traditional forms of business funding to obtain capital for their startups, and it gives smaller businesses whose funding needs are too small for these options a viable way to kick-start their operations. This is largely because crowdfunding allows entrepreneurs to punt their ideas to large numbers of potential funders (practically anyone with an internet connection), ask for contributions from each, and it allows them to dramatically lower the compliance and transactional costs of this process. This is significant for two main reasons.

The first is because it allows the average entrepreneur, regardless of social or economic standing, to find capital for a business venture when traditional business lenders, banks, venture capitalists and the like turn away almost all business plans received. Second, it would enable smaller communities – at a very low threshold of per capita monetary participation – to fund projects for those communities themselves, opening the door for the types of businesses that are far too small even to show up on the radar of the aforementioned funders. This would allow these communities to create jobs and to set up the types of businesses they may need: the laundromat, the hairdresser, the grocer, or the cellphone repair shop.

The economic potential of this concept cannot be ignored, but due to legal uncertainty on the matter, crowdfunding websites (the facilitators themselves) have been discouraged from creating these webbased services in South Africa. Accordingly, this paper will focus on crowd finance in the form of *investing* in businesses, mainly because other forms of crowdfunding raise far less contentious issues. Also, this type of investment, despite its complications, has the potential to play a major role in Small, Medium and Micro Enterprise (SMME)¹ business development in South Africa, which the government has strongly prioritised.² Thus, crowdfunding merits a more rigorous investigation.

To illustrate the legal issues that may flow from crowdfunding in South Africa, this paper will use an analysis of the market leader in the crowdfunding business, the United States, with a focus on its impact on securities law. Those issues will then be preliminarily discussed with the outlook of further, more definitive research.

¹ Small, Medium and Micro Enterprise

² Department of Trade and Industry: Republic of South Africa, *Small Medium Micro Enterprise Development*, (Department of Trade and Industry: Republic of South Africa), online at http://www.dti.gov.za/sme_development/sme_development.jsp (visited Sept 23 2013).

II. FUNDAMENTALS OF CROWDFUNDING

Before taking a closer look at the legal nature and ramifications of crowdfunding, it is important to establish a picture of what exactly crowdfunding is, how it takes place, and the forms in which it can be encountered. Section A looks at the basic forms of crowdfunding, provides an overview of the various ways a taxonomy of crowdfunding can be derived, and briefly investigates the current crowdfunding climate in South Africa.

A. Basic Premises

In the context of entrepreneurship within any country or market, finding a source of funding for a business venture is an extremely difficult task, and the conventional areas from which funding flows – typically venture capital, retained income or loans – are seldom available.³ This is mainly because these types of businesses exhibit a high level of uncertainty and expose investors to large amounts of risk in the face of asymmetrical management information, cutting off many of the traditional funding options despite the potential a particular business may have.⁴

This is especially true of young entrepreneurs who, despite innovative and potentially successful ideas, lack the business network, social placement, credit-history, collateral, or other prerequisites to accessing the capital that would make their ventures a reality. Coupled with this, an emerging trend in venture capital markets encourages a focus on investing in more developed businesses, rather than providing incubation for embryonic ventures, creating a so-called “funding gap” in the start-up market.⁵

Even if these early-stage businesses find a way to tap into banking or venture capital institutions, funding often must occur within strict regulatory regimes, and non-banking funders typically demand securities in exchange for their money, raising compliance costs well beyond any potential benefits.⁶

Crowdfunding offers a potentially powerful and versatile solution to this dilemma. The idea is an extension of the broader concept of *crowdsourcing*, which is defined as: (A) using an open or undefined group of collaborators (the “crowd”) to perform work usually performed by an employee or outsourced to an agent, by

³ C. Steven Bradford, *Crowdfunding and the Federal Securities Laws*, Colum Bus L Rev 1, 5 (2012).

⁴ Andy Ley and Scott Weaven, *Exploring Agency Dynamics of Crowdfunding in Start-up Capital Financing*, 17 Academy Entrepren J 85, 87 (2011).

⁵ Ley and Weaven, 17 Academy Entrepren J at 85 (cited in note 4).

⁶ Joan MacLeod Heminway and Sheldon Ryan Hoffman, *Proceed at Your Peril: Crowdfunding and the Securities Act of 1933*, 78 Tenn L Rev 879, 880 (2011).

way of an open invitation;⁷ or (B) merely using the crowd for feedback, ideas or solutions⁸ (e.g., the operating system *Linux*).⁹

Finding a circumscriptive definition of crowdfunding (which by its nature is new and constantly in flux) is difficult, but it is well defined as follows: “Crowdfunding involves an open call, essentially through the Internet, for the provision of financial resources either in the form of donation or in exchange for some form of reward and/or voting rights.”¹⁰

Crowdfunding has, with a reading of the above, alternatively been described as “... a process where entrepreneurs, artists, and non-profits raise money for their projects, businesses, or organizations by gaining the support of many people on the internet who collectively contribute money to projects to which they feel some affinity.”¹¹

Crowdfunding evolved out of a combination of crowdsourcing and the more familiar idea of micro-lending,¹² but it goes beyond this in leveraging the latent resources inherent in online social networks to provide new avenues for entrepreneurs to obtain capital.¹³ It also, generally speaking, has the additional characteristic that those who seek to be funded set a target amount and a deadline after which failure to raise that amount will result in a forfeiture of the money already contributed.

These networks are built to maximise users and therefore create the ability to communicate and interact *en masse*, allowing small start-up businesses to make minor funding requests but to receive those amounts in very high volumes.¹⁴ In the past, the costs of transaction with the general public in this way was far too high, but the advent of the internet has all but zeroed these costs,¹⁵ and doing business in this way has suddenly become not only viable but potentially advantageous.

⁷ Ley and Weaven, 17 *Academy Entrepren J* at 87 (cited in note 4).; Edan Burkett, *A Crowdfunding Exemption? Online Investment Crowdfunding and U.S. Securities Regulation*, 13 *Transactions: Tenn J Bus L* 63, 69 (2012).

⁸ Paul Belleflamme, Thomas Lambert, and Armin Schwienbacher, *Crowdfunding: An Industrial Organisational Perspective* *25-26 (unpublished paper prepared for the workshop *Digital Business Models: Understanding Strategies*, 2010), online at http://economix.fr/pdf/workshops/2010_dbm/Belleflamme_al.pdf (visited April 25, 2014).; Paul Belleflamme, Thomas Lambert, and Armin Schwienbacher, *Crowdfunding: Tapping the Right Crowd* (discussion paper at Center for Operations Research and Econometrics, 2012), online at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1578175 (visited April 25, 2014).

⁹ Bradford, *Colum Bus L Rev* at 28 (cited in note 3).

¹⁰ Belleflamme, Lambert, and Schwienbacher, *Tapping* *8 (cited in note 8).

¹¹ Burkett, 13 *Transactions: Tenn J Bus L* at 66 (cited in note 7).

¹² Bradford, *Colum Bus L Rev* at 27-29 (cited in note 3).

¹³ Ley and Weaven, 17 *Academy Entrepren J* at 86 (cited in note 4).; cf. also Joan MacLeod Heminway, *What is a Security in the Crowdfunding Era?*, 7 *Ohio St Entrepren Bus L J* 335, 357 (2012).

¹⁴ Thomas Lee Hazen, *Crowdfunding or Fraudfunding?*, 90 *NC L Rev* 1735, 1736-1737 (2012).

¹⁵ Bradford, *Colum Bus L Rev* at 5 (cited in note 3).

Crowdfunding therefore typically involves a web-based platform run by the crowdfunding enterprise itself that facilitates a partnership of the public (the eventual funders) and businesses or entrepreneurs who need funds to start a business, allowing the latter to incrementally solicit funds from the former.¹⁶ Whilst most forms of crowdfunding will use an intermediate party, such parties are not inherently necessary – rather, the decisive characteristic to be recognized is the relationship of many funders to one solicitor.¹⁷

Here it is prudent to define terms that will denote specific aspects of crowdfunding for the remainder of the paper:

Facilitator: The intermediary facilitating the match between the public and capital-seeker.

Platform: The web-based channel through which the facilitator runs the crowdfunding enterprise.

Participant: A business-seeking funding on a crowdfunding platform.

Subscriber: A member of the public or the crowd responding to the funding request. Here no technical meaning is intended, and it could denote, depending on the context, an investor, donor or other type of funder the venture may be calling for.

Venture: The business, product or any other project of a particular participant.

Interest: The content of the offer for the purposes of the subscriber, i.e., what the subscriber receives in return for responding favourably to the offer.

Offer: That which a particular participant is soliciting from the subscribers, i.e., an invitation to participate for a specified or unspecified contribution, including its purpose and the interest offered to potential subscribers.

The offers on the various existing platforms are multitudinous in nature. They range from unreciprocated donations (political, caused-based or merely charitable) to contributions towards the development and marketing of products. More recently, offers also include start-up capital for various ventures.¹⁸ Typically the interests correspond to the nature of the respective offers, such as products for product funding or some form of return on business capital.

Practically speaking, the system typically works as follows: participants publish their offers on the platform via the facilitator, and potential subscribers then peruse these offers and, depending on the offer and the interest, decide whether to

¹⁶ Heminway and Hoffman, 78 Tenn L Rev at 881 (cited in note 6).

¹⁷ Burke tt, 13 Transactions: Tenn J Bus L at 68 (cited in note 7).

¹⁸ Stuart R. Cohn, *The New Crowdfunding Registration Exemption: Good Idea, Bad Execution*, 64 Fla L Rev 1433, 1434 (2012).

respond. The facilitator then matches the parties and oversees the transaction.¹⁹

However, facilitators do not always play such a passive role and may be involved to a greater degree than standing as the proverbial venue for the party. They may also screen participants and offers, aid in the process of promoting the offers, create channels through which invested funds flow, help to administer interests, and manage administrative duties relating to the transaction or other ancillary matters.²⁰ They are therefore often less distanced from the transaction than it may appear and could play a potentially decisive role in whether or not transactions happen.

Despite having evolved from a combination of crowdsourcing and micro-finance, crowdfunding is distinguishable for two reasons: First, crowdfunding traditionally does not involve institutional lenders, and often no creditor relationship arises; second, the relationships that do arise are not bilateral but multilateral, that is, between one and many parties.²¹

Crowdfunding as characterized above has been quite successful in its brief past. A recent study found that the global crowdfunding market stood at around \$8 million and could reach the \$17 million mark by 2015.²² Another sets the average among of funds obtained at around \$28,583 and the maximum \$82 million,²³ and the crowdfunding website *Kickstarter* raised over \$15 million as of July 2010 for approximately 16,000 projects.²⁴ However, not all crowdfunding platforms have met the same success.

Offers, whether they seek capital investments in return for equity, take the form of loans to the participant, or offer a right to a portion of the revenues or profits, may be subject to regulation under financial or commercial law. In the U.S., certain types of crowdfunding offers may well constitute “securities,” and therefore they and the parties involved may fall under Federal law regulation.²⁵

The diverse spectrum of offers and interests prompted the American legislature to adopt Chapter III of the Jumpstart Our Business Startups Act (JOBS Act),²⁶ known as the Capital Raising Online While Deterring Fraud (CROWDFUND) Act,²⁷ to regulate the matter. But the provisions of this act may have only further complicated the matter.

¹⁹ Bradford, *Colum Bus L Rev* at 10 (cited in note 3).

²⁰ Heminway and Hoffman, 78 *Tenn L Rev* at 926-927 (cited in note 6).

²¹ Burkett, 13 *Transactions: Tenn J Bus L* at 67 (cited in note 7).

²² Mark DeCambre, *Why Crowd-funding is Set to Explode in Size over the Next Few Years*, Quartz (The Atlantic Media Company April 23, 2014), online at <http://qz.com/202090/why-crowd-funding-is-set-to-explode-in-size-over-the-next-few-years/>.

²³ Bradford, *Colum Bus L Rev* at 11 (cited in note 3).

²⁴ Burkett, 13 *Transactions: Tenn J Bus L* at 73 (cited in note 7).

²⁵ Heminway and Hoffman, 78 *Tenn L Rev* at 882 (cited in note 6).

²⁶ Jumpstart Our Business Startups Act, Pub L No 112-106, 126 Stat 306, to be codified in various section of 15 USC.

²⁷ Heminway, 7 *Ohio St Entrepren Bus L J* at 336 (cited in note 13).

This illustrates that the regulatory system is never quite up to speed with actual practices,²⁸ neither in terms of financial innovation nor the dealings of those who are unscrupulous about the law. This also demonstrates an important principle: markets move much faster than lawmakers, and this game of catch-up often causes regulators to opt for breadth as opposed to depth when they do react, with all sorts of unintended innovation-stifling consequences.

In light of this principle, the two overarching policy considerations that underlie such regulation – maintaining investor protection and market integrity – may indicate that crowdfunding should not be regulated under securities law.²⁹ Nevertheless, any broad securities regulation framework may end up applying to crowdfunding as an unintended consequence. This creates a need for targeted legislation.

As a final analysis, crowdfunding has several distinct advantages.³⁰ It may be able to offer an efficient and low-cost solution to the problem SMEs generally have had in adequately financing themselves. Funding may also be obtained quickly relative to the ordinary capital-raising routes. It allows investors to participate in economic activity hitherto inaccessible to them and can perhaps stimulate small business growth, a driver of macroeconomic growth, through the provision of capital in the “funding gap.”

However, crowdfunding also presents its problems.³¹ Due to the fluid and anonymous nature of the internet, crowdfunding may lack transparency and accountability, as its transactional environment lacks verifiable identity. It may also over-inform subscribers – information overload often makes investment decisions more difficult, rather than easier. Additionally, it opens up new avenues for fraud and ultimately may harm trust in broader financial markets.³²

In conclusion, two observations are salient. First, unless the crowdfunding phenomenon and its legal ramifications are better understood, one cannot mitigate its potential disadvantages. Second, crowdfunding cannot be effectively harnessed as a tool for economically advantageous and more allocatively efficient capital markets.

B. *A Workable Taxonomy*

Crowdfunding can be used to secure funding for a number of different purposes from the crowd, and has been used to do so in the past. As mentioned, its offers can be extremely varied along the spectrum between charity and equity for

²⁸ *Id.* at 336.

²⁹ Heminway and Hoffman, 78 *Tenn L Rev* at 884 (cited in note 6).

³⁰ *Id.* at 884.

³¹ *Id.* at 934-937.

³² Heminway and Hoffman, 78 *Tenn L Rev* at 934 (cited in note 6).

business or project development.³³ A number of crowdfunding taxonomies have therefore been suggested and will be discussed below.

The detailed taxonomy of Bradford breaks crowdfunding up into five models – donation, reward, pre-purchase, lending and equity.³⁴ The first is non-reciprocal, but the purpose need not be merely charitable. The second and third are grouped together, as the interest received falls short of a financial or investment interest but offers instead a perk or product in return for funding. The fourth is typically loans or peer-to-peer lending, with some models offering interest, mostly by way of notes. The final category contains offers in terms of which the interest received constitutes either equity, a share in profits or revenue or a combination of both.

Heminway broadly distinguishes non-profit from for-profit, whether there is an element of equity or investment in the traditional sense or not.³⁵ However, perhaps the term donation is more suitable: while the subscriber derives no benefit, the participant may utilise funds for a for-profit venture. Belleflamme suggests that non-charitable (or preferably “for-profit”) crowdfunding offers come in two forms: an invitation for consumers to pre-order the product or to fund an entrepreneurial venture in exchange for profit or equity.³⁶

Assuming that crowdfunding’s flexibility of offer is one of its great strengths, the best distinction in the context of for-profit crowdfunding is Burkett’s taxonomy, which divides the category into two broad models: patronage crowdfunding and investment crowdfunding.³⁷ The former rewards subscribers with gifts, products or perks, and the latter rewards subscribers with other interests, such as equity or even creditor status.³⁸ This is also the taxonomy that will be used for most of the following discussion.

Investment crowdfunding, which is the type of transaction that may raise regulatory red flags, is a more recent and emerging trend. It can be divided into two subcategories – “patronage-plus” and “pure investment” crowdfunding.³⁹ Patronage-plus is a slightly complex model, combining the reward element of pure patronage crowdfunding with a financial interest of the more pure investment crowdfunding persuasion. For example, the facilitator *Bandstocks* offered perks such as copies of the funded albums as well as a pecuniary return on the albums’ sales.⁴⁰ Pure investment crowdfunding entails financial interests only and is more

³³ Heminway, 7 Ohio St Entrepren Bus L J at 358 (cited in note 13).

³⁴ Bradford, Colum Bus L Rev at 14-15 (cited in note 3).

³⁵ Heminway, 7 Ohio St Entrepren Bus L J at 359 (cited in note 13).

³⁶ Belleflamme, Lambert, and Schwienbacher, *Tapping* *5 (cited in note 8).

³⁷ Burkett, 13 Transactions: Tenn J Bus L at 72-74 (cited in note 7).

³⁸ Heminway, 7 Ohio St Entrepren Bus L J at 359 (cited in note 13).

³⁹ Burkett, 13 Transactions: Tenn J Bus L at 74 (cited in note 7).

⁴⁰ Id at 74.

likely the next step in the concept's evolution.⁴¹

Finally, the practice of "crowdfunding at the margin" was frequent before the JOBS Act came into force.⁴² This is essentially structuring crowdfunding interests in such a way that they lie on the edge of being classified as securities, typically offering rewards like short-term profit or revenue-sharing *sans* governance rights. The goal of structuring interests in this manner was to raise capital by leveraging the crowd while avoiding the regulatory net that has been spun around the securities trade. These interests could still technically be securities, but they are neither debt nor equity. Rather, they constitute a mere investment contract, or "unequity."⁴³

Even a precursory analysis of the various classifications of crowdfunding offers and ventures shows a marked variation and a lack of uniformity,⁴⁴ even within the taxonomical models. In examining the legal impact of crowdfunding in South Africa and financial regulation in general, one of the biggest challenges is placing these interests on a conceptual spectrum or scale,⁴⁵ specifically so that they may be adequately regulated while minimising unnecessary transaction costs and unintended consequences.

C. South African Crowdfunding

Having established a general picture of crowdfunding, the most logical question is whether crowdfunding is viable in South Africa. It is assumed that the short answer is yes. In reality, however, it would seem such initiatives are few and far between.

The attrition rate and support structures for SMME-type businesses deserve careful attention; across the globe economic growth is strongly influenced by the number of small businesses that contribute to national GDP.⁴⁶ Therefore, crowdfunding, when seen as a support structure for enabling growth, has the potential to assume an important role.

ProFounder uses a model with the potential to solve the South African problem of parallel formal and informal economies. It matches potential subscrib-

⁴¹ Id at 75.

⁴² Heminway, 7 Ohio St Entrepren Bus L J at 360 (cited in note 13).

⁴³ Id at 360-361, describing "unequity" as follows:

"[A] particular type of financial interest that provides for profit-sharing or revenue-sharing on a short-term basis, with no accompanying governance rights. This type of interest is a security, but it is neither debt (because the funded business or project has no obligation to repay the funder) nor traditional equity (which typically combines, based on statutory mandate or contractual provisions, financial and governance rights); it is properly classified as a form of investment contract."

⁴⁴ Id at 336.

⁴⁵ Id at 361.

⁴⁶ Ley and Weaven, 17 Academy Entrepren J at 87 (cited in note 4).

ers to participants with whom they have a “substantial and pre-existing connection” – i.e., an extended network of mostly friends and family.⁴⁷ *ProFounder* describes itself as a “community-based” platform, giving smaller communities that are socioeconomically “stuck” in the informal sector the ability to fund community-based small businesses *themselves*. They do this via small contributions coupled with a high community participation threshold.

This type of entrepreneurship would likely increase formal employment, prosperity, and services, as well as perhaps even contribute to a merger of these parallel economies on a grass-roots level. Currently, such enterprises are exceedingly rare, as they sit right in the middle of the so-called funding gap.

Before a detailed look at this and other crowdfunding concepts in the context of South African law, an examination of other, more advanced jurisdictions – where crowdfunding is concerned – is necessary. Regrettably, there is limited source material on crowdfunding, particularly legal materials written outside of the United States.

III. CROWDFUNDING IN THE U.S.

Crowdfunding projects, ventures, charities and other endeavours have been used in countries across the globe, with platforms in places such as Hong Kong, Great Britain, Brazil, Germany, the Netherlands and sub-Saharan Africa.⁴⁸ The terrain, legally and otherwise, is new and in a state of considerable flux. However, the U.S. has generated substantial legal materials on crowdfunding, and can thus provide a starting point for legal analysis.

A. *Leading From the Front*

The U.S. is one of the only countries with academic discourse on the topic of crowdfunding – mostly surrounding securities law – and can therefore be used as a basis for comparative analysis. Furthermore, as mentioned, recent federal legislation – specifically, the JOBS Act – has addressed the issues that equity or investment crowdfunding has raised in the context of securities law, which merits brief attention in section four. Finally, only federal legislation will be considered, as it contains the most widely applicable and broadly constituted provisions.

B. *Crowdfunding and Securities Law*

Throughout this discussion it is prudent to be mindful of the open-endedness and lack of uniformity in both platforms and offers. However, what is almost

⁴⁷ Burkett, 13 Transactions: Tenn J Bus L at 77 (cited in note 7).

⁴⁸ Bradford, Colum Bus L Rev at 13-14 (cited in note 3).

self-evident is that forms of donation and patronage crowdfunding are not subject to federal securities regulation, and investment crowdfunding models generally fall readily under its ambit.⁴⁹ Furthermore, if the offer contains no interest and specifically no form of return to the subscriber (of the sort that would render it a security), the matter raises no securities-related issues.⁵⁰

In the morass of different offerings, there have been, and still are, interests offered in the form of return on capital, with or without equity.⁵¹ This necessarily means that crowdfunding will sometimes involve offers of interests that constitute securities under federal law.⁵² Notably, these laws present an obstacle⁵³ to the type of efficient and cost-effective capitalisation that crowdfunding enables. Yet without the regulatory go-ahead, such offers may violate federal and even state law.⁵⁴ In addition, crowdfunding and securities law seem to interact like oil and water,⁵⁵ perhaps even in spite of the JOBS provisions.

When investment crowdfunding is conducted, there is some conceptual overlap between traditional corporate finance and investment crowd-financing. A good example is the practical and even doctrinal difference between a direct public offering⁵⁶ and an offer on a platform with similar objectives.⁵⁷ However, certain nuanced differences – such as the presence of a facilitator – will be clarified below.

Looking more closely at the mechanics of U.S. securities law in regard to the nature of federal-state distinction, a preliminary observation can be made about the nature of the federal-state distinction: It is submitted that federal law casts the net of securities regulation far more widely than South African law. This is most simply because in such a system the catch-all legislation is federal,⁵⁸ and thus functions, *inter alia*, to pre-empt any *lacunae*, that is, risks left unmitigated or matters not fully dealt with by state legislatures.

With that in mind, U.S. securities legislation uses three main mechanisms to effect its oversight: mandatory disclosure, fraud prevention and substantive regulation. This applies to offers, transactions and the exercise of rights in the securi-

⁴⁹ Burkett, 13 Transactions: Tenn J Bus L at 65 (cited in note 7); Hazen, 90 NC L Rev at 1739 (cited in note 14).

⁵⁰ Hazen, 90 NC L Rev at 1739 (cited in note 14); Bradford, Colum Bus L Rev at 30 (cited in note 3).

⁵¹ Heminway and Hoffman, 78 Tenn L Rev at 890 (cited in note 6).

⁵² Bradford, Colum Bus L Rev at 1 (cited in note 3).

⁵³ Burkett, 13 Transactions: Tenn J Bus L at 75 (cited in note 7).

⁵⁴ Cohn, 64 Fla L Rev at 1434 (cited in note 18).

⁵⁵ Bradford, Colum Bus L Rev at 6 (cited in note 3).

⁵⁶ Selling securities directly to specific buyers in an immediate network, as opposed to a publicly underwritten initial public offering.

⁵⁷ Burkett, 13 Transactions: Tenn J Bus L at 78-79 (cited in note 7).

⁵⁸ Iain Currie and Johan De Waal, 1 *The New Constitutional and Administrative Law* 19-20 (Juta 2002). Federalism implies that states have de facto power to legislate *unless* there exists federal legislation that, if constitutionally authorised, would then apply.

ties domain.⁵⁹ The Securities Act⁶⁰ and the Securities Exchange Act⁶¹ contain provisions that impact this discussion,⁶² and two aspects of crowdfunding bring them into play, particularly the former act – the offers (and thus interests) of crowdfunding ventures and the facilitators that enable them.⁶³

Interests that have an element of equity, profit-sharing or both are obviously investments in the broader sense, but they are also most likely “securities” as defined by the Securities Act in 2(a)(1): “[U]nless the context otherwise requires, the term ‘security’ includes a variety of listed financial instruments. The list includes, among other, more typical financial interests such as stock, bonds, debentures, evidence of indebtedness, and options, an ‘investment contract.’”⁶⁴

So as to facilitate disclosure, any “issuers”⁶⁵ of such securities must register in order to both offer and sell them.⁶⁶ There are exemptions to the registration requirement, but, absent such an exemption, the Act demands that an issuer of such a security may not offer it for sale unless a registration has been filed with the Securities Exchange Commission; similarly, an issuer may not sell a security until the registration has become effective.⁶⁷

Do crowdfunding offerings fall under the ambit of these provisions, and, if so, which ones? It has been argued that most investment crowdfunding does so, including certain variations on the “lender model” under Bradford’s taxonomy if the interest offered includes capital interest on the money provided.⁶⁸ Further, the Supreme Court in *United Housing Foundation Inc. v Forman*⁶⁹ has drawn a clear distinction between the concepts of investment and consumption, putting most patronage crowdfunding offers in the clear.⁷⁰

The reasons for this are important – whilst the patronage-plus model tends to blur the line between investment and consumption, the investment component alone will prompt the same regulatory treatment as “pure” investment crowdfunding.⁷¹ Clearly, if stocks (in the case of investment crowdfunding) or bonds or debentures (in terms of the lender model) are offered, then the definition in section 2

⁵⁹ Heminway, 7 Ohio St Entrepren Bus L J at 345 (cited in note 13).

⁶⁰ The Securities Act of 1933 (Securities Act), 15 USC §77a et seq.

⁶¹ The Securities Exchange Act of 1934 (Exchange Act), 15 USC § 78a et seq.

⁶² Burkett, 13 Transactions: Tenn J Bus L at 80 (cited in note 7).

⁶³ Bradford, Colum Bus L Rev at 29 (cited in note 3).

⁶⁴ Heminway and Hoffman, 78 Tenn L Rev at 885, 891 (cited in note 6); Heminway, 7 Ohio St Entrepren Bus L J at 354 (cited in note 13).

⁶⁵ Cf. below at 3 for more detail.

⁶⁶ Heminway and Hoffman, 78 Tenn L Rev at 922-923 (cited in note 6).

⁶⁷ Bradford, Colum Bus L Rev at 30 (cited in note 3).

⁶⁸ Burkett, 13 Transactions: Tenn J Bus L at 82 (cited in note 7); Bradford, Colum Bus L Rev at 30 (cited in note 3).

⁶⁹ *United Housing Foundation Inc. v Forman*, 421 U.S. 837 (1975).

⁷⁰ Bradford, Colum Bus L Rev at 32 (cited in note 3).

⁷¹ Heminway and Hoffman, 78 Tenn L Rev at 897-898 (cited in note 6).

is almost unquestionably activated. However, any other investment crowdfunding that offers some form of participation, even if lesser than that offered by stocks or bonds, will most likely still be included, due to the last, catch-all security type – the “investment contract.”⁷²

To determine the scope of terms like “investment contract” in securities law, decisions in case law help give statutory provisions substantive content, particularly because they import a measure of flexibility.⁷³ *SEC v Howey Co.*⁷⁴ contains the classic exposition of what an investment contract entails:⁷⁵ an investment of money in a common enterprise with the expectation of profits and one arising [solely] from the efforts of the promoter or a third party.

Later case law has de-emphasised the word “solely,”⁷⁶ but otherwise this dictum remains the go-to test.⁷⁷ Later decisions have also stated that such a contract is, for interpretive purposes, the same as an “interest or instrument commonly known as a ‘security.’”⁷⁸

Heminway observes that, despite the fact some crowdfunding models exclude even the conclusion of some written contractual document, the fundamental underlying juristic engagement holds.⁷⁹ The reasoning is that it still involves a contractual offer and acceptance (from which flow obligations), reciprocal performance and other aspects of a valid contract in terms of US principles. So too is it with South African law.

Within a reasonable interpretation of the term “profits,” patronage crowdfunding can be definitively excluded, and the interests offered under investment crowdfunding meet the requirements of the *Howey* test.⁸⁰

Investment crowdfunding under the lender model fits even more easily into this securities law framework, as the definition specifically includes notes and other forms of debt,⁸¹ and thus such a loan will most likely also be deemed a security. If the offer includes “interests,” it passes the *Howey* test, and if the borrower offers notes, it falls into a less contentious aspect of the section 2 definition.⁸²

⁷² Bradford, Colum Bus L Rev at 33 (cited in note 3).

⁷³ Heminway, 7 Ohio St Entrepren Bus L J at 354-355 (cited in note 13).

⁷⁴ *SEC v Howey Co.*, 328 U.S. 293 (1946).

⁷⁵ Burkett, 13 Transactions: Tenn J Bus L at 80 (cited in note 7); Bradford, Colum Bus L Rev at 30-31 (cited in note 3); Heminway and Hoffman, 78 Tenn L Rev at 886 (cited in note 6); Heminway, 7 Ohio St Entrepren Bus L J at 356 (cited in note 13).

⁷⁶ Bradford, Colum Bus L Rev at 31 (cited in note 3).

⁷⁷ Heminway, 7 Ohio St Entrepren Bus L J at 356 (cited in note 13).

⁷⁸ *Id* at 356.

⁷⁹ Heminway, Tenn L Rev at 893 (cited in note 6).

⁸⁰ Burkett, 13 Transactions: Tenn J Bus L at 80 (cited in note 7); Bradford, Colum Bus L Rev at 31 (cited in note 3); Heminway and Hoffman, 78 Tenn L Rev at 904 (cited in note 6); Hazen, 90 NC L Rev at 1740 (cited in note 14); Heminway, 7 Ohio St Entrepren Bus L J (cited in note 13).

⁸¹ Hazen, 90 NC L Rev at 1740 (cited in note 14).

⁸² Bradford, Colum Bus L Rev at 34-36 (cited in note 3).

As mentioned, the courts play an important supplementary role in the interpretation of sections like 2(a)(1). In terms of debt-based securities, *Reeves v Ernst & Young*⁸³ is the decisive case. It posits that there is a rebuttable presumption that such a debt *is* a security and then establishes a “family resemblance” test to affirm or rebut this presumption.⁸⁴

The first leg of the test looks to a list of notes that are not considered securities, therefore rebutting this presumption. The court notes these as follows:

“[T]he note delivered in consumer financing, the note secured by a mortgage on a home, the short-term note secured by a lien on a small business or some of its assets, the note evidencing a ‘character’ loan to a bank customer, short-term notes secured by an assignment of accounts receivable, . . . a note which simply formalizes an open-account debt incurred in the ordinary course of business (particularly if, as in the case of the customer of a broker, it is collateralized), . . . [and] . . . notes evidencing loans by commercial banks for current operations.”⁸⁵

If the debt does not fall into this list, the second leg of the test is activated – a four-factor analysis of whether there is a sufficient “family resemblance” to justify treating the note as a security, formulated as follows:

The motivations of the buyer and seller; the note’s distribution plan; reasonable expectations held by the “investing public”; and whether there are other factors at play (such as a pre-existing regulatory framework) rendering the application of the Act unnecessary from a risk-perspective.⁸⁶

Since crowdfunding notes are usually both uninsured and without collateral, this test places them within the scope of the applicable sections of the definition.⁸⁷

Both the *Howey* and *Reeves* tests underscore the supplementary interpretive import of flexibility and variability by the courts into U.S. securities law. This is consistent with the ever-changing nature of commercial reality. This flows from a tacit understanding in the American system that the only way to deal with securities is to integrate such flexibility into the regulatory approach, discussed further

⁸³ *Reeves* 494 U.S. at 56.

⁸⁴ Bradford, Colum Bus L Rev at 36-37 (cited in note 3); Heminway and Hoffman, 78 Tenn L Rev at 891 (cited in note 6).

⁸⁵ *Reeves* 494 US at 65; Bradford, Colum Bus L Rev at 36 (cited in note 3).

⁸⁶ *Reeves* 494 US at 67; Bradford, Colum Bus L Rev at 37 (cited in note 3); Heminway and Hoffman, 78 Tenn L Rev at 890-891 (cited in note 6).

⁸⁷ Bradford, Colum Bus L Rev at 36-37 (cited in note 3); Heminway and Hoffman, 78 Tenn L Rev at 891 (cited in note 6).

in Part four. Therefore, crowdfunding interests that constitute equity and rights to revenue, unequity or even certain loan-based interests will be deemed securities under the U.S. federal regulatory framework. Further, unless an exemption can be found, they will be subject to the strict, transaction cost-raising registration and compliance requirements of the Acts.

C. Approaches Outside the JOBS Act

Before the JOBS Act came into force, could crowdfunding ventures side-step these onerous terms? Some analysis questions whether one or more of the exceptions to registration could be applicable. But first, it is necessary to clarify whose conduct must be regulated.

First, one must understand the term “issuer.” S 2 of the Securities Act defines “issuer” as “every person who issues or proposes to issue any security,” which is vague and implies that both the participant and the facilitator could be included. In this instance, case law is again helpful. First, *SEC v Murphy*⁸⁸ implies that the issuer is the entity that the investor must know about,⁸⁹ but, second, further case law clarifies that more than one actor may act as co-issuers.⁹⁰

When multiple parties’ conduct cannot be separated and is decisive to a transaction or offer pertaining to a security, the parties are deemed co-issuers.⁹¹ Thus, certain crowdfunding facilitators’ actions may be so closely connected with participants’ offers that they will be regarded as co-issuers. Consequently, the participants themselves are seen as the “issuers,”⁹² thereby becoming subject to the most stringent registration requirements. Registration presents a bleak picture for SMME-sized businesses (especially those looking for lesser amounts) due to the costs and time it entails; the costs will simply exceed the benefits.⁹³

Business opportunities are often fickle and subject to time constraints, and one of the distinct advantages of crowdfunding is its speed and ease. These registration requirements are onerous and often impracticable,⁹⁴ particularly because such a participant would, for example, have to become a public company upon registration and adhere to the consequential strictures.⁹⁵ This is why the best course of action outside of the JOBS Act provisions (and potentially in spite of them) is

⁸⁸ *SEC v Murphy*, 626 F.2d 633, 633 (9th Cir 1980).

⁸⁹ Heminway and Hoffman, 78 Tenn L Rev at 922 (cited in note 6).

⁹⁰ *Id* at 923. *SEC v Edwards*, 540 U.S. 293, 299 (1946).; *SEC v Datronics Engineers, Inc.*, 490 F.2d 250, 254 (4th Cir 1973).; *Howey* 328 US 293 (1946).

⁹¹ Heminway and Hoffman, 78 Tenn L Rev at 924 (cited in note 6).

⁹² However, bear in mind that what follows could be equally applicable to facilitators.

⁹³ Bradford, Colum Bus L Rev at 42-43 (cited in note 3); Heminway and Hoffman, 78 Tenn L Rev at 911-912 (cited in note 6).

⁹⁴ Burkett, 13 Transactions: Tenn J Bus L at 82-83 (cited in note 7).

⁹⁵ *Id* at 83.

utilising the available statutory exemptions.⁹⁶ It would seem, however, that these exemptions are not readily available or useful in the context of crowdfunding.⁹⁷

In short, the exemptions to registration with the SEC that merit examination are those found in s 4(2),⁹⁸ s 4(5), Regulations D and Regulation A.⁹⁹ S 4(2)'s exemption prohibits public offerings, making it a non-starter for crowdfunding.¹⁰⁰ This is especially so in light of subsequent case law following on the seminal decision *SEC v Ralston Purina*,¹⁰¹ which couples an investor sophistication threshold to the exemption, making it unsuitable to offers targeting the "unsophisticated" general investing public.¹⁰²

Regulation D contains three possible exemptions: Rule 504, Rule 505 and Rule 506. However, these exemptions are subject to certain restrictions, most importantly regarding securities' transferability and a prohibition on "any form of general solicitation or general advertising."¹⁰³ The latter makes these exemptions *per se* unsuitable for crowdfunding almost immediately.¹⁰⁴

However, Rule 504 offers a narrow way around this by providing an exemption for offerings not more than an average of \$1 million annually, but the prohibition on general solicitation or advertising is inapplicable if the transaction is done according to state law.¹⁰⁵ Therefore, offers can be made exempt from registration, but only if state law is less stringent than federal law and if one can determine that the investors, as per *Ralston*, possess a certain level of sophistication.¹⁰⁶

Regulation A's exemption is applicable for offerings up to \$5 million within twelve months, entails a watered-down registration process, and neither prohibits general solicitation nor prescribes a level of investor competence. However, it has certain disclosure requirements and limits as to what may be conveyed to

⁹⁶ Heminway and Hoffman, 78 Tenn L Rev at 923 (cited in note 6); Bradford, Colum Bus L Rev at 44 (cited in note 3).

⁹⁷ Heminway and Hoffman, 78 Tenn L Rev at 912 (cited in note 6); Bradford, Colum Bus L Rev at 44 (cited in note 3); Hazen, 90 NC L Rev at 1750 (cited in note 14).

⁹⁸ The so-called "private offering exemption."

⁹⁹ Heminway and Hoffman, 78 Tenn L Rev at 912 (cited in note 6); Bradford, Colum Bus L Rev at 44 (cited in note 3); Hazen, 90 NC L Rev at 1744-1750 (cited in note 14).

¹⁰⁰ Heminway and Hoffman, 78 Tenn L Rev at 912 (cited in note 6); Bradford, Colum Bus L Rev at 45-46 (cited in note 3).

¹⁰¹ *SEC v Ralston Purina*, 346 U.S. 119, 119 (8th Cir 1953).

