ДОНСКОЙ ГОСУДАРСТВЕННЫЙ ТЕХНИЧЕСКИЙ УНИВЕРСИТЕТ

УПРАВЛЕНИЕ ДИСТАНЦИОННОГО ОБУЧЕНИЯ И ПОВЫШЕНИЯ КВАЛИФИКАЦИИ

Кафедра «Мировые языки и культуры»

Учебное пособие

по дисциплине
«Английский язык»

«Английский язык для юристов»

Авторы

Канеева А.В.,
Минасян С.В.

Ростов-на-Дону, 2015

Аннотация

Методическое пособие «Английский язык для юристов» содержит тексты на юридические темы. Основным плюсом, предлагаемого пособия является то, что данные тексты взяты из Гарвардского юридического журнала, то есть содержат самую актуальную юридическую лексику, а также написаны на важные и волнующие современную общественность правовые темы. Такие тексты помогают студентам лучше усваивать терминологию их будущей профессии, а также призваны продемонстрировать современную ситуацию в юриспруденции другой страны. Подобная работа, несомненно, повышает профессиональный уровень подготовки. Кроме того, может быть использована как средство для расширения страноведческого кругозора студента. Тексы, а именно профессиональные статьи из одного из ведущих юридических журналов мира, помогают студентам более активно усваивать терминологические понятия, инструменты профессии, как на изучаемом иностранном языке, так и на родном языке. Предложенные после текстов тесты и вопросы позволяют полнее понять статьи, активизируют лексический запас студентов, развивают навыки говорения. Методическое пособие предназначено для студентов юридических специальностей очного и заочного отделения.

Авторы

к.филол.н., доцент
Канеева А.В.

к.филол.н., доцент
Минасян С.В.

Оглавление

A TRAGEDY OF ERRORS: BLACKSTONE, PROCEDURAL ASYMMETRY, AND CRIMINAL JUSTICE

RESPONSE BY LAURA I APPLEMAN, FEB, 10, 2015

Mantras have power, in and out of law. The best of them resonate throughout the ages: "Veni, Vedi, Vici"; "All for One and One for All"; "Liberty or Death"; "A House Divided Cannot Stand"; "I Have a Dream." Daniel Epps's article, The Consequences of Error in Criminal Justice, tackles the Mount Everest of legal mantras, critiquing the famous Blackstone adage, "better that ten guilty persons escape, than that one innocent suffer," and calling for its eradication.

Like many scholars before him, Epps is interested in diagnosing and solving the ills of the modern criminal justice system. More originally, Epps seeks to tie many, if not all, of the problems of America's criminal system onto that hoary old Blackstonian koan. He primarily does so by linking the use of the principle to the well-recognized costs of false acquittals and false convictions, as well as more broadly indicting a political process failure in criminal justice.

Epps is comprehensive in his exploration of the Blackstone principle's dynamic effect on the criminal justice system, and convincingly traces its effect from earliest lawmaking to the modern day. He also points out — as part of his argument that principles can have unintended, underappreciated, and counterintuitive results — that the actual application of the Blackstone principle might end up harming defendants more than helping them. Despite this, however, the implications of his Article, if taken to their rational conclusion, point to eradicating the asymmetry currently favoring defendants in criminal procedure. This is an extremely troubling result.

In addition, Epps proposes restrictions of constitutional requirements in his desire to provide more equity to the criminal justice system, at a time when the Supreme Court is similarly eradicating many Fourth and Fifth Amendment protections. The results of the criminal justice system he envisions, largely stripped bare of defendant-friendly protections, would be disastrous in actual effect, and would fail to help soften the heavy burden of criminal punishment we currently impose.

This Response proceeds in two parts. Part I looks at Epps's misunderstanding of the modern structure of criminal procedure, and how the relatively recent shift from jury trials to guilty pleas makes it all the more critical to retain some asymmetry favoring the defendant.

Part II critiques the author's suggestion to model the criminal law more equitably, with the goal of eliminating some of the false acquittals and false convictions that are arguably the result of the Blackstonian model. This second Part also focuses on Epps's incomplete comprehension of the true costs of the criminal law on our most vulnerable members of society. This Response concludes by endorsing Epps's desire to expose and fix the flaws of our current criminal justice system, but urging deliberation and mercy instead of harsh justice.

I. Twenty-First-Century Criminal Justice

One systemic problem with Epps's vision is that it relies upon an antiquated form of the criminal justice system. Although Epps acknowledges that most criminal indictments are resolved by guilty pleas, not by jury trials, he fails to truly integrate this knowledge into his model of a purely equitable criminal justice system. This failure to do so demonstrates a pervasive underestimation of the defendant-unfriendly aspects of our current system and seriously undermines his assumption that our system is extensively structured according to the Blackstone principle.

This failure to fully integrate the actual workings of criminal procedure into an overarching criminal theory is not, of course, limited only to Epps. The relatively recent change in adjudication from criminal trial to criminal guilty plea has not been accompanied by an equal shift in punishment theory, and many criminal theorists incorrectly assume a criminal justice system that is both trial-based and flexible in assigning punishment.

Even if we accept without cavil Epps's fundamental assertion — that Blackstone's maxim has had a tremendous structural effect on criminal law and the criminal justice system — the Article ultimately fails to accept plea bargaining's triumph, where the advantage is unquestionably and overwhelmingly to the prosecutor. No amount of formalized asymmetry toward the defendant can possibly overcome the tremendous forces arrayed against the average criminal offender.

It is worth briefly reviewing Epps's arguments concerning plea bargains, considering that some ninety-five to ninety-eight percent of criminal indictments are adjudicated through the guilty plea process. First, Epps claims that, like the use of torture in medieval adversary trials, the Blackstone principle is one of the forces driving the use of plea bargains, since trials are now too costly. More specifically, Epps contends that the more the formal rules of criminal procedure skew toward false acquittals, as he believes they do, then the more that plea bargaining becomes the standard workaround. Indeed, Epps repeatedly links the use of the Blackstone principle to the rise of plea

bargaining. Granted, Epps concedes that plea bargaining might seriously distort the distribution of errors produced by trial rules, and rather grudgingly admits "it's at least possible that procedural subversion is dramatically reducing the benefits of trial rules that are supposed to protect the innocent . . . while leaving in place [the Blackstone principle's] acknowledged costs". His major contention, however, is that plea bargains are the canaries in Blackstone's coal mine.

Epps's attempt to pin the crisis of plea bargaining on the use of the Blackstone principle belies a misunderstanding of the workings of criminal procedure. Indeed, the entire endeavor of plea bargaining illustrates quite the opposite of what Epps is trying to argue: instead of simply obfuscating how much we actually follow the Blackstone principle, plea bargaining suggests that we fail to adhere to the principle in any systematic way. The Blackstone principle — were it truly operative — would not only structure trial procedures (as Epps seems to suggest), but also operate on informal procedures like plea bargaining and on pre-prosecution criminal procedure.

It is all of a piece: a system truly committed to the Blackstone principle would be demonstrably defendant-friendly not just in trials, but at all other stages of the process. Since we certainly do not observe any such systemic pro-defense bias in the rest of criminal procedure, either before or after indictment, it's unlikely that the criminal justice system treats the Blackstone principle as anything other than a well-worn platitude.