¹⁰² Heminway and Hoffman, 78 Tenn L Rev at 914-915 (cited in note 6); Bradford, Colum Bus L Rev at 45-46 (cited in note 3).

¹⁰³ Heminway and Hoffman, 78 Tenn L Rev at 916 (cited in note 6); Burkett, 13 Transactions: Tenn J Bus L at 88-89 (cited in note 7); Bradford, Colum Bus L Rev at 46-47 (cited in note 3).

¹⁰⁴ Heminway and Hoffman, 78 Tenn L Rev at 918-919 (cited in note 6).

¹⁰⁵ Heminway and Hoffman, 78 Tenn L Rev at 917 (cited in note 6); Bradford, Colum Bus L Rev at 47 (cited in note 3).

¹⁰⁶ Heminway and Hoffman, 78 Tenn L Rev at 919-920 (cited in note 6).

potential investors.¹⁰⁷

Problems with this exemption's use for crowdfunding include the additional disclosure elements and prohibitive registration processes, requiring time and money.¹⁰⁸ Most importantly, the exemption does not exempt issuers from state offer and sale requirements, and most don't offer a similar exemption,¹⁰⁹ making it unsuitable for crowdfunding offers. Therefore, specifically regarding participants, it does not seem that the pre-JOBS (now parallel to JOBS) regulatory framework presented enough flexibility to allow crowdfunding offers to fly under the radar.¹¹⁰

Turning now to the regulatory implications for facilitators themselves, seldom can crowdfunding offers be effectively implemented without the intermediary platforms provided by facilitators. The running of these platforms raises its own pressing issues under securities law.¹¹¹ However, the primary issue is that the regulation applicable to participants may apply *mutis mutandis* to facilitators, should they qualify as co-issuers. In addition to this, the regulatory system identifies other actors such as exchanges, underwriters or brokers as part of the process. Facilitators could fall within the definitional ambit of these terms also, and thereby find themselves activating provisions that impose extra hurdles.

Preliminarily, it can be assumed that there is no pre-existing internet-based architecture in place for the transfer of interests to subscribers¹¹² (as there is with share trading, for example). However, ordinary contractual principles, as noted in the discussion of the *Howey* test, will apply to online transactions.

The issues cluster around what role these platforms play, and the first is whether these types of sites may qualify as "exchanges." S 3(a)(1) of the Exchange Act defines an "exchange" as follows: "[An] organization, association, or group of persons" that "constitutes, maintains, or provides a market place or facilities for bringing together purchasers and sellers of securities or for otherwise performing with respect to securities the functions commonly performed by a stock exchange as that term is generally understood...."¹¹³

The real point of contention lies in the detail – Rule 3b-16 of the Act stipulates that there must, for any given transaction, be multiple parties on both sides of the sale. A typical crowdfunding transaction is only asymmetrically multilateral – one participant (the "seller") and many potential subscribers ("buyers") – making

¹⁰⁷ Bradford, Colum Bus L Rev at 48 (cited in note 3); Heminway and Hoffman, 78 Tenn L Rev at 921 (cited in note 6).

¹⁰⁸ Bradford, Colum Bus L Rev at 48 (cited in note 3). In 1997 the average cost of compliance in terms of Regulation A was \$40,000 - \$60,000.

¹⁰⁹ Burkett, 13 Transactions: Tenn J Bus L at 88 (cited in note 7).

¹¹⁰ Hazen, 90 NC L Rev at 1744-1750 (cited in note 14).

¹¹¹ Bradford, Colum Bus L Rev at 49 (cited in note 3).

¹¹² Heminway and Hoffman, 78 Tenn L Rev at 903 (cited in note 6).

¹¹³ Bradford, Colum Bus L Rev at 50 (cited in note 3).

it fall shy of the definition's ambit, a position confirmed by the SEC.¹¹⁴

Obviously the position will differ if the interests themselves are widely traded, or even merely tradable on these platforms, i.e., in the so-called secondary market. As it currently stands, there is only one seller for any given offer. The important implication is that for any given offer there are no competing sellers or selling agents such as brokers.¹¹⁵

The next question is whether these websites may be underwriters. The Securities Act casts a wide net in its definition of an "underwriter" in s 2(a)(11):

The term "underwriter" means any person who has purchased from an issuer with a view to, or offers or sells for an issuer in connection with, the distribution of any security, or participates or has a direct or indirect participation in any such undertaking, or participates or has a participation in the direct or indirect underwriting of any such undertaking.

Crowdfunding platforms provide participants a direct route to a large audience of potential investors and, in one sense, function as typical underwriters (such as investment banks), locating investors and also promoting the issuer and what is being issued.¹¹⁶ Investment promotion seems to be enough to activate the definition,¹¹⁷ so even social networking websites connecting parties to a securities transaction will qualify as underwriters in their capacity as intermediaries, even if they themselves receive no pecuniary benefits.¹¹⁸ It seems unavoidable that facilitators will end up on the receiving end of regulatory burdens as underwriters.

It would seem facilitators are also at risk of being deemed securities brokers. In terms of s 3(a)(4) of the Exchange Act contains the following definition: "[A]ny person engaged in the business of effecting transactions in securities for the account of others." It is unclear whether facilitators will qualify as "brokers," but the SEC's approach to inclusion is expansive rather than restrictive, resulting in a strong possibility of them falling into this category as well.¹¹⁹ In addition, it seems that merely acting as an underwriter would be sufficient to qualify as a securities broker.¹²⁰

The final role into which crowdfunding facilitators could potentially stumble is that of the "investment adviser," a position which case law on analogous

¹¹⁴ Bradford, *Colum Bus L Rev* at 50-51 (cited in note 3).

¹¹⁵ Cf. 4.1 for a more detailed analysis.

¹¹⁶ Heminway and Hoffman, 78 *Tenn L Rev* at 924-925 (cited in note 6).

¹¹⁷ Heminway and Hoffman, 78 *Tenn L Rev* at 925 (cited in note 6).

¹¹⁸ Hazen, 90 *NC L Rev* at 1759-1760 (cited in note 14).

¹¹⁹ Bradford, *Colum Bus L Rev* at 52-53 (cited in note 3).

¹²⁰ Hazen, 90 *NC L Rev* at 1760 (cited in note 14).

enterprises seems to support.¹²¹ The above makes it abundantly clear that both participants and facilitators of crowdfunding operate in complex and interdependent relationships. This is mainly because crowdfunding creatively combines various elements of actors' roles in the securities market and does so in an original way. This exposes the participants and facilitators to "unexpected" regulation, because the provisions that regulate the actions of those traditional actors are so widely constituted.¹²² Whether this spectrum of regulations may additionally be called "undue" is a function of the policy considerations underlying those provisions.

D. Title II of the JOBS Act

So as to mitigate the chilling effect of these widely inclusive regulatory rules, the U.S. legislature included Chapter III in the JOBS Act, the so-called CROWDFUND Act. This was preceded by numerous proposals to create an exemption specifically tailored to crowdfunding, putting mounting pressure – already fuelled by the rise of the concept in practice¹²³ – on the SEC.¹²⁴

The Act, signed into law on April 5, 2012, contains a new exemption for both federal and state securities registration,¹²⁵ which attempts to capitalise on its possible effectiveness for business development.¹²⁶ The continuum of crowdfunding offers contains interests of varied and variable structure and nature. It has therefore been argued that the provisions contained in the CROWDFUND Act may serve to make the matter more, rather than less, complex.¹²⁷

The JOBS Act was enacted to address various securities law issues, but from the outset one of its main objectives was an appropriate exemption.¹²⁸ The Act now adds s 4(6) and s 4A to the Securities Act, importing alternative registration of facilitator enterprises, certain disclosures to potential subscribers and various other "preemptive" matters.¹²⁹ It covers a broad range of interests but essentially excludes those structured in more complex ways, such as the so-called "unequity" of crowdfunding interests at the margin¹³⁰ or those that fall under patronage-plus crowdfunding.¹³¹ The potential windfalls and pitfalls of these types of schemes and instruments fall well beyond the risks associated with either traditional securities

¹²¹ Bradford, *Colum Bus L Rev* at 67 (cited in note 3).

¹²² Cf. 3.1.1; and also 2.1 viz. legislator's preference for breadth over depth.

¹²³ Heminway, 7 *Ohio St Entrepren Bus L J* at 357 (cited in note 13).

¹²⁴ Hazen, 90 *NC L Rev* at 1750 (cited in note 14).

¹²⁵ Cohn, 64 *Fla L Rev* at 1433 (cited in note 18).

¹²⁶ Heminway, 7 *Ohio St Entrepren Bus L J* at 357 (cited in note 13).

¹²⁷ *Id* at 336.

¹²⁸ Cohn, 64 *Fla L Rev* at 1434 (cited in note 18).

¹²⁹ Hazen, 90 *NC L Rev* at 1754-1755 (cited in note 14).

¹³⁰ Cf. Fn. 43.

¹³¹ Heminway, 7 *Ohio St Entrepren Bus L J* at 369 (cited in note 13).

or patronage crowdfunding interests.¹³²

However, for the purposes of this discussion, it is neither necessary nor beneficial to deal with the Act's provisions in detail. There is not yet certainty over whether the CROWDFUND Act constitutes a step in the right direction. Many of the administrative requirements of the Act, as well as its overly intricate mechanics, may still amount to barriers that do not withstand a cost-benefit analysis. This is equally true for facilitators (who now seem to have no other choice) and possibly for potential participants.¹³³ These concerns speak directly to the viability and effectiveness of the rapidly growing concept of crowdfunding under the American regulatory regime.

IV. EMERGENT (POLICY) PROPERTIES

From a detailed treatment of what can be termed the U.S. law of crowdfunding, some insight is gained into the operative policy considerations that underlie securities law in general, including the interrelation between these normative undercurrents and the regulation of crowdfunding.

The crux of the securities law policy mix is finding a healthy balance between protecting investors, mostly by correcting informational dysfunction and combating potential fraud, and facilitating the raising of capital, specifically in the small business context.¹³⁴ Any legislature or regulatory agency must face this difficulty, as the two are often at odds with one another – the former often involves increasing red tape, while the latter involves reducing it.

The protection of investors constitutes part of a wider policy cornerstone – the maintenance of the integrity of markets. This is primarily done via disclosure, fraud prevention mechanisms and substantive regulation, such as assigning liability for material omissions or misrepresentations.¹³⁵ It is clear that regulators follow an investor-oriented approach strongly informed by the main economic theories on efficient capital markets. In conjunction with current data, this shows that disclosure is the favoured approach, necessitating some form of registration as a point of departure.¹³⁶

For those staring down the barrel of current SEC securities regulations, the process is lengthy, costly and onerous; and it carries an implied threat of action against non-compliance.¹³⁷ This constitutes a high economic cost connected to

¹³² *Id* at 369.

¹³³ Hazen, 90 NC L Rev at 1744-1745 (cited in note 14).

¹³⁴ Bradford, Colum Bus L Rev at 98 (cited in note 3); Hazen, 90 NC L Rev at 1738 (cited in note 14); Heminway, 7 Ohio St Entrepren Bus L J at 337 (cited in note 13).

¹³⁵ Heminway and Hoffman, 78 Tenn L Rev at 927 (cited in note 6).

¹³⁶ Heminway, 7 Ohio St Entrepren Bus L J at 345-346 (cited in note 13).

¹³⁷ Heminway and Hoffman, 78 Tenn L Rev at 908 (cited in note 6).

maintaining market integrity when raising capital,¹³⁸ mounting significant barriers to entry. The regulations have additional adverse effects; they may cause businesses to miss crucial opportunities (“market windows”) due to the lengthy process of compliance, which could have ruinous consequences for SMME-sized ventures.¹³⁹

Since crowdfunding involves offers to a public at large and implicates a high number of investors, the protection of potential and current subscribers remains a material consideration.¹⁴⁰ This is despite the distinct advantages in terms of capital formation, SMME development, entrepreneurship and potential job-creation that such platforms could hold.

On the other side of the coin lies the economic importance of capital formation. Should the benefits of an increased flow of capital to new business ventures be sufficient, one could argue for less regulation and justify a more risk-friendly policy stance. Investment crowdfunding has definite potential to achieve better capital formation, especially in the funding gap,¹⁴¹ thereby stimulating SMMEs and boosting overall growth.

Crowdfunding also corrects two of the funding gap’s most fundamental causes – first, it corrects informational defects in the market by more effectively matching participants and potential subscribers;¹⁴² and second, it makes available a new, unique source of capital that tips the scales in favour of smaller, inexperienced entrepreneurs whose greatest strengths are their ideas. In addition, crowdfunding provides access to funding for capital to players whose socio-economic status¹⁴³ and network would have barred them from traditional sources of funding, and who would not be eligible to utilise them, even if access were available.¹⁴⁴

Unfortunately, start-ups and younger businesses are riskier due to inexperienced management, tight cash flow, out and out failure and even fraud;¹⁴⁵ hence, faster, more readily available and less regulated capital formation is not always *allocatively* efficient. This illustrates that capital formation itself also has inbuilt economic costs. Perhaps one should view this as a distinct policy consideration, separating it from the market integrity imperatives from which flow the more traditional disclosure costs. This could be termed “start-up cost.”

¹³⁸ Heminway and Hoffman, 78 Tenn L Rev at 908-909 (cited in note 6) provides more detail on typical compliance costs.

¹³⁹ Id at 909.

¹⁴⁰ Hazen, 90 NC L Rev at 1737 (cited in note 14).

¹⁴¹ Bradford, Colum Bus L Rev at 100 (cited in note 3). This “gap” between where small businesses are created and the point they become attractive to traditional funders, is estimated to be worth approximately \$60 billion in demand by small companies seeking early stage financing, and is most pronounced when between \$100,000 and \$5 million is sought.

¹⁴² Bradford, Colum Bus L Rev at 101 (cited in note 3).

¹⁴³ Specifically aspects such as credit history and lack of collateral for debt-financing.

¹⁴⁴ Bradford, Colum Bus L Rev at 102 (cited in note 3). Venture capitalists rarely if ever fund projects asking for less than \$2m and reject 99% of the applications received.

¹⁴⁵ Bradford, Colum Bus L Rev at 99, 105-107 (cited in note 3).

With a basic understanding of the effects of these policy considerations, one can now look more closely at their roles in the context of crowdfunding. Here it is crucial to recognise crowdfunding's main field of application – small to medium enterprises, specifically start-ups and businesses looking for a first- or second-round of capitalisation. While this naturally implies an increased risk of loss, it also implies potentially better returns. The fundamental question then becomes what the “outcome” of the policy mix should be when raising capital via crowdfunding.

In any case, it is clear that registration and disclosure function as the primary guardians of investors and capital market integrity.¹⁴⁶ Offers of securities to the public have consistently been contingent on these conditions,¹⁴⁷ however stringent or lax these may be.¹⁴⁸

However, disclosure is not the only tool to achieve market integrity, nor is it always effective. This affects the importance that should be attributed to disclosure¹⁴⁹ when balanced with capital formation objectives, especially since there is little argument against the notion that public policy tends to support small business.¹⁵⁰

Crowdfunding leverages the public at large, which includes investors who are not necessarily financially savvy, to fund businesses with high-risk profiles. This, from a market integrity perspective, might justify some of the CROWDFUND Act's regulatory impositions.¹⁵¹

However, there are both risk-creating and risk-mitigating features inherent in crowdfunding's architecture. For example, some research attributes a collective intelligence and sagacity to the crowd.¹⁵² It would therefore seem that collective decision-making on the merit of any particular business venture is more accurate than expected, which counters many of the arguments based on an imputed ignorance of subscribers-at-large.¹⁵³

It has also been argued that crowdfunding is no different in principle than other forms of direct investment in small businesses,¹⁵⁴ where, for instance, a local entrepreneur calls friends up or knocks on the doors of family for funding. Crowdfunding, of course, is done on a much larger scale. Does this scale impact how regulation should occur?

¹⁴⁶ Heminway and Hoffman, 78 *Tenn L Rev* at 928 (cited in note 6).

¹⁴⁷ Hazen, 90 *NC L Rev* at 1736 (cited in note 14).

¹⁴⁸ The CROWDFUND exemption serving as prime example.

¹⁴⁹ Heminway, 7 *Ohio St Entrepren Bus L J* at 347 (cited in note 13).

¹⁵⁰ Hazen, 90 *NC L Rev* at 1764 (cited in note 14).

¹⁵¹ *Id* at 1765.

¹⁵² Bradford, *Colum Bus L Rev* at 114 (cited in note 3).

¹⁵³ *Id* at 109.

¹⁵⁴ *Id* at 112. “Crowdfunding investors will lose money either way.”

The issue of scale generally militates in favour of more regulation,¹⁵⁵ but crowdfunding has the unique benefit of spreading any potential loss over a large group of subscribers.¹⁵⁶ This limited exposure to loss arises because each subscriber only provides a small percentage of the overall capital. This, however, has been placed in contention, at least from a principled rather than practical perspective.¹⁵⁷

Moreover, the fact that sellers typically compete for buyers creates a very distinct risk to buyers when there are multiple parties at both ends of the transaction and it occurs on a large scale.¹⁵⁸ Crowdfunding, however, does not involve multiple sellers per offer, and so this risk is removed from the equation.

Therefore, this collective wisdom, limited quantitative exposure to risk and compartmentalized public perception of crowdfunding finance (i.e., that crowdfunding is not necessarily perceived as part of the “financial markets”) suggest that market integrity is not necessarily of the utmost concern in the crowdfunding sphere, and so regulation may be relaxed.

There is, however, a strong concern that crowdfunding platforms will create new opportunities for internet fraud. This is legitimate, as such fraud could harm the crowdfunding concept itself and could adversely impact the policy mix by increasing the need for heavy-handed regulation.

On one hand, the Internet allows fraud to proliferate at low cost, putting facilitators’ platforms in the crosshairs of potential fraudsters. On the other hand, internet fraud is easily discoverable, especially if crowdfunding facilitators perform their functions correctly. This needs to be further explored, but, for the purposes of this paper, it will be assumed that these two arguments are of equal merit and neutralise one another.¹⁵⁹

A third argument is that participants’ offers are largely limited to a target amount that is much smaller per capita than ordinary “public” investments. Hence, any fraud would be far more contained than other analogous securities offerings.¹⁶⁰ This inbuilt “containment” of offers may limit the ability of fraudsters to exploit crowdfunding and would reduce how far fraud can “travel.” In this line of thinking, crowdfunding fraud is only different from other types of internet fraud in that it can be more readily restricted. This mitigates against more onerous regulation in the policy mix, as the integrity of the market is less at risk.

In the final analysis, investment crowdfunding’s advantage of rapid allocation of untapped capital must be compared to its effect on investors and markets.

¹⁵⁵ Illustrated well in the manner that offers to the *public* are so heavily regulated.

¹⁵⁶ Bradford, Colum Bus L Rev at 105 (cited in note 3); Hazen, 90 NC L Rev at 1766 (cited in note 14).

¹⁵⁷ Hazen, 90 NC L Rev at 1765 (cited in note 14). A more fundamental examination of this argument reveals it cannot be used to totally discard disclosure constraints.

¹⁵⁸ Cf. 4.1 and 3.1.2 for a detailed analysis.

¹⁵⁹ Bradford, Colum Bus L Rev at 113 (cited in note 3).

¹⁶⁰ Heminway and Hoffman, 78 Tenn L Rev at 929-930 (cited in note 6).

Investors are already funding patronage crowdfunding on a large scale, which poses an equivalent amount of risk in terms of returns but avoids all but the most basic regulation.¹⁶¹

V. SOUTH AFRICAN LAW: A WAY FORWARD?

With a clearer picture of crowdfunding in the U.S., crowdfunding's implementation in South Africa and its potential legal issues in securities law can be considered. As there exists very little material with which to work, the rest of this paper is by nature speculative. An attempt will be made only to pinpoint areas where issues are likely to arise and indicate where the dice may fall regarding the impact of certain pieces of commercial legislation and classification as securities. Notably, it is assumed for these purposes that crowdfunding will be tax neutral, as the tax implications of various crowdfunding schemes are better left to a more detailed and specialised treatment.

A. Issues Raised in Securities Law

Depending on the type of crowdfunding, a host of legal issues may arise that require clarification. The focus remains, however, mainly on the impact of investment crowdfunding on securities law and pursuant regulation.

Clearly, the most uncertain aspects of crowdfunding are those that arise under the label of investment crowdfunding. This is mainly because crowdfunding in this form may run into a number of regulatory rules, especially in securities law. Many of these incidences are in fact unintended consequences of far-reaching regulatory provisions aimed at capital formation, far removed from the type that occurs via crowdfunding.

The contentious issue here is whether the interest being offered by a business seeking a crowdfunding platform could be considered a security. Should the interest on offers be classified as a security (whether equity- or debt-based), it could be subjected to the various onerous regulatory legal requirements discussed below.

First, however, the term "securities law" needs context. Under South African law, unlike that of the U.S., the term "securities law" references certain rules and regulations found in a number of statutes that oversee specific legal domains. Therefore, none of this can truly be termed a unified "securities law;" rather, fragmented rules regulate securities transactions for various purposes.

This is important because, should such a venture or its activities fall under the ambit of such regulation, the transaction and compliance costs for both

¹⁶¹ Bradford, *Colum Bus L Rev* at 116 (cited in note 3).

the crowdfunding enterprise and participants would be raised.¹⁶² This reasoning is equally applicable regardless of the jurisdictional regulatory framework, and may well nullify the benefits of obtaining funding in such a manner or make it as impracticable in South Africa as it is in the U.S.

The main players in this somewhat amorphous domain are the Collective Investment Schemes Control Act,¹⁶³ the Financial Markets Act¹⁶⁴ (which recently repealed the Securities Services Act¹⁶⁵) and the “new” Companies Act¹⁶⁶ (which less recently replaced the old Companies Act¹⁶⁷). The potential consequences of these acts on investment crowdfunding ventures are dealt with in the following section.

B. The Collective Investment Schemes Control Act

Starting with the Collective Investment Schemes Control Act, one must first ask whether such a venture could be classified as a collective investment scheme. If so, the Act regulates such collective investment schemes in the context of securities in Part IV,¹⁶⁸ regardless of whether the scheme offers “securities” or not.

A perusal of the Act and its organization makes it clear that the Act serves exclusively to regulate these schemes; thus, if such a venture falls outside the definition of a collective investment scheme, no further attention needs to be paid to the Act’s contents. However, this Act is not of primary importance for this discussion and has little effect on the relationship between crowdfunding and securities *per se*. A few remarks on the “gatekeeper” function of the definition will suffice.

An investment crowdfunding enterprise will most likely fall outside the Collective Investment Schemes Control Act, as it does not pass the definitional test for a number of reasons. First, investment crowdfunding is characterised by the solicitation of funding from the public on an online crowdfunding platform for *specific business ventures*. The members of the public peruse various businesses’ offers and choose one to fund, and, by doing so, they directly acquire the interest offered by the business venture. They do not acquire an interest in an intermediary entity that could be construed in any way similar to a portfolio as per the Act. Second, facilitators do not bundle offers together – potential investors choose among the available offers and may commit funds to one or more (as per the contents of

¹⁶² Cf. 3.2.

¹⁶³ The Collective Investment Schemes Control Act, Act 45 of 2002.

¹⁶⁴ The Financial Markets Act, Act 19 of 2012.

¹⁶⁵ The Securities Services Act, Act 6 of 2004.

¹⁶⁶ The Companies Act, Act 71 of 2008.

¹⁶⁷ The Companies Act, Act 61 of 1973.

¹⁶⁸ The Collective Investment Schemes Control Act, Act 45 of 2002 § 4, 39-46.; Johann W. Scholtz and Dawid de Villiers, *Securities Services and Collective Investment Schemes* in 26 *LAWSA* ¶ 147, 148 (LexisNexis 2012).

a particular offer). Though the investor may choose to fund various projects and thereby receive various corresponding interests, this does not imply that the platform is offering investments in a *group* of assets; rather, it facilitates separate investments in single assets (i.e., ventures). Third, no manager acts for the facilitator to administer the investors' interests in any of their investments; once an investor has contributed his funds, the relationship is typically between the venture and the investor, and the facilitator's work is done.

This holds true even for models similar to that of *Grow VC* (which charges an actual subscription fee and pools the crowdfunded capital, but it allows its subscribers to choose where the funding goes).¹⁶⁹ The concept of an administrative manager indirectly impacts the definitional elements of a collective investment scheme via its implicit inclusion in the provisions' collective definition of portfolio. Therefore, the fact that the subscribers themselves determine the projects in which their money should be invested may still exclude such a system from being classified as a scheme for want of strictly "managerial" administration.

Moreover, depending on how the pool and the interests are structured, it may be that each investor's money is tied up in one single project or multiple projects at a time, meaning there is no group of assets in which an investor has a *single* indirect stake. However, in comparison to a model such as *ProFounder*,¹⁷⁰ the position that this model is not a collective investment scheme is slightly more tenuous, and it may be that these distinctions are not fine enough to avoid the ambit of the Act, even though policy indicates otherwise.

C. The Financial Markets Act

The Financial Markets Act was signed into law by the President on February 5, 2013. The broad objectives of the Act are fair, efficient and transparent financial markets in South Africa, increased confidence in these markets, and the promotion of competitiveness both locally and abroad.¹⁷¹

However, the operative definition for the Act's application is not the broader term "financial markets" (also not defined in the Act) found in s 2, but

¹⁶⁹ Explained by Burkett, 13 Transactions: Tenn J Bus L at 75-76 (cited in note 7). "... one of the first pure investment crowdfunding platforms." To participate, potential *Grow VC* funders must register and pay a subscription fee-between \$25 and \$140 a month, depending on how much equity that member wants.' As of August 2010, *Grow VC* had over three thousand registered members." *Grow VC* takes 25% of the subscription fees upfront to cover administrative costs; the rest is pooled together in a community investment fund." "Subscribers have the power to allocate a portion of the community investment fund to particular entrepreneurial projects that they think have the most potential for return. Once a project meets its funding goal, "*Grow VC* along with its Indian partner, Springboard Ventures, carry out their own evaluation of the start-up and if they are satisfied, hand hold the venture for another three years or more before exiting the venture."

¹⁷⁰ Cf. 2.3.

¹⁷¹ The Financial Markets Act, Act 19 of 2012, § 2.

rather the more narrow and technical term “exchanges.” The purpose of the Act, it then seems, is to regulate those aspects of financial markets that cluster around exchanges, defined in s 1 by the Act as follows: “[A] person who constitutes, maintains and provides an infrastructure (a) *for bringing together buyers and sellers of securities*; (b) *for matching bids and offers for securities of multiple buyers and sellers*; and (c) *whereby a matched bid and offer for securities constitutes a transaction....*” If, much like the Collective Investment Schemes Control Act, the platform and/or facilitation of crowdfunding does not meet the definition of an exchange, then almost all of the Act’s regulation is moot for the purposes of this discussion.

Clearly, running a web-based platform for the facilitation of crowd-finance implies the constitution, maintenance and provision of the type of infrastructure envisioned. According to the definition of an exchange, two conditions determine if such a platform could be seen as an exchange or not: first, whether the goods being sold or bought are securities for the purposes of the Act;¹⁷² and second, whether the platform seeks matching bids and offers from multiple buyers and sellers.¹⁷³

In Part 3.1, it was shown that crowdfunding platforms inherently do not meet the second requirement above. Further, although the relationship between participants and potential subscribers for any given transaction is indeed multilateral, the relationship is asymmetrical (“many-to-one”). Therefore, the facilitators and their platforms cannot be deemed an exchange for the purposes of the Act, and its rules and regulations do not apply.

This observation is fundamentally important.¹⁷⁴ As there is only one seller for any given offer, there are no *directly* competing sellers, selling agents or brokers, merely competing buyers. The only party who gains any material benefit on the “selling side” of the transaction is the participant itself, and that participant is also the only party responsible for the underlying value of the interest. Gain on the part of facilitators is incremental and cumulative and not likely to be contingent on single transactions.

This decreases the risk the Act is attempting to mitigate for three reasons. First, there is a direct relationship between the capital seeker and the capital provider, and no intermediaries such as brokers to inject risk into the transactional chain. Any loss is therefore solely attributable to the participant. Second, flowing from that relationship, it is far easier to hold the participant accountable for the underlying stability and value of the investment, as the participant is the sole party responsible for that investment. This is one of the inherent advantages of private capitalisation that crowdfunding retains. Third, the fact that sellers do not compete directly decreases the risk of unscrupulous behaviour of sellers to get an edge over

¹⁷² Cf. The Financial Markets Act, Act 19 of 2012, § 2(a).

¹⁷³ Cf. The Financial Markets Act, Act 19 of 2012, § 2(b).

¹⁷⁴ Cf. 3.1.2 and 3.2.

their competition. This is not an argument for a total exclusion of the possibility of unscrupulous dealings, but it does mean that such behaviour cannot occur vis-à-vis the product, which drastically decreases the potential harm to buyers at large.

Despite all this, the Act may still be useful for its definition of a “security,” as this definition will have at least interpretive influence on the definition contained in the Companies Act 71 of 2008. The Financial Markets Act’s predecessor – the Securities Services Act – contained an almost identical definition of securities in section one. The Financial Markets Act states that “securities” means the following:

- (a) listed and unlisted-
 - (i) *shares, depository receipts and other equivalent equities in public companies, other than shares in a share block company as defined in the Share Blocks Control Act, 1980 (Act 59 of 1980);*
 - (ii) debentures, and bonds issued by public companies, public state-owned enterprises, the South African Reserve Bank and the Government of the Republic of South Africa;
 - (iii) derivative instruments;
 - (iv) notes;
 - (v) participatory interests in a collective investment scheme as defined in the Collective Investment Schemes Control Act, 2002 (Act 45 of 2002), and units or any other form of participation in a foreign collective investment scheme approved by the Registrar of Collective Investment Schemes in terms of section 65 of that Act; and
 - (vi) instruments based on an index;
- (b) units or any other form of participation in a collective investment scheme licensed or registered in a country other than the Republic;
- (c) the securities contemplated in paragraphs (a) (i) to (vi) and (b) that are listed on an external exchange;
- (d) an instrument similar to one or more of the securities contemplated in paragraphs (a) to (c) prescribed by the registrar to be a security for the purposes of this Act;
- (e) rights in the securities referred to in paragraphs (a) to (d), but excludes
 - (i) money market securities, except for the purposes of Chapter IV; or if prescribed by the registrar as contemplated in paragraph (d);
 - (ii) the share capital of the South African Reserve Bank referred to in section 21 of the South African Reserve Bank Act, 1989

- (Act 90 of 1989); and
 (iii) any security contemplated in paragraph (a) prescribed by the registrar...”

This exhaustive list (albeit in the context of exchanges) gives one at least an idea of the breadth of the concept of a security. However, because it is a list and provides no substantive delineation, it unfortunately has no depth. This problem is fundamental to the crowdfunding issue. However, like this Act’s predecessor,¹⁷⁵ it goes further than instruments seen as “traditional securities” such as shares.

D. The Companies Act

The definition above is in some ways distinguishable from the definition in the Companies Act. When this Act was originally drafted, its definition of securities merely incorporated by reference the definition of the Securities Services Act, but the amended Act included a new definition of “securities” in s 1: “...any shares, debentures or other instruments, irrespective of their form or title, issued or authorised to be issued by a profit company; [Definition of “securities” substituted by s. 1 of Act 3/2011]....”¹⁷⁶

The legislature moved away from the definition in the Securities Services Act toward the aspects of securities dealt with by the Companies Act. The fact that the Financial Markets Act incorporated a definition similar to the Securities Services Act instead of incorporating the Companies Act definition further underscores the point that each Act’s definition is tailored to the facets of securities that it aims to regulate. Thus, the definitions were not meant to be an exhaustive or foundational circumscription of what securities are.

The Act’s definition is simple – it includes shares, debentures and any other instrument, no matter the form or structure it assumes. The real question revolves around the meaning of “any other instrument.” Developing an understanding of this term in the context of crowdfunding is crucial, as, in Chapter 4 of the Act,¹⁷⁷ investment crowdfunding centres around offering interests similar to securities to the general public on its platforms.

Chapter 4 regulates offers of securities to the public, and so its restrictions, prospectus requirements, imposed potential liability and other regulatory impositions¹⁷⁸ are only activated if the offers are indeed securities under the Act. This is not as simple as it seems.

¹⁷⁵ Scholtz & De Villiers, 26 *LAWSA* at ¶ 7 (cited in note 168).

¹⁷⁶ The Companies Amendment Act, Act 3 of 2011 et seq.

¹⁷⁷ The Companies Amendment Act, Act 3 of 2011, § 95-111.

¹⁷⁸ Jacqueline Yeats, *Offers to the Public*, in Tshepo Mongalo, ed, *Modern Company Law for a Competitive South African Economy*, 118, 118 (Juta L 2010); cf. 119 et seq.; Robert C. Williams, *Companies: Part I*, in 4 *LAWSA* ¶ 126-130 (LexisNexis 2d ed 2012).

To begin with, some attention must be devoted to the potential limiting effect that s 43 (“*Securities other than shares*”) may have on the securities definition. S 43(1) states:

- (1) In this section -
- (a) “debt instrument” -
 - (i) includes any securities other than the shares of a company, irrespective of whether or not issued in terms of a security document, such as a trust deed; but
 - (ii) does not include promissory notes and loans, whether constituting an encumbrance on the assets of the company or not; and
 - (b) “security document” includes any document by which a debt *instrument is offered or proposed to be offered, embodying the terms and conditions of the debt instrument including, but not limited to, a trust deed or certificate.*

From this provision, two possible conclusions arise. The first is that the provision limits “any other instruments” solely to debt instruments that are not debentures,¹⁷⁹ by stating that *any security* that is not a share is included. That this applies to the Act as a whole is supported by the fact that s 43’s headings purport to deal with all securities that are not shares. This is the narrow, composite construction of the definition on securities. If, however, this section is successful in limiting the term “securities” to shares and debentures (as per s 1), and in limiting “any other instrument” to debt instruments that are not debentures (via s 43), for the purposes of the Act as a whole, one must still determine which interests are securities under the lender model for crowdfunding. Much will therefore still depend on what a security is or is not.

South African law has no substantive test for or delineation of what a debenture or other debt instrument is. It would seem, frustratingly, that they share with ordinary debts the exact same content in terms of rights and obligations. What separates them from mere loans is that they are “securities,” again illustrating the need for clarity on the broader legal meaning of securities. This is true at least in order to determine whether (and how) certain investment crowdfunding interests will be regulated under the Companies Act.

The second conclusion that arises from s 43 is that the legislature did not intend to limit the ambit of the term “any other securities” and sought merely (despite slightly inaccurate drafting) to regulate all forms of debt-based securities.

¹⁷⁹ Purely because debentures are already included in the Act’s *de facto* definition in s 1.

Credence for this interpretive stance can be found in both the wording “[i]n this section,” which qualifies the definitional import of s 43(1), and also in the question of why (if the first conclusion is accepted) the drafters used the words “any other instrument” and not “any other debt instrument” in s 1 in the first place. This is the wide definition and has a measure of support.¹⁸⁰

Therefore, whether or not s 43 successfully limits the overall definition of securities, a better understanding of the term is vital. It may be vital either because it will influence the regulation of crowdfunding interests rooted solely in debt, or vital because it will influence the regulation of these interests whether rooted in debt, equity or “unequity” interests. This distinction would flow from the meaning conferred on “any other instrument.”

The term “share” at least has an established meaning. The Act defines it in s 1 as “one of the units into which the proprietary interest in a profit company is divided.” However, it is fair to say that a share is more than just a “fractional part of the share capital.”¹⁸¹ It constitutes what is often described as a form of incorporeal property typified as a bundle of personal rights, including return on capital (dividends), a measure of control (voting rights) and the assets of the company at liquidation.¹⁸²

Shares, whether certificated or not, must be evidenced by some form of record,¹⁸³ *inter alia*, to facilitate their transfer. It is quite clear from the judgments of *Botha v Fick*¹⁸⁴ and *Smuts v Booyens*¹⁸⁵ that transfer occurs in three distinct steps. First is an agreement to transfer (*pactum de cedendo*) or some other underlying *causa* for such transfer; second is a valid cession of the rights the share affords the shareholder; and third is registered transfer.

Thus, the proposition that such evidencing is in order to facilitate transfer does not imply that such a record is a *prerequisite* to transfer – the share and beneficial interest is transferred simply by cession (without further formalities¹⁸⁶), and registered shareholding (which is linked to the evidencing of the share) is effected by entry into the securities register.¹⁸⁷ It should rather be understood to mean that this record – beyond mere *prima facie* proof of ownership¹⁸⁸ – is a form of evidencing that eases the efficiency with which shares can be bought and sold, as a general observation.

¹⁸⁰ Williams, *Companies: Part I* at ¶ 128 (cited in note 178).

¹⁸¹ *Bradbury v English Sewing Cotton Co Ltd*, AC (HL) 746 (1923).

¹⁸² Farouk Cassim, ed, *Contemporary Company Law* 213-14 (Juta 2010); Paul L. Davies, *Principles of Modern Company Law* 616-18 (Sweet 7th ed 2003).

¹⁸³ Cassim, ed, *Company Law* at 237-38, 253-54 (cited in note 182).

¹⁸⁴ *Botha v Fick*, (2) SA 750 (A) 81-82 (1995).

¹⁸⁵ *Smuts v Booyens*, (4) SA 15 (SCA) [10] (2001).

¹⁸⁶ Cf. *Botha v Fick* (1995).

¹⁸⁷ *Botha v Fick* (1995). *Smuts v Booyens* at [10] (2001).

¹⁸⁸ The Companies Act, Act 71 of 2008 § 51(1)(c).

Debt instruments such as debentures are slightly harder to pin down because their content does not distinguish them from other creditor-debtor arrangements. The Act, its predecessor, or case law do not provide any precise definition of a debenture,¹⁸⁹ but it provides at least a written affirmation of indebtedness (though not all such documents are), its terms may vary and it confers on the holder some special status as creditor, most notably because additional statutory content informs the relationship.¹⁹⁰

Debentures must, therefore, have additional qualities that make them not only debt obligations but (debt-based) securities also. This question, regarding debt or any other instruments, is the fundamental question prefaced, posed and discussed below.