Epps is also concerned that the Blackstone rule is no longer applicable, in part because our current criminal justice is not as harsh as it once was. However, our modern criminal justice system still exhibits extreme severity in its unregulated plea and sentence bargaining. As I have noted elsewhere, when the prosecutor unilaterally decides innocence or guilt along with the charged offense and sentence, plea proffers tend to become coercive.

Moreover, because the criminal defendant often does not have the same access to information as the prosecutor — as is true in discovery rules — the prosecutor often acts as the sole judge and jury of the case. These realities alone are enough to even out any advantage a defendant might get from the formal structure of our criminal process. As Professor William Stuntz astutely observed, "criminal settlements do not efficiently internalize the law".

In large part, Epps's careful exploration of the power of false acquittals and the problems with the asymmetrical nature of the criminal justice system (which he pins to overreliance on the Blackstone maxim) has more limited relevance in a world of guilty pleas, where the advantage has long gone to the prosecutor. Although Epps tries to

turn this stumbling block into an asset by arguing that criminal justice actors would be less keen to resort to plea bargaining if the Blackstone principle didn't structure trials and inform people's perceptions of the system, ultimately he is never able to demonstrate that the Blackstone principle truly motivates our actual practice of criminal justice, instead of just the formalized world of criminal trials. Our system of criminal justice as practiced has turned from an open community process into a backdoor regime of insider machination, a problem that far overwhelms any false conviction/acquittal conundrum.

In addition, Epps's assumption that our criminal procedure rules lean toward the defendant essentially ignores the past twenty to thirty years of Supreme Court rulings on the protections of the Fourth and Fifth Amendments. Although the basic structure of our criminal procedure originally formalized some extra safeguards for the accused, our recent criminal procedures have tilted heavily away from the defendant's protection, whether they address the exclusionary rule, the right to remain silent, custodial interrogation, post-arrest strip searches, or identification

evidence, to name just a few examples. When this reality is combined with the new guilty plea regime, Epps's focus on the asymmetry of our formal jury trial system, whether based on Blackstone's principle or not, seems shortsighted.

II: Equal Justice for None

Stepping back a moment from the realpolitik of criminal procedure, Epps's desire for the criminal law to resemble the civil law in its equal treatment of parties misses the fundamental difference between the two systems. Put plain, the violence, danger, and death that pervade our system of criminal indictments and convictions, from arrest to conviction to post-release supervision, demand not less asymmetry in favor of the defendant, but more. Epps is quite understandably concerned about the incredible harshness of our modern punishment regime, but bewilderingly, feels that the answer to overcriminalization and sentencing hysteria lies in more similar treatment for all parties, despite the codified inequities in power.

Epps's argument for greater procedural equity is weakened by his balancing of false acquittals against false convictions. In Epps's vision, once we are no longer shackled by procedural asymmetry, defendants and victims would both get a fairer outcome, as both could then be equal parties in the criminal justice process — neither entitled to more than the other. What Epps glosses over, however, is that unlike civil law, which cannot privilege civil plaintiffs over civil defendants, the two parties involved in criminal law are the accused and the

State. As our constitutional history teaches us, part of the reason we added the Fourth, Fifth, and Sixth Amendments to the Bill of Rights was in reaction to fears of governmental oppression. We eliminated private prosecution for criminal offenses almost 200 years ago, and in so doing made criminal justice about the public good. In this way, Epps's cost-benefit analysis of false acquittals versus false convictions misses the point.

In addition, holding the Blackstone principle as the reason for the criminal law's heightened evidentiary standards, as Epps does in his article, is misleading. It's not so much that we are so afraid of false convictions that we would let ten guilty men go free rather than convict one innocent man. Instead, we are careful with our evidentiary standards of proof because only in the criminal justice system does conviction result in loss of liberty, privacy, and sometimes life.

Indeed, the danger of tampering with the reasonable doubt standard has most recently been demonstrated in the outcry resulting from the application of the new Title IX standards now imposed on college campuses. Under Title IX, any school that accepts federal funding (that is, virtually all schools) is legally required to address sexual harassment and violence on campus. The Department of Education has drafted new rules to address women's safety, some of which have been enshrined into law by Congress, with more legislation likely on the way.

Under cover of these new rules, however, procedures have been put into place that put far more burden on the accused. By federal requirement, a student can be found guilty under the lowest standard of proof: preponderance of the evidence. This is a very minimal standard for a finding of criminal conduct, requiring only fifty-one-percent certainty of guilt. Because the punishment for campus sexual assault can be severe, many schools had previously used the clear and convincing evidence standard, a significantly higher burden of proof, though still below reasonable doubt. Title IX's new requirements have led to a system that some have alleged lacks "the most basic elements of fairness and due process", a process "overwhelmingly stacked against the accused". In other words, removing the special protections we currently provide for the criminally accused, few as they are, can lead to a tremendous derailment of due process.

The troubles stemming from Title IX's new rules minimizing protections for the accused should give us pause when considering the implementation of Epps's ideas. At minimum, moving away from the Blackstone principle would have some serious real-world consequences, something Epps does not fully take into account. Epps's vision of the criminal justice system seems to be one in which all play-

ers should be treated more equitably throughout the criminal process, neither side receiving any unfair advantage over the other. Although this theory might work well on paper, it fails on a number of levels in practice.

More damningly, given the tremendous asymmetries in who is arrested, indicted, convicted, and punished, to falsely equalize criminal procedure by eliminating various protections for the accused gives short shrift to problems of race, class, gender, and education that dog the process. Given recent events in Ferguson, Staten Island, and Cleveland, it is naïve to assume that there is a level playing field when it comes to the practice and implementation of criminal justice. At its heart, the system is discriminatory, most particularly in the areas of race and class, and any proposed rethinking of the system cannot be complete without a discussion of how that discrimination will be alleviated or exacerbated, at least in part.

This is a problem that Epps, in large part, fails to address. Although he carefully delineates the costs and benefits of the Blackstone principle in pursuit of a system that maximizes societal utility, Epps never wrestles with the fundamental flaws of modern criminal justice: that its weight falls most heavily on the most challenged among us — the impoverished, the mentally ill, the poorly educated, those on society's edge. By seeking to remove some of the protections currently afforded to the defendant, whether ascribable to the Blackstone principle or not, Epps advocates extra burden on those already marginalized by our communities.

As Professor Robert Cover famously argued in Violence and the Word, "legal interpretation takes place in a field of pain and death". To suggest that the criminal law take more of a lead from the civil law, even on a philosophical level, misses the vast gulf between the two systems — the difference between human life, on the one hand, and damages for loss, on the other. Or, to return to Cover, "neither legal interpretation nor the violence it occasions may be properly understood apart from one another".

Conclusion: The Violence of Legal Acts

Overall, the question that lingers after reading Epps's Blackstonian exegesis is one of relevance: what effect does the Blackstone principle really have on the criminal justice system? Put differently, do the outcomes of the Blackstone principle have any import on the quick-and-dirty world of actual criminal practice?

Epps would say yes, and I would agree to a limited extent. As I said in the beginning: mantras have power. But we fundamentally disagree on the best underlying philosophy to govern the criminal justice system. Epps is concerned with net costs, system errors, adver-

sarial asymmetry, and the social costs of false acquittals and convictions. In contrast, I am more concerned with the treatment of the accused, guilty or innocent, throughout the process. Ensuring procedural justice for all defendants, from arrest to release (and beyond), should be the primary goal in criminal reform, to counter the great unraveling of American criminal justice.