There is an established interpretive rule that when a class or genus of words is listed and has at the end of the list a general or plenary word, the latter must be interpreted *eiusdem generis*. This means its meaning is limited to the generic attributes of that class¹⁹¹ – i.e., interpreted in terms of the words' commonalities. Thus, answering the question of whether debt-related crowdfunding interests fall under the definitional ambit of the Companies Act as securities requires a recourse to some set of "first principles" regarding securities. This is equally true of potentially having to establish a *eiusdem generis* meaning of "any other instrument," especially in light of interests such as unequity.

The only possible commonality ascribable to shares and debentures is that they are both, despite their radically different content, "securities" in the broader sense of the concept, and, thereby, this term should have some objective content – characteristics, elements or at least a list of distinguishing factors capable of abstraction.

It is outside the scope of this paper to provide a conclusion on the matter, but it would be prudent to analyse more closely whether some substantive abstraction can be made as to what a "security" is. To begin, it is helpful to look at some legal dictionary definitions of the term.

The *Oxford Dictionary of Law* provides the following: "Loosely, *stocks, *shares, *debentures, *bonds or any other rights to receive dividends or interest. Strictly, the term should only be used for rights backed by some sort of security, as in the case of debentures."¹⁹²

Black's Law Dictionary states as follows:

An instrument that evidences the holder's ownership rights in a firm

¹⁸⁹ Cassim, ed, *Company Law* at 231 (cited in note 182); Davies, *Principles* at 807-809 (cited in note 182).

¹⁹⁰ Cassim, ed, *Company Law* at 232 (cited in note 182).

¹⁹¹ Lourens Marthinus Du Plessis, *Re-Interpretation of Statutes* 234 (Buttersworth 2002).

¹⁹² Jonathan Law, ed, and Elizabeth A. Martin, ed, *Oxford Dictionary of Law* 498 (Oxford 7th ed 2009).

or government (e.g., a bond), the holder's creditor relationship with a firm or government (e.g., a bond), or the holder's other rights (e.g., an option) ... A security indicates an interest based on an investment in a common enterprise rather than direct participation in the enterprise ... securities differ from other commodities in which people deal. They have no intrinsic value in themselves – they represent rights in something else. – Ratner, Securities Regulation in a Nutshell 1 (4th Ed 1992)....¹⁹³

Given the above, as well as certain observations made about shares and debentures (both in terms of form and content), some suggestions can be made about the nature of securities in general. Moreover, “securities” is a practical term – it is used in the course of business to denote certain types of interests and specific consequences.

This means that a flexible approach to pinning down what “securities” may or may not denote is necessary. It has already been pointed out at 3.1.1 that the U.S. securities law implicitly recognises this and therefore relies on the courts to build a measure of flexibility into the system.

Shares can be seen as a package of personal rights that constitutes incorporeal property. Broadly, the rights contained are not a rigid, fixed checklist of contents that are constitutive of a share. More accurately, if rights typically found in a share exist *together with the packaging and evidencing* of those rights *also* typical of a share (i.e., those personal rights are contained in an incorporeal real right vehicle), then it is indeed a “share.”

Of course there are limits to the variability of this package of rights. For example, the Companies Act states that, if a company only has one class of shares, those shares must have voting rights, and that all shareholders must divide the surplus assets at liquidation in the same way.¹⁹⁴ Additionally, if there is more than one class of shares, at least one class must have voting rights.¹⁹⁵ Despite these and other limitations, shares remain flexible in terms of the rights they may contain.

This point is simple yet fundamental. A share is identifiable primarily by the rights it contains and the vehicle in which those rights arrive. However, the particular configuration of these two qualities¹⁹⁶ makes it more typical of a “security.” Similarly, the rights and obligations contained in debt instruments can easily be created through ordinary contractual principles and can be disposed of via cession; but again, a typical *packaging and evidencing* of these rights is found in the

¹⁹³ Bryan A. Garner, ed, *Black's Law Dictionary* 1358 (West 7th ed 1999).

¹⁹⁴ The Companies Act, Act 71 of 2008, § 37(3)(b) (i); The Companies Act, Act 71 of 2008, § 37(3)(b)(ii).

¹⁹⁵ The Companies Act, Act 71 of 2008, § 37(4).

¹⁹⁶ I.e., the qualities of certain typical rights, *and* the packaging and evidencing of those rights in a certain manner.

context of debt-based securities. Debentures are usually characterised by written evidencing, the presumed¹⁹⁷ import of *ex lege* terms, and their being backed by actual security;¹⁹⁸ but it is the broader configuration of the instrument that makes these creditor-relationships typical of a security.

This first conclusion, therefore, is that securities are always packages of rights, but the operative term in this description is not “rights” - status as a security is not determined by a specific combination of specific rights. Rather, “packages,” which describes how the interest is structured and recorded, is the decisive factor.

Second, it is not only how these interests are structured that increase the likelihood of them being securities, but also the reason for which they are so structured. One of the common features of securities is that they are widely traded, often at high volume and velocity. Therefore, one of the characteristics that typifies securities is that, although not without exception, they are generally structured in a way that is conducive to trading,¹⁹⁹ and done so by intentional design.

Third, an important feature of securities is alluded to in the second dictionary definition above: these instruments have no intrinsic value. Their value is typically contingent on something else, and this is enabled by and demonstrated through the creation of some secondary vehicle – a share or stock certificate, or, in case of debt securities, a written instrument.

This argument is not claiming that they have no value, but rather that securities are characterised by *one step of notional removal from the underlying interest*. In other words, the structure and consequences of the packaging creates one degree of separation from whatever securities derive their value from. This is equally true for shares and debt instruments, and finds further vindication in the “from the efforts of a promoter or third party” element of the *Howey* test for investment contracts.²⁰⁰

Fourth, securities often have the property of being fungible – holding a particular security is considered economically equivalent to holding another of the same type.²⁰¹ This links closely with the idea that securities are structured to be conducive to trading – *res fungibiles* of the same genus are considered economic

¹⁹⁷ “Presumed” to prevent a circular argument, as well as to highlight the notion that in practice often mere “denotation as” confers “status as” debt-instrument securities.

¹⁹⁸ This has a bearing on the content of the rights and obligations, but is also characteristic of debt instruments’ typical structure.

¹⁹⁹ This is often shown in the way that the rights and duties themselves are structured, as well as how the evidencing of these rights and duties is structured.

²⁰⁰ Cf. 3.1.1.

²⁰¹ C.G. Van der Merwe, *Sakareg* 34 (Butterworths, Durban 1979).; David Visser, *Unjustified Enrichment*, 293-294 in Coenrad Visser, ed, *Annual Survey of South African Law* (Georgetown 2003).; Jack Samet, *The Concept of Fungibility in Securities Laws* 21 *Bus Lawyer* 383, 383 (1972) as a good exposition of the US position.

equivalents,²⁰² and thus are by their nature easier to trade. Also, this quality has important remedial consequences²⁰³ that are specifically intended to address the trading aspects of securities. Illustrative of this point is that, being fungible, the sale of securities could readily be classified as a *genus* sale, which changes the operation and incidence of risk before transfer occurs.²⁰⁴

Last, interests are usually securities if they are represented to be so. However, this is a difficult argument to raise to the level of an legal axiom; it is, however, more reasonable to assert that the law imposes certain consequences purely because particular relationships are in existence.²⁰⁵ Therefore, if the interest is offered by a broker or similar intermediary, or called a security by a financial professional, one of the legal consequences that may flow from that transactional relationship is that the interest is more likely to be deemed a security.

In U.S. law, this can be seen in the third leg of the family resemblance test in *Reeves*,²⁰⁶ which concerns the “reasonable expectations of the...public.” This could even imply that merely calling a certain form of debt a “security” makes it entirely so.

In sum, the term “securities” is flexible and not perfectly determinate, and, therefore, should its treatment be in law. These attributes are useful in determining what forms of investment crowdfunding interests (not readily classifiable under the Company Act as securities) may be subject to securities regulation.

In so doing, they form a range of factors whose presence typifies securities. Thus, an inquiry centered around the *configuration* – not necessarily the content – of these interests could be applied as follows:

The nature of the interest obtained – debt, equity, mere profit-sharing and so forth (as opposed to consumer interests such as products);

How the rights and duties pursuant to the interest are packaged:

Is it structured in such a way that would typify it a security?

Is it evidenced in such a way that would typify it a security?

In answering these questions regard must be had for the following:

Has the interest been designed to be facilitative to trading?

Does the interest create a degree of notional removal from the un-

²⁰² Van der Merwe, *Sakareg* at 34 (cited in note 201).; Visser, *Unjustified Enrichment* in Visser, ed, *Annual Survey* (cited in note 201).; Samet, 21 *Bus Lawyer* at 383 (cited in note 201).

²⁰³ Samet, 21 *Bus Lawyer* at 384 (cited in note 201).

²⁰⁴ C.F. R. Van den Bergh, *Perfecta emptione periculum est emptoris: Why all the fuss?* 4 *TSAR* 623, 623 (2008).

²⁰⁵ For example, the term “parent” in family law is variable – it denotes not biological relation, but rather a particular relationship between parties from which certain consequences flow; see also Gerrit Pienaar, *Die regs aard van privaatregtelike reëls en regulasies*, THRHR at 401 (1991) regarding the inception and legal nature of the domestic statute or constitution of an *universitas hominem*.

²⁰⁶ Cf. 3.1.1.

derlying assets it confers rights to, and is this apparent from how it is evidenced?

Is the interest fungible?

Finally, does the presentation of an interest as a security flow from the type of transactional relationship that would render it likely to be a security?

A balanced, variable application of these factors could somewhat clarify how and when the Companies Act, and specifically the regulatory duties and liabilities contained in Chapter 5, will apply to participants and facilitators, if at all.

VI. LOOKING AHEAD

Some tentative conclusions have been put forward, especially regarding both the issue of how to construe crowdfunding in light of securities regulation and, using crowdfunding as illustration, the abstract nature of securities in general.

The next step is to delve deeper. With these matters now having been identified and raised, it is hoped that further research will provide more definitive answers. More clarity on equity crowdfunding will lead to more clarity on the ever-evolving nature of corporate finance in general and on the use of securities in the increasingly complex and hybridised financing efforts of the commercial world.

It has also been observed that legislators typically focus on breadth in response to the rapid rate of development in the business world. However, perhaps the answer to a more efficient and relevant regulatory framework lies in depth, abstraction and the establishment of a flexible set of first principles.

From these, the often-conflicting policy considerations of market integrity, investor protection and capital formation should be implemented. This seems true in the context of a phenomenon like crowdfunding or the next radical capital-raising mechanism or scheme may come to the fore. In this regard, the courts (as in the U.S.) ought to be seen as instrumental in this process of flexible abstraction.

VII. CONCLUSION

This essay has provided a detailed analysis of the nature and forms of crowdfunding. Further, it has shown how the U.S. – being the most developed jurisdiction around the matter – classifies, treats and regulates crowdfunding. From this, certain applicable conclusions have been drawn pertaining to South African commercial law; it has also been stated, though, that, South Africa's regulations need not share such a broad inclusivity with the U.S. federal system when it comes to on-the-margin concepts such as crowdfunding given a different set of policy considerations.

This essay suggests that investment crowdfunding, for subscribers, facilitators and participants, largely escapes the definitional ambit of South African

securities law, specifically regarding collective investments and securities services in the context of exchanges. It also suggests that when crowdfunding offers equity or debt in a more investment-oriented setting, the matter becomes increasingly complex. But, at least where shares are offered, the provisions regulating such offers are certainly activated.

Where the interests are structured in ways less akin to traditional securities, and even when such interests bring about a creditor relationship, their inclusion as securities is dependent on how they are constituted. Consequently, some tentative suggestions have been made about a range of factors that may aid our understanding of this.

Given that crowdfunding can potentially impact the growth and development of small business, especially in areas where it was previously impossible, further research into the matter is crucial. With increased understanding of crowdfunding, it will be easier for ventures to start up and leverage new avenues to raise capital, thereby boosting economic growth. Thus, academics and policymakers alike are urged to look more deeply into crowdfunding.

ARTICLE**ENABLING TYRANNY: PROCEDURAL AND
JURISDICTIONAL CHANGE IN THE COURT OF
STAR CHAMBER**

Julia Kelsoe

ABSTRACT

The Court of Star Chamber, an early modern English royal court of law, is remembered in modern times for its tyranny under the Stuart kings James I and Charles; however, it was established as a legal safeguard to redress fifteenth-century judicial corruption that had resulted from the instability of the Wars of the Roses. Scholars have attributed Star Chamber's transformation to the absolutism of the Stuart kings and their loyal ministers; however, I contend that the court's tyranny resulted as much from institutional changes as from the kings' will. The expansion of Star Chamber's jurisdiction and the increased complexity of its procedure, changes that occurred well before the court's noted degradation, enabled the Stuart kings in the seventeenth century to exploit the court for their own ends. Although the Court of Star Chamber was abolished more than three centuries ago, its history and demise present a cautionary tale for all institutions, judicial or otherwise. In the absence of defined restrictions on institutional change, Star Chamber evolved from a mechanism meant to protect the commonwealth to one that suppressed it. While the court is considered a notorious anomaly in the history of English law, it is clear, through the examination of the court's institutional changes, that Star Chamber's ill-fated trajectory was not exceptional, but rather entirely repeatable.

I. INTRODUCTION

On 6 March 1640, Charles Howard, Viscount Andover, addressed the House of Lords regarding the Court of Star Chamber. Andover claimed that Star Chamber, a royal prerogative court composed of members of the Privy Council and other high peers and prelates of the realm, lacked jurisdictional limitation and had consequently “grown a Monster and will hourly produce worse effects unless it be reduced” by Parliament.¹ He proposed that a parliamentary committee be established to enquire into the proceedings and purview of the court in order to regulate and reform the institution. When the findings of the committee, known as the Star Chamber Committee, were presented a year later to the House of Commons, the consensus was not reform, but rather dissolution.

The committee’s announcement instantly ignited and polarized the House of Commons. Some members, most notably Sir John Coventry, grandson of the late Lord Keeper and Star Chamber president Thomas Coventry, argued that the committee had overstepped its powers by demanding the abolition of one of the high courts of the realm. The majority of Commons, however, sided with the committee: Sir Simonds D’Ewes claimed that the “irregularities of the [Star Chamber] Court had been so extreme” that the committee “could never have performed the order by making a good bill” that only reformed Star Chamber. The only solution was for the court to be “extinguished and abolished.”² Edward Hyde, the future Earl of Clarendon, recorded a member of Commons to have asserted,

the remedies provided by [a bill of reform] were not proportionable to the diseases; that the usurpations of [Star Chamber] were not less in the forms of their proceedings, than in the matter upon which they proceeded; insomuch that the course of the court (which is the rule of their judging) was so much corrupted that...the proper and most natural cure for that mischief would be utterly to abolish that court...³

Supporters of the abolition of Star Chamber maintained that the court had long overstepped the jurisdictional boundaries established by the 1487 act *Pro Camera Stellata*, the parliamentary statute they identified as the legal origin of the royal court. While Star Chamber’s purview was initially limited to “unlawful maintenances, giving of Liveries...Retainers by indentures...[the] taking of

¹ Anonymous, *A True Copy of the Lord Andover’s Two Speeches to the Lords in Parliament; the one concerning the Star-Chamber; the other concerning the Pacification* 2 (1641).

² Henry Philips, *The Last Years of the Court of Star Chamber*, 21 *Transactions of the Royal Historical Society* 103, 131 (1630-41).

³ Edward Hyde, *The History of the Rebellion and Civil Wars in England, begun in the year 1641* 285 (1721).

money by Juries, by great Riots and unlawful assemblies...and murders, robberies, perjuries,” by the mid-seventeenth century the court’s jurisdiction had so expanded that “no man could hope to be longer free from the inquisition of [Star Chamber].”⁴ Placed in the context of Charles I’s “Personal Rule”, an eleven-year period during which the king ruled without calling a session of Parliament, the arbitrary jurisdiction of Star Chamber only increased Parliament’s fears of a tyrannical and uncontrollable sovereignty. On 28 June 1641, therefore, both houses of Parliament engrossed a bill to dismantle Star Chamber, claiming that the court “adventured to determine the estates and liberties of the subject contrary to the law of the land and the rights and privileges of the subject.”⁵

Thus ended the Court of Star Chamber, one of the most infamous judicial institutions in English history. Indeed, modern historiography has identified Star Chamber as a principal cause of the English Civil War, the revolutionary conflict between king and Parliament that broke out only a year after the court’s dissolution.⁶ This view is by no means unwarranted: by Charles I’s reign in the mid-seventeenth century, Star Chamber ruthlessly executed the king’s will, ignoring existing common law protections for the accused and suppressing dissenters of the Crown’s religious and political policies. For example, when the Puritan lawyer William Prynne published in 1632 the treatise *Histriomastix: The Player’s Scourge, or Actor’s Tragedy*, which criticized practices of the Church of England, he was imprisoned in the Tower of London without trial at the urging of Archbishop William Laud and on the order of Star Chamber. When the king’s Attorney General had compiled a case against Prynne to bring before the court, Prynne was denied by the clerks of Star Chamber “the liberty of Pen, Inke, and Paper, to draw up his answer and instruct his councell” so that the prosecution could proceed against him *pro confesso*—that is, as if Prynne had confessed his guilt.⁷ William Prynne was sentenced by the court on 17 February 1633:

Master Prynne should be committed to prison during life,
pay a find of 5000 pounds to the King, be expelled Lincolns

⁴ John S. Burn, *The Star Chamber: Notices of the Court and its Proceedings; with a few additional notes of the High Commission Statute 3rd Henry VII, cap. 1 (1487) 203 (London 1st ed 1870); Hyde, *The History of the Rebellion* at 284 (cited in note 3).*

⁵ John Rushworth, 4 *Historical Collections of Private Passages of State, Volume IV: 1640-1642* 112 (London 1721); John Raithby, *Statutes of the Realm: volume 5: 1628-80*, 5 An Act for the Regulating the Privie Councell and for taking away the Court commonly called the Star Chamber (1640), 111 (1819).

⁶ G.R. Elton, *England under the Tudors* (1955); F.W. Maitland and F.C. Montague *A Sketch of English Legal History* (1915); Phillips, 21 *The Last Years of the Court of Star Chamber* at 103 (cited in note 2); D.L. Vande Zande, *Coercive Power and the Demise of the Star Chamber*, 3 *Am J Legal Hist* 326, 349 (2008).

⁷ Anonymous, *A New Discovery of the Prelates Tyranny in their late prosecutions of Mr. William Pryn...Dr. John Bastwick...and Mr. Henry Burton* 20 (London 1641).

Inne, disbarred and disabled ever to exercise the profession of a Barrester; degraded by the University of Oxford for his degree there taken; and that some time set in the Pillory of Westminster, with a paper on his head declaring the nature of his offense, and have one of his Eares there cut off, and at another time be set in the pillory of Cheap-side with a paper as aforesaid and there have his other Eare cut off; and that a fire shall be made before the said pillory, and the hanging-man being there ready for that purpose, shall publicly in disgracefull manner cast all the said bookes which could be produced into the fire to be burnt.⁸

William Prynne's punishment, both pecuniary and corporal, was more than a response to the libel and sedition for which he was convicted: it was intended to make an example of him—to show what would happen to those who disobeyed the will of the king and his ministers. It did not matter that Prynne was a gentleman and thus legally exempt from corporal punishment, for the court had grown so powerful that no individual could prevent it from implementing its rulings. Indeed, the “cropt ears, slit noses, branded faces, whipt backs, gag'd mouths” of several prominent gentlemen—Prynne included—became a principal reason why “the English Nation began to lay heart to the slavish condition they were like to come to if [Star Chamber] continued in its greatness.”⁹ More alarming, however, were the ways in which defendants like William Prynne were denied the basic rights of the court's judicial procedure: they were refused the right to voice their defense and were considered guilty before their trials began. This abuse of Star Chamber procedure—carried out and accepted by the officers and judges of the court—demonstrates more than any form of punishment how Star Chamber had become a “means of giving emphatic utterance of the will of the Crown.”¹⁰

It is unreasonable, however, to label any institution, particularly one that had existed for centuries, solely on its endpoint and the views of its adversaries. To say that Star Chamber was tyrannical is to undervalue and ignore the court's judicial role for the majority of its institutional existence. Indeed, Star Chamber was instituted in the fifteenth century as a legal safeguard to offset the corruption of the common law courts and to hear cases that had not received redress. Set in the context of the Wars of the Roses, a period during which the nobility dominated and exploited the local courts, Star Chamber was one of few means to attain justice. Common law procedure in the fifteenth century was slow, overly formalized, and costly: any “trivial mistake in the pleading could lose a good case, and a clever

⁸ *Id* at 10.

⁹ Burn, *The Star Chamber: Notices of the Court and its Proceedings* at 10 (cited in note 4).

¹⁰ Cora L. Scofield, *A Study of the Court of Star Chamber* 60 (1900).

lawyer could drive a coach and four through the law by exploiting technicalities.”¹¹ In consequence of the widespread civil unrest, moreover, the most lauded component of the common law system—the jury—collapsed. Juries were often “intimidated or bribed or packed” by members of the nobility to reflect their views, or in cases in which noblemen were convicted, the sentence was simply ignored.¹² William Aslak, for example, violently persecuted William Paston, a local judge in Norwich, without restraint, for he was under the protection of a powerful knight, Sir Thomas Erpingham. Indeed, even when the county court passed an injunction against him to stop his violence, Aslak, certain of his protection by Erpingham, was able “not only to evade the execution of the sentence passed against him, but even continue his persecution” of Paston.¹³

The establishment of Star Chamber addressed many of the common law courts’ shortcomings: its procedure was known for its “cheapness and speed,” and it did not rely on juries.¹⁴ The judges of Star Chamber were composed of the most powerful members on the king’s council, and consequently their rulings were not overlooked, not even by the local nobility. For these legal advantages, the court was perceived favorably by the English people throughout the fifteenth and much of the sixteenth century. Indeed, it was considered a “most noble and praiseworthy Court; the beames of whose bright Justice...do blaze and spread themselves as far as this Realme is long or wide.”¹⁵

It is evident that there existed a dissonance between the court at its establishment and its abolition. Instituted as a legal protection against civil unrest, by the mid-seventeenth century Star Chamber had become a tool of tyranny and oppression. How can these contradictory views of the royal court be reconciled? When did one of the most respected courts of the realm become a principal cause of the English Civil War? To claim, as some scholarship on the court has, that Star Chamber was corrupted in consequence to the early Stuart monarchs and their ministers, particularly the Archbishop of Canterbury William Laud, is to oversimplify Star Chamber’s evolution.¹⁶ The individual personalities associated with the court have overshadowed the institutional problems that lay at the heart of Star Chamber’s transformation. Had the court been a sound institution with secure limits on its judicial power, these historical figures could not have wielded the court in the oppressive fashion that they did. It is necessary, then, to consider the institutional factors that enabled Star Chamber’s tyranny. The culmination of changes to the court’s procedure and jurisdiction that occurred during the Tudor and ear-

¹¹ G.R. Elton, *England under the Tudors* 63 (Selden 1955).

¹² Id.

¹³ James Gardiner, 1 *The Paston Letters: AD 1422-1509* 33 (1904).

¹⁴ Elton, *England under the Tudors* 414 (1955)

¹⁵ William Lambarde, *Archeion, or a Discourse upon the High Courts of Justice in England* § 116 (Cambridge 1957).

¹⁶ Elton, *England under the Tudors* 417 (1955).

ly Stuart periods reshaped the institution for the worse. The formalization of the court's proceedings, its acceptance of post-pleading motions, and the increasing corruption among its officers compromised the speed, economy, and efficiency of Star Chamber's judicial procedure. The expansion of the court's judicial purview to adjudicate civil offenses in addition to criminal ones made it possible for the Crown to persecute its enemies even if they had not committed a crime that jeopardized the king's peace. By the 1630s, therefore, Star Chamber had become procedurally deficient and jurisdictionally domineering; it should be unsurprising, when placed in the context of Charles' attempted absolutism, that there developed a "universall resentment... against the High Court of Star Chamber."¹⁷

An examination of the changes to Star Chamber's jurisdiction necessitates a study of the cases the court adjudicated. Like any common law court, Star Chamber determined its rulings based on judicial precedent—that is, based on its past judicial decisions. Lord Keeper Egerton, for example, justified the court's 1596 decision to imprison, whip, and cut the ears off of a commoner convicted of slandering the Lord Admiral by pointing to a similar punishment imposed on a slanderer of the Chief Justice of the King's Bench—"an office much inferior to that of the Admiral of England"—some years before.¹⁸ By analyzing Star Chamber's cases and verdicts over the Tudor and Stuart periods, it is therefore possible to determine how the court's jurisdiction changed and expanded with time. Unfortunately, research on the cases judged by the court is limited due to the condition of its records, as entire books of Star Chamber's proceedings have gone missing over the centuries. Most Star Chamber cases from Charles I's reign, for example, have been lost or destroyed: at the British National Archives in which the court's proceedings are stored, only thirty-three Caroline cases remain, in comparison to the 8,200 actions accounted for from James I's rule.¹⁹ The Decree and Order books, moreover, documenting the verdicts and sentences given by the Star Chamber judges, went missing during the English Civil War, as noted by a committee from the House of Lords in 1719.²⁰ This loss impedes an analysis of the court's jurisdiction because one cannot learn the intent of Star Chamber's judges as they deliberated their rulings. Did the judges purposefully expand the court's purview? Did their definition of the offenses over which the court had jurisdiction change with time? Questions such as these cannot be directly resolved.

The condition of the extant records of Star Chamber's proceedings at the

¹⁷ Phillips, 21 *The Last Years of the Court of Star Chamber* at 127 (cited in note 2).

¹⁸ W.P. Baildon, *Les reportes del cases in Camera Stellata 1593-1609. From the Original MS. of John Hawarde of the Inner Temple, Esquire, Barrister-At-Law* 45 (London 1894).

¹⁹ British National Archives, Star Chamber Records James I Stuart, *The Court of Star Chamber: Proceedings, James I* (unpublished manuscript).

²⁰ Stanford Lehmborg, *Star Chamber: 1485-1509*, 24 *Huntington Library Quarterly* 189, 190 (1961); John Raynor *An Inquiry into the doctrine lately propagated, concerning the attachments of contempt, the alteration of records, and the Court of Star Chamber* 95 (1769).

National Archives further complicates an analysis of the court's jurisdiction. The physical manuscripts on which Star Chamber's pleadings and examinations were recorded reflect their age: many of the manuscripts are burned, torn, faded, darkened (due to oxidation), or wrinkled enough to damage the writing inscribed on the parchment. Most of these records were never transcribed to print; therefore, their content cannot be recovered.

There are, thankfully, unofficial reports of Star Chamber's cases that mitigate some of the court's limited documentation. John Hayward's *Les Reportes del Cases in Camera Stellata*, John Rushworth's *Historical Collections of Private Passages of State*, and Samuel Gardiner's *Reports of Cases in the Court of Star Chamber and High Commission* document the trials before and the judgments issued from Star Chamber, but only over the limited periods of the late Elizabethan-early Stuart period and during Charles I's reign.²¹ While these compilations often present the opinions and discussion of the judges in Star Chamber, thus permitting a glimpse into the intent of the court as it considered suits, it is important to recognize the hermeneutical problem raised by such texts. As the original records of the court's judgments no longer remain, one cannot confirm the validity of these reports nor if all of the cases that were heard before the court were included in the compilations. John Hayward, for example, was an attorney who, like most jurists of the period, participated in the popular pastime of "court-watching" the trials heard before Star Chamber.²² Based on this recreational interest, it is unlikely that Hayward was present at every case brought before the court, nor is it probable that he recorded each case exactly as it unfolded at the time. John Rushworth's work should be approached even more cautiously, for Rushworth was a clerk-assistant to the House of Commons and, upon the outbreak of the English Civil War, a messenger between Commons and the pro-Parliament armies. Though he claimed in the title page of his work that all events were "impartially related," it is likely that, in light of his parliamentary affiliation, his documentation of the Star Chamber cases was biased against the royal court.²³

There are many sources that discuss the court's judicial procedure and the factors that enabled its change and growing inefficiency during the Tudor and Stuart periods. Hargrave MS 216 and Harley MS 2310 of the British Library, both composed by various Star Chamber clerks over the late-sixteenth and seventeenth centuries, describe the court's composition and procedure, the duties and fees of its officers, and the procedural reforms instituted by the court's judges. The Hargrave manuscript contains registers of the fees received by Star Chamber's officers during the Elizabethan and Caroline periods in articles such as *Certeyne*

²¹ Baildon, *Les reportes del cases in Camera Stellata* at 45 (cited in note 18); Rushworth, *4 Historical Collections of Private Passages of State* at 112 (cited in note 5); S.R. Gardiner, *Reports of Cases in the Courts of Star Chamber and High Commission* (London 1886).

²² Thomas Barnes, *Hawarde John (c. 1517-1631)*, Oxford Dictionary of National Biography (2004).

²³ Rushworth, *4 Historical Collections of Private Passages of State* at vii (cited in note 5).

breife notes concerning the rules and fees of the Starr Chamber and Note of fees belonging to the Clerke of his Majesties Councell in his office of Star Chamber and how the same hath beene executed by his under Clerkes. These articles verify the increasing fees demanded by Star Chamber's officers and clerks and can, consequently, elucidate how the court became one of the most lucrative practices in the legal field.²⁴ The Harley manuscript documents procedural reforms introduced to Star Chamber under Elizabeth's Lord Keeper, Sir Thomas Egerton, and under Charles I's equivalent, Sir Thomas Coventry. That the procedural reforms instituted by Coventry in the 1630s mirror those enacted under Egerton suggests that the court was incapable of resolving the problems that impeded the speed and efficiency of its procedure.

William Hudson's *Treatise on the Court of Star Chamber* is another useful source for an analysis of the court's procedure.²⁵ Hudson was the longest-standing attorney to Star Chamber, and as such his treatise presents detailed knowledge of the daily workings of the court and of its members. In his compilation, Hudson identified specific bureaucratic changes, such as the increase in the number of attorneys and clerks employed by the court during the Jacobean period, that he believed reduced the efficiency of Star Chamber's procedure. Speaking on the clerks, for example, Hudson claimed that "since the office hath been executed by many deputies, one being thrust out by that time he understandeth the duties of the place, and another put in altogether inexperienced," the court had become increasingly negligent of its procedural duties.²⁶ There exist, moreover, texts from the Stuart period that criticize Star Chamber's procedural inefficiency and bureaucratic corruption. John Raynor's treatise *An Inquiry into the doctrine lately propagated, concerning the attachments of contempt, the alteration of records, and the Court of Star Chamber* condemns the corruption and extrajudicial practices of the Star Chamber officers "which make the Court swell and the Country pine," and the anonymous pamphlet entitled *The Star-Chamber Epitomized, or a Dialogue between Inquisition, a news-smeller, and Christopher Cobweb, a Keeper of the Records for Star Chamber* uses satire to denounce the court's excessive fees and procedural abuses.²⁷ When considering works such as *The Star Chamber Epitomized*, it is imperative to consider the context in which and the audience for which it was printed. This particular satire was published in 1641, the year in which Star Chamber was abolished by Parliament, and relates a strong anti-prerogative sen-

²⁴ Barnes, *Hawarde John (c. 1517-1631)* (cited in note 22).

²⁵ F. Hargrave, 2 *Collectanea Juridica, consisting of tracts relative to the Law and Constitution of England* A Treatise on the Court of Star Chamber 1-241.

²⁶ Isaac S. Leadam, 16 *Select cases before the King's Council in the Star Chamber, commonly called the Court of Star Chamber: A.D. 1477-1509* xi (Bernard Quaritch 1902).

²⁷ Raynor, *An Inquiry into the Doctrine Lately Propagated* at 16 (cited in note 20); Anonymous, *The Star-Chamber Epitomized, or a Dialogue between Inquisition, a news-smeller, and Christopher Cobweb, a Keeper of the Records for Star Chamber* (1641).

timent. It is necessary, therefore, to acknowledge that the text is biased and likely exaggerates the deficiencies of the court. Publications such as *The Star Chamber Epitomized* are nevertheless essential to understanding existing grievances against the late Star Chamber Court.

The origin of the Court of Star Chamber has long been of historiographical concern. The Long Parliament abolished Star Chamber in 1641 on the grounds that the court had overstepped its original jurisdiction defined in the 1487 act of Parliament known as *Pro Camera Stellata*. This statute, issued in the third year of Henry VII's reign, stipulated that the court had cognizance of criminal offenses that included "unlawful maintenance, giving of Liveries, Signs and tokens, great riots, unlawful assemblies" and "murders, robberies and perjuries."²⁸ That Star Chamber in the seventeenth century had "not kept [itself] to the points limited by the said statute [*Pro Camera Stellata*], but have undertaken to punish where no law doth warrant" was therefore a clear rationale for its dissolution.²⁹

Modern scholars and even jurists from the Tudor and Stuart periods, however, have argued that *Pro Camera Stellata* was not the institutional origin of Star Chamber and did not delineate its jurisdiction. The court, for example, in the years immediately following the enactment of *Pro Camera Stellata*, never adhered to only the criminal offenses enumerated in the 1487 statute. The 1493 cases of *Vale v. Broke* and *Donington v. Broke*, for example, concerned defamation, and the 1500 case between the Mayor of London and the Mayor of Exeter involved a violation of royal charters.³⁰ The fact that, furthermore, the two Chief Justices of England were also judges of Star Chamber made Parliament's claims particularly difficult to digest: to accept Parliament's rationale would mean that the two highest judges of common law had actively contributed to illegal proceedings. Indeed, in making its 1641 decision, the Long Parliament conveniently overlooked the fact that in 1614 the two Chief Justices, Sir Henry Hobart and the renowned Sir Edward Coke, declared in open court that *Pro Camera Stellata* "extendeth not in any way to this Court [of Star Chamber]."³¹

These arguments, while convincing, did not affect the Long Parliament's decision to abolish the court in 1641. By the mid-seventeenth century, popular opinion had turned so against Star Chamber that few were willing to criticize Parliament's justification for the court's dissolution. To fully understand the reasons for Star Chamber's abolition, however, it is imperative to learn of the origins of the court. Indeed, to analyze the changes in the court's procedure and jurisdiction over the Tudor and Stuart periods requires an examinable starting-point for comparison.

²⁸ Burn, *The Star Chamber: Notices of the Court and its Proceedings* Statute 3rd Henry VII, cap. 1 (1487) at 203 (cited in note 4).

²⁹ Raithby, 5 *Statutes of the Realm* An Act for the Regulating the Privie Councell and for taking away the Court commonly called the Star Chamber (1640) at 111 (cited in note 5).

³⁰ Leadam, 16 *Select cases before the King's Council in the Star Chamber* at lxxvii (cited in note 26).

³¹ Burn, *The Star Chamber: Notices of the Court and its Proceedings* at 1 (cited in note 4).

Modern scholars agree that the court was not established by the 1487 act of Parliament, but rather “grew out of the immemorial jurisdiction of the king’s council.”³² Since medieval times, the king’s council, an assembly of the great peers of the realm and of the king’s highest ministers, had had the right to adjudicate offenses that disrupted the king’s peace. The council, as a result, had judicial purview over most criminal matters for “any deed of violence, any use of criminal force, [could] be converted into a breach of the King’s peace and brought within the cognizance” of the council.³³ The council’s jurisdiction, however, was never limited to criminal offenses: by parliamentary statute in 1430, the king’s council was allowed to arbitrate any case “in which the Council saw other reasonable cause,” in effect giving the council an unlimited purview, for it could interpret “reasonable cause” as it pleased.³⁴ It is from this conciliar judicial authority that Star Chamber developed. Indeed, the name “Star Chamber” stemmed from the fact that the king’s council would meet in a room in Westminster Palace whose ceiling was adorned with gilded stars to manage the judicial matters of the kingdom.³⁵

Star Chamber became an institutionalized court of law during Henry VIII’s reign—years after the 1487 act of Parliament—in consequence of Cardinal Wolsey and Thomas Cromwell’s reorganization of the central government. Under Wolsey, Henry VIII’s first Lord Chancellor, Star Chamber was transformed from a “tribunal of state into a court used freely by the king’s subjects in the settlement of their affairs.”³⁶ While the Cardinal did not institutionalize the court, he refashioned it to become part of “the regular system of law-administration in England.”³⁷ Lord Chancellor Thomas Cromwell’s reformulation of the king’s council into the smaller Privy Council in the mid-1530s permitted Star Chamber to become institutionally and judicially distinct. In 1540, the court was assigned a separate clerk and record keeper from that of the Privy Council, and from that point on the council and Star Chamber “were two entirely separate institutions.”³⁸

What, then, was the purpose of *Pro Camera Stellata*? On this subject, scholars cannot agree. Some argue that the statute did not “for good nor for bad” affect the development and jurisdiction of the court – that the Long Parliament only identified this earlier act in order to have a legal pretense for its abolition of Star Chamber.³⁹ A more likely explanation, one that is espoused by Cora Scofield, is that because Henry VII became king following the Wars of the Roses, the enactment of *Pro Camera Stellata* was a way for the king to announce to his subjects

³² Elton, *England under the Tudors* 415 (1955).

³³ Maitland and Montague, *A Sketch of English Legal History* 109 (1915).

³⁴ Baildon, *Les reportes del cases in Camera Stellata* at 1 (cited in note 18).

³⁵ Lambarde, *Archeion* (1591), eds C.H. McIlwain and P.L. Ward 84 (1957).

³⁶ Elton, *England under the Tudors* 82 (1955).

³⁷ *Id* at 83.

³⁸ *Id* at 415.

³⁹ Baildon, *Les reportes del cases in Camera Stellata* at 1 (cited in note 18).

that the offenses enumerated in the statute, which hadn't been penalized during the war, would be from then on be punished. Without diminishing or restricting the purview of the king's council in Star Chamber, the 1487 act brought attention to the criminal offenses within the council's jurisdiction that most affected the legal and political context of the late fifteenth century.

Whatever the intended purpose of the 1487 statute, it is evident that it did not establish Star Chamber nor define its jurisdictional parameters as the Long Parliament had claimed. Perhaps the only way Parliament saw fit to combat the extrajudicial and oppressive practices of the late Star Chamber Court was to assume its own extrajudicial role.

II. PROCEDURAL CHANGE

As the Court of Star Chamber evolved from the king's medieval royal council and was neither instituted nor defined by statute, the composition of the Star Chamber—the judges and officers that administered the court's procedure—was never fixed. Many of the positions in Star Chamber grew from precedent and continued to change throughout the sixteenth and seventeenth centuries. Such changes notwithstanding, the composition of the court can be divided into four parts: the judges, attorneys, clerks, and ushers.

The permanent judges of Star Chamber included the Lord Chancellor or Lord Keeper of the Great Seal, the Lord Treasurer, the Lord Privy Seal, the Chief Baron of the Exchequer, and the Chief Justices of the King's Bench and Common Pleas. Other members of the Privy Council, prelates, peers, and officers of state could serve on Star Chamber at their discretion by paying the clerk of the court a fee for admittance.⁴⁰ The judges would sit in Star Chamber during term time on Wednesday and Friday mornings from nine to eleven o'clock to hear cases and give judgment. They would deliver their verdicts individually in ascending order of precedence, starting with the lesser lords and ending with the Lord Chancellor or Lord Keeper, the preeminent judge and president of Star Chamber. A majority decision would determine the court's sentence; however, in the case of a hung verdict, "the Lord Chancellor or the Lord Keeper's voice swayeth it in one way or another."⁴¹

The Chief Justices of the King's Bench and Common Pleas, the two high judges of common law, were included among the judges of Star Chamber for their knowledge of the law. The other judges of the court, while great officers and peers of the realm, often had "no study or Judgment of the lawe and but small experynce

⁴⁰ British Library, Collection Hargrave 216, *The fee due to the Clerke of the Councell for such as are admitted to the Councell* (unpublished manuscript).

⁴¹ Burn, *The Star Chamber: Notices of the Court and its Proceedings* at 9 (cited in note 4).

of lawe to dyscusse what is an offence of lawe and what not.”⁴² The Chief Justices, therefore, acted as legal advisors for the other Star Chamber judges and ensured that the court’s verdicts heeded the rules and precedents of common law. It could be said, moreover, that the Chief Justices served to legitimize Star Chamber as a judicial institution, for it was more difficult to object to the court’s methods and verdicts if the principal judges of common law actively participated in its procedure.⁴³

For most of Star Chamber’s existence, three attorneys were appointed by the Lord Chancellor or Keeper to litigate cases before the court. With each case submitted to Star Chamber, one attorney would represent the prosecution, one would serve as counsel for the defense, and the final would act as an examiner to hear the testimonies of the defendants and witnesses. In addition to following “their Clyents causes and [instructing] them in the course of their causes and what they should do,” the attorneys were required to copy the pleadings they drafted and submitted for their clients.⁴⁴ To complete this ministerial task, each attorney therefore had his own set of clerks separate from those serving the court.⁴⁵ The number of Star Chamber attorneys increased to four in 1608, the same year in which Francis Bacon was appointed clerk of the court, ostensibly to disperse the amount of work the attorneys had to manage; however, William Hudson, a retired Star Chamber attorney and foremost expert on the court, condemned this expansion of the attorneys’ office as “most unnecessary” and cited it as a principal cause of the growing inefficiency in Star Chamber’s procedure.⁴⁶

Of all parts of Star Chamber’s bureaucracy, the clerical establishment saw the greatest change and sophistication during the sixteenth and seventeenth centuries. In 1540, a single clerk was appointed to Star Chamber to differentiate the judicial functions of the court from the executive functions of the Privy Council (which also received its own clerk).⁴⁷ By the late Elizabethan period, however, the number of clerks had increased exponentially, creating an entire system of clerks and under-clerks that administered the court’s procedure. At the top of this clerical hierarchy was the “Clerk of the Council in Star Chamber”. Appointed by the king, the clerk of the court was the highest-ranking officer after the Star Chamber judges. Whereas the judges were present in Star Chamber only two days of the week, the clerk oversaw the court’s daily business and ensured its ordinary course was observed. All pleadings, orders, sentences, and decrees submitted to and issued

⁴² Scofield, *A Study of the Court of Star Chamber* at 43 (cited in note 10).

⁴³ Maitland and Montague, *A Sketch of English Legal History* at 119 (cited in note 33).

⁴⁴ British Library, Collection Hargrave 216 (unpublished manuscript).

⁴⁵ Thomas Barnes, *Due Process and Slow Process in the Late Elizabethan-Early Stuart Star Chamber*, Part II 4 Am J Legal Hist 341 (1962).

⁴⁶ Hargrave, *Collectanea Juridica*, A Treatise of the Court of Star Chamber at 37-38 (cited in note 25).

⁴⁷ G.R. Elton, *The Tudor Constitution* 415 (1982, orig. 1960).

from the court had to be certified and endorsed by the clerk. Under the clerk of the court were specialized clerks responsible for various aspects of Star Chamber's procedure: the registrar clerk was in charge of "drawing, entering, and copying of the decrees and orders taken by the Court or by the Lord Chancellor;" the clerk of the file was to receive and enter all pleadings submitted to the court and collect all costs relating to the court's procedure; and the clerk of process was responsible for drafting and issuing writs and warrants.⁴⁸ In turn, each of these clerks had his own under-clerks to whom many clerical duties were delegated. The expansion of the clerical establishment, while necessary in the sixteenth century to address growing litigation, was considered excessive by the seventeenth century and was viewed as reducing the efficiency of the court's procedure. Indeed, William Hudson, typically favorable to the court with regard to its composition and procedure, lamented that "negligence hath crept into the Court...since the [clerk's] office hath been executed by many deputies, one being thrust out by the time he understandeth the duties of the place, and another put in altogether inexperienced."⁴⁹

The final officer of Star Chamber was the usher, who was responsible for ministering the court's records, attending to the clerks and attorneys, and, most importantly, admitting and registering all litigants who appeared before the court. When Star Chamber summoned by subpoena a defendant or witness to court, the usher ensured that the subpoena was delivered or, in the case that the suitor could not be found, that the local sheriffs and commissioners received notice. By controlling admission to Star Chamber, the usher also profited by admitting into the court young noblemen and gentlemen "which flock thither in great abundance when causes of great weight are there heard and determined."⁵⁰ Indeed, for some seventeenth-century *causes célèbres* in which peers or prominent officials were tried before the court, lawyers and gentry would arrive as early as three o'clock in the morning to reserve seats from the usher.⁵¹

Whereas Star Chamber administered common and statute law like the common law courts, its procedure resembled that of the ecclesiastical courts in which pleadings and examinations were written and convictions were decided without the use of a jury. Reduced to its essentials, the court's procedure can be divided into four distinct parts: the pleadings, the examination, the trial hearing, and the judgment.

In the pleadings stage of Star Chamber's procedure, a plaintiff would submit a bill of petition or complaint to the court alleging and enumerating the crimes committed by the defendant against him and against the king's peace. In his bill, the plaintiff would ask the court for a subpoena *ad comparendum*, which when

⁴⁸ British Library, Collection Hargrave 216, *Offices and duties of the Clerks* (unpublished manuscript).

⁴⁹ Leadam, 16 *Select cases before the King's Council in the Star Chamber* at xi (cited in note 26).

⁵⁰ Scofield, *A Study of the Court of Star Chamber* 67.

⁵¹ E.P. Cheyney, *The Court of Star Chamber* 4 *Am Hist R* 731 (1913).

served would enjoin the defendant to appear before Star Chamber.⁵² Upon the arrival of the defendant in court, he would be assigned by the clerk of the court to an attorney and would have one week to submit an answer to the plaintiff's claims; failure to do so would be considered contempt and would result in a fine.⁵³ The defendant could answer the plaintiff's bill in several ways: he could submit a sworn answer to the plaintiff's charges, he could draft a demurrer that challenged the crimes set against him, he could take exception to the sufficiency of the bill, or he could plead not guilty. Taking exception to the sufficiency of a bill meant that the defendant claimed the charges against him were not triable in Star Chamber. In this case, the clerks of Star Chamber would assemble a commission of learned counselors and attorneys to ascertain whether the plaintiff's bill was determinable in the court. If the defendant were proven correct, the case would be dismissed and the plaintiff would be charged *pro falso clamore* and would pay a fine. If the commission found the plaintiff's charges within the jurisdiction of Star Chamber, the defendant would be held in contempt and would pay a fine.⁵⁴ When the defendant submitted his answer to the court, the plaintiff and his counsel would have until the next term to submit a replication, a sworn response that clarified or objected to the defendant's answer. The defendant could, in turn, submit another reply, a rejoinder, in response to the plaintiff's replication. Sur-replications and sur-rejoinders were possible but rare, and the submission of the plaintiff and defendant's pleadings to the court accomplished the first stage of procedure.

For the examination stage of the procedure, the plaintiff was not examined; only the defendant and the witnesses of both parties were required to testify. The plaintiff's counsel would first draft a series of questions, known as interrogatories, addressing the charges of the bill to be put to the defendant by the examining attorney of the court. If the defendant could not be present at Star Chamber for the examination, an impartial group of commissioners (typically the Justice of the Peace, sheriff, and local gentlemen) by a writ of *dedimus potestatem* would administer the examination where the defendant was detained.⁵⁵ On oath, the defendant was obliged to answer each interrogatory directly and present his responses in writing to the court. After the examination of the defendant, the attorneys of both parties would submit a set of interrogatories to be put to the witnesses by the examining attorney or, in the case that a witness could not appear in Star Chamber, by commission. Each witness was examined in secret so that the cross-examining counsel could not learn of the witness' testimony. Indeed, the attorneys of both

⁵² Thomas Barnes, *Due Process and Slow Process in the Late Elizabethan-Early Stuart Star Chamber*, Part I 4 Am J Legal Hist 227 (1962).

⁵³ British Library, Collection Hargrave 216, *The ordinary Course of Proceedings in Causes depending in her Majesties most honorable Court of Star-Chamber* (unpublished manuscript).

⁵⁴ Leadam, 16 *Select cases before the King's Council in the Star Chamber* at xxx (cited in note 26).

⁵⁵ British Library, Collection Hargrave 216, *The ordinary Course of Proceedings in Causes depending in her Majesties most honorable Court of Star-Chamber* (unpublished manuscript).

parties would guard their obtained testimonies very closely throughout the examination stage. When both counsels were satisfied with their examinations, they would agree on a day of publication to make available for the other party's scrutiny the testimonies they had administered. If the attorneys could not agree on a day of publication, the clerk of the court would assign a day for them. In publishing the records of examination, the lawsuit would be entered into the court's book of hearing, and the clerk of the court would assign a day for the litigants' case to be heard before the Star Chamber judges. The trial date, however, could be delayed so that the cases of "more diligent suitors" or the Attorney General could be tried first.⁵⁶

Unless the Lord Chancellor or Keeper ordered otherwise, the trial hearing for the case would occur when the judges were present in Star Chamber—that is, Wednesday or Friday mornings during term time. In front of the Star Chamber judges, the attorneys of both sides would argue their case based on the examinations obtained during the previous stage and try to construe the facts to their client's benefit. The judges, if they so desired, could examine the defendant or witnesses *viva voce* in court by submitting a subpoena *ad audiendum judicium* to summon them.⁵⁷ A trial hearing could be completed in mere minutes or, as in cases of *causes célèbres*, over several days.

At the end of the hearing, the Star Chamber judges would deliver their verdict. In ascending order of precedence, each judge would declare whether the defendant should be acquitted or convicted and the type of punishment he would impose. The court's ultimate ruling would be determined by a majority vote; in the case of a hung decision, the Lord Chancellor or Keeper would decide the sentence. If the defendant were found not guilty, the case would be dismissed from the court with costs and the plaintiff would be fined for vexing the court's proceedings *pro falso clamore*. If the defendant were convicted, he could be sentenced to a pecuniary fine, imprisonment in Fleet Prison, corporal punishment, or a combination of the three. The corporal punishment that Star Chamber imposed was intended as public humiliation and included pillory, whipping, cutting off the convict's ears, or branding the letter of the convict's crime on his cheek.⁵⁸ Sentences could be reviewed, however, at the court's so-called "mitigation hearing" that occurred on the day after the Hilary and Trinity terms. Here, the counsel of the convicted would plead for reconsideration of the original sentence, and in many cases, particularly those involving fines, the Star Chamber judges would remit or mitigate their ruling.⁵⁹

There were two exceptions to the court's ordinary course of procedure: cases of *ore tenus* and *pro confesso*. If a defendant confessed to a crime triable in

⁵⁶ British Library, Collection Hargrave 216, *The ordinary Course of Proceedings in Causes depending in her Majesties most honorable Court of Star Chamber* (unpublished manuscript).

⁵⁷ Barnes, 6 Am J Legal Hist at 229 (cited in note 52).

⁵⁸ British Library, Collection Hargrave 216 (unpublished manuscript).

⁵⁹ Id.

Star Chamber to the Attorney General or a member of the king's learned counsel, the Attorney General could submit information against him to the court and prosecute *ore tenus* (orally) at the bar. The information presented by the Attorney General would substitute the pleading stage of the court's procedure, so the defendant would not have the chance to make an answer.⁶⁰ Indeed, the defendant's guilt was by course assumed. In the case of *pro confesso*, if a defendant refused to answer the plaintiff's bill and remained "mute of malice", the plaintiff could proceed against him *pro confesso*, as if the defendant had admitted his guilt.⁶¹ Cases of *pro confesso* often occurred when a defendant was already imprisoned and could envisage no improvement to his present circumstances by cooperating.⁶² These procedural exceptions were intended to expedite the court's procedure; however, they were employed rarely relative to the bulk of Star Chamber cases that went through the lengthy pleadings and examination stages of the court's procedure. By the 1630s, moreover, the Attorney General and officers of the court increasingly used the *ore tenus* and *pro confesso* procedure to punish and suppress dissenters of the king's political and religious policies.

Star Chamber's procedure, lauded in the fifteenth and early sixteenth centuries for its celerity, had become by the late Elizabethan period complex and time-consuming. The court's procedure was increasingly formalized during the Tudor period as common, but optional, matters of form were incorporated into the ordinary course of proceedings. This is not to say that Star Chamber's procedure changed as a whole; rather, that the stages of its procedure, particularly the pleadings, examinations, and trial hearings, became more complex, lengthening the entire judicial process as a result. Whereas in the fifteenth century the court's procedure was summary relative to that of the common law courts, by the seventeenth century this relationship had reversed: it took on average two to three years for an ordinary bill submitted to Star Chamber to proceed to judgment, while an assize court, using common law procedure, "habitually put seven or eight defendants on as many separate indictments for felony" during that same length of time.⁶³

This deceleration of Star Chamber's procedure stemmed largely from four basic factors, each of which delayed the court's ordinary judicial process. The first derived from the formalization of the bills, answers, and interrogatories submitted to the court, which increased the physical bulk of that material Star Chamber managed and considered. The second grew out of the corruption of Star Chamber's clerks and attorneys, who compromised attempts at judicial reform for their own financial gain. The third derived from the court's acceptance of post-pleading motions, which delayed the completion of trial-hearings. The last factor grew from the

⁶⁰ Barnes, 6 Am J Legal Hist at 230 (cited in note 52).

⁶¹ Id at 231.

⁶² Baildon, *Les reportes del cases in Camera Stellata* at 46 (cited in note 18).

⁶³ Thomas G. Barnes, *Star Chamber Mythology*, 1 The American Journal of Legal History, 6 (1961).

increasing number of *pro regia* cases prosecuted by the Attorney General, which, because of their priority over private suits, postponed ordinary proceedings. The loss of procedural celerity affected Star Chamber's dispensation of justice. The "deleying the subjects days, weakes, and sumtyme termes, racketh the subject lamentably," and the corresponding costs required to maintain a case in the court prevented all but the wealthy and reckless from seeking redress there.⁶⁴ Further, the growing number of cases introduced by the Attorney General made Star Chamber less of an arena for private suits as an outlet to determine cases of public import, involving the protection of and profit for the Crown.

Thomas Barnes discusses several of these "decelerating" factors in his two-part article "Due Process and Slow Process in the Late Elizabethan-Early Stuart Star Chamber," particularly the increased length of proceedings and the delaying motions litigants pursued in court.⁶⁵ While his scholarship is invaluable to the analysis of Star Chamber's procedural change, it concentrates almost exclusively on how the actions of litigants compromised the court's judicial process. Suitors to Star Chamber undoubtedly contributed to the court's inefficiency; however, it is important to recognize that the officers of Star Chamber were even more responsible for the court's loss of celerity. Barnes, for example, addresses some of Lord Keeper Egerton's procedural reforms from the Elizabethan period, but only to emphasize how Egerton opposed litigants' attempts to delay and obstruct proceedings.⁶⁶ He does not consider that these reforms equally reflected the corrupt practices of Star Chamber's clerks and attorneys who lengthened suitors' proceedings for their own financial gain. Barnes, moreover, barely mentions that the increase of *pro regia* suits, cases initiated by the Attorney General on behalf of the Crown, impeded the court's ability to entertain private suits, thereby transforming Star Chamber from a court of appeal into a means of executing the king's will.⁶⁷ Perhaps Barnes' emphasis on Star Chamber's litigants was intended to revise previous scholarship that had focused only on the corrupt practices of the court; however, by disregarding the clerks' and attorneys' contribution to Star Chamber's procedural change, Barnes' analysis becomes equally one-sided. It is necessary, therefore, to consider concurrently the decelerating factors that stemmed from the litigants of the court and those that derived from the court itself.

By the late Elizabethan period, the court's pleadings and examinations had become highly technical and encumbered with legal formulae. Much of this complexity developed, paradoxically, out of a need for clarity: throughout the sixteenth century, counsel would take exception to the matter or form of a bill or answer to force the opposing party to clarify its pleadings. An exception to matter questioned

⁶⁴ Barnes, 6 Am J Legal Hist at 222 (cited in note 52).

⁶⁵ Id at 221, 249; Barnes, 6 Am J Legal Hist at 315,346 (cited in note 45).

⁶⁶ Barnes, 6 Am J Legal Hist at 243,249 (cited in note 52).

⁶⁷ Barnes, 6 Am J Legal Hist at 330 (cited in note 45).

whether the terms of the alleged offense were sufficient to be determined in Star Chamber, while an exception to form indicated that counsel objected to the manner in which the offense was explained in a bill or answer. If the court agreed with the excepting counsel, not only would the opposing party be compelled to amend its pleadings, but all future pleadings submitted to Star Chamber were required to observe and include the amendment. This precedent-based process of accretion explains why, for example, every Star Chamber bill that claimed riot included an almost formulaic description of the offense: the person alleged of riot “with force and armys, that is to sey, with bowes, arrowes, bylles, swerdes and bolekers riotously assembled and made assault” on the claimant’s property.⁶⁸ That every deposition pleaded to the court contains this description (or something almost identical to it) suggests that sometime in the sixteenth century exception was taken to the matter of the offense—that the circumstances or, perhaps, the types of weapons used had not been sufficient to bring the suit within the purview of the court. The use of such phrasing, therefore, ensured a case would not be dismissed for want of sufficiency; however, it also lengthened pleadings while adding little to the actual content of the suit.

Exceptions were also taken to the form of pleadings. When describing the offense in a bill or answer, it became increasingly necessary to spell out all the essentials related to the event or crime: how many people contributed to the offense? In what exact place did the offense take place? When did the offense occur? Did it happen before or after the king’s most recent general pardon? These last two stipulations explain why the case of *Lord Morlye v. Colte et al* was dismissed from Star Chamber in 1608—the plaintiff did not heed the precedent set by earlier cases and specify the exact date on which the offense occurred:

Exceptyon was taken to the bill for that the same was incerteinlye layd, saying in the Charge thereof “this instante September,” and laying no yeare, so it mighte be before the pardon; and albeit the defendants had by there aunsweares and examynacyons reduced [the year] to a certeintye, yet the Charge in the bill was that [which] the Cowrte must judge of; and so for this cause yt was dismissed by the opinion of the Judges.⁶⁹

Successful exceptions to matter or form could “put another word, one more sentence, or perhaps a whole clause” to subsequent pleadings, and when considered collectively, they greatly formalized and lengthened the bills and answers.⁷⁰ As all

⁶⁸ Leadam, 16 *Select cases before the King’s Council in the Star Chamber* Joyfull v. Warcoppe at 106 (cited in note 26).

⁶⁹ Baildon, *Les reportes del cases in Camera Stellata* Lord Morely v. Colte and others at 348 (cited in note 18).

⁷⁰ Barnes, 6 *Am J Legal Hist* at 234 (cited in note 52).

pleadings were submitted to Star Chamber in writing, it is possible to observe this formalization by examining the records of the court's proceedings. Pleadings from the Henrician period were relatively brief, although they were written in tightly scrawled handwriting; in contrast, bills and answers from the Stuart period were discernably longer, both by the number of lines and by the size of the parchment. Indeed, the longest pleading among the extant records of Star Chamber proceedings is a bill from James I's reign that was written in tight handwriting on a piece of parchment three and a half feet wide and five feet long.⁷¹

The examinations of defendants and witnesses also underwent a similar process of accretion, as lengthier and more complex pleadings demanded lengthier and more complex examinations. William Hudson noted in his work *A Treatise of the Court of Star Chamber* that during Henry VIII's reign, "the examinations were taken by the Lord Chancellor in the Court, where the [articles of] interrogatories were never above six or seven, and those everyone a short question."⁷² By the end of the sixteenth century, however, not only had the number of articles in an interrogatory increased, but the articles themselves were comprised of several distinct questions. The result of this multiplication of articles and questions is evident in the 1596 case of *Wheeler v. Dean of Worcester*: Lord Keeper Egerton dismissed the case from court as overly tedious to examine, for "the interrogatories on the one side being 155, and on the other 125" pages.⁷³

The physical increase in the court's pleadings and examinations compromised judicial celerity, as the sheer bulk of material Star Chamber officers had to examine in order to understand the matter of legal dispute used up time that could have been used to draft, manage, and consider other cases. Indeed, the bills, answers, and interrogatories had become so lengthy that, in addition to copying the pleadings and examinations in booklets for the court's records, the clerk of the court and his staff were obliged to write abstracts of the submitted material so that the Star Chamber judges could follow what was discussed at trial-hearings.⁷⁴ In a 1630 case, for example, an under-clerk "had in some seven sheetes of paper full writ with a small hand collected all depositions of witnesses and all allegacions of councell on both parties in both causes, having imployed a full hower at least in reading thereof."⁷⁵ When considered, however, in light of William Hudson's critique of the clerical establishment, that the court's judicial process had become inept "since the [clerk's] office hath been executed by many deputies, one being thrust out by the time he understandeth the duties of the place, and another put in altogether inexperienced," it is unlikely that these abstracts benefitted in any way

⁷¹ Id.

⁷² Leadam, 16 *Select cases before the King's Council in the Star Chamber* at xxxi (cited in note 26).

⁷³ Baildon, *Les reportes del cases in Camera Stellata Wheeler v. Dean of Worcester* at 54 (cited in note 18).

⁷⁴ Barnes, 6 *Am J Legal Hist* at 235 (cited in note 52).

⁷⁵ Id at 236.

the efficiency of the court's dispensation of justice.⁷⁶

The judges of Star Chamber were well aware of the "the loss of time spent by them upon the consideracion of long and frivolous pleadings and interrogatories exhibited into [the] Court," and introduced, starting in Elizabeth's reign, reforms to curb the physical bulk of proceedings.⁷⁷ In 1578, Lord Keeper Nicholas Bacon ordered that all bills, answers, and replications submitted to Star Chamber be limited to fifteen sheets of paper with fifteen lines per sheet, and that no interrogatory for the examination of a defendant should include more than fifteen articles. Failure to heed the order resulted in a fine: a suitor would be required to pay a copying fee for every extra sheet of paper submitted in his bill or answer, and would be obliged to pay 5s for each additional article attached to his interrogatory.⁷⁸ Bacon's decree was reaffirmed fifteen years later by Lord Keeper John Puckering, to which it was further added that no article in an interrogatory should contain more than three questions. In addition to the fine stipulated by the 1578 order, Puckering declared that any suitor who did not comply with the reform "shall pay to the partied grieved...such reasonable levy of money as the [court] shall sett."⁷⁹

Whether these reforms were actually observed in Star Chamber can be deduced from later decrees of the court. Almost half a century after Puckering's order, Thomas Coventry, the Lord Keeper under Charles I, issued a decree against extensive pleadings stating that, "the service of his Majestie is hindered and the Court perplexed upon the hearing of causes in respect of the great length...of the Bills exhibited into this Court."⁸⁰ The stipulations of Coventry's reform, however, were virtually identical to those of the 1578 order; in fact, the Caroline decree was more lenient with regard to the number of pages allowed in a bill: "[it is] now ordered that no person shall from henceforth exhibit any bill into this Court the Copie whereof shall extend the number of 20 sheets after the rate of 15 lines per sheet."⁸¹ Coventry reasserted in 1631, moreover, the fifteen-article limit set by the 1578 order regarding interrogatories submitted to the court. That the Lord Keeper felt compelled in the 1630s to renew the Elizabethan decrees suggests that the earlier reforms had been neither heeded nor well enforced; the pleadings and examinations submitted to Star Chamber continued to be formalized and lengthy, retarding the entire judicial procedure as a result.

⁷⁶ Leadam, 16 *Select cases before the King's Council in the Star Chamber* at xi (cited in note 26).

⁷⁷ British Library, Collection Harley 2310, *In Camera Stellata: 16 November Anno 35 Eliz* (unpublished manuscript).

⁷⁸ British Library, Collection Harley 2310, *In Camera Stellata: 13 May Anno 20 Eliz* (unpublished manuscript).

⁷⁹ British Library, Collection Harley 2310, *In Camera Stellata: 16 November Anno 35 Eliz* (unpublished manuscript).

⁸⁰ British Library, Collection Harley 2310, *In Camera Stellata: 9 November Anno 3 Charles I* (unpublished manuscript).

⁸¹ *Id.*

A clue as to why the Elizabethan reforms failed to affect Star Chamber's procedure is found in Coventry's 1631 order on interrogatories. Rather than lay blame and impose fines solely on the litigants who brought suits to the court, as Bacon and Puckering's orders had, Coventry was equally critical of the Star Chamber attorneys who administered the suitors' examinations. "The excessive number and length of Interrogatories exhibited into this Court," stated Coventry, "are for the most part drawne by Solicitors who therein incert much impertinent matter."⁸² If a suitor's counsel signed and authorized an interrogatory that exceeded the limits of the 1578 decree, Coventry ordered that the attorney would pay the same fine the litigant was required to expend to Star Chamber.⁸³

This adjunct in Coventry's 1631 order broaches the principal obstacle to Star Chamber's efficiency: the attorneys and clerks of the court worked to increase rather than decrease procedural complexity. The material growth of pleadings and examinations required more work on the part of Star Chamber's officers (work they promptly delegated to deputies); nonetheless, it also meant that the attorneys and clerks received greater fees. Almost every step in Star Chamber's procedure—from the entry of the defendant's appearance at court to the issuing of Star Chamber's judgment—demanded a fee from the suitors. Pleadings and examinations were no exception: any bill, answer, or interrogatory submitted to the court had to be first signed and authorized by the suitor's counsel and the clerk of the court for the fee of 2s; the copy of every bill, answer, and interrogatory, required for the use and record of Star Chamber, cost a suitor 1s per sheet of paper; and, the fee for the examination of every defendant and witness was 2s 4d. All of these fees were collected and pocketed by the court's attorneys and clerks, so it should not come as a surprise that the officers continued to accept lengthy proceedings, contrary to the imposed reforms. The court's officers also received the fees for the renewal of writs of subpoena, each renewal typically costing a suitor 2s 6d.⁸⁴ As the court's subpoenas expired within a term of their issuing, it was to the officers' financial gain to extend the pleadings and examination stages of a case to cover multiple terms.⁸⁵ Star Chamber's clerks and attorneys clearly benefitted financially from the increase—both in physical material and in time—of the pleadings and examinations they administered. That Bacon and Puckering's reforms neither addressed nor reproached the officers' contribution to procedural deceleration may explain why the reforms failed to improve Star Chamber's celerity.

Only the indomitable Thomas Egerton, president of Star Chamber from 1596 to 1617, confronted the avarice of the court's clerks and attorneys direct-

⁸² British Library, Collection Harley 2310, *In Camera Stellata: 17 February Anno 6 Charles I.* (unpublished manuscript).

⁸³ *Id.*

⁸⁴ British Library, Collection Hargrave 216, *Tertio May 1598* (unpublished manuscript).

⁸⁵ British Library, Collection Hargrave 216, *The ordinary Course of Proceedings in Causes depending in her Majesties most honorable Court of Star-Chamber* (unpublished manuscript).

ly. Having reaffirmed Bacon's 1578 reform merely months into his presidency, Egerton set out to enforce the order on a case-by-case basis, penalizing both litigants and their counsel for transgressions.⁸⁶ Presented in 1605 with a bill containing "divers offences, seven or eight several forgeries of bonds, releases, etc., and charges [against] fourteen or fifteen other defendants," Egerton penalized the plaintiff's counsel with costs for the length of the pleadings.⁸⁷ With the submission, furthermore, of a bill of "125 sheetes of paper Close wrytten" in 1606, not only did Egerton fine the plaintiff and his counsel for submitting the lengthy bill, but he also ordered that the attorney,

showld have had the bill slytte with a [hole] in the middle thereof, and wore it as a heralde's Coate, and gone throughe all the courtes of Westminster.⁸⁸

In 1598, Egerton also attempted to curtail the officers' support of procedural complexity by reducing the fees awarded to them for completing various steps in the procedure, steps that "of late by Intrusion and abuse are used in other sourte or manner."⁸⁹ Among other reappraisals, the filing of bills and answers to Star Chamber's records, a task that had cost suitors 1s in preceding years, was to be completed gratuitously; and, the drawing, entering, and copying of every order required by a litigant, an undertaking officers had charged 3s for the first page and 2s for each additional page written, was to be ministered for 3s "bee it longe or short."⁹⁰ Such changes to the court's register of fees were meant to remove the unnecessary charges Star Chamber's officers had exploited and limit the costs a clerk or attorney could hope to collect from lengthy proceedings.

That procedural efficiency once again lapsed after Egerton's retirement in 1617 is evidenced by Lord Keeper Thomas Coventry's renewal of the 1578 reform in the 1630s. Coventry also attempted to reform the court's register of fees; however, an examination of the order shows that it was essentially a restatement of Egerton's 1598 decree. Among other reforms, Coventry reaffirmed Egerton's reduced charge for drawing, entering, and copying orders and reasserted Egerton's lowered fee for the writing and entry of recognizances.⁹¹ The failure of Egerton's

⁸⁶ British Library, Collection Harley 2310 (unpublished manuscript).

⁸⁷ Baildon, *Les reportes del cases in Camera Stellata* Nicholas v. Hitchcocke at 246 (cited in note 18).

⁸⁸ *Id.* at 263.

⁸⁹ British Library, Collection Hargrave 216, *The fees of the Clerke of the Councill in the Starr Chamber* (unpublished manuscript).

⁹⁰ British Library, Collection Hargrave 216, *Fees taken in Mr. Mills his tyme and disallowed about 39 or 40 Eliz Reginus* (unpublished manuscript).

⁹¹ British Library, Collection Hargrave 216, *Note of the fees belonging to the Clerke of his Majesties Councill in his office of Star Chamber* (unpublished manuscript).

reforms to have a long-term impact on the court's procedure can be attributed to the inability of succeeding Star Chamber presidents to implement reform. Sir Francis Bacon (1617-1621), who had been the clerk of the court before assuming the chancellorship, had profited greatly from the fees he collected as clerk and was therefore unlikely to consider procedural deceleration as a problem. The Bishop of Lincoln John Williams (1621-1625), moreover, had no previous judicial experience and thus lacked the legal prowess necessary to enact and enforce procedural reform.⁹² By Coventry's presidency, then, neither the length of procedure nor the avaricious practices of Star Chamber's officers had abated. Indeed, the court's procedural "slowness" and bureaucratic corruption was well known and well criticized by the Caroline period. Consider the following satirical dialogue between Christopher Cob-webb, the fictional keeper of Star Chamber's records, and Inquisition, a "newsmeller":

Inquisition: [The Star Chamber cases] are very large indeed, they [must] cost something in writing.

Christopher: I believe you, for they have bin coppied, ingrossed, written, rescribed, prescribed, and transcribed forty times over.

In: But what did the Cliants use to pay for so many times writing?

Chr: Yes that they did, and in ready money too, the [officers] of our Court would not be procrastinated, prorogued, or demurred.

In: But I hope their Rates were conscionable: where they not?

Chr: Yes! They did pay but 12d a sheete for the Cobby.

In: That was something deare...⁹³

This dialogue, published in the same year as Star Chamber's dissolution, was clearly intended to be critical of and partial against the court, and as such many of Star Chamber's procedural practices were exaggerated. The "deare" copying fee of 12d (1s), however, was no overstatement, and the fact that the practices of the court's officers were disparaged in particular suggests that the clerks and attorneys' self-invested tendencies were well recognized. Although they must be taken with a grain of salt, contemporary publications such as this reveal how Star Chamber had come to be conceived on the eve of the Civil War: the court was replete with superfluous and costly measures that served to benefit its officers rather than the administering of justice.

In light of the time and cost required for a case to be determined in Star

⁹² Barnes, 6 Am J Legal Hist at 319-321 (cited in note 45).

⁹³ Anonymous, *The Star-Chamber Epitomized: or a Dialogue between Inquisition, a Newes Smeller, and Christopher Cob-web a Keeper of the Records for Star-Chamber, as they met at the Office in Grayes-Inne* at 2 (1641).

Chamber, one wonders why suitors continued to initiate pleadings in the court during the seventeenth century. Indeed, by Charles I's reign, less than twenty percent of the cases started in Star Chamber progressed beyond the pleadings stage of procedure and only four percent of cases arrived at a hearing.⁹⁴ Despite these low rates, the number of suits initiated in Star Chamber actually grew from Elizabeth's reign to the Stuart period: during the forty-fourth year of Elizabeth's rule, an estimated 700 cases were filed in the court; in contrast, during the second year of Charles I's reign, the number of cases initiated had increased to over a thousand.⁹⁵ This seeming contradiction is resolved when one considers the motives of suitors for bringing a case to Star Chamber. By the seventeenth century, many litigants *wanted* to delay the determination of a legal suit (particularly if it was unlikely to be judged in their favor) and would therefore deliberately start proceedings in Star Chamber to postpone judgment. Star Chamber, being a high court of the realm, held precedence over most common law courts, so a plaintiff's initiation of proceedings at the court would prevent his opponent from bringing a similar suit against him in the more efficient common law courts.⁹⁶ This ploy of preemptive prosecution was by no means a new phenomenon to the court: even in Henry VIII's reign one finds examples of litigants initiating proceedings at Star Chamber to circumvent common law suits.⁹⁷ What differentiates the two periods was Star Chamber's procedural inefficiency: whereas litigants in the early sixteenth century sought prosecution in the court to benefit from its "considerable procedural advantages," many cases were initiated in Star Chamber during the seventeenth century to choke up and leave unresolved the matter of legal dispute.⁹⁸

Suitors from the late Elizabethan and Stuart periods also actively pursued ways to prolong even further the cases they initiated in Star Chamber. The most common of methods was the post-pleading motion. A post-pleading motion occurred when a plaintiff or defendant's counsel took exception to the matter or form of the original offense after the pleadings had been submitted to the court. Indeed, such motions were often brought up in the midst of trial hearings as attorneys defended their client's claims. As with exceptions to sufficiency during pleadings, counsel's post-pleading objection to matter or form compelled Star Chamber to "referreth the Consideracon [of the exception] to some Judges or Barons or some of her highness learned Councill," causing the trial to be postponed until

⁹⁴ Henry E.I. Phillips, *The Last Years of the Court of Star Chamber 1630-41: (The Alexander Prize Essay)*, 21 Transactions of the Royal Historical Society 103, 111 (1939).

⁹⁵ *Id.*

⁹⁶ Frederic William Maitland, *The constitutional history of England: a course of lectures* at 216-217 (Cambridge 1913).

⁹⁷ John Guy, *The Cardinal's Court* at 55-56 (Sussex 1977).

⁹⁸ *Id.*

the counsel's exception could be appraised.⁹⁹ Star Chamber's judges, particularly Thomas Egerton, condemned such delaying measures; however, as these motions had been entertained and accepted in the past, they became, through precedent, an incorporated—albeit unwelcomed—part of the court's procedure. In his notes on cases heard before the late Elizabethan Star Chamber, for example, John Hayward made no comment when, in 1596, Francis Bacon (then a mere attorney) “moved to dismiss for uncertainty a bill of riot supposed to be made ‘in 35 of her Majesties raigne of thereaboutes’,” which suggests that the motion of exception at trial was routine.¹⁰⁰

By the Stuart period, the court's high costs and procedural delay transformed its litigation into the ultimate battle of wills. A suitor initiated proceedings in Star Chamber less with the objective of having the case judged in his favor than to compel his opponent to spend so much money and time on the case that he would be forced to settle. Taking exception to a bill or answer post-pleading, then, served to “raise the stakes” and test the mettle of the opposing party. By the seventeenth century, Star Chamber had departed from its original role as a legal safeguard against corruption and exploitation; it was no longer “the effect of [the] Court to bridle such stoute noble men or Gentlemen which would offer wrong by force to any manner man [who] cannot... defend their right by order of lawe.”¹⁰¹ And while not every suitor that started an action in Star Chamber matched this description, it is evident that “thrifty and careful men and poor men did not frequent the court.”¹⁰²

The final factor that compromised the court's ordinary procedure was the increasing frequency of *pro regia* cases initiated by the Attorney General. In the forty-five years of Elizabeth's reign, approximately 800 suits were filed in Star Chamber by the Attorney General, whereas during the twenty-two years of James I's rule, the number of cases initiated was almost 600. The average annual frequency of *pro regia* cases submitted to the court therefore increased from approximately eighteen to twenty-seven percent.¹⁰³ While the loss the Decree and Order books makes it impossible to know how many cases proceeded to judgment, it is likely that *pro regia* suits reached the final stages of procedure at a higher rate than that of private suits since the Attorney General began prosecution upon information collected previously by him or by a member of the king's learned council.