In the end, with our system of rapid guilty pleas, vast race- and class-based outcome disparities, and harsh mandatory sentencing, we should still desire a little asymmetry favoring the defendant, even for those who are guilty. We may no longer reside in a Blackstonian world, where felony conviction automatically equals death, but we still live a world where felony conviction often means financial dissolution, disenfranchisement, and societal exile. Although Epps does briefly acknowledge the malignant power of felony conviction, his belief that creating more procedural equity would help eradicate some inequities of criminal punishment seems overly hopeful, if not naïve.

Criminal theory — and indeed, criminal justice as a whole — does not exist in a vacuum. Epps is correct when he posits that even small philosophical changes can have large effects in the long run. But before deciding to dispense entirely with Blackstone's principle, perhaps it's time we ponder another ancient but equally noteworthy saying in the criminal law: "Justice, justice, shall you pursue".

(HARVARD LAW REVIEW)

1. Complete the test

1.What idea is critiquied by Daniel Epps?

a) "All for One and One for All"

b) "I Have a Dream"

c) "Better that ten guilty persons escape, than that one innocent suffer"

d) "Veni, Vedi, Vici"

2. Epps points that the actual application of the Blackstone principle might end up…

a) harming defendants more than helping them

b) helping defendants more than harming them

c) being unuseful

d) being dangerous

3. One systemic problem with Epps's vision is that it relies upon…

a) largely stripped bare of defendant-friendly protections

b) incomplete comprehension of the true costs of the criminal law

c) an antiquated form of the criminal justice system

d) suggestion to model the criminal law more equitably

4. Our modern criminal justice system still exhibits …

a) the crisis of plea bargaining on the use of the Blackstone principle

b) extreme severity in its unregulated plea and sentence bargaining

c) more limited relevance in a world of guilty pleas

d) the problems with the asymmetrical nature of the criminal justice system

5. Stepping back a moment from the realpolitik of criminal procedure, Epps's desire for the criminal law …

a) to resemble the civil law in its equal treatment of parties

b) not to observe any such systemic pro-defense bias in the rest of criminal procedure

c) to change in adjudication from criminal trial to criminal guilty plea

d) to provide more equity to the criminal justice system

6. Under Title IX, any school that accepts federal funding (that is, virtually all schools) is legally required to address sexual …

a) violence

b) danger

c) death

d) harassment and violence on campus

7. The troubles stemming from Title IX's new rules … for the accused

a) minimize

b) increase

c) are aqual

d) are not important

8. The system is discriminatory, most particularly in the areas of …

a) gender

b) race and class

c) age

d) education

9. Any proposed rethinking of the system cannot be complete without a discussion of how …

a) that discrimination will be alleviated or exacerbated, at least in part

b) moving away from the Blackstone principle would have some serious real-world consequences

c) restrict constitutional requirements

d) provide more equity to the criminal justice system

10. Epps is correct when he posits that even …

a) the criminal law takes more of a lead from the civil law, even on a philosophical level

b) the Blackstone rule is no longer applicable

c) most criminal indictments are resolved by guilty pleas, not by jury trials

d) small philosophical changes can have large effects in the long run

THE SALARY REVOLUTION AND THE MARKS OF GOVERNMENT'S DISTINCTNESS: A RESPONSE TO JON MICHAELS

NICHOLAS R. PARRILLO,

FEB, 10,2015

In Against the Profit Motive: The Salary Revolution in American Government, 1780–1940, I trace the process by which American lawmakers went from paying public officials by fees for service and bounties to paying them the fixed salaries that we now take for granted in public administration. In his thoughtful and wide-ranging review essay, professor Jon Michaels rightly casts the banishment of the profit motive as one of multiple developments by which American government came to be differentiated from the surrounding society and especially from the market. He points out two other developments — civil service protection for officials and participation rights for citizens — that further contributed to this differentiation. As Michaels acknowledges, the salary revolution was completed largely before the advent of civil service protection and well before the advent of citizen participation rights, and the salary revolution did not make either of these two later developments inevitable. Still, when they did arise, civil service protection and citizen participation rights had the effect of setting government apart — as salarization, too, had done. Michaels makes a powerful argument that these three features, together, have been key to the emergence of an effective, legitimate, and meaningfully democratic government in the United States.

Thus, Michaels provides us with a usable ideal of "government" that is defined in terms of practical organizational features that we can readily identify. It is an ideal grounded in America's recent past and — less so but still meaningfully — in America's present. A government agency today will often bundle the three features, and thus Michaels's ideal tells us what we are likely to give up when we outsource a public function from an agency to a profit-seeking firm.

To Michaels, the three features form a package; they can reinforce each other and also operate in productive tension with each other.

This view does capture the reality of many agencies. But I want to suggest that each of the three features (and especially salarization) can also be viable and consequential even when the full triad is not in

place. I think this point is significant because, given the skepticism that prevails today regarding so many aspects of government that were once taken for granted, it may prove impossible — for any particular public function or more generally — to maintain intact the triple combination of nonprofit status, civil service protection, and citizen participation rights. If we insist that every agency must stick with all three features, the result may be that skeptical lawmakers and agency heads will circumvent agencies altogether through outsourcing to profit-seeking firms, thereby negating all three features. But perhaps — in the context of a particular public function or more generally — some of the triad can be given up and the remainder conserved.

On this point, I think it especially important to consider the relationship between the nonprofit status of public functions and civil service protection for those who carry out those functions. "One might go so far as to suggest", writes Michaels, "that whereas salarization helped eliminate problematic financial incentives to work diligently, the civil service spawned salutary, nonmonetary alternatives", that is, the promise of security that induced government employees to stick with their jobs for life and to invest in expertise and reputation valuable to the agency's mission. This relatively rational process of development did indeed play out in some instances. But establishing and maintaining civil service protection was (and remains) difficult, for several reasons: the need of political parties for personnel and funding to conduct the electoral campaigns that are essential to democracy; the possible resistance of nonpartisan employees to the efforts of elected officials to carry out what those officials consider their democratic mandate; and populist hostility among the middle class and working class toward job protections that exceed, often greatly, those available to workers in the private sector. The greatest practical support for civil service protection often comes from lobbying and unionization on the part of protected bureaucrats themselves, but that very lobbying and unionization may serve to delegitimize civil service protection in the long run by structuring protection to serve the narrow interests of bureaucrats rather than the public, or at least contributing to the popular impression that protection is so structured.

Amid the present backlash against civil service protection that is prevalent at the state and possibly gaining momentum at the federal level, those sympathetic to Michaels's normative argument may need to ask whether they prefer to (a) concede some rollback of civil service protection within the public sector, or (b) insist on maintaining full protection within the public sector at the risk of pushing skeptical lawmakers to "go private" by outsourcing to profit-seeking firms. Or if outsourcing is taken as a given, there remains the question of wheth-

er to preserve the nonprofit status of public functions by directing contracts toward private nonprofit organizations rather than toward profit-seeking businesses.

In the history of salarization, lawmakers found profit-seeking to be so incompatible with the emergent demands and challenges of modern governance that they often abolished profit-seeking with a cry of "anything but this!" and shifted to salaries without a clear idea of what would now motivate administrators. The salutary motivators for civil servants described by sociologists — clear orders and monitoring from above, hope for advancement, dedication to technocratic standards, professional pride and reputation, and the like — were established and grew robust only in some agencies, with others left to muddle through. The pre-salary experiences of modernizing nineteenth-century lawmakers were so bad that even the relatively unaccountable, capricious, unresponsive, or directionless behavior of many post-salary administrators seemed an improvement.

Consider a few examples. As federal criminal law grew to include more technical regulatory crimes, conviction fees motivated prosecutors to convict huge numbers of people for nit-pickingly trivial offenses, and congressmen responded by replacing those fees with salaries without establishing any other mechanisms of accountability, blithely assuming that now-salaried prosecutors would choose their targets more-or-less reasonably (hence our present regime of prosecutorial discretion, which targets a mercifully small proportion of prosecutable conduct, albeit in an often politicized and arbitrary manner). Meanwhile, as federal lands

were increasingly depleted, conservationists and some land users organized to challenge the old policy of distributing lands to homestead applicants as if those applicants were the government's customers, and Congress responded by marginalizing the old fee-taking officers, transferring lands to new sustainable-use programs run partly by civil service bureaucrats but also by local advisory boards highly responsive to the interests of the big land users in each locality — a nonprofit regime that promoted sustainability but hardly in a neutral or technocratic manner

Examples like these reveal the attraction of nonprofit government, compared to profit-seeking government, even in the absence of the tenured civil service ideal. Banishing the profit motive, even without much of an accountability mechanism to replace it, can at least prevent the perverse run-up in government activity that may occur when monetary rewards are pegged to numerical measures of performance. Likewise, banishing the profit motive can at least prevent the favoring of a narrow interest that may occur when government

adopts a "customer service" mentality (say, toward immediate resource users) to the exclusion of the other interests that inhabit a pluralist polity (such as future generations of users). The virtues of nonprofit government are deep, and the experience that gave us the nonprofit norm in our public sector lies so deep in our history that we may easily forget it. Michaels shows us that salarization was, in many contexts, only the beginning of American government's differentiation from the market. But it is in beginnings that we make our most basic, minimum commitments.

(HARVARD LAW REVIEW)

Answer the questions:

1. What process did the author trace?
2. How was the salary revolution completed as Michael acknowledges?
3. What powerful argument does Michael make?
4. In what terms is a usable ideal of "government" defined?
5. What relationship is especially important to consider?
6. For what reasons the establishing and maintaining civil service protection was (and remains) difficult?
7. Where does the greatest practical support for civil service protection often come from?
8. What are the salutary motivators for civil servants?
9. What do given examples reveal?
10. What does Michael show?

ENVIRONMENTAL LAW

CENTER FOR COMMUNITY ACTION & ENVIRONMENTAL JUSTICE V. BNSF RAILWAY CO.

In 1976, Congress passed the Resource Conservation and Recovery Act (RCRA), in part to permit private citizens to sue the owners or operators of solid waste treatment, storage, or disposal facilities whose solid or hazardous waste disposal "presents an imminent and substantial endangerment to health or the environment". This statute serves as a complement to laws focused on specific environmental media, such as the Clean and was intended to ensure a more holistic scheme of federal environmental regulation. Recently, in Center for Community Action & Environmental Justice v. BNSF Railway Co., the Ninth Circuit held that the emission of diesel particulate (DPM) from a rail yard does not qualify as "disposal" of solid waste within the meaning of RCRA. The Ninth Circuit's decision barring the citizen suit in this case may be supported by the court's inquiry into the nature of rail yard emissions. However, the court's interpretation of "disposal," if read narrowly, may exclude activities that should be included. Accordingly, future courts should conduct case-by-case analyses into the nature of a waste's contribution to contamination of nearby land or water.

The defendants, Burlington Northern Santa Fe Railway Companies (BNSF) and Union Pacific Railroad, operate sixteen rail yards in California. Numerous trains and heavy-duty vehicles emit tons of DPM into the air surrounding these yards. The plaintiffs, environmental groups whose members live near the rail yards, claimed that their members suffer severe health impacts, including increased risk of cancer, from this DPM emission. On February 1, 2012, the plaintiffs filed their first amended complaint in the U.S. District Court for the Central District of California, claiming that the operators of the defendant rail yards "have contributed to and are contributing to the . . . disposal of solid or hazardous waste that may present an imminent and substantial endangerment to health or to the environment", in violation of RCRA. The statute defines "disposal" as "the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that it may enter the environment or be emitted into the air or discharged into any waters". The defendants moved to dismiss the complaint, arguing that the plaintiffs failed to state a claim because, first, airborne emissions are regulated by the CAA, not RCRA, and second, the defend-

ants did not dispose of solid waste under RCRA because DPM was not released "into or on any land or water".

The district court granted the defendants' motion to dismiss. Because the plaintiffs sufficiently pleaded that DPM emission from the rail yards creates an imminent and substantial danger to health, the motion turned on the sufficiency of the allegations that the defendants were disposing of solid or hazardous waste. The district court evaluated the defendants' two proposed grounds for dismissal, finding each independently meritorious. First, the court agreed with the defendants that the CAA foreclosed federal regulation — including through RCRA citizen suits — of DPM emissions from "indirect sources", defined as "facilities" such

as rail yards that "attract, or may attract, mobile sources of pollution". Second, the court found that the plaintiffs' characterization of DPM as "solid waste" did not comport with the statute and would lead to the negative result of applying RCRA to all diesel exhaust–emitting vehicles — which the CAA already expressly regulates.

The Ninth Circuit affirmed. Writing for the panel, Judge Murguia held that the plaintiffs failed to state a claim because DPM emissions from rail yards do not qualify as "disposal" of solid or hazardous waste. Reviewing the motion to dismiss de novo, the court read RCRA's citizen-suit provision to require an allegation based on a cognizable legal theory that (1) the defendants contributed to the "disposal" of DPM, (2) DPM is a "solid waste", and (3) DPM presents an "imminent and substantial" danger to health or the environment. The court held that the plaintiffs' allegation could not satisfy the first prong.

First, the court found that RCRA's text and structure excluded vehicle emissions from the statutory definition of "disposal". Though RCRA defines "disposal" to include "discharging, depositing, injecting, dumping, spilling, leaking, and placing", no reference is made to "emitting".

The statute also limits "disposal" to conduct that causes the placement of solid waste "into or on any land or water" so that the waste "may enter the environment or be emitted into the air". The court took this to mean that disposal only occurs when "waste is first placed 'into or on any land or water' and is thereafter 'emitted into the air'". Because DPM emission enters the air before touching the ground or water, it is not a "disposal" within the meaning of RCRA.

Second, the court looked to the legislative histories of both the CAA and RCRA, finding that they resolved any textual ambiguity with respect to the definition of "disposal". Specifically, the court found that RCRA was crafted to solve the problem of "land disposal" and

that the CAA was meant to govern air emissions. Congress overhauled the CAA in 1977 to require an EPA study on emissions from trains and to establish the "indirect source review program", reserving regulation of indirect sources, like rail yards, to the states. The CAA's 1990 amendment restricted regulation of emissions from new locomotives to the EPA, preempting any state regulation of the same. Because the court understood the CAA's exclusion of indirect sources from federal regulation and trains from state regulation as deliberate moves by Congress, it held that RCRA should not be read to apply to either. Therefore, the court found the plaintiffs to be without statutory authority to bring a citizen suit seeking to enjoin rail yard DPM emissions.