As Attorney General's cases were given priority in Star Chamber's trial-hearing schedule, the increased frequency of *pro regia* cases and their higher

⁹⁹ British Library, Collection Hargrave 216, *The usuall Course of Orders granted to ordinary motions in the Starr Chamber* (unpublished manuscript).

¹⁰⁰ Baildon, *Les reportes del cases in Camera Stellata* at 61 (cited in note 18).

¹⁰¹ Thomas Smith, *De Republica Anglorum, Book III* at 125 (Cambridge 1st ed 1583).

¹⁰² Barnes, 6 Am J Legal Hist at 339 (cited in note 45).

¹⁰³ British National Archives, Star Chamber Records James I Stuart (unpublished manuscript).

likelihood to proceed to trial certainly affected the court's ordinary procedure.¹⁰⁴ Suits submitted *pro regia* often involved complicated and lengthy matters of public import, and therefore expended much of the time allocated to Star Chamber's judges to determine cases. The trial-hearings of ordinary, private suits could thereby be postponed for months. Indeed, the greater frequency of Attorney General prosecutions in the seventeenth century helps clarify the evident increase in time required for a private action to proceed to judgment: in 1596, one and one-half years was the average duration of an ordinary case; by 1641, two and one-half years was the norm.¹⁰⁵

The increasing frequency of *pro regia* cases also affected how the court was perceived during the Stuart period. Whereas in the fifteenth century Star Chamber was considered a means for individuals to receive redress and to curtail an exploitative nobility, by the seventeenth century the court was increasingly seen as a tool to carry out the will of the Crown. This was particularly true during Charles I's reign: between 1631 and the dissolution of the court ten years later, the majority of the *pro regia* cases brought before Star Chamber were prosecuted for fiscal ends—to raise revenue on behalf of the Crown so as to support Charles' "Personal Rule."¹⁰⁶ Those cases that were not motivated for fiscal ends were often pursued to censure dissent: opponents of the king's religious and political policies were prosecuted *pro regia* in Star Chamber, the judges of the court invariably convicting these individuals for their alleged crimes.¹⁰⁷ By the 1630s, then, not only was Star Chamber considered procedurally inefficient and bureaucratically corrupt, but it was viewed as a means to enable the king's arbitrary and tyrannical rule.

A court's procedural speed, economy, and efficiency are often as important as its ability to provide substantive justice. Indeed, if it cannot reach judgment in a timely manner or if its judicial process is too expensive for most litigants to bear, a court's procedure can, in fact, prevent substantive justice from being realized. This is particularly evident with regard to Star Chamber's procedural change during the Tudor and Stuart periods. Due to the increased length of its proceedings, the higher fees demanded by its officers, and the postponement of private suits for the hearing of *pro regia* suits, Star Chamber could not provide legal redress in the seventeenth century as effectively as it once had. Renowned in the Tudor period for its summary and inexpensive judicial process, Star Chamber was considered by the Stuart period as procedurally inept and costly.¹⁰⁸ Edward Hyde, in fact, identified Star Chamber's changed procedure as the principal difference between the court during

¹⁰⁴ Phillips, 21 Transactions of the Royal Historical Society at 113 (cited in note 97).

¹⁰⁵ Barnes, 6 Am J Legal Hist at 337 (cited in note 45).

¹⁰⁶ Christopher Brooks, *Law, Politics and Society in Modern England* at 199-208 (Cambridge 2008).

¹⁰⁷ Phillips, 21 Transactions of the Royal Historical Society at 120-123 (cited in note 97).

¹⁰⁸ Smith, *De Republica Anglorum, Book III* at 125 (cited in note 101).

the Tudor period and under Stuart rule:

They who look back upon the Council-Books of Queen Elizabeth, shall find [in Star Chamber] as high instances of Power, and Sovereignty upon the Liberty, and Property of the subject, as can be since given. But the art, order and gravity of those Proceedings (where short, severe, constant rules were set, and smartly pursued...) made them less taken notice of, and so less grievous to the Public.¹⁰⁹

By Charles I's reign, when the king and his ministers used Star Chamber to implement and maintain their absolutist policies, Star Chamber's inefficient procedure became a prominent point of criticism. In the satirical publication *The Star Chamber Epitomized*, for example, the author sardonically declares that the "Court would not be procrastinated, prorogued, or demurred," in its administration of justice.¹¹⁰ Such criticism, however, broached a principal existential concern relating to the court, one that would only be resolved with its dissolution in 1641: what was the purpose of the Court of Star Chamber as a judiciary if it could not provide effective substantive justice but rather carried out the king's tyranny?

III. JURISDICTIONAL CHANGE

The principal grievance raised against the late Star Chamber court, indeed, the justification for its abolition in 1641, concerned the court's jurisdictional expansion. By the end of Elizabeth's reign, critics, in particular common law jurists, began to question Star Chamber's judicial purview: whether the court was legally sanctioned to hear and judge the offenses that it did. Opponents of Star Chamber—be it the common law attorneys Hexte and Grimstone in the 1580s or the Viscount Andover in the 1640s—believed that the court's jurisdiction had inflated beyond its original parameters, that Star Chamber had "undertaken to punish where no law doth warrant."¹¹¹ These critics, however, used the offences enumerated in the 1487 act *Pro Camera Stellata* to define the court's original jurisdiction, a statute that leading jurists of the period argued did not delineate nor constrain the court's purview.¹¹² Must the grievances against Star Chamber's jurisdiction therefore be

¹⁰⁹ Edward Hyde, *The History of the Rebellion and Civil Wars in England, begun in the year 1641* at 285 (1721).

¹¹⁰ Anonymous, *The Star-Chamber Epitomized: or a Dialogue between Inquisition, a Newes Smeller, and Christopher Cob-web a Keeper of the Records for Star-Chamber* at 2 (cited in note 96).

¹¹¹ Guy, *The Cardinal's Court* at 2-3 (cited at note 97); Raithby, *5 Statutes of the Realm* An Act for the Regulating the Privie Council and for taking away the Court commonly called the Star Chamber (1640) at 111 (cited in note 5).

¹¹² Burn, *The Star Chamber: Notices of the Court and its Proceedings* at 9 (cited in note 4).

ignored? Even in the most tenacious of opposition there is often some truth. Regarding Star Chamber, such “truth” is not so difficult to uncover, for even supporters of the court and loyalists to the Crown criticized the court’s growing purview. William Hudson, the longest-standing Star Chamber attorney and the court’s staunchest supporter, claimed that “when once this Court began to swell big... then began the English Nation to lay heart to the slavish condition they were like to come unto, if this Court continued in its greatness.”¹¹³ Edward Hyde, Earl of Clarendon and a royalist stalwart during the English Civil War, also denounced the court’s jurisdictional expansion, arguing that

The Exorbancies of this Court had been such...that there were few Persons of Quality who had not suffer’d or been perplex’d by the weight or Fear of those Censures and Judgements. For, having extended Their Jurisdiction...no man could hope to be longer free from the Inquisition of that Court.¹¹⁴

Hyde’s remarks, in fact, broach on a principal fear of Star Chamber’s critics: that the court’s expansive purview would enable the king and his ministers to persecute almost any person for almost any crime. This fear was by no means unfounded. The Puritan lawyer William Prynne, for example, was arrested and convicted by Star Chamber in 1633 for libel on the grounds that his treatise *Histriomastix: The Player’s Scourge, or Actor’s Tragedy* vilified Queen Maria Henrietta. Prynne’s publication contained certain passages that condemned actresses as “notorious whores”; however, these claims had been approved by the English censors “after serious perusal thereof, both in the written and printed copy” upon publication in November of 1632.¹¹⁵ It was only after the queen’s theatrical performance in December of the same year that Prynne’s work was condemned as libelous. The Star Chamber judges, who had long hoped for a reason to censure Prynne and his radical religious views, construed Prynne’s publication as a direct critique of the queen even though “the whole booke [was] finished at the presse at least three moneths and published six weekes before” the queen’s recital.¹¹⁶ The judges, specifically Archbishop William Laud, justified Prynne’s sentence of life imprisonment by claiming that the court had the authority to punish libel as a capital offense, despite that “no precedent, or authority at common law [was] cited to

¹¹³ Id at 10.

¹¹⁴ Edward Hyde, *The History of the Rebellion and Civil Wars in England, begun in the year 1641* 284-5 (London 1721).

¹¹⁵ Anonymous, *A New Discovery of the Prelates Tyranny in their late prosecutions of Mr. William Pryn...Dr. John Bastwick...and Mr. Henry Burton* at 7 (London 1641).

¹¹⁶ Id at 8.

warrant the resolution.”¹¹⁷ Not only, then, did Laud use Star Chamber’s expansive jurisdiction to suppress a religious opponent, but the judges also actively extended the court’s authority over libel to ensure that Prynne would be put away indefinitely.

Another fear of Star Chamber’s detractors was that the court’s jurisdictional expansion usurped the authority of the common law courts. Star Chamber, a high court of the realm, already held supervisory jurisdiction over the common law courts: it had the power to review judgments issued from the lower courts, and it could stay proceedings at common law so that a suit would be first heard and determined in Star Chamber.¹¹⁸ That the court increasingly entertained cases that were the cognizance of the common law courts, particularly with regard to civil suits, convinced many that Star Chamber’s growing purview undermined the entire common law system. Indeed, one of the reasons cited for the dissolution of Star Chamber in 1641 was that the court “hath of late times assumed unto it self a power to intermeddle in civil causes and matters only of private interest between party and party, and have adventured to determine the estates and liberties of the subject contrary to the law of the land.”¹¹⁹ Whereas the common law courts had particular safeguards, such as their use of juries, to prevent arbitrary judgment, Star Chamber had no such provisions. Critics feared, consequently, that the court’s expanding purview would not only usurp common law jurisdiction, but in doing so more cases would be determined based on the will of the Star Chamber judges rather than the ordinary course of law.

To cite sources that claim and condemn Star Chamber’s jurisdictional expansion is one thing; however, it is an entirely different feat to illustrate this growth. Indeed, any analysis of Star Chamber’s inflating purview is hindered for two principal reasons. First, one cannot determine with certainty the original jurisdiction of the court. Star Chamber’s purview derived from the judicial authority of the medieval king’s council, an authority that was never explicitly specified. The council heard and dealt with threats to the king’s peace; yet, almost any criminal matter could be “converted into a breach of the King’s peace and brought within the cognizance” of the council.¹²⁰ The early Tudor statutes that addressed Star Chamber’s jurisdiction, particularly those enacted in 1487 and 1494, therefore do not present an exhaustive list of the offenses over which the court held cognizance. This jurisdictional indeterminacy makes it difficult to illustrate Star Chamber’s expansion, for there is no comprehensive starting-point to which to compare the

¹¹⁷ William Bolla, *The Freedom of Speech and Writing upon public affairs considered* 50 (London 1766).

¹¹⁸ F.W. Maitland, *The constitutional history of England: a course of lectures* 216-17 (Cambridge 1913).

¹¹⁹ Raithby, *5 Statutes of the Realm* An Act for the Regulating the Privie Councill and for taking away the Court commonly called the Star Chamber (1640) at 110 (cited in note 5).

¹²⁰ F.W. Maitland and F.C. Monague, *A Sketch of English Legal History* 109 (New York 1915).

court's later purview.

The condition of the court's records, furthermore, impedes an analysis of Star Chamber's inflating jurisdiction. Many records of proceedings initiated in Star Chamber, particularly those from the late fifteenth and early sixteenth centuries, have been lost or destroyed. The extant records, therefore, do not represent a complete list of cases brought before the court, and consequently, one cannot determine Star Chamber's original jurisdiction simply by examining the court's earliest recorded offenses. The loss of the Decree and Order books, which had documented all of the verdicts and penalties imposed by Star Chamber, presents an even larger obstacle: without these books, one cannot know which cases pleaded to Star Chamber were accepted, dismissed, or referred to the jurisdiction of common law.¹²¹ Not only does this prevent knowing the offenses over which the court had cognizance at any given time, but the loss makes it difficult to learn the intent of Star Chamber's judges—whether or not they deliberately pursued judgments that would expand the purview of the court.

Some of this uncertainty is clarified by reason of John Hayward's *Les Reportes del Cases in Camera Stellata*, John Rushworth's *Historical Collections of Private Passages of State*, and Samuel Gardiner's *Reports of Cases in the Courts of Star Chamber and High Commission*.¹²² These works document the judgments and sentences of the court, but only over the limited periods of the late Elizabethan and early Stuart period (1593-1609), the first twelve years of Charles I's reign (1625-1637), and the earliest years of Charles' Personal Rule (1631-1632). As the original records of Star Chamber's judgments have been lost, there is no way to verify the accuracy and representativeness of these works; one cannot ascertain whether these records faithfully portray the court's deliberations or whether they include all of the suits the court heard and determined. John Rushworth's *Historical Collections*, for example, should be taken with a grain of salt: during the time in which he composed the work, he served as a clerk to the House of Commons and relayed messages to the pro-Parliament armies at the outbreak of the English Civil War. Despite Rushworth's claim that he "did personally attend to and observe all Occurrences of Moment . . . in the Starr-Chamber," it is likely, in light of his associations, that his description of the court's cases and his choice of suits to include in his compilation are biased.¹²³

In spite of these obstacles, much can still be determined regarding the court's jurisdiction and its inflation over time. First, it is evident that Star Chamber had held cognizance over certain criminal offenses since the fifteenth centu-

¹²¹ Lehmberg, 24 *Huntington Library Quarterly* at 190 (cited in note 20).

¹²² Baildon, *Les reportes del cases in Camera Stellata* (cited in note 18); Rushworth, 4 *Historical Collections of Private Passages of State* at 481 (cited in note 5); Gardiner, *Reports of Cases in the Courts of Star Chamber and High Commission* (cited in note 21).

¹²³ Joad Raymond, *Oxford Dictionary of National Biography, John Rushworth (c.1612–1690)*, (Oxford University Press 2004).

ry. From the extant records of suits initiated in Star Chamber during Henry VII's reign, it is clear that the court heard cases in which criminal offenses were alleged, particularly (although not limited to) riot, assault, conspiracy, forgery, wrongful imprisonment, perjury, and defamation.¹²⁴ That these same offenses were consistently pleaded to Star Chamber from the fifteenth to seventeenth centuries suggests that they were well established as part of the court's jurisdiction. Indeed, Sir Edward Coke, the leading jurist of the seventeenth century, confirmed the court's purview over criminal offenses, asserting that "the jurisdiction of this Court dealeth not with any offence that is not *malum in se*, against the common law, or *malum prohibitum*, against some statute."¹²⁵

Second, it is still possible to demonstrate Star Chamber's jurisdictional expansion during the Tudor and Stuart periods. By examining the offenses over which Star Chamber consistently held cognizance, it is clear that the definitions of these offenses—the circumstances necessary to bring a suit within the purview of the court—became less restrictive with time. As the requisites for a Star Chamber offense became less constrained and more inclusive, the court was able to adjudicate issues that would have been beyond its judicial scope only generations before. Significantly, the court extended its authority at the direct expense of common law jurisdiction, regardless of how well established the lower courts' purview may have been. By broadening its definitions for the offenses to which it claimed authority, Star Chamber became by the seventeenth century judicially domineering, imposing a "despotic Domination exercised over the People of England."¹²⁶

This definitional change in the offenses over which Star Chamber had jurisdiction occurred for two reasons. First, the offense a plaintiff alleged in a suit was not always the matter of legal dispute he wished to resolve in Star Chamber. Indeed, the issue in dispute was often civil in nature, the traditional cognizance of common law. Particularly under the reigns of Henry VII and Henry VIII, litigants would allege an offense determinable in Star Chamber to elevate their case to the domain of royal jurisdiction and beyond the claim of common law to benefit from the summary and inexpensive procedure of the court.¹²⁷ Second, by entertaining and judging these "disguised" cases, Star Chamber established, by judicial precedent, a new standard to which to refer when adjudicating future cases. Over time and over many suits, the court was able to expand its jurisdiction to cover areas of the law it could not originally consider, often at the expense of common law authority. This process of jurisdictional inflation is particularly evident when examining the cases of riot and defamation that were brought before the court during the Tudor and Stuart periods. By analyzing specific suits of riot and defamation

¹²⁴ Leadam, 16 *Select cases before the King's Council in the Star Chamber* (cited in note 26).

¹²⁵ Bollan, *The Freedom of Speech and Writing* at 59 (cited in note).

¹²⁶ Raynor, *An Inquiry into the Doctrine Lately Propagated* at 90 (cited in note 20).

¹²⁷ Guy, *The Cardinal's Court* at 54 (cited in note 97).

from the fifteenth to seventeenth centuries, the process by which Star Chamber expanded its purview will become clear.

A. Case Study I: Riot

Since the fifteenth century, riot had been part of Star Chamber's jurisdiction. Indeed, it was considered a principal offense adjudicated by the court: among the existing 128 cases brought before Star Chamber during Henry VII's reign, eighty allege riot in some form.¹²⁸ The sixteenth-century legal scholar Sir Thomas Smith, moreover, affirmed Star Chamber's cognizance of riot in his work *De Republica Anglorum*, claiming that if riot "be found and certified...or if otherwise it be complained of, the party is sent for, and he must appear in this Star Chamber."¹²⁹ That riot was consistently pleaded to the court from the fifteenth to seventeenth centuries makes this offense particularly useful to the examination of Star Chamber's jurisdictional expansion. By analyzing the circumstances in which litigants alleged riot and the judgments of the Court included in Hayward, Rushworth, and Gardiner's compilations, the definitional change in this offense will become evident.

Early definitions of riot are collectively vague, as parliamentary record in 1433 equated riot to "disobediences against the king's estate," and Thomas Smith claimed that riot occurred "where any number is assembled with force to do anything."¹³⁰ It is not until 1594 that a sufficient definition of riot appears in Sir Richard Crompton's treatise *Star-Chamber cases Shewing what causes properly belong to the cognizance of that court*.¹³¹ Crompton asserted that riot "is the forcible doing of an unlawful act by three or more persons assembled together for that purpose." These unlawful acts included "the breach of enclosures, or banks or conduits, parks, ponds, houses, barns, the burning of stacks of corn...to beat a man, to enter forcibly upon a possession." To constitute riot, Crompton maintained, three provisions had to be incident: "First, that the force raised be greater than may be resisted by him against whom it is intended, without other help. Next, that the force be *vis armata* [armed]. The third, that there be *dolus*, that is, a pretended malice."¹³² It is important to notice that, while this definition of riot is more explicit and, consequently, useful to this analysis, Crompton published this description at the end of the Tudor period. This definition may have differed from one equally explicit but issued at the start of Henry VII's reign; nonetheless, Crompton's definition likely

¹²⁸ Lehmborg, 24 *Huntington Library Quarterly* at 195 (cited in note 20).

¹²⁹ Smith, *De Republica Anglorum*, Book III at 125 (cited in note 101).

¹³⁰ Chris Given-Wilson, *Parliament Rolls of Medieval England, Henry VI: July 1433*; Smith, *De Republica Anglorum*, Book III at 125 (cited in note 101).

¹³¹ Richard Crompton, *Star-Chamber cases Shewing what causes properly belong to the cognizance of that court* (London 1630).

¹³² *Id.* at 4.

reflected practice for some time as he composed this treatise at the end of his legal career.

In examining the early Star Chamber cases in which riot was alleged, it is evident that the matter of legal dispute in many suits concerned a contested title to property rather than the offense of riot. Indeed, in the eighty cases of alleged riot from Henry VII's reign, forty-two suits dealt with disputed property rights, and almost two-thirds of the riot cases pleaded to Star Chamber during the first half of Henry VIII's reign "were in reality about unquiet titles."¹³³ Although the modern reader may be confused as to how property disputes could be "disguised" as offenses of riot, these two issues were in fact linked during the Tudor and Stuart periods due to the legal principle of seisin. Seisin, the legal right to land or freehold, required the physical occupation of a property: a person could be the inheritor of land by means of a will; however, he would only be legally recognized as the seisor, or owner, of the property when he personally entered and occupied the land.¹³⁴ Asserting one's right to land, then, known in legal terms as "the right of entry", was as simple as walking into one's property. To avoid a "slow and troublesome" action at common law to resolve a contested claim to title, litigants from the Tudor and Stuart periods would often take matters into their own hands.¹³⁵ Armed with weapons and accompanied by at least two other individuals, a suitor would enter and possess the property to which he claimed ownership. As "to enter forcibly upon a possession" constituted riot during this period, the litigant hoped that his actions would compel his adversary to claim riot and start a suit in Star Chamber, thus circumventing common law jurisdiction entirely.¹³⁶ If the court decided to entertain the suit, the judges would be forced, in turn, to determine the disputed right to property, for the litigant's actions could only be considered riotous if the land into which he entered was not his own.

The Star Chamber case *Cappis v. Cappis* exemplifies this practice of alleging riot to settle a disputed claim to property.¹³⁷ In her petition, Philippa Cappis, the widow of a landowner, charged her stepson, Robert Cappis, of having "wrongfully, forcibly and in riotous manner" entered the family's manor lands, driving away livestock, and threatening the tenants.¹³⁸ While Robert Cappis, in his answer, claimed title to the estate, Philippa countered that he had no "manner of colour of title" to the property because he was not his father's heir.¹³⁹ As only the pleadings

¹³³ Lehmborg, 24 *Huntington Library Quarterly* at 196 (cited in note 20); Guy, *The Cardinal's Court* at 53 (cited in note 97).

¹³⁴ S.F.C. Milton, *What was a Right of Entry?*, 61 *Camb L J* 1, 562 (2002).

¹³⁵ *Id.*

¹³⁶ Crompton, *Star-Chamber cases* at 4 (cited in note 131).

¹³⁷ G. Bradford, *Proceedings in the Court of the Star Chamber in the reigns of Henry VII and Henry VIII, Cappis v. Cappis (before 1548)*, 264 (London, 1911).

¹³⁸ Bradford, *Proceedings in the Court of the Star Chamber, Cappis v. Cappis (before 1548)*, 265.

¹³⁹ *Id.* at 266.

remain from this Star Chamber case, it is impossible to ascertain whether the defendant had legal claim to the estate; nonetheless, it is likely that Robert deliberately entered the manor lands to resolve the title dispute, for his actions could only be considered riotous if he was not the seisor of the property.

The riot case *Wode v. Sir John Crockkar* is another example of a “disguised” dispute over property.¹⁴⁰ Wode, who owned a wood bordering the deer park of Sir John Crockkar’s estate, had enlarged the hedge that marked the limit of his property so as to prevent deer from damaging his lands. In his petition to Star Chamber, the plaintiff accused Crockkar of having “riotously entered the wood to cut down the hedge and other trees.”¹⁴¹ Crockkar, in his answer, countered that no riot had occurred, for the hedge had been on his property, not Wode’s, permitting him every right to cut it down. Given that “the breach of enclosures” was included in Crompton’s definition of riot, Crockkar’s dismantlement of the hedge could be construed as riotous.¹⁴² As Crockkar argued in his deposition, however, riot could only have occurred if it was first proven that the hedge was on Wode’s property and not his own. As with Robert Cappis in the previous case, it is possible that Crockkar deliberately entered the contested land and breached an enclosure to compel Wode to initiate pleadings against him in Star Chamber. If this case was entertained by the court, not only would the disputed claim to land be resolved, but it would have been determined more quickly and for less cost than at common law.¹⁴³

The cases of *Cappis v. Cappis* and *Wode v. Sir John Crockkar* demonstrate how the allegation of riot, whether false, exaggerated, or true, was a convenient adjunct to include in cases of disputed title to bring a suit within the purview of Star Chamber. This is not to say that incidents of riot in the “traditional” sense did not occur; however, it is evident that these “disguised” cases of riot were equally—if not more—prevalent among the riot cases pleaded to the court. As these “disguised” cases were consistently pleaded to the court throughout the sixteenth and seventeenth centuries, it is probable that Star Chamber did accept and adjudicate many of these suits, rather than refer them to common law jurisdiction. That these cases dealt so obviously with title disputes, moreover, suggests that the Star Chamber judges were at least partially complicit in allowing this litigation to continue. This should not come as a surprise: faced with the option to increase or relinquish power, the choice is almost always the former.

The practice of claiming riot in cases of contested titles, repeated as often as it was, became rooted in Star Chamber’s jurisdiction, establishing a new precedent from which to determine riot. Indeed, the court’s acceptance of these “disguised” cases enabled it to entertain and determine even more contentious is-

¹⁴⁰ British National Archives, Star Chamber Records Henry VII Tudor, *Wode v. Sir John Crockkar* (1502) (unpublished manuscript).

¹⁴¹ *Id.*

¹⁴² Crompton, *Star-Chamber cases* at 4 (cited in note 131).

¹⁴³ Guy, *The Cardinal’s Court* at 55 (cited in note 97).

sues under the allegation of riot. This is particularly evident in a number of late Elizabethan riot cases that are included in John Hayward's *Les Reportes del Cases in Camera Stellata*. Given that Hayward documented the trials heard and the verdicts issued from Star Chamber, it is possible to deduce the intent of the court from case to case. In examining Star Chamber's decisions in the following proceedings, then, it is clear that the court knowingly broadened its jurisdiction. By decreasing the conditions required for a suit to constitute riot, the court expanded its purview, particularly over civil issues.

In the riot case *Lady Davers v. Sir Walter Longe and others*, Star Chamber expanded its judicial authority by establishing that the intent of riot, regardless of whether or not the offense was committed, was enough to constitute riot.¹⁴⁴ Having been refused entry to an enclosed section of land on Lady Davers' estate, Davers' tenants sought the counsel of Sir Walter Longe, the county's Justice of the Peace, so as to find an alternative way to access the land. Longe advised the tenants to dismantle the land's enclosures in groups of two, without weapons or any other form of force so that their actions could not be considered riot. The court ruled, however, that the tenants were guilty of riot, for the breach of enclosures, forcible or not, constituted riot. Star Chamber, more importantly, also charged Longe with riot, even though he had not acted in the crime *per se* but in its instigation. The judges argued that because Longe's advice had been "mutinous, and would give occasion to rebellion," he was as guilty of riot as the tenants had been.¹⁴⁵ Longe's conviction, then, marked a departure from earlier definitions of riot: the offense was no longer limited to the physical act itself, but rather a person's intention of riot, even if he did not later pursue the crime, was deemed riotous.

The Star Chamber case *Scrogs v. unknown* further exemplifies how the court's definition of riot had changed and broadened during the Elizabethan period.¹⁴⁶ Despite the implications of the court's ruling in this suit, little information relating to the case itself was documented in Haywarde's notes, not even the name of the defendant. What can be determined from the accounts of this case, particularly from the judges' deliberations, is nonetheless significant. While the plaintiff had alleged riot, the court was uncertain as to whether the claim was legitimate as the offense included "no weapons nor blows, but only carrying hay with piclepronges."¹⁴⁷ The judges, in fact, deemed the offense to be a "small" riot and complained that it was not worthy of their consideration. Star Chamber nevertheless judged the case because, as Haywarde indicated, a grand jury at common law had previously ruled that Scrogs' claim did not constitute riot.¹⁴⁸ As a high court of the realm, Star

¹⁴⁴ Baildon, *Les reportes del cases in Camera Stellata* *Lady Davers v. Sir Walter Longe and others* (1596) at 49-52 (cited in note 18).

¹⁴⁵ *Id.* at 130.

¹⁴⁶ *Id.* at 103.

¹⁴⁷ *Id.*

¹⁴⁸ Baildon, *Les reportes del cases in Camera Stellata* at 104 (cited in note 18).

Chamber had the authority to review a case on appeal; even so, that both a grand jury and many Star Chamber judges doubted the plaintiff's allegation raises the question as to why the court ultimately ruled in favor of riot.¹⁴⁹ There is always the possibility that the judges were bribed into issuing this decision, for corruption was certainly not unheard of in Star Chamber. A more likely explanation, however, is that the court intentionally sought the opportunity to expand its purview at the expense of common law.

The court's decision in the case *Hele v. Prestwoodde* represents another example in which the Star Chamber judges attempted to extend their judicial authority, this time at the direct expense of the jurisdiction of common law.¹⁵⁰ In his bill, Hele accused the defendant of riot, for Prestwoodde and his tenants had dismantled the enclosures on Hele's estate so as to have access to a nearby wood. Prestwoodde countered Hele's allegation by arguing that he and his tenants had breached the enclosures at the points in which a *via regia*, a public road guaranteed by the Crown, had cut through Hele's property. The defendant claimed, moreover, that he had dismantled the enclosures "in peaceable manner without weapons" to avoid any confrontation with Hele.¹⁵¹ In its verdict, the court sided with Hele, but it was hung in its decision on Prestwoodde's conviction: five judges argued that the defendant should be found guilty of riot, for he had breached enclosures; however, the other five judges contended that Prestwoodde should be convicted of trespass—a misdemeanor—for he had entered Hele's estate without weapons or violence. To resolve the stalemate, Egerton ruled that in suit in which the court was split in determining an offense as riot or as a misdemeanor, the case would be judged as riot.¹⁵² As the arbitration of misdemeanors was under the judicial authority of common law, it is possible that Star Chamber deliberately established this precedent in order to keep the case, and future suits like it, within its purview.

By the Stuart period, the court's cognizance over "disguised" and expanded instances of riot was well established. In 1633, for example, Star Chamber adjudicated a riot case that centered on a dispute between two local gentlemen for the right to sit in a specific church pew, and, by extension, to assert their eminence over the other. The riot was that the defendant had taken the plaintiff's servant "by the haire of the head, and bowed him down very lowe towards the grounde by the haire, and then thrust him out" of the pew.¹⁵³ In the 1628 case of *Bluet v. Cave and others*, moreover, the court's ruling mirrored its verdict in the earlier suit of *Lady*

¹⁴⁹ F.W. Maitland, *The constitutional history of England: a course of lectures* at 216-17 (Cambridge 1913).

¹⁵⁰ Baildon, *Les reportes del cases in Camera Stellata* *Hele v. Prestwoodde* at 149 (cited in note 18).

¹⁵¹ *Id.* at 150.

¹⁵² *Id.*

¹⁵³ Gardiner, *Reports of Cases in the Courts of Star Chamber and High Commission* *Young and Sayer v. Broughton et al* (1633) at 143 (cited in note 21).

Davers v. Sir Walter Longe: despite that the defendant did not personally participate in the riot—in this case the taking of the plaintiff’s corn—he was nonetheless convicted by the court for the intent of riot.¹⁵⁴ By way of these cases, it is evident that Star Chamber benefitted from claims of riot to broaden its cognizance over civil suits. Cases in which the matter of legal dispute dealt with contested titles of seisin rather than the alleged riot enabled the court to render judgment on disputes that otherwise would have been determined at common law. The definition of riot, once equated in the fifteenth century to “disobediences against the king’s estate,” had inflated to include, by the Stuart period, incidents of riotous intent and situations where neither violence nor weapons were employed.¹⁵⁵ If such an expansion of purview is apparent from just one offense within Star Chamber’s jurisdiction, it is perhaps more understandable why jurists from the seventeenth century feared that “Star Chamber enlarged their Jurisdictions to a vast extent, imposing a despotic Domination exercised over the People of England.”¹⁵⁶

B. Case Study II: Defamation

Albeit not as frequently alleged as riot, defamation was another offense over which Star Chamber consistently held cognizance. Indeed, both William Hudson in his *Treatise on the Court of Star Chamber* and Richard Crompton in his analysis of the English justice system, *L’Authorite et Jurisdiction des Courtes de la Majeste de la Roygne*, identified defamation as among the “great offences punished in this great court” of Star Chamber.¹⁵⁷ In the cases that remain from Henry VII’s reign, defamation was alleged in four suits; that being said, by Charles I’s reign, the frequency of defamation cases submitted to the court had increased more than seven-fold. This rise can be explained in part by the development of print culture during the Tudor and Stuart periods: William Caxton established the first English printing press in 1476, and by the mid-sixteenth century printing had spread rapidly, facilitating not only the diffusion of ideas but the dispersion of defamation.¹⁵⁸ The increase in defamation suits before Star Chamber occurred, more importantly, due to the court’s changing definition of the offense. As with riot, the definition of defamation evolved over the sixteenth and seventeenth centuries to incorporate instances of defamation that Star Chamber could not originally have adjudicated. While the court’s purview was initially limited to offenses that defamed high peers, prelates, and magistrates of the realm, by the late sixteenth

¹⁵⁴ Rushworth, 4 *Historical Collections of Private Passages of State* *Bluet v. Cave and others* (1628) at 488 (cited in note 5).

¹⁵⁵ Chris Given-Wilson, *Parliament Rolls of Medieval England, Henry VI: July 1433*.

¹⁵⁶ Raynor, *An Inquiry into the Doctrine Lately Propagated* at 90 (cited in note 20).

¹⁵⁷ Hargrave, *Collectanea Juridica*, A Treatise of the Court of Star Chamber at 71 (cited in note 25); Crompton, *Star-Chamber cases*, at 10-11 (cited in note 131).

¹⁵⁸ V.V. Veeder, *The History and Theory of the Law of Defamation*, 3 *Colum L Rev* 1, 561 (1903).

century Star Chamber determined cases of private defamation, the traditional cognizance of common law and ecclesiastical courts.¹⁵⁹

Whereas modern jurists clearly delineate spoken defamation, or slander, from written defamation, or libel, this distinction was not as explicit during the Tudor and Stuart periods. In a 1575 parliamentary committee, for example, organized to investigate a member of parliament's "irreverent" views of Queen Elizabeth, the bill submitted to the committee was entitled, "the Case brought for slanderous Words and Writings."¹⁶⁰ During a libel case heard by Star Chamber in 1605, moreover, the judges justified their ruling of libel by pointing to the precedent established in a slander case some years before.¹⁶¹ It is evident, therefore, that the mode by which defamation was expressed was less definitive historically, and to be sure, the modern legal distinctions that separate slander from libel did not exist during this period.¹⁶² This should not necessarily come as a surprise: during the fifteenth and sixteenth centuries, only a minority of the population could read, let alone write; consequently, there was less need to distinguish between spoken and written defamation.¹⁶³ Indeed, for much of the Tudor period, plaintiffs who pleaded to Star Chamber in defamation cases would allege slander, regardless of whether the offense had been spoken or written. Written libel only became a common allegation in Star Chamber by the end of Elizabeth's reign, the same period during which print culture became widespread in England.¹⁶⁴ That the Star Chamber judges repeatedly referred to slander precedents when ruling on libel, however, makes it clear that there were no legal distinctions between the two offences in court.¹⁶⁵ For the purpose of this research, then, slander and libel will be considered legally analogous.

Star Chamber's cognizance over defamation derived from the judicial authority of the medieval king's council. In 1388, Parliament gave the king's council statutory authority to punish any person

so hardy to invent, to say, or to tell any false News, Lies or such other false Things, of the Prelates, Dukes, Earls, Barons, and other Nobles and great Men of the Realm, and also of the Chancellor, Treasurer, Clerk of the Privy Seal, and Steward of

¹⁵⁹ Id at 550-51.

¹⁶⁰ *House of Commons Journal, Volume 1: 08 February 1576, 1 Journal of the House of Commons I, 104* (London, 1802).

¹⁶¹ Baildon, *Les reportes del cases in Camera Stellata* Sir Robert Dudley's Case (1605) (cited in note 18).

¹⁶² Veeder, 3 Colum L Rev at 558 (cited in note 158).

¹⁶³ David Cressy, *Literacy in context: meaning and measurement in early modern England,* "Consumption and the world of goods" 314 (London, 1993).

¹⁶⁴ Baildon, *Les reportes del cases in Camera Stellata* Attorney General v. Elston and others (1602) at 143 (cited in note 18).

¹⁶⁵ Id at 207.

the King's House, the Justice of the one Bench or of the other,
and other great Officers of the Realm.¹⁶⁶

This statute, commonly known as *De Scandalis Magnatum*, awarded the king's council, and subsequently the Court of Star Chamber, the right to determine defamation cases that concerned the leading men of the realm. Perhaps this act was implemented to prevent great peers and officers from demeaning themselves by pleading slander in any jurisdiction other than that of their sovereign. More likely, however, was that the statute was directed against political scandal, for any defamation of these aforementioned individuals—almost all of whom were connected to the administration of the realm—would have been a calumny against Crown, and by extension, the king.¹⁶⁷ As the king's council and later Star Chamber's foremost objective was to defend "the polacye and good rule of [the] realme," it is indeed probable that the justification by which *De Scandalis Magnatum* was enacted rested on the political consequences of this sort of defamation.¹⁶⁸

As evidenced, however, by the cases pleaded to and judged by the court during the Tudor and Stuart periods, Star Chamber increasingly entertained private and non-political suits of defamation, cases that would have been otherwise determined by the common law or ecclesiastical courts. In one Elizabethan case, for example, in which a woman slandered her adversary by calling him a "stronge theife" who "wilte stealle anye thinge," Star Chamber fined the woman five shillings.¹⁶⁹ In 1607, more interestingly, the court incarcerated and imposed a five hundred pound fine on a physician from Exeter for having written a slanderous letter to another physician addressed as "Mr. Docturdo and fartardo."¹⁷⁰ In a Caroline case from 1626, furthermore, Star Chamber fined several persons three hundred pounds each for defaming a local tailor with a libelous song entitled, "A proper Song of a great Blockhead Woollen-Draper."¹⁷¹ These cases neither defamed nor concerned the great noblemen and officers of the realm, but instead dealt with non-political and, with regard to the Elizabethan case, minor instances of defamation. That Star Chamber nonetheless heard and judged such suits clearly illustrates that the court had expanded its jurisdiction over defamation beyond the parameters of the *De Scandalis Magnatum* statute.

It is not difficult to surmise why litigants would have preferred to initiate

¹⁶⁶ *The Punishment of him that telleth Lies of the Peers or great Officers of the Realm*, 12 Richard II, cap. 11 (1388).

¹⁶⁷ Veeder, 3 Colum L Rev at 554 (cited in note 158).

¹⁶⁸ Burn, *The Star Chamber: Notices of the Court and its Proceedings* Statute 3rd Henry VII, cap. 1 (1487) at 203 (cited in note 4).

¹⁶⁹ Baildon, *Les reports del cases in Camera Stellata* at 232 (cited in note 18).

¹⁷⁰ *Id* at 343.

¹⁷¹ Rushworth, 4 *Historical Collections of Private Passages of State* Frize v. Bennet et al. (1627) at 486 (cited in note 5).

private defamation suits in Star Chamber, particularly during the Tudor period. The common law courts were often corrupt and ineffective, their judicial processes obstructed by exploitative noblemen. While safe from the procedural shortcomings of common law, the ecclesiastical courts' punishment of defamers was considered by litigants as insufficient to compensate for the injuries against them.¹⁷² Star Chamber, in contrast, was known for its efficient and inexpensive procedure, and it could impose a more considerable punishment, such as a large fine or imprisonment, on those found guilty of defamation. What is left to be determined, then, is how Star Chamber incorporated these cases of private defamation into its purview when such sort of offense exceeded the scope of *De Scandalis Magnatum*. By analyzing some of earliest private defamation cases pleaded to Star Chamber, one can infer, if not verify, the process by which the court expanded its cognizance over defamation.

The 1493 Henrician case *Vale v. Broke*, the earliest defamation case documented in the court's records of proceedings, offers a possible explanation as to how Star Chamber obtained cognizance over private suits of defamation.¹⁷³ The plaintiff, Simon Vale, accused John Broke and his wife Alice for having "thentent utterly to shame him and his [family] forever," by claiming that Vale and his kin were "stronge theves and Comyn Robbers."¹⁷⁴ Vale asserted, however, that he was "not able to sue the sade John Broke and his wife for his remedy at Comyn lawe" because the defendant was the county bailiff and wielded considerable and often arbitrary influence over the local courts.¹⁷⁵ While Star Chamber's ruling on the case no longer remains, it is likely that the court did entertain and judge the suit, for the court had statutory authority since 1453 to adjudicate cases not determinable at common law.¹⁷⁶ This case, then, may exemplify how Star Chamber incorporated private defamation into its purview: by arbitrating numerous private and non-political defamations in which the plaintiff pleaded insufficiency at common law, Star Chamber could have established the precedent to judge such suits.

Another and perhaps more likely explanation as to how Star Chamber expanded its jurisdiction over defamation is evidenced in a combined slander and riot case against the aforesaid John Broke and his wife.¹⁷⁷ This suit was, as most riot cases were, in essence a dispute over property—in this case over fourteen pounds of wool. The plaintiff, Thomas Smyth, claimed to have bought the wool from a local merchant and then brought it back to his home, at which point Alice Broke,

¹⁷² Veeder, 3 Colum L Rev at 552 (cited in note 158).

¹⁷³ Leadam, 16 *Select cases before the King's Council in the Star Chamber* *Vale v. Broke* (1493) at 40 (cited in note 26).

¹⁷⁴ *Id* at 38.

¹⁷⁵ *Id* at 40.

¹⁷⁶ Baildon, *Les reports del cases in Camera Stellata* at 1 (cited in note 18).

¹⁷⁷ Leadam, 16 *Select cases before the King's Council in the Star Chamber* *Smyth v. Broke* at 41 (cited in note 26).

asserting that the wool belonged to her husband, defamed Smyth as a thief and “furiously came to the hous . . . and with an axe in hir hand agenst [the king’s] laws and peace riotously brake open the door.”¹⁷⁸ That John Broke, however, in his answer to the plaintiff’s bill, denied entirely the riotous allegation against his wife raises doubts on the validity of Smyth’s original claim of riot.¹⁷⁹ Although the loss of the court’s ruling on this case makes it difficult to verify the following conjectures, it is indeed possible, in light of Broke’s demurrer, that the plaintiff alleged riot, a well-known Star Chamber offense, to elevate his private defamation suit beyond common law jurisdiction. As evidenced in the analysis of riot cases, Star Chamber was amenable to expanding its judicial authority at the expense of common law, and would have likely adjudicated Smyth’s claim of slander in addition to that of riot so as to establish precedent over cases of private defamation. That riot was used as an adjunct to bring non-political defamation to the purview of Star Chamber is supported by the fact that the later court justified its cognizance over private defamation by asserting that such cases breached the king’s peace, the same rationale it used to claim jurisdiction over riot.¹⁸⁰

Whether Star Chamber expanded its purview over defamation through cases in which common law could not provide redress or through suits in which litigants claimed riot alongside slander to elevate their proceedings to royal jurisdiction, it is nonetheless evident that cases of private defamation had become the cognizance of the court by the end of the Tudor period. Sir Edward Coke, albeit a staunch defender of common law authority, affirmed that defamation “against a private man . . . deserveth a severe punishment” in Star Chamber, for such form of defamation “inciteth all those of the same family, kindred, or society to revenge, and so may be the cause *per consequens* to quarrels and breach of the peace.”¹⁸¹ In a libel case from 1607, moreover, the Star Chamber judges agreed that private defamation was “an offence in this Cowrte to be severelye punished.”¹⁸² Having established this new precedent from which to judge defamation, Star Chamber further inflated its purview over defamation cases during the Stuart period by amending its definition of the offense. These definitional changes, which coincided with the spread of print culture in England, were likely introduced to safeguard the rights and liberties of individuals; however, by the 1630s, it is clear that these changes had become fundamental to the court’s suppression of religious and political dissent.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at 43.

¹⁸⁰ Baildon, *Les reports del cases in Camera Stellata* *Edwardes v. Wootton* (1607) at 343 and *Att-Gen. v. Pickeringe* (1605) at 226 (cited in note 18).

¹⁸¹ Steve Sheppard, 1 *The Selected Writings and Speeches of Sir Edward Coke* *The Case de Libellis Famosis* (1605) (Indianapolis 2003).

¹⁸² Baildon, *Les reports del cases in Camera Stellata* *Edwardes v. Wootton* (1607) at 343 (cited in note 18).

The 1605 libel case against Lewes Pickeringe, a gentleman and religious scholar from Northamptonshire, exemplifies an instance in which Star Chamber broadened its purview through its definition of defamation.¹⁸³ Pickeringe was found guilty by the court for having pinned a libelous pamphlet to the hearse of the deceased Archbishop of Canterbury, John Whitgift, which stated “Jockie is deade and done, and Dum Dickie is left alone.”¹⁸⁴ In their verdict, the Star Chamber judges reaffirmed the court’s cognizance over both private and *de scandalis magnatum* defamations; however they included an additional provision heretofore unspecified:

It is not material whether the Libel be true, or whether the party against whom the Libel is made, be of good or ill fame; for in a setled state of Government the party grieved ought to complain for every injury done him in an ordinary course of Law, and not by any means to revenge himself, either by the odious course of libelling, or otherwise.¹⁸⁵

That it was inconsequential for defamation to be true or false marked a clear break from precedent. As seen in the original *De Scandalis Magnatum* statute, Parliament specifically acknowledged the king’s council’s cognizance over “*false* News, Lies or such other *false* Things,” but made no mention of instances in which the defamation was true. Indeed, it was an established precedent of the court that a defendant accused of slander or libel had the right to prove his claims to be correct, and if the judges agreed with him, he would not be convicted of the offense.¹⁸⁶ Pickeringe’s case clearly altered this practice and established that a contriver of defamation would be found guilty regardless of the defamation’s veracity. The Star Chamber judges likely implemented this precedent with the purest of intentions: the rapid spread of printing during this period ushered an unprecedented dispersal of defamation; therefore, by punishing from the outset any instance of defamation—be it true or false—the judges hoped to protect the integrity of the realm’s subjects. As can be seen from the court’s dictum, moreover, Star Chamber hoped that by penalizing any defamatory claim, it could preemptively inhibit individuals from avenging themselves in an extrajudicial manner, breaching the king’s peace as a result. The court’s original intentions for establishing this precedent, however, were lost on the later generations of Star Chamber judges: by Charles I’s reign, the

¹⁸³ *Id* at 222.

¹⁸⁴ *Id* at 223.

¹⁸⁵ Sheppard, 1 *The Selected Writings and Speeches of Sir Edward Coke* John Lamb’s Case (1610) (cited in note 181).

¹⁸⁶ Veeder, 3 *Colum L Rev* at 568 (cited in note 158); Frank Carr, *The Law of Defamation and the Historical Origin of the Difference between Spoken and Written Slander in England* 16 (London 1902)

court exploited this definition of defamation to suppress political opponents who criticized—rightly or wrongly—the policies of the monarchy, the most notable examples being the libel suits against William Prynne, John Bastwick, and Henry Burton.

Star Chamber further expanded its definition of defamation in its ruling of the 1610 libel suit commonly known as *Lamb's Case*.¹⁸⁷ Despite the significance of the court's judgment in this case, little information remains pertaining to the circumstances of the suit; however, it is evident that Sir John Lamb, the Dean of Arches, accused several individuals from Northampton of publishing two libels against him. The court ruled in favor of the plaintiff, and in its judgment clarified what constituted the publication of libel. A publisher or contriver of libel was no longer limited to the individual who composed the defamatory statement, but also included anyone who "hath read or heard it...repeats the same, or any part of [the libel] in the hearing of others."¹⁸⁸ The court's ruling in the case, like that of the previous suit, was likely put forward to prevent civil unrest: by punishing anyone who repeated a libelous claim, Star Chamber hoped to prevent or at least contain the dispersion of defamation, thereby minimizing the reasons for individuals to seek revenge outside the rule of law. Also similarly to the previous case, however, *Lamb's Case* gave rise to perhaps unintentional but nonetheless autocratic practices by the mid-seventeenth century. Due to the precedent established in this case, the late Star Chamber could in theory persecute anyone who voiced criticism against the king's policies, even if the grievance expressed by the individual did not originate from him. Indeed, under the rationale of defamation, the court could legally and systematically suppress widespread opposition to the government, becoming, in consequence, a "means of giving emphatic utterance of the will of the Crown."¹⁸⁹

The Star Chamber's use of its cognizance of defamation to persecute opponents of the monarchy was apparent by the 1630s. Indeed, as evidenced in William Prynne's first Star Chamber conviction in 1633, the court would even construe the facts of a case to convict religious and political dissenters of libel. More infamously, Star Chamber established a new precedent for its punishment of defamation during this period, confirming its role as a means to suppress opposition rather than to administer justice. In 1630, Star Chamber found Alexander Leighton guilty of libel for having composed the treatise *Sion's Plea to the Prelacy*, which condemned the English episcopate and called for its overthrow. Despite being a doctor and minister, Leighton was sentenced to be whipped, to lose his ears, to have his nose slit, and to be branded on his face with the letters "S.S",

¹⁸⁷ Sheppard, 1 *The Selected Writings and Speeches of Sir Edward Coke* John Lamb's Case (1610) (cited in note 181).

¹⁸⁸ *Id.*

¹⁸⁹ Scofield, *A Study of the Court of Star Chamber* at 60 (cited in note 10).

for “Sower of Sedition”.¹⁹⁰ Leighton’s corporal punishment clearly diverged from precedent, for gentlemen were typically exempt from such treatment at any court of law—Star Chamber included. Lewes Pickeringe, for example, was spared in 1605 from such punishment on the grounds that he was “a gentleman borne of a noble howses, the kings servaunte, and a professor of relligion.”¹⁹¹ The precedent established in Leighton’s case opened the floodgates for future, physical suppression of the Crown’s political and religious opponents: Mephistosheth Robyns, William Prynne, Henry Burton, John Bastwick, John Lilburne, and William Pickering were all sentenced to similar fates in the following years.¹⁹²

The physical abuse imposed on these well-known gentlemen incited fear throughout the realm, particularly among the upper classes. Sir Simonds D’Ewes, commenting on William Prynne’s 1633 sentence, admitted that, “men were affrighted to see that neither [Prynne’s] accademical nor barrister’s gowns could free him from the infamous loss of his ears.”¹⁹³ In the eyes of many, Leighton’s case and punishment signaled a new phase of the Crown’s tyranny: if a gentleman’s long-held privilege could not save him from the designs of the king’s ministers in Star Chamber, then no one was safe from the Crown’s despotic grasp. Star Chamber had “become a Terror even to the Great,” ushering in and enabling an unprecedented form of absolutism.¹⁹⁴ William Prynne, speaking from the pillory before Westminster in 1636, warned his spectators that the Star Chamber judges “spare none of what society or calling soever, none are exempted that crosse their owne ends. Gentlemen look to yourselves, you know not whose turn may be next.”¹⁹⁵

From this analysis of defamation cases pleaded to and determined by Star Chamber, it is clear that the court broadened its purview over defamation at the expense of common law and ecclesiastical authority. While Star Chamber’s original jurisdiction was limited to defamation against high peers and leading officers of the realm, by the end of the Tudor period the court had established authority over private and non-political suits of defamation—the traditional cognizance of the lower and religious courts. During the Stuart period, furthermore, the court actively expanded its jurisdiction by extending its definition of defamation. While it is likely that the Star Chamber judges established new precedents to adjudicate defamation so as to safeguard the integrity of the commonwealth and to prevent breaches against the king’s peace, the precedents founded in the *pro regia* cases of Pickeringe, Lamb, and Leighton gave rise to and enabled the oppressive judicial

¹⁹⁰ Phillips, 21 *The Last Years of the Court of Star Chamber* at 120 (cited in note 2).

¹⁹¹ Baildon, *Les reports del cases in Camera Stellata* Att-Gen. v. Pickeringe (1605) at 227 (cited in note 18).

¹⁹² Phillips, 21 *The Last Years of the Court of Star Chamber* at 122 (cited in note 2).

¹⁹³ Wallace Notestein, *The Journal of Sir Simonds D’Ewes: From the Beginning of the Long Parliament to the Opening of the trial of the Earl of Strafford* 104 (Yale 1923).

¹⁹⁴ Raynor, *An Inquiry into the Doctrine Lately Propagated* at 89 (cited in note 20).

¹⁹⁵ Phillips, 21 *The Last Years of the Court of Star Chamber* at 126 (cited in note 2).

practices of the late Star Chamber court.

Riot and defamation were but two offenses over which Star Chamber held cognizance. The court's jurisdictional expansion through definitional change is equally evident in the other offenses to which it claimed authority. Star Chamber's jurisdiction over perjury, for example, is linked to the statute 11 Hen. 7, c. 25, which stated that, "perjury committed by unlawful Maintenance, Imbracing, or Corruption of Officers, or in the Chancery, or before the King's Council" would be punished by the court.¹⁹⁶ In a 1606 *pro regia* case for perjury, however, the Star Chamber judges claimed that "the Courte maye determyne all perjuries at the Common lawe," denying the defendant's objections that the Star Chamber's cognizance was limited to the courts of law enumerated in the aforementioned act.¹⁹⁷ The court's judicial authority over forgery also saw expansion. A statute from Elizabeth's reign recognized the court's cognizance of forgery, declaring that, "if any Person or Persons...shall pronounce, publish or shew forth his Evidence...as true, knowing the same to be false and forged...[he] shall be thereof convicted by the Court of Star Chamber."¹⁹⁸ Contrary to this act, however, Star Chamber found a former mayor of Canterbury, one Nethersall, guilty of forgery in 1607 even though Nethersall had not known the item he had copied to be forged.¹⁹⁹

The jurisdictional expansion that occurred with each Star Chamber offense, when considered concurrently, greatly extended the purview of the court. And as evidenced in the defamation cases from Charles I's rule, the late Star Chamber judges were not at all opposed to exploiting this broad jurisdiction for political, religious, and even personal ends. By the Stuart period, then, the court was well known and even feared as judicially domineering. Indeed, John Chamberlain, a well-known letter writer, lamented to his friend Dudley Carleton in 1620 that "the world is now much terrified with the Star Chamber, there being not so little offence liable and subject to the censure of that Court."²⁰⁰

IV. CONCLUSION

On 28 June 1641, the Long Parliament agreed to dissolve the Court of Star Chamber, declaring that it "shou'd not meddle with Mens Estates, nor try Causes

¹⁹⁶ *The haynouse and destable perjuries daily commyted within this realme in enquestes and Juries*, 11 Hen. VII, cap. 25 (1494).

¹⁹⁷ Baildon, *Les reports del cases in Camera Stellata* Attorney General v. Miles (1606) at 301 (cited in note 18).

¹⁹⁸ *Of Deeds, Wills, or Writings seal'd, or of any Aquaintaince: Those who assent to it, and those who knowingly publish such*, 5 Eliz. 1, cap. 14 (1562).

¹⁹⁹ Baildon, *Les reports del cases in Camera Stellata* Robinson v. Nethersall (1607) at 319 (cited in note 18).

²⁰⁰ Scofield, *A Study of the Court of Star Chamber* at 49 (cited in note 10).

determinable by Law.”²⁰¹ Despite Parliament’s engrossment of this bill of abolition, however, several days would pass before Charles I agreed to authorize the statute. Indeed, certain members of the House of Commons openly criticized the king’s delay in signing the bill, the most accusatory being John Pym and Edmund Prideaux, both of whom had played central roles in Star Chamber’s overthrow.²⁰² Charles was well informed of such dissent, and therefore explained his hesitancy in a speech before Parliament. The king considered it “very strange that any one could think that he should pass [a bill] of such Consequence, without time of Consideration, since ‘tis no less than to alter in great measure those Fundamental Laws which his Predecessors had established.”²⁰³

Charles was not alone in expressing reservations over the court’s dismantlement; many members of the House of Lords also shared the king’s misgivings. John Hacket, the bishop of Coventry and Lichfield, questioned why Parliament’s original bill of reform had been insufficient to address Star Chamber’s defects. “I am not so bold with Providence,” he wrote, “to determine why God caused or permitted this great Court to be shut up like an unclean place... a Pot that boils over may be taken from the fire and set on again.”²⁰⁴ Edward Hyde, the future Earl of Clarendon, conceded that the abolition of Star Chamber was at the time “an act very popular”; however, he worried that the bill’s approval was bolstered by the whims of the moment, and that Parliament would regret its choice “when the present distempers shall be expired.”²⁰⁵ For the abolition of the Court of Star Chamber was indeed no small feat to implement. The court had been for two centuries one of the highest judiciaries of the realm, the “most honourable Court... that is in the Christian world.”²⁰⁶ To dismantle it entirely, to attempt to erase its legacy, was considered a rash decision by many.

On 5 July 1641, Charles nonetheless consented to the bill. Having signed previously the Triennial Act, which deprived him of his prerogative to call and end sessions of Parliament as he pleased, the king hoped that this additional concession would appease the parliamentary dissent and the civil unrest that had been mounting against him. In truth, however, Charles’ approbation of the bill did nothing but confirm the court’s fate, one that had been under way for some time. For months, Parliament had dismantled systematically the authority of Star Chamber, reversing the court’s decisions and impeaching its judges. John Pym’s first objective in the Long Parliament, for example, had been to petition the Star Chamber verdicts against John Bastwick and Henry Burton, both victims of the court’s political and

²⁰¹ Rushworth, 4 *Historical Collections of Private Passages of State* at 112 (cited in note 5).

²⁰² Phillips, 21 *The Last Years of the Court of Star Chamber* at 103 (cited in note 2).

²⁰³ Rushworth, 4 *Historical Collections of Private Passages of State* at 115 (cited in note 5).

²⁰⁴ Phillips, 21 *The Last Years of the Court of Star Chamber* at 131 (cited in note 2).

²⁰⁵ Hyde, *The History of the Rebellion* at 386 (cited in note 3).

²⁰⁶ Cheyney, 4 *Am Hist R* 745 (cited in note 51).

religious persecution.²⁰⁷ The members of Parliament were moved to tears upon hearing of the gentlemen's punishment, and pardoned Bastwick and Burton of their offenses in early 1641.²⁰⁸ William Prynne, moreover, twice convicted by the Star Chamber judges, was released by Parliament from his imprisonment in late 1640 and quickly resumed his public dissent of the king's religious policies.²⁰⁹

The Long Parliament also targeted the judges of Star Chamber, the men deemed responsible for implementing Charles' absolutist policies during his Personal Rule. Archbishop of Canterbury William Laud, Lord Keeper John Finch, and Secretary of State Francis Windebank, all prominent and infamous judges of the court, were impeached by Parliament in December 1640.²¹⁰ Whereas Finch and Windebank found asylum abroad, Laud, "the roote and ground of all our miseries and calamities... the sty of all pestilential filth that hath infected the State and Government," was not so fortunate.²¹¹ He was incarcerated by Parliament mere days after his impeachment and would be executed in 1645.²¹² By the time, then, that Charles set his hand to the bill of dissolution, Star Chamber had already suffered a series of debilitating blows. The king's signature was therefore a reluctant acknowledgment of the inevitable.

The abolition of the Court of Star Chamber was a decisive moment in English history. Rather than blame solely the king's ministers for the failures of the king's policies, Parliament defied precedent and condemned a royal institution, a manifestation of the king's power, for the problems in the realm.²¹³ With its decision, the Long Parliament breached a threshold that previous generations would have never dreamed of approaching: the monarchy, in its various institutional forms, could be held accountable for its wrongdoings. Having broken this threshold, however, it was only a small step further to condemn a king.

Instead of placating parliamentary dissent and civil unrest as he had hoped, Charles' approval of the court's abolition only served to set the course toward civil war—a war that broke out only a year later. Star Chamber, a court that had for so long dictated and enforced the king's will, could not, in the end, protect the king's life. Charles I was executed on 30 January 1649 before the Banqueting House of Whitehall, mere rods away from the Star Chamber.²¹⁴

It was Star Chamber's greatest irony that it both concluded and provoked

²⁰⁷ Michael Mendle, *De Facto Freedom, De Facto Authority: Press and Parliament, 1640-1643*, 38 *The Historical Journal*, 313 (1995).

²⁰⁸ Zande, 50 *The Am Journ of Leg Hist* at 345 (cited in note 6).

²⁰⁹ William Lamont, *Oxford Dictionary of National Biography* Prynne, William (1600-1669) (Oxford 2004).

²¹⁰ Cheyney, 4 *Am Hist R* 750 (cited in note 51).

²¹¹ Notestein, *The Journal of Sir Simonds D'Ewes* at 169 (cited in note 193).

²¹² Zande, 50 *The Am Journ of Leg Hist* at 345 (cited in note 6).

²¹³ A. Fletcher and D. MacCulloch, *Tudor Rebellions* The Proclamation of the Earls (1569) 163 (Harlow 5th ed 2008).

²¹⁴ Cheyney, 4 *Am Hist R* 750 (cited in note 51).

civil war. The court was established to restore civil and judicial stability following the Wars of the Roses; yet, it was abolished for precipitating monarchical tyranny, the central conflict of the English Civil War. This evident role reversal, from a legal safeguard to an instrument of absolutism, was caused in part by the Stuart ministers who served as the court's judges; however, Star Chamber's transformation was more a result of the institutional changes to its procedure and jurisdiction that occurred in the Tudor and Stuart periods. Star Chamber, originally an effective and inexpensive outlet for individuals to receive legal redress – particularly against powerful noblemen – had become by the 1630s procedurally inefficient, bureaucratically corrupt, and partial to cases initiated on the king's behalf. Its jurisdiction had, moreover, greatly expanded, often at the direct expense of common law authority. The court had evolved, in short, into a consummate tool for oppression. Placed in the control of Stuart ministers like Archbishop William Laud and Lord Keeper John Finch, Star Chamber would be employed for that very purpose.²¹⁵

Despite having been abolished more than three centuries ago, Star Chamber and its history remain pertinent to the modern day. Indeed, the royal court presents a cautionary tale for all institutions, judicial or otherwise. In the absence of persistent procedural reform and clear restrictions on its judicial expansion, Star Chamber evolved from an institution meant to protect the commonwealth to one that suppressed it. This fateful trajectory was not intended; however, it nonetheless occurred due to the institutional changes Star Chamber underwent during the Tudor and Stuart periods. These changes were accepted and incorporated into the court's composition largely because Star Chamber's original parameters were never clearly defined. Rather than being instituted by statute, the court developed from the judicial authority of the medieval king's council, and as such neither its function nor its limitations were explicitly delineated. The changes to the court's procedure and jurisdiction, moreover, were not proposed to make Star Chamber corrupt or domineering. More often than not, the modifications were introduced with the best intentions in mind, to better address the problems of the time. It was only in a changed historical circumstance and with a new group of judges that these alterations became the means of oppression.

The unfortunate truth of this tale of institutional change is that it can only be realized in hindsight. To be sure, the judges and litigants who modified Star Chamber's procedure, bureaucracy, and jurisdiction were unaware of the far-reaching consequences of their actions. It is this truth, if nothing else, which should be remembered from Star Chamber's history. Indeed, it should induce caution when implementing institutional change in the present. All too often, legislators, lobbyists, and jurists enact reform without considering how the change may be construed in the future. Even if the reform is introduced for just reasons and better confronts the issues of today, it remains unclear how the amendment may be utilized or exploited

²¹⁵ Louis Knafla, *Oxford Dictionary of National Biography* Finch, John (1584-1660) (Oxford 2004).

under different circumstances.

For this very reason, several contemporary critics have condemned the U.S. Foreign Intelligence Surveillance Act (FISA) for instituting a modern Star Chamber. Enacted in 1978, the statute established a tribunal, the Foreign Intelligence Surveillance Court (FISC), to authorize federal agencies' surveillance of foreign powers and non-American citizens.²¹⁶ Following the September 11th terrorist attacks and the 2001 anthrax attacks, however, the USA PATRIOT Act (2001) amended FISC's purview so that it could authorize the surveillance of American citizens, without the need of a warrant.²¹⁷ While the reform was introduced to combat the real threat of domestic terrorism, it is evident that this amendment, without effective legal oversight, could result in the infringement of American citizens' civil liberties. Like Star Chamber, the Foreign Intelligence Surveillance Court may ultimately come to persecute the people it was established to protect.

Star Chamber is all too often remembered in the present for its endpoint. Its punishment of Prynne, Bastwick, and Burton, its support of the Stuart kings' absolutist policies, and its instigating role in the English Civil War has made Star Chamber a symbol of tyranny and oppression. Indeed, the name of the court "ranks with such proper names as "the Inquisition" and "Machiavelli" as one of modern history's few really dirty words."²¹⁸ This limited view of the court's history, to the complete exclusion of its change over time, has made Star Chamber's fate seem exceptional, rather than entirely possible and, indeed, repeatable. By analyzing the institutional changes to the court that occurred during the Tudor and Stuart periods, it becomes evident just how easy it can be for an institution to meet a similar fate. Without proper oversight and defined restrictions on growth, even the most noble of institutions can fall into the same trajectory as the Star Chamber Court.

²¹⁶ No name, *Shifting the FISA Paradigm: Protecting Civil Liberties by Eliminating Ex Ante Judicial Approval*, 121 Harv L Rev, 2201 (2008).

²¹⁷ Paul Schwartz, *Warrantless Wiretapping, FISA Reform, and the Lessons of Public Liberty: A Comment on Holmes's Jorde Lecture*, 97 Cal L Rev 414, 415 (2008).

²¹⁸ Thomas Barnes, *Star Chamber Mythology*, 5 *Am Journ of Leg Hist* 1, 1 (1961).

ARTICLE

PROTECTING FUNDAMENTAL RIGHTS OR AUTONOMY?

Will the European Union's Accession to the European Convention on Human Rights affect the legal autonomy of the European Union?

Lauren Eaton

ABSTRACT

The conclusion of the negotiations for the European Union's (EU) ¹ accession to the European Convention on Human Rights (the Convention)² has been heralded as a positive development for the protection of fundamental human rights in Europe. By acceding to the Convention, the EU's institutions will be directly bound by the provisions therein and subject to external review by the European Court of Human Rights (ECtHR). The result is "a single European legal space" for the protection of fundamental rights guaranteed by the Convention. The creation of this legal space is contentious. In particular, granting the ECtHR powers to externally review the EU's institutions has incited concern that the autonomy of EU's legal order could be compromised. This paper addresses this precise concern by examining whether the EU's accession to the Convention will affect the autonomy of the EU's legal order, in light of the 2013 final draft accession agreement. This paper is organized into four distinct parts. Part one opens with an explanation of the historical background and lays the analytical foundations for this paper's successive discussion by defining the scope and significance of 'autonomy'. Part two considers the current European legal space and the relationship between the ECtHR and the Court of Justice of the EU (CJEU). Part three will examine the effects of accession and critically analyze whether the features of the accession agreement preserve the autonomy of the EU's legal order. This discussion will be confined to two particular examples, the 'co-respondent mechanism' and the 'prior involvement procedure', the defining features of the relationship between the Courts after accession. ³ Finally, part four questions the level of protection afforded to autonomy and offers two recommendations for reform. This paper contends that the accession agreement must strike a balance between preserving the legal autonomy of the EU and protecting fundamental human rights.

¹ The 'EU' will be employed in this paper to refer to both the European Union and the European Community, as it stood prior to the entry into force of the Lisbon Treaty on 1 December 2009.

² Signed 4 November 1950 and entered into force on 9 September 1953.

³ Konstantinos Margaritis *The Framework for Fundamental Rights Protection in Europe Under the Prospect of EU Accession to ECHR*, 6 Politics and Law, 64, 76 (2013).

PART ONE: THE ROAD TO ACCESSION

1.1. *Background*

While the final draft agreement for the EU's accession to the Convention was only reached in April of 2013, accession is certainly not a modern idea. As early as 1979, the European Commission adopted a memorandum proposing accession⁴, followed by a formal proposal to the Council of Europe in 1990.⁵ In 1996, an advisory opinion was sought from the Court of Justice of European Union (CJEU) on the competence and compatibility of accession with EU law.⁶ The CJEU doubted that the EU had the competence to conclude an accession agreement of the kind envisaged and that accession "could be brought about only by way of Treaty amendment."⁷ Notwithstanding the CJEU's decision, the Steering Committee for Human Rights (CDDH) adopted a study examining the precise legal and technical issues that needed to be addressed in order for accession to become a real prospect.⁸ The legal barriers were dismantled with the entry into force of the Lisbon Treaty on December 1, 2009 and Protocol No. 14 of the Convention in June 2010.⁹ The former imposed a legal obligation on the EU to accede to the Convention,¹⁰ and the latter amended Article 59 of the Convention allowing the EU to become a High Contracting Party to the Convention.¹¹

Although the requisite legal basis for accession had been firmly established, the technical aspects of accession meant that this framework alone would not be sufficient for the EU to accede to the Convention immediately. A negotiated agreement setting out the conditions for accession was therefore

⁴ Commission of the European Communities *Accession of the Communities to the European Convention on Human Rights: Commission Memorandum* (Bulletin of the European Communities Supplement 2/79, COM (79) 210 Final, 4 April 1979).

⁵ Dominique Ritleng, *The Accession of the European Union to the European Convention on Human Rights and Fundamental Freedoms: A Threat to the Specific Characteristics of the European Union and Union Law?* *5 (Working Paper) (on file with author).

⁶ Opinion 2/94 [1996] ECR-I-1759

⁷ *Id.* at 35.

⁸ Steering Committee for Human Rights, *Study of Technical and Legal Issues of a Possible EC/EU Accession to the European Convention on Human Rights*, Council of Europe (June 28, 2012).

⁹ Council of Europe, *Draft Explanatory Report to the Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms*, Council of Europe, 2, (April 2, 2013).

¹⁰ Treaty of Lisbon (signed 13 December 2007, entered into force 1 December 2009) Article 6(2): "[t]he Union shall accede to the [Convention]. Such accession shall not affect the Union's competences as defined in the Treaties."

¹¹ J Kralova *Comments on the Draft Agreement on the Accession of the EU to the Convention for the Protection of Human Rights and Fundamental Freedoms*, Czech Yearbook of Private and International Law 131 (CYIL November 9, 2011), online at <http://www.cyil.eu/contents-cyil-2011/>.

necessary.¹² In accordance with the procedure stipulated in Article 218 of the Treaty on the Functioning of the European Union (TFEU), the Council of the EU adopted a decision authorizing the European Commission to negotiate an accession agreement.¹³ Negotiations commenced in July 2010 with the meeting of an informal group of fourteen members (seven EU Member States and seven non-EU Member States) resulting in the conclusion of a draft agreement in 2011.¹⁴ In 2012, the Committee of Ministers authorized CDDH to conduct negotiations with the EU in an ad hoc group, “47+1 .” The conclusion of this phase of negotiations on April 5, 2013 produced the final draft agreement for the EU’s accession to the Convention.¹⁵ However, the ‘final’ agreement does not mean the accession process is complete.¹⁶ It may still be some time before accession takes effect, for the agreement is subject to an additional advisory opinion of the CJEU and ratification by the 47 High Contracting Parties to the Convention.¹⁷ In order to properly analyze the effects of accession, it will be assumed for the latter part of this paper that the accession agreement will be approved by the relevant institutions and ratified by the High Contracting Parties. Nevertheless, the conclusion of the accession agreement makes this a pertinent time to consider the impact, if any, that accession will have on the autonomy of the EU legal order.

1.2. *Debating Accession*

As well as complying with the legal obligation to accede, there is good reason that accession has persisted on the European agenda. First and foremost, accession intends to fill a lacuna existing in human rights protection. At present, only the EU’s Member States are High Contracting Parties to the Convention. Consequently, the ECtHR lacks jurisdiction *ratione personae* to externally review conduct of the EU’s institutions.¹⁸ This has proven problematic in circumstances when Member States are obliged to implement a provision of EU law, which allegedly violates the Convention. So long as the ECtHR lacks jurisdiction over the EU, Member States are required to bear the burden for violations that are a product of the EU’s action. This void can be remedied with the EU’s accession to the Convention, as this would allow actions to be brought directly against the

¹² Council of Europe, *Final Report to the CDDH*, Council of Europe, (April 5, 2013)

¹³ *Id* at 3.

¹⁴ Council of Europe, *Draft Legal Instruments on the Accession of the European Union to the European Convention on Human Rights*, Council of Europe, (July 19, 2011)

¹⁵ Council of Europe, *Final Report to the CDDH*, Council of Europe, (April 5, 2013).

¹⁶ Sionaidh Douglas-Scott, *The European Union and Human Rights after the Treaty of Lisbon*, 11 H.R.L.Rev 645, 661 (2011).

¹⁷ Kravola, 131 CYIL at 130 (cited in note 12).

¹⁸ Christina Eckes *EU Accession to the ECHR: Between Autonomy and Adaption*, 76 MLR 254, 260 (2013).

EU. Accession would, in this regard, be a welcome development for the protection of human rights, as it would subject all European legal systems to the same level of external scrutiny.¹⁹ Similarly, it would provide the necessary coherence in European human rights law by ensuring a uniform standard of minimum human rights protection is applied across Europe.²⁰ Not only would accession bridge the gap in human rights protection but it would also improve the credibility of the EU as a prominent human rights actor, from both an internal and external perspective.²¹ Internally, it seems paradoxical that accession is requisite for EU membership, yet the EU itself is not a party to the Convention.²² Accession would remove this double standard.²³ Externally, the EU is a strong advocate for human rights in third states. By subjecting its own actions to external review, the EU would enhance its legitimacy in pursuing its external actions. Accession would therefore be a symbol of the EU's commitment to protecting human rights both internally and externally.

Despite compelling reasons for accession, the proposal has not been unanimously commended. Opponents have argued that accession is unnecessary because the EU is already indirectly bound by the Convention. According to Article 6(3) of the Treaty on the EU (TEU), the Convention is a source of the general principles on which the CJEU relies when delivering its judgments.²⁴ However, it is only by way of accession that the EU can be held directly accountable for breaches of the Convention.²⁵ Until then, the enforcement of the Convention in EU law is merely *de facto*.²⁶ Other skeptics have argued that accession is superfluous because the EU has developed its own Charter of Fundamental Rights. The mere fact that the EU has its own human rights instrument should not automatically render additional protection under the Convention redundant nor make accession unnecessary.²⁷ One objection that has persisted throughout the negotiation phases

¹⁹ Michael O'Boyle, *The Future of the European Court of Human Rights*, 12 *German Law Review* 1862, 1875 (2011).

²⁰ Françoise Tulkens, *Effective Remedies, Lengthy Proceedings and Accession to Justice in the EU: Ensuring the right to a fair trial under the Charter of Fundamental Rights of the EU and the European Convention on Human Rights*, 15 *European Law Journal* 462, 471 (2009).

²¹ Hans Christian Kruger, *Reflections Concerning Accession of the European Convention on Human Rights*, 21 *Penn State International Law Review* 89, 94 (2002).

²² Bruno de Witte, *The Past and Future Role of the European Court of Justice in the Protection of Human Rights*, in Philip Alston, Mara Bustelo and James Heenan, eds *The EU and Human Rights* 859, 890 (Oxford 1999).

²³ Douglas-Scott, 11 *H.R.L. Rev* at 658 (cited in note 17).

²⁴ Paul Gragl, *Strasbourg's External Review after the EU's Accession to the European Convention on Human Rights: A Subordination of the Luxembourg Court?*, 17 *Tillburg Law Review* 32, 33 (2012) at 33.

²⁵ *Id* at 34.

²⁶ Ritleng, *The Accession of the European Union* at 6 (cited in note 6).

²⁷ Martin Kuijer, *The Accession of the European Union to the ECHR: A Gift for the ECHR's 60th Anniversary or an Unwelcome Intruder at the Party?*, 3 *Amsterdam Law Forum* 17, 22 (2011); and Kruger, 21 *Penn State International Law Review* at 93 (cited in note 22).

is that accession carries a risk of compromising the autonomy of the EU's legal order.²⁸ Put simply, this contention holds that by subjecting the EU to external review by the ECtHR, there is a danger that the CJEU will become subordinate to the ECtHR. In order to address whether this contention is substantiated in practice, it is necessary first of all to define the scope of the concept in the European context.