The Ninth Circuit's holding that the emission of DPM from rail yards is not a "disposal" of solid waste in violation of RCRA may be adequately supported by the court's inquiry into the legislative context of rail yard emissions. However, the court's restriction of "disposal" to require discharge initially to land or water without first traveling through the air, if applied strictly, may exempt from citizen suits some disposals of solid substances through the air in gaseous or semiliquid form even though they contribute to hazardous waste contamination of land or water. Nevertheless, it remains unclear how strictly this order-of-disposal rule will apply to borderline RCRA cases going forward: cases dealing with disposal that looks more like an emission of particulate matter (PM) than a dump or leak. Future courts should avoid the negative consequences of the BNSF Railway Co. court's bright-line order-of-disposal rule by relying on an individualized inquiry into the nature of each alleged disposal.

PM is a mixture of solid and liquid that poses significant danger to human health and that, despite being released into the air, also contaminates land and water. Though also regulated under the CAA, PM is distinct from other types of

air pollution. PM is already in solid or liquid form at the time of discharge, as opposed to EPA-regulated gases that may become solid after reacting in the atmosphere and others that never become solid. While PM is distinct from other solid substances due to its small size and wide dispersal into the air, it is also distinguishable from truly gaseous emissions by its makeup. And more germane

to the Ninth Circuit's BNSF Railway Co. decision, DPM's structural similarity to mists, vapors, and emissions, when coupled with the order-of-disposal rule, may lead to the unnecessary disqualification from RCRA citizen suits of some borderline "aerosolized waste" releases.

In formulating its order-of-disposal rule, the Ninth Circuit was unable to explain how a facility's discharge of aerosolized wastes in the form of "mist" could still qualify as disposal. In *United States* v. *Power Engineering Co.,* the Tenth Circuit held that the release by air scrubbers of "a mist" containing hazardous particulate matter qualified as RCRA disposal. This mist contaminated the ground

and water nearby but, by definition, first traveled through the air as small particles indistinguishable from PM. The Ninth Circuit in BNSF Railway Co. recognized that aerosolized waste does not lose its character as solid, but the court distinguished Power Engineering Co., claiming that the mist in that case was disposed of "onto the soil" and not "through the air". The time spent in the air between the mist's discharge from the scrubbers and when it settles onto the Facility soil, however, seems incompatible with the Ninth Circuit's order-of-disposal rule despite the court's reticence to disagree with the misting case.

The order-of-disposal rule also may jeopardize citizen suits brought in response to the discharge of hydrocarbon vapors from storage tanks and pipes. An underground storage tank (UST) system includes a combination of tanks and pipes (the volume of which "is 10 percent or more" below ground) that contain petroleum or other substances. Such tanks and pipes are regulated by RCRA and

can leak both liquid gasoline and hazardous vapors contained therein. Because up to ninety percent of a UST may be above ground, the EPA's regulation of USTs (in the "Solid Wastes" subchapter of the CFR) anticipates both "subsurface" and "aboveground release" of solid waste, including in the form of vapor. Included in a list of "solid wastes" under RCRA is "petroleum-contaminated media and debris", which can be caused by vapor. And the EPA's reference to the "leak", rather than "emission", of hydrocarbon The Ninth Circuit's order-of-disposal rule, however, would preclude RCRA citizen suits for release of hazardous vapors above ground, even though these discharges may later mix with subsurface release to contaminate land or water.

A rule that conclusively precludes aerosolized mists and hydrocarbon vapors from citizen suits under RCRA would constitute a harmful removal of an important method of enforcement of environmental standards. While federal and state regulations already purport to govern solid and hazardous waste facilities and USTs under RCRA, "Congress intended citizen suits to supplement government action, to make up the balance of necessary enforcement . . . when underfunded or over-worked agencies cannot ensure that all laws are complied with".

Citizen enforcement against improper disposals is "more necessary than ever" as government enforcement is "increasingly less reliable". The harm of categorically disqualifying some methods of land pollution from citizen suit under RCRA, then, is a dearth of enforcement of that statute and resultant unpunished pollution violations. Thus, disqualification of a method of pollution from RCRA's definition of disposal should only occur after an individualized inquiry into how the nature of the pollution relates to RCRA as a whole.

Rather than strictly follow the order-of-disposal rule, future courts should recognize that the Ninth Circuit implicitly performed a case-specific analysis into the nature of the pollution and should follow suit. *BNSF Railway Co.* relied in great depth on the statutory history of the CAA and RCRA to determine whether rail yard emissions are covered by RCRA. The court also might have distinguished DPM's tendency to travel great distances on wind currents from that of denser aerosolized waste to contaminate land or water closer to its source. The court was correct to implicitly recognize limitations on its order-of-disposal theory, but was imprecise about how to draw the line between, for example, Power Engineering Co. and the instant case. Future courts should rely on case-by-case analyses of potential disposals to avoid the negative consequences of an inflexible rule.

Strict application of an order-of-disposal rule would add an unnecessary restriction on some citizen suits against solid waste discharge in the Ninth Circuit. This result would cut against RCRA's purpose to serve as a remedial statute, acting as a "supplement to media-based laws". Though rail yard emissions may not qualify as disposal due to the nature of their emission sites and fallout area, courts should conduct case-by-case analyses to determine if solid waste is disposed, and initial release into the air should not disqualify all such disposals.

(HARVARD LAW REVIEW)

Complete the test

1. Congress passed the Resource Conservation and Recovery Act (RCRA), in part to permit private citizens to sue the owners or operators of solid waste treatment, storage, or disposal facilities whose solid or hazardous waste disposal "presents an imminent and substantial endangerment to health or the environment..."

a) 1975
b) 1976
c) 2006

2. RCRA permits private citizens to...

a) to spy the owners or operators of solid waste treatment, storage, or disposal facilities

b) to marry the owners or operators of solid waste treatment, storage, or disposal facilities

c) to sue the owners or operators of solid waste treatment, storage, or disposal facilities

3. This statute was intended to ...

a) ensure a more holistic scheme of federal environmental regulation

b) forbid the production of solid waste treatment, storage, or disposal facilities

c) protect the owners or operators of solid waste treatment, storage, or disposal facilities

4. In this article DPM means ...

a) dual processor mode

b) diesel particulate

c) dynamic power management

5. The district court granted the defendants' motion to dismiss because...

a) the CAA foreclosed federal regulation

b) RCRA's text and structure excluded vehicle emissions from the statutory definition of "disposal"

c) the plaintiffs sufficiently pleaded that DPM emission from the rail yards creates an imminent and substantial danger to health

6. The court found that RCRA was crafted to solve the problem of ...

a) "land disposal"

b) air emissions

c) legislative histories

7. In formulating its order-of-disposal rule, the Ninth Circuit was unable to explain how...

a) it poses significant danger to human health

b) a facility's discharge of aerosolized wastes in the form of "mist" could still qualify as disposal

c) it may jeopardize citizen suits

8. Included in a list of "solid wastes" under RCRA is ...

a) emission of particulate matter

b) aerosolized wastes

c) "petroleum-contaminated media and debris", which can be caused by vapor

9. Citizen enforcement against improper disposals is ... as government enforcement is "increasingly less reliable".

a) more necessary than ever

b) not necessary

c) not useful

10. This result would cut against RCRA's purpose to serve as ..., acting as a "supplement to media-based laws".

a) antitrust law

b) a remedial statute

c) law charges

IN RE WARRANT TO SEARCH A CERTAIN EMAIL ACCOUNT CONTROLLED & MAINTAINED BY MICROSOFT CORP.