1.3. *Autonomy*

To say that the EU's legal order is 'autonomous' generally means that the EU possesses its own independent legal system.²⁹ But autonomy in the European context is considered "a principle of constitutional quality."³⁰ It is only natural therefore to consider the term within this specific context. The European treaties do not expressly refer to autonomy; it is a judicial creation.³¹ Autonomy, as developed by the CJEU, comprises two aspects: internal and external autonomy. The origins of the former can be traced back to the foundational case of *Costa v ENEL*.³² There, the CJEU established that EU law takes precedence over the national law of its Member States. In order to command the primacy of EU law, the CJEU must necessarily be autonomous.³³ Accession, however, is concerned with the relations of the EU and the ECtHR, an external entity. It is therefore more pertinent for present purposes to consider the external dimension of the EU's autonomy. The opportunity first arose in Opinion 1/91, where the CJEU rejected the idea that the EU could be bound by an international treaty creating a European Economic Area (EEA).³⁴ In particular, the CJEU took issue with the establishment of a tribunal to oversee the implementation of the EEA insofar as the tribunal would have jurisdiction to determine disputes between "the parties to the treaty," a term undefined in the agreement. In the absence of definition, the tribunal would be required to determine who the correct respondent in the proceedings was; that is, it would have jurisdiction to rule on the competences between the EU and its Member States. The Court concluded that to confer such jurisdiction was "likely [to] adversely affect the allocation of responsibilities defined in the Treaties and

²⁸ Gragl, 17 Tillsburg L.R. at 33 (cited in note 25).

²⁹ Paul Craig, *EU Accession to the ECHR: Competence, Procedure and Substance*, 36 Fordham International Law 1114, 1142 (2013).

³⁰ Tobias Lock, *Walking on a Tightrope: The Draft Accession Agreement and the Autonomy of the EU Legal Order*, 48 CMLR 1025, 1032 (2011).

³¹ Bruno de Witte, *European Union Law: How Autonomous is its Legal Order?* 65 Zeitschrift für öffentliches Recht 141, 150 (2010).

³² *Flamino Costa v ENEL*, 12.11.1964 OJ 2900, 2900 (ECR 1964)

³³ Paul Gragl, *Accession Revisited: Will Fundamental Rights Protection Trump the European Union's Legal Autonomy?* in Benedek, W Benoît-Rohmer, F Karl, W and Nowak, M eds. *European Yearbook on Human Rights* 67 (NWV 2011), online at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2180452&download=yes.

³⁴ Opinion of the Court of 14 December 1991, *Opinion 1/91*, (filed Dec 14, 1991)

the autonomy of the Community legal order, respect for which must be assured by the [CJEU].”³⁵

(a) *A Distinctive Legal Order*

It is evident from Opinion 1/91 that the Court was not only concerned with general authority but also with the particular authority of the international tribunal to determine the EU’s internal division of competences. The internal division of competences is a distinct feature of the EU legal order. This was emphasized more recently in *P Kadi and Al Barakaat*.³⁶ The Court held, in reference to the Charter of the United Nations, that an international agreement must not affect the allocation of powers and division of competences of the EU.³⁷ But the Court in *Kadi* went one step further in holding that an international agreement also must not prejudice the constitutional principles of the Treaty, including fundamental rights.³⁸ *Kadi* is significant in that it draws a direct link between the protection of fundamental rights while maintaining the importance of the autonomy of the EU in its external relations with international organizations. When taken together, Opinion 1/91 and *Kadi* established that neither an international court nor an international agreement may encroach upon the jurisdiction of the CJEU and, in particular, must not interfere with the exclusive power to determine the division of competences of the EU. It follows that autonomy can be construed not only in regard to a separate legal order but also to a distinctive legal order.³⁹

The features that render the EU’s legal order distinctive are essentially threefold. The first feature, already discussed, is the CJEU’s exclusive power to determine the internal division of competences between the EU and its Member States. Secondly, the CJEU holds a “hermeneutic monopoly.”⁴⁰ Article 19(1) of the TEU provides that the CJEU has sole jurisdiction to determine the interpretation and application of the EU Treaties. Additionally, Article 344 of the TFEU provides that the CJEU is the ultimate arbiter in settling disputes relating to the interpretation and application of EU law. The latter provision thereby excludes any national or international court from adjudicating on matters concerning EU law.⁴¹ An illustrative application of this provision is *Commission v Ireland (Mox Plant)*.⁴² Pursuant to Article 344 of the TFEU, the CJEU claimed jurisdiction over a dispute

³⁵ Id at 34-35.

³⁶ Joined Cases C-402/05 P and C-415/05 I-6351 (ECR 2008).

³⁷ Id at 282.

³⁸ Id at 285.

³⁹ Craig, 36 Fordham Int’l Law at 1143 (cited in note 30).

⁴⁰ Id at 1145.

⁴¹ Paul Gragl *The Accession of the European Union to the European Convention on Human Rights* at 21 (Hart 2013)

⁴² Case C-459/03 *Commission v Ireland (Mox Plant)* [2006] ECR I-4635

arising under the United Nations Convention on the Law of the Sea (UNCLOS), to the exclusion of other international tribunals. The CJEU held that UNCLOS was a mixed agreement and because mixed agreements have the same status as laws deriving solely from the EU, UNCLOS was deemed an integral part of EU law.⁴³ The essence of these provisions is that the CJEU, as the only body competent to interpret the laws of the EU, has “interpretative autonomy.”⁴⁴ Thirdly, the power to invalidate EU acts is a power reserved for the CJEU. *Firma Foto Frost v Hauptzollamt Lubeck-Ost* confirmed this principle by holding that no national court may declare the acts of the EU invalid.⁴⁵ The aforementioned features render the EU legal order distinctive and thereby autonomous. Preservation of autonomy requires that the essential character of the EU and its distinctive powers are not altered by external interference.⁴⁶ This is now confirmed in Articles 2 and 3 of Protocol No 8 of the Treaty of Lisbon, which provide that accession “shall not affect the competences of the [EU] or the powers of its institutions” and that “[n]othing in the [accession] agreement referred to in Article 1 shall affect Article 344 of the [TFEU].”

(b) *The Significance of Autonomy*

The primary rationale behind the CJEU’s consistent affirmation of the autonomous nature of the EU legal order is unity.⁴⁷ The effective functioning of the EU relies on the uniform application of the law. Uniformity can only be achieved if the interpretation and application of EU law is entrusted to one authority. The significance of protecting autonomy also resides in the fact that it defines the very nature of the EU’s legal order. In the seminal decision of *Van Gend en Loos v Netherlands Inland Revenue Administration*, the CJEU declared the creation of a new legal order.⁴⁸ The Court considered the legal order of the EU distinguishable from international law on the basis that the founding EU treaties were directly effective on Member States, a feature that was not inherent in other international treaties.⁴⁹ While scholars have debated whether the EU is distinctly severable

⁴³ Gragl, *The Accession* at 42 (cited in note 42).

⁴⁴ Theodor Schilling, *The Autonomy of the Community Legal Order: An Analysis of Possible Foundations*, 37 *Hav. Int’l L.J.* 389, 389-390 (1996) and Xavier Groussot, Tobias Lock and Laurent Pech, *EU Accession to the European Convention on Human Rights: A Legal Assessment of the Draft Accession Agreement of 14th October 2011* at 5 (Foundation Robert Schuman 2011).

⁴⁵ *Foto-Frost v Hauptzollamt*, 22.10.1987 OJ 16, 17 (ECR 1987)

⁴⁶ Opinion of Court of 18 April 2002, *Opinion 1/00*, I-3493 (filed April 18, 2002)

⁴⁷ Jan Willem van Rossem, *The Autonomy of EU law: More is Less?*, in Ramses Wessel and Steven Blockman, eds *Between Autonomy and Dependence: The EU Legal Order Under the Influence of International Organisations* 13, 19 (Asser Press 2013).

⁴⁸ *Van Gend en Loos v Administratie der Belastingen*, 5.02.1963 OJ 1, 12 (ECR 1963).

⁴⁹ Craig, 36 *Fordham Int’l Law* at 1143 (cited in note 30).

from international law⁵⁰, there is a strong correlation between the principle of autonomy and the creation of a new legal order. Unless the EU were to some degree autonomous, it would be difficult to claim that the EU did constitute a new legal order.⁵¹ Autonomy in this regard has been described as a “disguised claim to sovereignty.”⁵² Despite criticism that sovereignty is traditionally bound to the nation state, the term is employed in this context to refer to an ultimate authority.⁵³ Fundamentally, the notion of autonomy becomes a means through which the EU can assert its identity within the international community. It is therefore crucial that autonomy be preserved. Not only is preservation of the EU’s autonomy important to the very foundations of the EU, it is also required by virtue of the treaties. Article 1 of Protocol No 8 of the Lisbon Treaty provides that the accession agreement “shall make provision for preserving the special characteristics of the [EU] and [EU] law.” The ‘special characteristics’ are not expressly listed but the autonomy of the EU is generally considered to fall within this provision.⁵⁴

While it is not disputed that autonomy must be preserved with accession, the extent to which it should be protected is questionable when fundamental human rights are at stake.⁵⁵ As part two of this paper will illustrate, fundamental human rights now form an integral part of EU law. But human rights are not merely another area in which the EU’s competences now extend; they are universally shared values.⁵⁶ What makes fundamental human rights ‘fundamental’ is that they are intended to be enjoyed by every individual.⁵⁷ It is paramount therefore that the accession agreement affords adequate weight to the protection of fundamental human rights. A key objective of accession is to close the existing gap in human rights protection by enabling the EU to be held accountable to breaches of the Convention. In order to give full effect to this purpose, it is clear that the accession agreement must carefully balance autonomy on the one hand and fundamental human rights on the other. The protection afforded to each should reflect their relative importance — that is, autonomy should not outweigh the protection of fundamental human rights.

⁵⁰ See generally Schilling above n45; compare JHH Weiler and Ulrich Haltern, *The Autonomy of the Community Legal order – Through the Looking Glass*, 37 Harv. Int’l L.J. 411 (1996).

⁵¹ Piet Eeckhout, *Human Rights and the Autonomy of EU Law: Pluralism or Integration*, 66 Current Legal Problems 169, 170 (2013).

⁵² Van Rossem, *The Autonomy of EU Law: More is Less?* at 19 (cited in note 48).

⁵³ *Id.* at 26.

⁵⁴ Tobias Lock, *EU Accession to the ECHR: Implications for the Judicial Review in Strasbourg*, 35 European Law Review 777, 781 (2010).

⁵⁵ Kruger, 21 Penn State International Law Review at 94 (cited in note 22).

⁵⁶ *Id.* at 95.

⁵⁷ Johan Callewaert, *The European Convention of Human Rights and European Union Law: A Long Way to Harmony*, 6 E.H..R.L.R. 768, 782 (2009).

PART TWO: THE PRESENT EUROPEAN LEGAL ORDER

2.1 *Jurisdiction of the European Courts*

Presently, there are two separate and distinct courts operating at the supranational level in Europe, namely the CJEU and the ECtHR. The Courts differ in respect to their origin, jurisdiction and function. The CJEU, based in Luxembourg, is a formal EU institution that operates as an adjudicating body for the application and interpretation of EU law. The CJEU may be seen as a quasi-domestic court seeking to preserve the standard application of the law within its jurisdiction.⁵⁸ On the other hand, the ECtHR is a “freestanding human rights court” created by the Council of Europe.⁵⁹ Its mandate is to ensure fundamental human rights, as guaranteed under the Convention, are protected. Although the CJEU’s jurisdiction is evidently broader than the ECtHR’s, there is a jurisdictional overlap: both Courts are concerned with protecting fundamental human rights. However, the CJEU has not always addressed human rights issues. Rather, the CJEU’s human rights jurisdiction has been an incremental development in response to the expanding competences of the EU and the needs of its Member States.

Initially, the CJEU’s purpose was “to uphold a process of economic integration between states.”⁶⁰ This aligned with the original intention to establish the EU as an organization that would foster transnational economic cooperation.⁶¹ The EU has since expanded its competences beyond purely economic objectives. Expansion incited concerns among national constitutional courts that the EU could theoretically override fundamental human rights provisions of the nation state.⁶² In order to alleviate these concerns, the EU needed to ensure compliance with human rights standards and to provide mechanisms for redress where standards were not adhered to.⁶³ The CJEU took the lead in inserting human rights standards into the EU’s constitutional framework.⁶⁴ As early as 1969, the CJEU asserted that fundamental human rights were “enshrined in the general principles of community

⁵⁸ Gragl, *Accession Revisited* at 67 (cited in note 34).

⁵⁹ Sionaidh Douglas-Scott, *A Tale of Two Courts: Luxembourg, Strasbourg and the Growing European Human Rights Acquis*, 43 CMLR 632, (2006).

⁶⁰ Laurent Scheek, *The Relationship between the European Courts and Integration Through Human Rights*, ZaoRV, 837, 843 (2005).

⁶¹ Gerard Quinn, *The EU and the Council of Europe on the Issue of Human Rights: Twins Separated at Birth?*, McGill L J, 849, 851 (2001).

⁶² *Id* at 862.

⁶³ Douglas-Scott, 11 H.R.L.Rev. at 648 (cited in note 17).

⁶⁴ Grainne de Burca, *The Road Not Taken: The European Union as a Global Human Rights Actor* 105 Am. J. Int’l L., 649, 650 (2011).

law and protected by the Court.”⁶⁵ The CJEU reiterated its position in *Internationale Handelsgesellschaft*.⁶⁶

[r]espect for human rights forms an integral part of the general principles of Community law protected by the Court of Justice. The protection of such rights, whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structure and objectives of the Community.

It is by implication of the Court’s recognition that fundamental human rights are an essential feature of the EU legal framework. Articles 2 and 6(3) of the TEU now confirm this position.⁶⁷ The CJEU has subsequently been empowered with the necessary competence to ensure compliance not only in regard to the EU’s institutions but also in respect of its Member States.⁶⁸ The outcome of this development is a manifestation of what Eeckhout has coined “the principle of limited and shared jurisdiction.”⁶⁹ Under this principle, which Eeckhout bases on the theory of the integration of laws, both Courts are limited by their respective jurisdictions: the CJEU has jurisdiction to determine matters of EU law and the ECtHR considers violations of the Convention. Within those jurisdictions, both Courts share the protection of human rights.⁷⁰ This theory considers that EU law and the Convention are becoming increasingly intertwined. As laws are integrated, the Courts are required to share their jurisdiction in the interpretation and application of those laws.⁷¹ The following section illustrates that the current relationship between the Courts is underpinned by the gradual integration of laws. Both Courts

⁶⁵ Case 29/69 *Stauder v Ulm* [1969] ECR 419 at 425; contrast Case 1/58 *Stork v High Authority* [1958] ECR 17 and; Case 40/64 *Sgarlata v Commission of the European Communities* [1965] ECR 215.

⁶⁶ *Internationale Handelsgesellschaft mbH v Einfuhr-und Vorratsstelle fur Getreide und Futtermittel*, 17.12.1970 OJ 1125, 1134 (ECR 1970).

⁶⁷ Treaty on the European Union (signed 1 February 1992, entered into force 1 November, 1993) Article 2: “The Union is founded on the values of respect for human dignity, freedom democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail”; and Article 6(3) “The Union shall respect fundamental rights, as guaranteed by the European Convention on Human Rights and as a result from the constitutional traditions common to member states as general principles of Community law.”

⁶⁸ Rick Lawson, *Confusion and Conflict? Diverging Interpretations of the European Convention on Human Rights in Strasbourg and Luxembourg* in Rick Lawson and Matthijs De Blois, *The Dynamics of the Protection of Human Rights in Europe – Essays in Honour of Professor Henry G Schermers* 219, 224 (Martinus Nijhoff 1994).

⁶⁹ Eeckhout 66 *Current Legal Problems* at 170 (cited in note 52).

⁷⁰ *Id* at 186.

⁷¹ *Id* at 172.

have reciprocally, but mindfully, intruded on the jurisdiction of the other through a process of ‘borrowing’ and judicial dialogue.

2.2. Current Relationship Between the Courts

(a) Borrowing from the ECtHR

In formulating its own human rights jurisprudence, the CJEU has ‘borrowed’ from the Convention and the jurisprudence of the ECtHR.⁷² The term ‘borrowing’ in this context denotes a process of drawing inspiration from the ECtHR and applying those principles within the EU’s own legal framework. Following and affirming its position in *Internationale Handelsgesellschaft*, the CJEU in *Nold v Commission* said, “international treaties for the protection of human rights... can supply guidelines which should be followed within the framework of community law.”⁷³ Shortly after *Nold*, in *Rutili v Minister of the Interior*⁷⁴, the CJEU made its first explicit reference to the Convention. There, the Court viewed limitations on the relevant EU directives as providing “a specific manifestation of the more general principles enshrined in Articles 8, 9, 10 and 11 of the Convention.”⁷⁵ In reaching its decision, the CJEU confirmed not only that the Convention falls squarely within this category of ‘international treaties for the protection of human rights’ recognized in *Nold*, but also that the Court was willing to review EU law in accordance with the standards under the Convention.⁷⁶ The CJEU has continued to cite the Convention and its individual articles in subsequent decisions.⁷⁷ Guild and Lesieur note that between 1975 and 1998, the Convention was cited in over 70 of the CJEU’s judgments⁷⁸; a sizeable number given that there is no formal obligation for the Court to do so.

References to the jurisprudence of the ECtHR are a more recent phenomenon. The CJEU’s first citing was only recorded in 1996.⁷⁹ In a case concerning transsexual rights, the CJEU cited the earlier decision of *Rees v United Kingdom* and the ECtHR’s definition of a “transsexual.”⁸⁰ Such early references to the ECtHR were brief but over time the CJEU has demonstrated an increased

⁷² Scheek, 65 ZaoRV at 850 (cited in note 61).

⁷³ *Nold KG v Commission*, 11.01.1997 OJ 491, 13 (ECR 1974).

⁷⁴ *Rutili v Ministre de l’interieur*, 28.10.1975 1219, 12 (ECR 1975).

⁷⁵ *Id* at 32.

⁷⁶ Jason Coppel and Aidan O’Neill, *The ECJ: Taking Rights Seriously?*, 29 CMLR 669, 675 (1992).

⁷⁷ *Hauer v Land Rheinland-Pfalz* 3727 (ECR 1979); *Johnston v Chief Constable of Royal Ulster Constabulary* 1651 (ECR 1986); *Union Nationale des Entraîneurs et Cadres Techniques Professionnels du Football v Heylens and others* 4097 (ECR 1987).

⁷⁸ Guild and Lesieur, 65 ZaoRV at xxi (cited in note 73).

⁷⁹ *P v S and Cornwall County Council*, I-2143 (ECR 1996).

⁸⁰ *Leander v. Sweden*, 9248/81 ECHR 4, 9 (EHRR 1986)

willingness to rely on the ECtHR's judgments.⁸¹ For instance, in the 1998 decision of *Baustahlgewebe v Commission* the Court interpreted "criminal charge" as required by Article 6 of the Convention "in light of the case-law" of the ECtHR.⁸² Similarly, in the 2005 decision of *Pupino* the CJEU considered the meaning of Article 6 of the Convention as interpreted by the ECtHR and relied extensively on the ECtHR's case law in reaching its decision.⁸³ The examples cited above illustrate that the Convention and the ECtHR's jurisprudence have been incrementally integrated into the CJEU's own case law, but on a very ad hoc basis.⁸⁴ The Convention is only a source of inspiration for the CJEU and the purpose of 'borrowing' is merely to assist the CJEU in determining the principles of EU law.⁸⁵ Therefore, the CJEU is selective in its reference to the Convention and the ECtHR's jurisprudence. Where the CJEU does consider the Convention relevant, its application nevertheless remains indirect due to a lack of binding obligation on the CJEU to apply the Convention and follow the interpretation of the ECtHR.

(b) Divergent Interpretations

A lack of binding obligation carries an inevitable risk that the Courts will reach divergent interpretations.⁸⁶ *Hoechst AG v Commission*⁸⁷ is a pertinent example. The CJEU held that respect for private life and home, enshrined in articles 8 and 9 of the Convention, did not apply to businesses.⁸⁸ The decision of the EU Commission requiring businesses to submit to investigations was therefore not considered to be a violation of the Convention. The ECtHR later went on to decide, contrary to the CJEU's ruling, that Article 8 did encompass certain professional or business activities.⁸⁹ Similarly, in *Orkem v Commission*⁹⁰ the CJEU held that Article 6(1) of the Convention, guaranteeing the right to a fair trial, did not include a right to protection against self-incrimination. In the later decision of *Funke and*

⁸¹ Douglas-Scott, *A Tale of Two Courts*, at 645 (cited in note 60); Guy Harpaz, *The European Court of Justice and its Relations with the European Court of Human Rights: The Quest for Enhanced Reliance, Coherence, and Legitimacy*, CMLR 105, 109 (2009).

⁸² *Baustahlgewebe v Commission* I-8485 (ECR 1998).

⁸³ *Pupino*, 16.06.2005 OJ I-5285, 60 (ECR 2002).

⁸⁴ Harpaz, CMLR at 107 (cited in note 82); Elizabeth Defeis, *Human Rights and the European Union: Who Decides? Possible Conflicts Between the European Court of Justice and the European Court of Human Rights*, 19(2) Dick. J. Int'l. L 301, 302 (2000 – 2001).

⁸⁵ Adam Balfour, *Application of the European Convention on Human Rights by the European Court of Justice*, Harvard Law Student Scholarship Series Paper No. 4, 1, 12 (2005).

⁸⁶ Dean Spielmann, *Human Rights Case Law in the Strasbourg and Luxembourg Courts: Conflicts, Inconsistencies and Complementaries*, Oxford 757, 761 (1999).

⁸⁷ C-46/87 and 227/88, OJ 2859, (ECR 1989).

⁸⁸ Scheek, 65 ZaoRV at 854 (cited in note 61).

⁸⁹ *Niemietz v Germany*, 31 (ECHR 1992)..

⁹⁰ *Orkem*, (cited in note 88).

*Others v France*⁹¹ the ECtHR reached the opposite conclusion. The ECtHR found that there was a breach of Article 6(1) and held that the meaning of “charged with a criminal offence” included the right to remain silent and not to contribute to self-incrimination.⁹²

In light of the nature of the Courts and the context in which they operate, it is not difficult to see how divergence may result. Both Courts follow a teleological method of interpretation, meaning that the Convention is interpreted in accordance with each Court’s objectives,⁹³ which do not necessarily coincide. The ECtHR is focused solely on preserving the rights of the individual as guaranteed by the Convention, whereas the CJEU strives to fulfill the broader aims of the EU. It is possible therefore that even when the Courts are faced with the same issue, their objectives may shape their conclusions towards divergent results.⁹⁴ However, the level of divergence between the Courts is relatively rare and should not be overestimated: ⁹⁵ the above decisions demonstrate that divergence resulted primarily where the ECtHR had previously been silent on the matter. In some cases, once the ECtHR had been given the opportunity to decide the matter the CJEU subsequently realigned itself with the ECtHR’s rulings. In *PVC II*, for example, the CJEU reached the same conclusion as the ECtHR with regard to the right to protection against self-incrimination.⁹⁶ Nevertheless, any divergence in interpretation is undesirable.⁹⁷ Uniform application of the Convention is preferable in order to avoid confusion in the eyes of those who are seeking to adhere to the Convention. Accession should seek to minimize this level of divergence.

(c) *The ECtHR’s Approach to EU Law*

The relationship between the CJEU and the ECtHR runs both ways. Attention must also be given to the ECtHR’s treatment of the CJEU’s jurisprudence. References to the CJEU are relatively sparse. It is more common for the CJEU to look to the ECtHR’s jurisprudence given that the ECtHR is a specialist human rights court. Of the references that do exist, it has been observed that they are at least approving of and deferential to the CJEU.⁹⁸ For example, in *Marckx v*

⁹¹ *Case of Funke v. France*, 25.02.1993 OJ 256-A, 25 (EHRR 1993).

⁹² *Id* at 44.

⁹³ AG Toth, *The European Union and Human Rights: The Way Forward*, 35 CMLR 491, 499 (1997); Iris Canor, *Primus Inter Pares: Who is the Ultimate Guardian of Fundamental Rights in Europe?*, 25(1) E.L. Rev 3, 9 (2000).

⁹⁴ Balfour, Harvard Law Student Scholarship Series Paper No. 4 at 16 (cited in note 86).

⁹⁵ Spielmann, Oxford at 770 (cited in note 87).

⁹⁶ Joined cases C-238/99 P, C-244/99 P, C-245/99 P, C-250/99 P and C-252/99 P *Limburgse Vinyl Maatschappij (LVM) and Others v Commission (PVC II)* [2002] ECR I-8618, cited in Scheek, above n 61, at 855.

⁹⁷ Callewaert, E.H.R.L.R at 775 (cited in note 58).

⁹⁸ Douglas-Scott, *A Tale of Two Courts*, above n 60, at 641; and Harpaz, above n 82, at 115.

*Belgium*⁹⁹ the ECtHR not only approved the “prospective overruling” concept that was employed by the CJEU in *Defrenne v Sabena*¹⁰⁰, but also seemed willing to rely on it.¹⁰¹ Similarly, in *Pellegrin v France*¹⁰² the ECtHR expressly relied on the CJEU’s definition of “public service” outlined in *Commission v Belgium*.¹⁰³ The existing, albeit infrequent, references of the ECtHR to the CJEU’s case law do at the very least recognize the CJEU as having authority in human rights matters and demonstrate that there is a level of mutual respect existing between the Courts.¹⁰⁴ This relationship between the Courts was put to the test for the first time in *Matthews v United Kingdom*¹⁰⁵ when an alleged violation of the Convention directly called into question a provision of EU law. Given that the ECtHR lacks jurisdiction *ratione personae* over the EU, it was necessary for the ECtHR to formulate an approach that would allow the Court to scrutinize EU law without directly reviewing the EU’s acts.¹⁰⁶ In response, the ECtHR developed the presumption of “equivalent protection,” otherwise known as the *Bosphorus* presumption.

The *Matthews* case concerned an alleged breach of Article 3 of Protocol No. 1 of the Convention concerning the right to vote in free elections. The question for the Court was whether the United Kingdom could be held responsible for failing to hold elections to the European Parliament in Gibraltar. This was notwithstanding that the alleged violation derived from the European Community’s Act on Direct Elections of 1976, which stipulated that the Act applied only in respect of the United Kingdom.¹⁰⁷ The Court held that a Member State was not prevented from transferring competences to an international organization, provided that the Member State continued to “secure” the rights guaranteed under the Convention.¹⁰⁸ The United Kingdom was not prevented from entering into the 1976 Act, but in doing so, it would still have an obligation to secure the rights guaranteed under the Convention. The United Kingdom was consequently held responsible for the breach of Article 3 of Protocol No.1 of the Convention even though the violation was derived from EU law. The *Matthews* decision did however leave several questions unanswered, including whether a Member State could be held liable for a breach of EU secondary law and whether a Member State could be held liable where they had no discretion in implementing the law in question. These questions

⁹⁹ (6833/74), OJ, 330 (EHRR 1979).

¹⁰⁰ Case 43/75, OJ, 455 (ECR 1976).

¹⁰¹ Douglas-Scott, CMLR at 641 (cited in note 60).

¹⁰² *Pellegrin v France*, 38 (Grand Chamber 1999).

¹⁰³ Case 149/79, 3881 OJ (ECR 1980).

¹⁰⁴ Douglas-Scott, CMLR at 644 (cited in note 60).

¹⁰⁵ *Case of Matthews v. The United Kingdom*, 18.02.1999 OJ 1, 1 (ECHR 1999).

¹⁰⁶ Cathryn Costello, *The Bosphorus Ruling of the European Court of Human Rights: Fundamental Rights and Blurred Boundaries in Europe*, 6(1) H.R.L. Rev 87, 88 (2006).

¹⁰⁷ Id at 31.

¹⁰⁸ Id at 32.

remained open until the decision of *Bosphorus Airways v Ireland*.¹⁰⁹

The dispute in *Bosphorus* arose from the impounding of an aircraft that was the property of Yugoslav Airlines but leased by Bosphorus Airways. Irish authorities impounded the aircraft in accordance with a United Nations resolution that had been implemented as a European Community regulation, and in turn adopted in Ireland. The applicant alleged that the impounding of the aircraft breached Article 1 of Protocol No. 1 of the Convention, the right to peaceful enjoyment of possessions. The question for the ECtHR was whether Ireland was liable or whether compliance with its obligations under EU law was sufficient to justify interfering with the applicant's fundamental rights. The ECtHR was satisfied that the impugned interference with the rights at issue was a direct result of Ireland's legal obligations to the EU.¹¹⁰ Building on its approach in *Matthews*, the ECtHR held however that compliance with membership obligations did not absolve a Member State from liability even where there was no discretion in implementing the measure in question.¹¹¹ State action taken in compliance with legal obligations is only justified where the international organization in question provides protection for fundamental human rights "equivalent" to the protection guaranteed under the Convention.¹¹² This is the presumption of equivalent protection, which can only be rebutted where the protection was considered "manifestly deficient."¹¹³ On the facts of the case, the Court considered that the protection afforded to fundamental rights in the EU was equivalent to the protection guaranteed under the Convention, and that the circumstances did not warrant a rebuttal of the presumption. Therefore, Ireland could not have been said to depart from its requirements under the Convention when acting in accordance with its legal obligations to the EU.¹¹⁴

The *Bosphorus* presumption is an attempt to strike a balance between two competing interests: on the one hand, freedom for High Contracting Parties to transfer competences to international organizations, and on the other hand, ensuring that such a transfer does not relinquish these Parties' obligations under the Convention.¹¹⁵ Its implications are institutional in the sense that the presumption has continued to govern the relationship between the Courts when the conduct of the EU allegedly has violated the Convention.¹¹⁶ Concerns have been raised over

¹⁰⁹ *Case of Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi v. Ireland*, 30.06.2005 1, 12 (ECHR 2005).

¹¹⁰ *Id* at 148.

¹¹¹ *Id* at 154.

¹¹² *Bosphorus v. Ireland*, 30.06.2005, at 155.

¹¹³ *Id* at 156.

¹¹⁴ *Id* at 175.

¹¹⁵ Steve Peers, *Bosphorus: European Court of Human Rights*, 2(3) *European Constitutional L. Rev* 443, 451 (2006).

¹¹⁶ *Cooperative des Agriculteurs de Mayenne v France* (16931/04) (ECHR 2006); *Kokkelvisserij v The Netherlands* (13645/05), (ECHR 2009). Distinguished in *Michaud v France* (12323/11) 112, 114 (ECHR 2013).

whether the protection granted to fundamental human rights in the EU can truly be said to be comparable to the protection guaranteed by the Convention¹¹⁷ and the relatively low threshold that the “manifestly deficient” test establishes.¹¹⁸ It is not necessary to dwell on these criticisms of the case for the purpose of this paper. What is particularly relevant here is that the finding of the ECtHR was general rather than specific in nature, meaning that the ECtHR did not scrutinize in detail the acts of the EU or the decisions of the CJEU.¹¹⁹ The effect of this deferential approach is that the autonomy of the EU remained intact.

Although the *Bosphorus* presumption preserves the EU’s autonomy, the current legal framework grants inadequate protection to fundamental human rights. The CJEU’s indirect application of the Convention means that there is not only a lack of certainty and legitimacy but also a real possibility that conflicting interpretations will arise.¹²⁰ The indirect application of the Convention is a result of a lack of binding obligation on the CJEU to apply the Convention and follow the interpretation of the ECtHR. Accession can alter this manner of application. The next part of this paper will consider whether accession can still protect the autonomous nature of the EU’s legal order.

PART THREE: ACCEDING TO THE CONVENTION

3.1. *The Status Quo: What for Bosphorus?*

Any alteration to the European legal order by way of accession warrants an inquiry into what effect this will have on the status quo. A particular concern is whether the *Bosphorus* presumption of equivalent protection will continue to govern the relationship between the ECtHR and CJEU when acts of the EU are called into question with the rights guaranteed under the Convention. The accession agreement is silent on this matter, but commentators have expressed doubt that

¹¹⁷ Olivier De Schutter, *The Two Lives of Bosphorus: Redefining the relationships between the European Court of Human Rights and the Parties to the Convention*, Working Paper, Interdisciplinary Research Cell in Human Rights, 1, 9 (2013).

¹¹⁸ *Bosphorus* (cited in note 110); Joint concurring opinion of Judges Rozakis, Tulkens, Traja, Botoucharova, Zagrebelsky and Garlicki at 4; Tobias Lock “Beyond Bosphorus: the European Court of Human Rights’ Case Law on the Responsibility of Member States of International Organisations under the European Convention on Human Rights” 10(3) H.R.L.Rev. 529 at 541 (2010).

¹¹⁹ Costello, 6(1) H.R.L. Rev at 103 (cited in note 107).

¹²⁰ Catherine Turner, *Human Rights Protection in the European Community: Resolving Conflict and Overlap between the European Court of Justice and the European Court of Human Rights*, 5(3) European Public Law 453, 458 (1999).

the presumption should continue to apply after accession, for two main reasons.¹²¹ Firstly, it is contended that accession will render the presumption unnecessary. The *Bosphorus* presumption was developed as a means to address violations of the Convention resulting from EU conduct, insofar as there was an absence of a formal relationship between the Courts. Once the EU is a party to the Convention, the relationship between the Courts will be formally defined, thus reducing the need to retain the presumption.¹²² Secondly, retention of the presumption would place the EU in a privileged position. It has been emphasized tirelessly that the EU is to accede equal footing with all other High Contracting Parties.¹²³ The ECtHR does not grant any other High Contracting Party the benefit of a presumption where the domestic level of protection is comparable to the Convention. Therefore, it would be unjustified to allow the EU to claim the benefit of such a presumption where other High Contracting Parties are accorded no such privilege.¹²⁴ The only other means to which the presumption could be retained without privileging the EU would be to extend the presumption to all High Contracting Parties.¹²⁵ It is argued that it would therefore be unnecessary and inappropriate for the *Bosphorus* presumption, at least as it currently stands, to be retained after accession.

But *Bosphorus* signified more than just a mechanism to address compliance with the Convention in cases involving the EU. The presumption recognized the protection given to human rights by the EU and CJEU, and most importantly ensured that the autonomy of the EU remained intact. If the presumption is abandoned upon accession, will the autonomy of the EU be compromised? Accession alone would be unlikely to impact the EU's autonomy. It has been reasoned that if merely acceding to an international treaty compromised the autonomy of a legal order, then arguably no legal order that has entered into an international treaty or has undertaken international obligations can be said to be autonomous.¹²⁶ Therefore, the question of autonomy must be considered in light of the effects of accession and the particular features of the EU's autonomous legal order.¹²⁷

¹²¹ See Noreen O'Meara "A More Secure Europe of Rights? The European Court of Human Rights, the Court of Justice of the European Union and EU Accession to the ECHR" (2011) 12(10) German Law Journal 1813 at 1828; and Eckes, "EU Accession to the ECHR: Between Autonomy and Adaption," above n 19, at 265.

¹²² De Schutter, Working Paper, Interdisciplinary Research Cell in Human Rights at 14 (cited in note 118).

¹²³ Council of Europe, *Draft Explanatory Report to the Agreement on the Accession* 47+1(2013)007 at 40 (cited in note 10).

¹²⁴ Craig, at 1141 (cited in note 30); De Schutter, Working Paper, Interdisciplinary Research Cell in Human Rights at 12 (cited in note 118); Groussot, Lock and Pech, 37(2) *Hav. Int'l. L. J.* at 4 (cited in note 45).

¹²⁵ See generally De Schutter, above n 118.

¹²⁶ Craig, at 1143 (cited in note 30).

¹²⁷ See part 1.3. (a) of this paper.

3.2. *The Impact of Accession*

In Opinion 1/91, the CJEU contemplated a situation whereby an international agreement could bind the EU's institutions:¹²⁸

Where, however, an international agreement provides for its own system of courts, including a court with jurisdiction to settle disputes between the Contracting Parties to the agreement, and, as a result to interpret its provisions, the decisions of that court will be binding on the Community institutions including the [CJEU]. Those decisions will also be binding in the event that the [CJEU] is called upon to rule, by way of preliminary ruling or in a direct action, on the interpretation of the international agreement, in so far as that agreement is an integral part of the Community legal order.

The implications of accession arguably fall within the scope of this dictum. The Convention is an international agreement providing its own dispute resolution system within the ECtHR. Given that accession will render the Convention an integral part of EU law, the EU's institutions will be formally bound by the decisions of the ECtHR. It follows from this that the effects of accession are twofold: institutional and jurisdictional.¹²⁹ The former represents the creation of a formally binding relationship between the Courts and the latter reflects the extended jurisdiction of the ECtHR to review acts of the EU. In light of the question posed by this paper, each of these effects must be considered in regard to the autonomy of the EU legal order.

(a) *The Institutional Effect*

Accession has incited some concern that a hierarchy between the ECtHR and the CJEU will be created with the ECtHR as the supreme judicial authority. The ECtHR is, however, more aptly viewed as a specialist rather than a superior Court.¹³⁰ As already outlined, the ECtHR's jurisdiction is limited to cases concerning violations of the Convention. Cases involving the Convention in particular, and human rights in general, only constitute a small percentage of the cases that the CJEU addresses.¹³¹ When considering the broader functions that the CJEU undertakes, it cannot be said that accession would render the ECtHR the European supreme court. Furthermore, the ECtHR is not empowered with an

¹²⁸ *Opinion 1/91*, at 39 (cited in note 35).

¹²⁹ Eeckhout, 66 *Current Legal Problems* at 175 (cited in note 52).

¹³⁰ Gragl "Accession revisited," above n 34, at 68; and Kruger, above n 22, at 96.

¹³¹ Gragl "Accession revisited," above n 34, at 95.

appellate jurisdiction. The ECtHR's role is not to address or correct alleged errors of law from the decisions of domestic courts on the interpretation and application of national laws.¹³² Given that accession will not alter the functional nature of the ECtHR, the ECtHR will by no means be entitled to hear appeals from decisions of the CJEU or overrule decisions of the CJEU on the basis of an alleged error of law.

Notably, in the absence of any formal binding relationship between the European legal orders at present one can only speculate as to the institutional effects of accession. A formally binding relationship does however currently exist between the ECtHR and the domestic courts. While the relationship between the ECtHR and domestic courts is by its very nature fundamentally different from the horizontal relationship between the ECtHR and the CJEU, it can nevertheless be used as an instructive illustration. The relationship between the ECtHR and the domestic courts arguably mirrors the current informal relationship between the ECtHR and the CJEU. Former European Court of Human Rights Judge, Lech Garlicki, writing extra-judicially, noted that the interaction between the domestic courts and the ECtHR is often founded on a level of cooperation that runs both ways between the courts. Depending on which court has the first say, the ECtHR may reach a decision that the national court subsequently follows or, the domestic court may make a judgment that the ECtHR then "absorbs" into its case law.¹³³ References to the ECtHR are not uncommon in the domestic courts. The Honorable Baroness Hale of Richmond noted that in a case before the United Kingdom Supreme Court one would be "struck by the amount of time counsel spend referring and discussing the Strasbourg case law. They treat it as if it were the case law of our domestic courts" even in the absence of a doctrine of *stare decisis*.¹³⁴ The product of this interaction is an evident 'borrowing' of jurisprudence between the courts akin to that which has shown to be operating horizontally between the ECtHR and the CJEU. Judge Garlicki has highlighted that this requisite cooperation is a product of the common desire of the courts to protect and develop human rights. It is clear that the ECtHR and the CJEU share this common aim and therefore cooperation and respect will continue between the courts in their pursuit to protect human rights.

It is nonetheless inevitable that there will, at times, be divergence between the ECtHR and national courts. Jean-Paul Costa, former President of the ECtHR, has acknowledged that there are three categories that represent the relationship between the ECtHR and the domestic courts in the event of divergence of interpretation. Firstly, consensus may prevail in circumstances where the domestic

¹³² Gragl *The Accession of the European Union to the European Convention on Human Rights*, above n 42, at 115.

¹³³ Lech Garlicki, *Cooperation of Courts: The Role of Supranational Jurisdictions in Europe* 6(3) ICON 509, 513 (2008).

¹³⁴ Brenda Hale, *Argentoratium Loctum: Is Strasbourg or the Supreme Court Supreme?* 12(1) Human Rights L Rev 65, 68 (2012).

court realigns itself with a judgment of the ECtHR. Secondly, where the domestic court refuses to follow the solution adopted by the ECtHR, the conflict will remain. In rare circumstances whereby there is a flagrant divergence between the courts, the divergence tends to be factual rather than legal.¹³⁵ Finally, a compromise may result from judicial dialogue between the courts.¹³⁶ An illustration of the dialogue between the domestic courts and the ECtHR can be taken from the United Kingdom case of *Findlay v the United Kingdom* where the ECtHR concluded that some aspects of the court-martial system were not compatible with the rights guaranteed under Article 6 of the Convention.¹³⁷ The House of Lords declined to follow this decision in *R v Boyd and Others*¹³⁸ and the ECtHR remedied its approach in the later decision of *Cooper v the United Kingdom*.¹³⁹ The result was a “compromise that maintained a sense of mutual respect between the ECtHR and the House of Lords.”¹⁴⁰ A similar realignment process was evident in the relationship between the ECtHR and the CJEU in the *PVC II* decision. The implication of this level of cooperation and dialogue means, “there has never been a genuine head-on collision between the courts.”¹⁴¹

The relationship between the domestic courts and the ECtHR is based on cooperation, mutual respect and judicial dialogue. It is evident that these are pre-existing features in the relationship between the ECtHR and the CJEU. The main difference is that in contrast to the national courts, the CJEU is not formally and directly bound by the decisions of the ECtHR. It is therefore argued that formalizing the relationship between the European supranational courts is unlikely to alter the nature of their relationship. Cooperation, mutual respect and dialogue will likely be of continued importance in order to give effect to their common goal: the protection of fundamental human rights.

(b) *The Jurisdictional Effect*

After accession, the EU will be subject to the jurisdiction of the ECtHR and its judgments will be binding on the EU. *Prima facie*, the ability of the ECtHR to deliver binding judgments carries a risk that accession will encroach on the autonomy of the EU legal order.¹⁴² Yet, to say that the EU is bound by the ECtHR “does not immediately answer the question of what the normative impact of

¹³⁵ Jean Paul Costa, *The relationship between the European Court of Human Rights and the National Courts*, 3 EHRLR 264, 268 (2013).

¹³⁶ *Id.* at 269.

¹³⁷ (22107/93) ECHR 1997-I.

¹³⁸ [2002] UKHL 31 at [6].

¹³⁹ ECHR 2003-XII.

¹⁴⁰ Garlicki, 6(3) ICON at 517 (cited in note 134).

¹⁴¹ *Id.* at 530.

¹⁴² Lock, 48 CMLR at 1043 (cited in note 31).

the ECtHR decisions will be on the EU legal order.¹⁴³ Part one of this paper outlined two functions that are exclusive to the CJEU's authority, namely the CJEU's interpretative monopoly and the Court's ability to invalidate EU acts. The autonomy of the EU will only be adversely affected if either of those features is compromised by accession.

Any perceived danger that the ECtHR's judgments will offer a binding interpretation on the content of EU law is not substantiated. In proceedings before the ECtHR, domestic law is generally considered to form part of the facts of the case. The ECtHR has acknowledged that "it is primarily for the national authorities, notably the courts, to interpret and apply domestic law."¹⁴⁴ Post-accession, 'domestic law' will cover EU law and thus the CJEU will be considered a 'domestic court' for the purposes of proceedings relating to the Convention.¹⁴⁵ EU law, insofar as it relates to the proceedings before the ECtHR, will generally only form part of the material facts of the case.¹⁴⁶ Consequently, the ability of the ECtHR to deliver binding judgments on the EU will not impact the CJEU's exclusive jurisdiction to interpret and apply EU law.

Nevertheless, it must be acknowledged that there are some cases in which the nature of the alleged violation requires the ECtHR to engage in an assessment of domestic law. For instance, an interference with Articles 8 to 11 of the Convention will constitute a violation of the Convention unless the interference was "prescribed by law or in accordance with the law, pursued a legitimate aim and was necessary in a democratic society."¹⁴⁷ The ECtHR evidently cannot answer this question without making an assessment as to whether the domestic law in question was "prescribed by or in accordance with the law." After accession, if an applicant alleges that an EU law violated one of the rights contained in the Articles 8 to 11, it may appear that the EU's autonomy would be infringed. However, it must be emphasized that this assessment does not warrant the ECtHR to offer an *original* interpretation of the domestic law. The ECtHR said in *Kemmache v France (No3)*:¹⁴⁸

The Court reiterates that the words 'in accordance with a procedure

¹⁴³ Christian Eckes, *The European Court of Justice and (Quasi-) Judicial Bodies of International Organisations*, in Ramses Wessell and Steven Blockman, eds, *Between Autonomy and Dependence* 85, 100 (Asser, the Hague, 2013).

¹⁴⁴ *Huvig v France* appl. No. 11105/84, series A no 176-B at 28.

¹⁴⁵ Council of Europe, *Draft Explanatory Report to the Agreement on the Accession* 47+1(2013)007 at 40 (cited in note 10).

¹⁴⁶ Lock, 48 CMLR at 1034 (cited in note 31)

¹⁴⁷ *Bladet Tromso and Stensaas v Norway* (21980/93) ECHR, 20 May 1999 at [50] cited in Gragl, *The Accession of the European Union to the European Convention on Human Rights*, above n 42, at 117.

¹⁴⁸ (17621/91) ECHR, 24 November 1994 at 37 cited in Gragl, "Accession Revisited," above n 34, at 48.

prescribed by law' essentially refer back to the domestic law; they state the need for compliance with the relevant procedure under that law.

In determining whether or not the Convention has been violated, the ECtHR simply refers back to the domestic law and domestic court's interpretation of that law. The ECtHR's decision cannot prejudice the interpretation of EU law and thus the CJEU's interpretative monopoly is unlikely to be infringed.

The CJEU also retains an exclusive jurisdiction to invalidate acts of the EU.¹⁴⁹ The binding nature of the ECtHR's decisions will only affect the autonomy of the CJEU if those decisions have the ability to strike down EU law. This is not the case. A judgment of the ECtHR does not mean that an EU law would be void "as soon as the ECtHR has spoken."¹⁵⁰ On the contrary, the ECtHR's decisions are declaratory.¹⁵¹ Even where the ECtHR is required to assess the domestic law, in the circumstances outlined above, its role is to refer to the domestic law in question and make a declaration as to whether that law is in breach of the Convention. The task of remedying that violation would then fall to the EU's own institutions. In order to comply with the judgment of the ECtHR, the EU may be required to amend or revoke the law in question.¹⁵² This cannot be said to be incompatible with EU law. It is concluded on this basis that the binding nature of the ECtHR's judgment does not accord the ECtHR with the ability to strike down EU law and thus leaves CJEU's exclusive jurisdiction to invalidate EU law intact.¹⁵³

While accession evidently intends to formally bind the EU's institutions by the Convention and the judgments of the ECtHR, it cannot be said that the effect of this binding relationship will adversely affect the EU's autonomy. It has been reasoned that the CJEU's exclusive jurisdiction to interpret EU law and to invalidate EU acts is not surrendered to the ECtHR with accession. If the effect of accession does not contradict the EU's autonomy, consideration must be given to the question of whether the accession agreement similarly preserves the EU's autonomy. The following section will examine two features of the accession agreement: the co-respondent mechanism and the prior involvement procedure.

3.3. *Co-Respondent Mechanism*

Article 46 of the Convention provides that the judgments of the ECtHR are only binding *inter partes*. It follows that the EU will only be bound by the decisions of the ECtHR in proceedings to which the EU is a respondent. Identifying the

¹⁴⁹ *Firma Foto-Frost*, above n 46, at 15 cited in Lock "Walking on a Tightrope," above n 31, at 1036.

¹⁵⁰ Lock, 48 CMLR at 1037 (cited in note 31).

¹⁵¹ *Id* at 1037.

¹⁵² *Id* at 1037.

¹⁵³ Gragl, *Accession of the European Union* at 166 (cited in note 42).

correct respondent can be ambiguous for an individual complainant who generally has little knowledge of the inner workings of EU law.¹⁵⁴ It may well be the case that one High Contracting Party (a Member State) has implemented the law, while another High Contracting Party (the EU) has enacted that law. There is an inevitable risk that when deciding whether to direct the application against the Member State or the EU, the application will be lodged against the wrong party.¹⁵⁵ In accordance with Article 1b of Protocol No 8 of the Treaty of Lisbon and to accommodate the needs of the individual applicant, the accession agreement introduces the co-respondent mechanism to prevent applications from becoming inadmissible due to erroneous identification of the respondent.¹⁵⁶

Article 3 of the accession agreement proposes to amend Article 36 of the Convention by inserting an additional paragraph into the Convention allowing the EU or a Member State to become a co-respondent to proceedings before the ECtHR. Although Article 36 of the Convention is titled “third party interventions,” a third party intervener is distinguishable from a co-respondent. The former allows a third party merely to participate in proceedings by way of written submission.¹⁵⁷ In the latter case, the co-respondent becomes a party to the proceedings.¹⁵⁸ The co-respondent model has the advantage of enabling the party to be held liable and bound by the judgments of the Court.¹⁵⁹ According to Article 3 of the accession agreement, there are three situations that will trigger the co-respondent mechanism. The first situation is when an application is directed against one or more Member States. In that case, the EU may become a co-respondent if the allegation calls into question the compatibility of an EU law with the Convention rights at issue, where that violation could only have been avoided by disregarding an obligation under EU law.¹⁶⁰ This is intended to address situations akin to *Bosphorus*. The second situation contemplates the *Matthews* scenario. One or more Member States may become a co-respondent where the application is directed against the EU and the alleged violation of the Convention is at issue with EU primary law.¹⁶¹ The final situation is triggered where the application is directed against both the EU and one or more of the Member States and the conditions in Article 3(2) or (3) are met.

According to Article 3, the substantive test for invoking the co-respondent

¹⁵⁴ Tobias Lock, *Accession of the EU to the ECHR: Who would be responsible in Strasbourg?*, in Diamond Ashiagbor, Nicola Countouris and Ioannis Lianos, eds, *The European Union After the Treaty of Lisbon* 109, 123 (Cambridge 2012).

¹⁵⁵ Gragl, *Accession of the European Union* at 142-143 (cited in note 42).

¹⁵⁶ Kuijjer, 3(4) *Gift or Unwelcome Intruder* at 26 (cited in note 28).

¹⁵⁷ Council of Europe, *Draft Explanatory Report to the Agreement on the Accession* 47+1(2013)007 at 39 (cited in note 10).

¹⁵⁸ *Id* at Article 3.

¹⁵⁹ *Id* at 33.

¹⁶⁰ *Id* at Article 3(2).

¹⁶¹ Council of Europe, *Draft Explanatory Report to the Agreement on the Accession* 47+1(2013)007 at Article 3(2) (cited in note 10).

mechanism is whether the alleged violation questions the compatibility of a provision of EU law. When considering what constitutes a ‘provision of EU law’, it is notable that during the negotiation phases there was some debate as to whether primary law should be excluded from the jurisdiction of the ECtHR.¹⁶² Proponents for the exclusion of primary law submitted that the EU should not be held accountable for breaches of primary law because the EU cannot amend violations of primary law. Primary law is a product of Member States’ agreement and can only be altered by way of treaty amendment pursuant to Article 48 TEU.¹⁶³ This reason alone is arguably not sufficient to exclude an entire area of law from the ECtHR’s jurisdiction. No other High Contracting Party is entitled to exclude its constitutional provisions from the review of the ECtHR and thus there is little justification for entitling the EU to this privilege.¹⁶⁴ More importantly, Lock has argued that the exclusion of primary law may intrude on the EU’s legal autonomy, as it would invite the ECtHR to make a determination on the derivation of the violation in question. This would require the Court to distinguish between the sources of EU law, which would in turn infringe the EU’s right to determine its internal division of competences.¹⁶⁵ It is preferable that primary law be within the scope of the ECtHR’s jurisdiction. Article 3 of the accession agreement now settles this debate by expressly referring to EU primary law.¹⁶⁶ This, in terms of autonomy, is the favorable approach.

The conditions in Article 3 are carefully worded to protect the autonomy of the EU. The accession agreement provides that the co-respondent mechanism will be triggered “if it appears” that the allegation calls into question the compatibility of a provision of EU law with the Convention rights at issue. The word “appears” suggests that the ECtHR must accept that the co-respondent conditions are met if a case is *prima facie* made out.¹⁶⁷ This relatively low threshold means that the Court may suppose that incompatibility exists whenever an applicant makes an allegation.¹⁶⁸ This is intended to protect the autonomy of the EU by ensuring that the Court does not engage in a critical assessment of the content of the EU provision in question. Similarly, the Court employs a plausibility test when designating who is the co-respondent. Article 3(5) provides that a High Contracting Party to the

¹⁶² See generally Lock “Implications for the Judicial Review in Strasbourg,” above n 55, at 783; Lock “Walking on a Tightrope,” above n 31, at 1038; and Paul Gragl, “Strasbourg’s External Review after the EU’s Accession,” above n 25, at 51.

¹⁶³ Jean-Paul Jacques, *The Accession of the European Union to the European Convention on Human Rights and Fundamental Freedoms*, 48 CMLR 995, 1106 (2011).

¹⁶⁴ Gragl, *Accession of the European Union* at 128 (cited in note 42).

¹⁶⁵ Lock, 48 CMLR at 1038 (cited in note 31).

¹⁶⁶ Council of Europe, *Draft Explanatory Report to the Agreement on the Accession 47+1(2013)007* at Article 3(2) – Article 3(3) (cited in note 10).

¹⁶⁷ Gragl *Accession of the European Union* at 159 (cited in note 41); and Jacques, *European Convention on Human Rights and Fundamental Freedoms* at 1014. (cited in note 164).

¹⁶⁸ Gragl, *Accession of the European Union* at 159 (cited in note 41).

Convention “shall become a co-respondent either by accepting an invitation of the Court or by decision of the Court upon the request of a High Contracting Party .”¹⁶⁹ In making its decision, the Court considers whether it is “plausible” in light of the reasons given by the parties that the conditions of Article 3 are met. Paul Gragl has observed that plausible is “not a very persuasive or powerful word ,” thereby restraining the ECtHR from delving into a detailed examination of EU law and the internal division of competences.¹⁷⁰ Furthermore, even when the Court considers that the conditions of Article 3 have been met, the designation of the co-respondent is contingent on the invited party accepting the invitation.¹⁷¹ A lack of obligation to comply with the request is a weakness of the agreement.¹⁷² There seems no good reason in principle why the EU should not be required to participate in the proceedings. Where both parties are identified in the original application, they are obliged to appear before the Court. The EU should not be relieved of this obligation simply because the EU would join the proceedings at a later point in time.¹⁷³

Nevertheless, when the invited party does accept the request to participate in the proceedings and the ECtHR subsequently finds that there has been a violation of the Convention, it will be the general practice of the Court to hold co-respondents jointly liable for any violation.¹⁷⁴ The justification for joint responsibility is that if the ECtHR were allowed to determine the extent to which each party was liable for the violation, the Court would intrude on the division of competences between the Member States and the EU.¹⁷⁵ In contrast to the previous drafts, the final version provides that the Court may, on the basis of the reasons given by the respondent, co-respondent, and applicant, decide that only one be held responsible.¹⁷⁶ However, it is stipulated that the decision is to be reached “on the basis of the reasons given” and thereby the ECtHR is expressly prohibited from delving into an analysis of the EU law in question. The inability of the ECtHR to determine the precise responsibility of the parties in question means that the EU will be required to develop internal rules in order to determine where the violation arose and how

¹⁶⁹ Council of Europe, *Draft Explanatory Report to the Agreement on the Accession* 47+1(2013)007 at Article 3(5) (cited in note 10).

¹⁷⁰ Gragl, *Accession of the European Union* at 160 (cited in note 41).

¹⁷¹ 47+1(2013)007, above n10, at [47] provides “[n]o High Contracting Party may be compelled against its will to become a co-respondent.”

¹⁷² O’Meara, *A More Secure Europe of Rights?* 1821 (cited in note 122).

¹⁷³ Lock, 48 CMLR at 1045 (cited in note 31); and Gragl, *Accession of the European Union* at 156 (cited in note 42).

¹⁷⁴ Council of Europe, *Draft Explanatory Report to the Agreement on the Accession* 47+1(2013)007 at 54 (cited in note 10).

¹⁷⁵ Gragl *Accession of the European Union* at 168 (cited in note 42).

¹⁷⁶ Council of Europe, *Draft Explanatory Report to the Agreement on the Accession* 47+1(2013)007 at Article 3(7) (cited in note 10).

to remove it.¹⁷⁷ Holding the parties jointly respondent prevents the ECtHR from delineating the competences of the EU and its Member States. Therefore, a finding of joint responsibility does not gravely impact the autonomy of the EU legal order, even though it is binding.

3.4. *Prior Involvement Procedure*

For a claim to be admissible to the ECtHR, Article 35(1) of the Convention requires the exhaustion of domestic remedies.¹⁷⁸ One domestic remedy available, by virtue of Article 267 TFEU, is a preliminary reference to the CJEU. This remedy, however, lies in the hands of the national court and not the individual complainant.¹⁷⁹ Furthermore, a national court is only obliged to request a preliminary reference where they are a court of last instance or where they consider a provision of EU law to be invalid.¹⁸⁰ To require an applicant to exhaust this remedy before making a claim would amount to an “undue denial of access to the ECtHR.”¹⁸¹ It follows that for the purposes of Article 35(1), a preliminary reference to the CJEU cannot be considered a legal remedy.¹⁸² As a corollary of this interpretation, it cannot be guaranteed that the CJEU will have had the opportunity to rule on the matter before the case is brought before the ECtHR.¹⁸³ While this result should not arise often, there remains a possibility. Possibility was enough to compel Presidents of the European Courts, Vassilios Skouris and Jean-Paul Costa, to recommend that a mechanism be put in place to address this concern.¹⁸⁴ The recommended solution, now contained in the accession agreement, is a ‘prior involvement’ procedure.

Article 3(6) of the accession agreement states that in the event that the CJEU has not yet had the opportunity to assess the compatibility of the EU law in

¹⁷⁷ Gragl *Accession of the European Union* at 168 (cited in note 42).

¹⁷⁸ Gragl, *The exhaustion of Domestic Remedies and the Prior Involvement of the Luxemburg Court* at 209, in *The accession of the European Union*, (cited in note 42).

¹⁷⁹ European Commission, *Previous Involvement of the Court Justice in the Context of the Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms*(DS 1930/10 Brussels, 10 January 2011) at 2.

¹⁸⁰ Lock, 48 CML Rev at 1046 (cited in note 31), a citing TFEU Art. 267(3) and *Firma Foto-Frost*, [1987] ECR 4199, 15 (cited in note 46).

¹⁸¹ Lock, 35 EU L Rev at 792 (cited in note 55).

¹⁸² Gragl, *The accession of the European Union* at 254 (cited in note 42).

¹⁸³ Tobias Lock, *End of an Epic?: The Draft Agreement on the EU's Accession to the ECHR* 31(1) Yearbook of European Law 162,181(Oxford Journal 2012).

¹⁸⁴ Jean Paul Costa and Vassilios Skouris, *Joint Communication from Presidents Costa and Skouris* (24 January 2011) at 2, online at http://curia.europa.eu/jcms/upload/docs/application/pdf/2011-02/cedh_cjue_english.pdf; and Court of Justice of the European Union, *Discussion Document of the Court of Justice of the European Union on Certain Aspects of the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms* (5 May 2010) at 9, online at http://curia.europa.eu/jcms/upload/docs/application/pdf/2010-05/convention_en_2010-05-21_12-10-16_272.pdf.

question, the CJEU is afforded sufficient time to make an assessment. The purpose of this procedure is to allow the CJEU to internally review the law at issue before it is subjected to the external review of the ECtHR.¹⁸⁵ The procedure is only available in cases where the EU is a co-respondent.¹⁸⁶ The test invoking the procedure is whether the CJEU has assessed “the compatibility with the Convention rights at issue.”¹⁸⁷ It is important to emphasize that the wording of the provision implies the CJEU must have had the opportunity to assess the specific rights at issue. Under a preliminary reference, the CJEU is restricted to considering only those questions that have been put before it. Determining if the CJEU has considered the rights at issue may require careful scrutiny of preliminary references made.¹⁸⁸ Where the prior involvement procedure is triggered, the CJEU’s decision will not be binding on the ECtHR. While it is expected that the ECtHR “will not lightly contradict an assessment specifically made by the [CJEU]”¹⁸⁹, it nevertheless remains to be seen how the ECtHR will treat a decision of incompatibility. The prior involvement procedure creates a clear formal link between the Courts and it has been observed that it may well become *the* defining feature of the Courts’ relationship after accession.¹⁹⁰

Two questions must be addressed in light of the EU’s autonomy and the prior involvement procedure. First, whether this procedure is necessary to preserve the autonomy of the EU legal order. Arguably, this procedure would only be necessary insofar as a decision of the ECtHR would result in a binding interpretation of EU law or would allow the ECtHR to invalidate EU law.¹⁹¹ It has already been reasoned that this is not the case. While the ECtHR will have jurisdiction to decide if there has been a violation of the Convention, the CJEU will remain the sole authority to interpret and apply EU law. If the prior involvement procedure is not necessary to preserve the EU’s autonomy, the second question that arises is whether its inclusion is compatible with the autonomy of the EU. It would appear at a first glance that the procedure would protect the autonomy of the EU legal order by giving the CJEU the first opportunity to pass judgment on matters affecting the EU. It has, however, been argued that the very introduction of the prior involvement procedure may endanger the EU’s autonomy. This contention is based on the premise that introduction may constitute a clandestine

¹⁸⁵ *Id* at 2.

¹⁸⁶ Council of Europe, *Draft Explanatory Report to the Agreement on the Accession*, 47+1(2013)007 at 65 (cited in note 10).

¹⁸⁷ Council of Europe, *Final Report to CDDH 47+1(2013)008* at Article 3(5) (cited in note 16).

¹⁸⁸ Lock, 31(1) *Yearbook of European Law* at 184 (cited in note 185).

¹⁸⁹ Giorgia Gaja, *The ‘Co-Respondent Mechanisms’ According to the Draft Agreement for the Accession of the EU to the ECHR* (European Society of International Law 9 January 2013) at 4 online at <http://www.esil-sedi.eu/node/266>.

¹⁹⁰ Gragl, *The Accession of the European Union* at 211 (cited in note 42).

¹⁹¹ Lock, 48 *CM L Rev* at 1047 (cited in note 31).

amendment to the EU treaties.¹⁹² While Opinion 1/91 confirms that EU law does not prevent an international agreement from conferring new functions on the EU's institutions, Opinion 1/00 asserts that preservation of autonomy requires that any new functions must not alter the existing powers of the CJEU as set out in the treaties. The prior involvement mechanism must ensure that the powers of the CJEU remain unaltered.¹⁹³ It has been argued, by implication of Article 6(2) TEU and the obligation to accede, that a prior involvement mechanism could be implicitly authorized. At the same time, competence to accede does not expressly warrant competence to establish a prior involvement procedure.¹⁹⁴ On this basis, it is questionable whether the existing powers of the CJEU will remain unaltered with the introduction of the prior involvement procedure.¹⁹⁵

Fears that the EU's legal autonomy will be adversely affected with accession have arguably been exaggerated. The preceding analysis has illustrated that as a result of lengthy negotiations and carefully drafted provisions, the accession agreement has effectively preserved the distinctive features of the EU legal order. That is, the ECtHR will not have the ability to determine the internal division of competences, nor will the CJEU's interpretative autonomy and its exclusive jurisdiction to invalidate EU law be compromised. While this outcome is undoubtedly desirable, part four of this paper questions whether the level of protection afforded to autonomy is justified.

PART FOUR: PROTECTING FUNDAMENTAL RIGHTS OR AUTONOMY?

While autonomy is an interest worth protecting, it is vital that the protection granted to autonomy not outweigh the fundamental purpose of accession: to enhance the European system of fundamental human rights protection. The protection afforded to autonomy is therefore only justified insofar as it does not compromise the protection of fundamental human rights. Arguably, the voluntary nature of the co-respondent mechanism and the prior involvement procedure create an unfavorable imbalance between these interests. Two proposals are put forward to create a more effective balance: requirement to appear as a co-respondent and a pre-decision interpretation question.

4.1. *A Requirement to Appear as a Co-Respondent*

Where the conditions of Article 3 are met, the invited party should be obliged to accept the invitation of the Court to become a co-respondent. The co-

¹⁹² Id at 1048.

¹⁹³ Groussot, Lock and Pech, Foundation Robert Shuman, Policy Paper 218 at 15 (cited in note 45).

¹⁹⁴ Lock, 48 CM L Rev at 1037 (cited in note 31).

¹⁹⁵ Jacques, 48 CM L Rev at 1020 (cited in note 164).

respondent mechanism is, in its current form, voluntary. The rationale offered for the voluntary nature of the mechanism is that a party cannot be forced to join proceedings in which it was not identified in the original application.¹⁹⁶ This reasoning should be viewed critically. By justifying the non-obligatory nature of the mechanism on a “mere technicality”¹⁹⁷, negotiators seem to be tiptoeing around a perceived intrusion on the EU’s autonomy. Any fears that an obligation to become a co-respondent would adversely affect the autonomy of the EU legal order ought to be dismissed. The preceding analysis confirmed that the autonomy of the EU is not jeopardized by appearing as a co-respondent. Neither the assessment of the conditions in Article 3 nor a finding of joint responsibility would affect the EU’s autonomy.

Moreover, the voluntary nature of the mechanism appears to thwart the very purpose for which the mechanism was introduced. The explanatory report to the accession agreement provides that the purpose of the co-respondent mechanism, *inter alia*, is “to avoid gaps in participation, accountability and enforceability in the Convention system .”¹⁹⁸ Yet, allowing the invited party to decline to appear before the Court guarantees neither the participation of the party nor that the party will be held accountable for the alleged violations that have occurred.¹⁹⁹ This effect would render the accession agreement an unsuccessful bid to remedy the existing lacuna in human rights protection. The explanatory report also claims that the co-respondent mechanism is “fully in line with Article 1b of Protocol No. 8 of the Treaty of Lisbon .”²⁰⁰ The strength of this contention is doubted by the voluntary nature of the co-respondent mechanism. If the invited party can decline to appear before the Court, it does not “ensure” that the correct respondent is identified. Rendering the co-respondent mechanism mandatory would give better effect to the purposes of the mechanism and ensure that parties are held accountable for violations where appropriate.

Imposing an obligation to appear as a co-respondent mechanism is not as radical as it may appear. The CDDH acknowledged the possibility of an obligation to comply with the request of the Court in its 2002 report,²⁰¹ but this was unfortunately omitted from the accession agreement. Admittedly, the final version of the accession agreement does go to some lengths to remedy this weakness. It

¹⁹⁶ Council of Europe, *Draft Explanatory Report to the Agreement on the Accession* 47+1(2013)007 at 46 (cited in note 10).

¹⁹⁷ Lock, 31(1) Yearbook of European Law at 173 (cited in note 185).

¹⁹⁸ Council of Europe, *Draft Explanatory Report to the Agreement on the Accession* 47+1(2013)007 at 33 (cited in note 10).

¹⁹⁹ Lock, 31(1) Yearbook of European Law at 173 (cited in note 185).

²⁰⁰ Council of Europe, *Draft Explanatory Report to the Agreement on the Accession* 47+1(2013)007 at 35 (cited in note 10).

²⁰¹ Steering Committee for Human Rights, *Study of Technical and Legal Issues of a Possible EC/ EU Accession*, DG-II (2002)006 at 57 (cited in note 9).

requires that the EU undertake a declaration at the time of signature that it will accept the request to become a co-respondent where the conditions of the mechanism are met.²⁰² While this is a positive step forward, there is no similar obligation for circumstances where a Member State is the invited party. A requirement to appear as a co-respondent would avoid the need for a declaration, would treat both the EU and other High Contracting Parties equally, and would restore the balance between autonomy and fundamental rights to a more apt equilibrium.

4.2. *A Pre-Decision Interpretation Question*

The second recommendation is to replace the prior involvement procedure with a ‘pre-decision interpretation question’. The suggested alternative would operate conversely to the current procedure by entitling the CJEU to request guidance from the ECtHR on the interpretation of the Convention.²⁰³ This would apply in circumstances in which the question arises before the CJEU, and the ECtHR has not yet addressed the question. This approach is not entirely novel. In its 2002 study, the CDDH recognized that consideration should be given to the question of whether it would be advisable to allow the CJEU to request an interpretation from the ECtHR.²⁰⁴ But it was Balfour who first coined the term ‘pre-decision interpretation question’ in 2005 and advocated for this approach.²⁰⁵ Notably, this procedure has also been suggested as a more suitable alternative to accession. However, this paper proposes the procedure as an addition to accession.²⁰⁶ Balfour suggested that this procedure could take one of two forms. The first option would enable the CJEU to simply request an interpretation of the Convention from the ECtHR. This procedure would have the benefit of allowing the interpretation to remain in the more experienced hands of the specialist human rights court.²⁰⁷ The second option would allow the CJEU to interpret the Convention, and then refer that interpretation to the ECtHR for approval. Under this approach, the ECtHR would be required to approve or disapprove the interpretation along with any recommended amendments.²⁰⁸ Like Balfour, this paper argues that the approval

²⁰² Council of Europe, *Final Report to CDDH 47+1(2013)008*, Annex II at 13 (cited in note 16).

²⁰³ Balfour, *Application of the European Convention* at 23 (cited in note 86).

²⁰⁴ Steering Committee for Human Rights, *Study of Technical and Legal Issues of a Possible EC/ EU Accession*, DG-II (2002)006 at 75-77 (cited in note 9).

²⁰⁵ Balfour, *Application of the European Convention* at 23 (cited in note 86).

²⁰⁶ See generally Koen Lenaerts, *Fundamental Rights to be Included in a Community Catalogue* (1991) 16(5) EU L Rev 367, at 380; and Adam Balfour, *Eliminating Conflicting Interpretations of the European Convention on Human Rights by the European Court of Justice and the European Court of Human Rights: the PDIQ System as a Preventative Solution* (2007) 2 Intercultural Hum Rts L Rev 183.

²⁰⁷ Louise Campbell, *Judicial Co-operation and Human Rights in Europe after the Treaty of Lisbon: A Twist in the Tale of Two Courts?* (2012) 2(2) Southampton Student L Rev 25, at 44.

²⁰⁸ Balfour, *Application of the European Convention* at 24 (cited in note 86).

method is preferable.

A pre-decision interpretation question and the approval method would realize a more suitable balance between autonomy and human rights protection. Allowing the CJEU to seek approval from the ECtHR on the interpretation of the Convention would likely reduce the level of divergence in the application of the Convention. It was evident from the discussion in part two of this paper that divergence has primarily resulted from cases where the CJEU was given the first opportunity to decide the matter, but the CJEU has tended to align its jurisprudence with the ECtHR once the ECtHR has subsequently decided the matter. The approval method would mimic this process, but would circumvent the need for an appropriate case to arise before the ECtHR, allowing the Court to offer its opinion. While it is not guaranteed that divergence will never exist with the pre-decision interpretation question, the approval method would incite valuable judicial dialogue. This would be likely to prevent, at the very least, flagrant conflicting interpretations while promoting continued cooperation between the Courts. At the same time, allowing the CJEU the opportunity to interpret the Convention, albeit subject to the ECtHR's approval, would preserve, and may even strengthen, the method autonomy of the EU. After accession, the Convention will form part of EU law and thus it will also be the task of the CJEU to interpret the Convention.²⁰⁹ Allowing the CJEU to offer its interpretation to the ECtHR would protect the CJEU's interpretative monopoly.

The pre-decision interpretation question is not without its flaws. Tobias Lock has argued that this procedure may place the ECtHR in a superior position to the CJEU, thereby creating a formal hierarchy between the Courts.²¹⁰ This can be rebutted by the argument that the ECtHR is not a superior court but merely more specialized.²¹¹ The specialized nature of the ECtHR is a reason to support the pre-decision interpretation question, as it would ensure that the Convention is interpreted correctly. This criticism cannot be a reason to favor the prior involvement procedure, as the prior involvement procedure attracts similar criticism. Not only does the prior involvement procedure suggest that the CJEU is superior to the ECtHR, it arguably places the EU in a privileged position relative to other High Contracting Parties. In some Member States, such as Italy, it is possible for a claim to come before the ECtHR without the question having been addressed by the national constitutional court, but there is no possibility of a prior involvement mechanism existing for the Italian Constitutional Court.²¹² Entitlement to this procedure arguably "unduly favors" the CJEU in regard to both the ECtHR

²⁰⁹ Lock, 36 EU L Rev at 794 (cited in note 55).

²¹⁰ Id at 794.

²¹¹ See 3.2 (a) of this paper.

²¹² Lock, 31(1) Yearbook of European Law at 182 (cited in note 185).

and national courts.²¹³ Any contention that the pre-decision interpretation question unduly favors the ECtHR ought to be dismissed, because reversing the mechanism would not preclude the CJEU from participating in proceedings before the ECtHR. For instance, where the case first arises before the ECtHR, the EU may participate as a third party intervener. In some cases, this may even be the most appropriate way to involve the EU.²¹⁴ Regardless of which method is adopted, contentions of superiority are likely to arise but the approval method of the pre-decision interpretation question would arguably minimize these contentions by encouraging dialogue between the Courts.

Criticism of the pre-decision interpretation question has also stemmed from the contention that the ECtHR's interpretation would fail to take into account the wider aims of the EU and its legal instruments.²¹⁵ The Convention, after accession, will only constitute one facet of EU law. Contrast that to the ECtHR, whose role is to consider only the Convention, the CJEU must conduct its assessment in view of EU law as a whole. Although it is not disputed that the ECtHR's guidance will be strictly limited to the Convention, this should not diminish the value of the ECtHR's opinion altogether. The ECtHR's approval or disapproval of the CJEU's interpretation should be made non-binding. The non-binding nature of the ECtHR's opinion implies that it would remain open to the CJEU to consider that opinion in light of wider considerations, and allow the EU to apply a higher standard of protection where warranted. It has also been contended that a reference mechanism would only further delay proceedings before the Court. This argument extends to both the prior involvement procedure and the pre-decision interpretation question. Thus, it cannot be considered sufficient to dismiss the alternative. Arguably, the approval system of the pre-decision interpretation method would reduce the delay to some extent by only requiring the Court to accept or decline the interpretation given.²¹⁶

Despite its drawbacks, the pre-decision interpretation question is the preferred procedure. It would positively contribute to human rights jurisprudence by encouraging dialogue between the Courts and ensuring that the Convention is applied more uniformly, while still granting the necessary protection to the EU's autonomous legal order. It has similarly been contended that there is no reason in principle as to why there should not be a requirement to appear as a co-respondent where the conditions are met. The co-respondent mechanism and the prior involvement procedure, in their current form, arguably afford greater protection

²¹³ Jorg Polkackiewicz, *EU law and the ECHR: Will EU accession to the European Convention on Human Rights Square the Circle?: The Draft Accession Agreement of 5 April 2013* (26 September 2013) at 22, online at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2331497.

²¹⁴ Council of Europe, *Draft Explanatory Report to the Agreement on the Accession* 47+1(2013)007 at 40 (cited in note 10).

²¹⁵ Lock, 35 EU L Rev at 794 (cited in note 55).

²¹⁶ Balfour, *Application of the European Convention* at 25 (cited in note 86).

to autonomy than is required. The above amendments are considered necessary in order to achieve a better balance between autonomy and the protection of fundamental human rights, as outlined in part one. With these recommendations in place, the accession agreement would still preserve the distinctive features of the EU legal order and thereby would not alter the conclusions reached in part three. At the same time, the amendments would allow the accession agreement to give full effect to the primary purpose of accession – the protection of fundamental human rights.









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