District Court Holds that SCA Warrant Obligates U.S. Provider to Produce Emails Stored on Foreign Servers.

Jan 12, 2015

The 1986 Stored Communications (SCA) allows the government to obtain a warrant (SCA Warrant) that requires an Internet Service Provider (ISP) to produce customer information, emails, and other materials upon a showing of probable cause. While the Internet has transformed since 1986, the Act remains mostly unchanged. Recently, in In re Warrant to Search a Certain Email Account Controlled & Maintained by Microsoft Corp., a magistrate judge in the Southern District of New York ruled — and a district judge affirmed — that an SCA Warrant obligates an ISP like to produce information stored on overseas servers SCA Warrants, the magistrate judge explained, are part-subpoena, part-warrant hybrids and so are not bound by the same territorial constraints that restrict traditional warrants. While the decision is well reasoned, the territorial question raised by this litigation underscores the potential risks of judicial application of the SCA and the corresponding need for Congress to reform the outdated statute by clarifying its application to data stored abroad.

In December 2013, as part of a presently undisclosed criminal investigation, federal prosecutors in the Southern District of New York sought and obtained an SCA Warrant authorizing "the search and seizure of information" — including emails — "associated with a specified web-based e-mail account" stored by Microsoft. The warrant, granted by Magistrate Judge Francis, requested the production of responsive material within two weeks and delayed notification to the subscriber for thirty days.

Upon receipt of the SCA Warrant, Microsoft's Global Criminal Compliance team determined that while some of the responsive account information was stored on U.S. servers, the corresponding emails were stored on servers located in Dublin, Ireland. Microsoft handed over the data stored in the United States, but moved to "quash the warrant to the extent that it directed the production of information stored abroad". Microsoft's argument hinged on the fact that the government here, as required by the SCA, sought the account information pursuant to "a warrant issued using the procedures described in the Federal Rules of Criminal Procedure". Because ac-

cording to Rule 41 "federal courts are without authority to issue warrants for the search and seizure of property outside the territorial limits of the United States", Microsoft contended that SCA Warrants do not reach data abroad.

Microsoft's motion to quash came before Magistrate Judge Francis, who first turned to the text of the SCA to determine whether it permitted the government to demand data stored abroad. He determined that while Microsoft's interpretation of the SCA was reasonable, the requirement that SCA Warrants be issued "using the procedures described in the Federal Rules of Criminal Procedure" could, "equally plausibly", be read to require only that SCA Warrants comply with the "procedural aspects of the warrant application process. Deciding that the text of the SCA was ambiguous, Magistrate Judge Francis proceeded to consider the statute's structure and legislative history, as well as the practical consequences of Microsoft's argument.

In examining the structure of the SCA, the magistrate determined that an SCA Warrant "is a hybrid: part search warrant and part subpoena". Like a conventional search warrant, an SCA Warrant is obtained upon application to a neutral magistrate and upon a showing of probable cause. However, once an SCA Warrant is issued, it acts like a subpoena in that it is served upon an ISP with the expectation of a response and does not require the government to conduct a physical search and seizure. Under subpoena doctrine, the location of the requested documents is irrelevant; what matters is that the subpoenaed party have control over the requested material. Requiring an ISP to produce its records held abroad "does not implicate principles of extraterritoriality", but is considered an extension of the court's power toward a party over whom it has personal jurisdiction.

Next, Magistrate Judge Francis considered the legislative history of the SCA. While the Senate Report did not address the SCA's territorial reach, the House Report did, stating that instruments to "access . . . stored . . . communications are intended to apply only to access within the territorial United States". This reference "suggested that information stored abroad would be beyond the purview of the SCA". However, he noted that these comments more likely indicated that electronic communications intercepted abroad by foreign law enforcement apart from U.S. search and seizure procedures could still be admissible at trial. Furthermore, the report failed to clarify whether "access" to data "meant access to the location where the electronic data was stored or access to the location of the ISP". Fortunately, a House Report accompanying a 2001 amendment to the SCA provided some clarity. In describing the operation of Rule 41, that report

equated " 'where the property is located' with the location of the ISP, not the location of any server".

Lastly, Magistrate Judge Francis turned to the practical implications of Microsoft's interpretation, concluding that Congress could not have intended SCA Warrants to be limited to data stored in the United States. First, some ISPs attempt to house a customer's data near her residence, but are not required to verify the residency information provided by customers. Therefore, if SCA Warrants were so limited, criminals could provide false information, have their data stored overseas, and thereby avoid the reach of U.S. law enforcement. Second, if SCA Warrants did not allow for the production of data stored abroad, the government would have to obtain such information through Mutual Legal Assistance Treaty (MLAT) procedures, which are lengthy, cumbersome, and unreliable. Since the United States is a party to such treaties with only approximately sixty countries, some data "within the control of an American service provider" would be entirely out of law enforcement authorities' reach.

It does not require even the physical presence of service provider employees at the location where data are stored. At least in this instance, it places obligations only on the service provider to act within the United States".

Based on the foregoing, Magistrate Judge Francis determined that SCA Warrants function as subpoenas and require the production of all responsive information, regardless of where it is stored. He thus denied Microsoft's motion to quash the warrant. Microsoft appealed Magistrate Judge Francis's order to the district court. Judge Preska heard argument in July 2014 and orally affirmed Magistrate Judge Francis's order.

While Magistrate Judge Francis's order accords with the SCA, the court's decision was not the only potential outcome. The statute was not written for today's Internet and the huge amounts of data stored across the globe. It is startling that issues concerning the production of data stored overseas are only being raised for the first time in this and their importance will only continue to grow. In re Warrant is illustrative of the problems that arise from the SCA's age and ambiguity. As it currently stands, judicial application of the vague statute carries a high risk of problematic outcomes. The SCA can, and should, be revised in a way that clarifies the territorial questions raised by this case and weighs the government's legitimate law enforcement needs against valid privacy interests and practical concerns.

When Congress passed the Electronic Communications Privacy Act of 1986 (ECPA), which included the SCA, the Internet was in its infancy. It was unclear whether existing Fourth Amendment doctrine

would apply to stored electronic communications, and there was a concern that emails would not be subject to any privacy protections whatsoever. As a result, the ECPA was intended to balance privacy concerns with law enforcement needs. It also included provisions granting law enforcement investigatory tools to legally gather stored communications. While the SCA was amended in 1994 and 2001, "the basic structure of the 1986 statute remains in place today".

There is no doubt the Internet has changed dramatically in the nearly thirty years since the SCA was enacted. Two of the most transformative technological shifts were integral to this litigation. First, because at the time of the SCA's passage, storage of data was prohibitively expensive and rare, Congress did not envision stored communications as a central privacy concern. Since the 1980s,

however, the cost of storing data has decreased exponentially and the amount of stored personal data has increased commensurately. Second, the Internet has evolved from a predominantly American network into a global one, both in usage and infrastructure. As a result of these unforeseen developments, the stakes of misapplying the ambiguous SCA have ballooned. Stored electronic communications have assumed a pivotal importance that the statute can no longer adequately manage.

If Magistrate Judge Francis had come to a different, but permissible, interpretation of the SCA Warrant and the vague text authorizing it, the outcome could have been highly problematic. Relying on national borders in today's cloud-based Internet is untenable. Microsoft, in particular, stores data around the world. This is particularly problematic because there is no obligation that an ISP verifies a customer's professed residence, which can dictate where her data is stored. Tying an SCA Warrant to the location of the requested data rather than the location of a provider would severely hinder the efforts of law enforcement and draw a nonsensical distinction. Furthermore, Microsoft's position is incongruous when set against Fourth Amendment doctrine. Courts have already determined, in the context of conventional search warrants, that when a search occurs outside of the United States, non-U.S. persons have no Fourth Amendment rights while U.S. persons are shielded only by a "reasonableness" requirement. Because individuals already have fewer or no constitutional privacy protections abroad, it would be strange for Magistrate Judge Francis to have ruled that a search that would be legal if conducted on U.S. soil is prohibited if conducted abroad.

At the same time, however, an extraterritorial SCA Warrant does raise privacy and practical concerns, particularly for foreign subscribers. For example, Microsoft and other technology companies have

received complaints from "both current and potential customers overseas about the U.S. Government's extraterritorial access to their user information" that might "substantially undermine" the companies' positions in cloud computing.

The resolution of the SCA's territorial reach should fall to Congress as the body most capable of clarifying the statute to better regulate access to stored communications in light of such communications' current outsized importance. The government has a legitimate interest in uncovering and combating criminal activity that should not be hindered by the location of a company's servers or other factors unrelated to an individual's privacy interests. To the extent that the SCA's language referencing the Federal Rules of Criminal Procedure is ambiguous, it should be revised to more closely align with the tool it authorizes: a subpoena requiring a showing of probable cause to a neutral magistrate. Additionally, because this issue is bound to reappear, the revision should include precise wording that clearly specifies the obligation of an American service provider when the data requested is stored overseas. With cloud-computing systems, data, including fragments and copies, can be stored everywhere; it is important that the SCA explicitly acknowledge that the location of the data is not the crucial consideration. Rather, the location of the service provider should govern. Finally, because at least in the case of Microsoft, where a customer's data is stored is based on user-provided information that is never independently verified, Congress could mandate a vetting requirement that obligates a service provider to base the location of storage upon a subscriber's IP address, rather than her self-reported location.

Despite the importance of law enforcement prerogatives, Congress should also endeavor to safeguard privacy and U.S. business interests to the extent possible. First, any revised policy should include a heightened burden on the government when seeking a warrant for the information of non-U.S. persons. A reviewing court can look to see if the prosecutor met a substantial evidence burden rather than probable cause. Second, Congress can specify the types of crimes where an SCA Warrant can be used to obtain data belonging to non-U.S. persons and those where MLATs must be used. Thus, SCA Warrants can be reserved only for the most serious and time-sensitive crimes. While this proposal may not be sufficient to satisfy all privacy concerns expressed by foreign customers of an American provider, it would be an important step. Such a limitation would strengthen the privacy considerations of the statute without severely impacting its law enforcement prerogatives.

An SCA Warrant allows the government to obtain private emails upon a showing of probable cause. Despite its moniker, an SCA Warrant is akin to a subpoena in that the location that matters is that of the service provider and not the requested data. Despite the ruling in this case, the transformations in communications technology and the ubiquity of data stored across the globe demand a clarification of the SCA only Congress can provide.

(HARVARD LAW REVIEW)

Answer the questions:

1. What does the Stored Communications (SCA) allow the government?
2. What did federal prosecutors in the Southern District of New York seek and obtain in 2013?
3. What is the Rule 41 about?
4. What did Magistrate Judge Francis determine?
5. What is the location of the requested documents under subpoena doctrine?
6. What did Magistrate Judge Francis note about electronic communications?
7. What did Magistrate Judge Francis do with Microsoft's motion?
8. Is relying on national borders in today's cloud-based Internet untenable?
9. What should Congress endeavor?
10. What do the transformations in communications technology and the ubiquity of data stored across the globe demand?

FIRST AMENDMENT: SPEECH

STATE V. MELCHERT-DINKEL

Minnesota Supreme Court Determines that False Claims Used to Advise or Encourage Suicide Do Not Fall Within the Alvarez Fraud Exception.

In United States v. Alvarez, the Supreme Court struck down the Stolen Valor Act of 2005 on First Amendment grounds. The statute had criminalized making false claims that one had been "awarded any decoration or medal authorized by Congress for the Armed Forces of the United States". Writing for

the plurality, Justice Kennedy stated that "where false claims are made to effect a fraud or secure moneys or other valuable considerations . . . it is well established that the Government may restrict speech without affronting the First Amendment". Given that the Stolen Valor Act prohibited false speech "absent any evidence that the speech was used to gain a material advantage", Justice Kennedy determined that the statute burdened a significant amount of protected speech. Thus, he applied the "most exacting scrutiny" to the statute and found that it failed to pass muster.

Recently, in *State v. Melchert-Dinkel,* the Minnesota Supreme Court upheld a prohibition on speech that assists suicide, but struck down a prohibition on speech that advises or encourages suicide. Reviewing a conviction based on the use of "deceit, fraud, and lies" to advise and encourage suicide, the court appears to have interpreted Alvarez's "material advantage" language as meaning that fraud is unprotected only when it is made to gain a material advantage. Future courts might be persuaded to adopt such a reading of Alvarez's material-advantage language because it is in keeping with the general rule that First Amendment exceptions are meant to be narrow. Courts, however, should not succumb to that temptation — that reading of Alvarez is implausible in light of the case's language and common law backdrop. Yet even if courts do adopt this reading, litigants might still prevent its narrowing effect by characterizing harm to one person as material advantage to another.

William Francis Melchert-Dinkel, a 46-year-old man who lived in Minnesota, posed as a "depressed and suicidal young female nurse" on suicide websites. Responding to posts on these websites, Melchert-Dinkel conversed with suicidal individuals, "feigning caring and understanding to win their trust". He "encouraged them to hang themselves, falsely claimed that he would also commit suicide, and attempted to persuade them to let him watch the hangings via

webcam". In total, Melchert-Dinkel "entered into approximately five suicide pacts".

Two of the individuals with whom Melchert-Dinkel corresponded committed suicide. After investigating the second death, law enforcement officials were able to connect Melchert-Dinkel's Internet aliases to his email address. Melchert-Dinkel admitted that he had posed as the suicidal nurse and authored the Internet messages. He was then prosecuted under a statute that "makes it illegal to 'intentionally advise, encourage, or assist another in taking the other's own life'". The Minnesota state district court found that "Melchert-Dinkel intentionally advised and encouraged" his victims and convicted him, rejecting both his facial and as applied First Amendment challenges to the statute. Melchert-Dinkel appealed.

The Minnesota Court of Appeals affirmed. Writing for the court, Judge Ross held that the statute was constitutional both on its face and as applied. Beginning with the facial challenge, Judge Ross stated that the covered speech was "an integral part of another's suicide". Judge Ross then determined that even though suicide had been decriminalized in Minnesota, the covered speech was categorically unprotected because the state still maintained a strong policy against suicide. Judge Ross also held that the prohibition was not overbroad, for the statute required a sufficiently "direct connection between the prohibited speech and the harmful conduct to be avoided". Then, addressing the as-applied challenge, Judge

Ross noted that "the First Amendment does not shield fraud" and found that Melchert-Dinkel's speech easily fell within this exception from First Amendment protection.

The Minnesota Supreme Court reversed and remanded. Writing for the majority, Justice Anderson held that the statute's prohibition on assisting suicide was constitutional but that its prohibitions on advising and encouraging were not. Justice Anderson determined that the statute was content-based and thus inherently suspect, but also recognized that it would be exempted from First Amendment scrutiny if the covered speech fell within a First Amendment exception. He observed that "speech integral to criminal conduct" and speech "directed to inciting or producing imminent lawless action" are two examples of such exceptions. However, for both, he determined that the decriminalization of suicide proved: not only was the speech not integral to criminal conduct or lawless action because suicide is not a crime, but also courts are not permitted to morph the criminal-conduct exception into an exception that captures all "speech integral to 'harmful, proscribable conduct'".

Justice Anderson next considered whether "the speech used by Melchert-Dinkel fell under the 'fraud' exception to the First Amendment". Relying on Alvarez's plurality opinion, Justice Anderson noted that "speech is not unprotected simply because the speaker knows that he or she is lying". Rather, "a plurality of the Court recognized in Alvarez that the government can restrict speech when false claims are made to 'gain a material advantage', including money or 'other valuable considerations', such as offers of employment". Justice Anderson determined that "there are a multitude of scenarios in which the speech prohibited by the challenged statute would not be fraudulent, and thus the First Amendment's fraud exception does not protect the statute from a facial challenge". He also noted that the court could not "see how, even under the unusual facts of this case, Melchert-Dinkel gained a material advantage or valuable consideration from his false speech". He concluded: "Accordingly, we reject the State's argument that the 'fraud' exception to the First Amendment applies here".

Finally, because the speech prohibited by the statute was not categorically exempt from First Amendment protection, Justice Anderson subjected the statute to strict scrutiny: the restriction would be upheld only if it "(1) were justified by a compelling government interest and (2) were narrowly drawn to serve that interest". Justice Anderson determined that Minnesota undoubtedly had a compelling interest in "preserving human life". Moreover, he found that the definition of "assist" required that any speech deemed to reach the level of assistance be directly and causally linked to the suicide. Thus, he concluded that a prohibition on assisting suicide was sufficiently narrowly tailored. However, the prohibitions on advising and encouraging suicide could include speech "more tangential to the act of suicide", potentially including "general discussions of suicide with specific individuals or groups". As a result, the court struck down the advising and encouraging prohibitions.

In assessing whether the statute at issue was a valid proscription of unprotected fraudulent speech, the Minnesota Supreme Court seemed to read the Alvarez plurality opinion as exempting fraud from First Amendment protection only when it is "made to 'gain a material advantage'". Courts may be tempted to adopt this reading of Alvarez because it is in keeping with the general rule that First Amendment exceptions are meant to be narrow, but they should not do so because such a reading is implausible in light of the case's language and common law backdrop. Yet even if courts adopt such a reading, litigants can still seek to fit all types of fraud within the fraud exception

by characterizing harm to one person as material advantage to another.

In the Alvarez plurality opinion, Justice Kennedy endeavored to discern the scope of the false claims First Amendment exception. To start his inquiry, Justice Kennedy determined that the Stolen Valor Act of 2005 imposed a "content-based speech regulation" and noted that "as a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content". However, he observed that "content-based restrictions on speech have been permitted . . . when confined to the few 'historic and traditional categories of expression long familiar to the bar'". Although "the Court had never endorsed the categorical rule . . . that false statements receive no First Amendment protection", he observed that "where false claims are made to effect a fraud or secure moneys or other valuable considerations . . . it is well established that the Government may restrict speech without affronting the First Amendment". Because the Stolen Valor Act of 2005 "by its plain terms applied to a false statement made at any time, in any place, to any person", and "did so entirely without regard to whether the lie was made for the purpose of material gain", Justice Kennedy determined that the Stolen Valor Act of 2005 could not be upheld as a restriction on categorically unprotected speech

In Melchert-Dinkel, Justice Anderson seems to have interpreted the Alvarez plurality opinion as attaching a material-advantage requirement to the fraud exception. In flatly rejecting the state's argument "that Melchert-Dinkel's speech was unprotected because it amounted to fraud", Justice Anderson recited the Alvarez plurality's observation that "the government can restrict speech when false claims are made to 'gain a material advantage'". He then immediately determined that the statute at issue was not protected from the facial challenge because "there are a multitude of scenarios in which the speech prohibited by the statute would not be fraudulent". Thus, Justice Anderson appears to have equated Alvarez's reference to false claims made to secure a material advantage with Alvarez's reference to fraudulent speech, and in turn to have imputed the material-advantage requirement to the fraud exception. In fact, this imputation seems all the more likely because it could explain why the court noted that it "failed to see how . . . Melchert-Dinkel gained a material advantage or valuable consideration from his false speech", before it "rejected the State's argument that the 'fraud' exception to the First Amendment applied".

The narrowness of this reading of Alvarez's material-advantage language could be attractive to courts because the exceptions to First

Amendment protection are supposed to be narrow. However, such a reading is implausible for two reasons. First, the actual Alvarez material-advantage language states that false claims lack protection when they are "made to effect a fraud or secure moneys or other valuable considerations". The use of "or" indicates that the "securing moneys or other valuable consideration", inquiry is separate from any relevant fraud inquiry. In other words, the direction to courts is to look for material advantage only when false claims do not amount to fraud. If Justice Kennedy had intended to indicate that fraud is exempt from protection only when the perpetrator of the fraud sought a material advantage, "and" would have been the natural word to use.

Second, such a reading is inconsistent with how fraud is conventionally defined in both tort and contract law. The tort of fraud often requires a demonstration that harm was suffered, but not that advantage was sought.

In fact, this is the case in Minnesota. And contract law does not differ substantially: Williston on Contracts, for example, includes among the list of elements required for a case of actual fraud "damage to the plaintiff" but not advantage to the defendant. In either case, then, "the fact that the defendant has not realized a benefit is not dispositive". It is possible that the Alvarez plurality intended to define the fraud exception in a way that differed from the way fraud is often defined in states' common law. However, Justice Kennedy seemed to indicate that the plurality intended not to disturb settled doctrine. After all, when he examined language cited by the government that seemed to indicate that all false speech is unprotected speech, he wrote that the government's quotations "derive from cases discussing defamation, fraud, or some other legally cognizable harm". He concluded further, after reviewing examples of regulations on false speech such as laws punishing perjury: "This opinion does not imply that any of these targeted prohibitions are somehow vulnerable".

Nonetheless, if courts read the Alvarez plurality's material-advantage language as applying to fraud, savvy litigants might still be able to limit the effects on First Amendment doctrine by reframing harm to plaintiffs as material advantage for defendants. For instance, here Melchert-Dinkel entered into suicide pacts. A suicide pact is essentially a contract, albeit one probably unenforceable on public policy grounds. Since a suicide pact is an exchange of promises to harm oneself, the promised harm could be characterized as the suicide pact's "valuable consideration" in the contract sense of the term. However, this approach might not work in every case. After all, in Melchert-Dinkel, either the Minnesota Supreme Court did not consider the possibility of characterizing harm to Melchert-Dinkel's victims as

advantage to Melchert-Dinkel, or the court was not persuaded by it, since Justice Anderson indicated that Melchert-Dinkel had not received a material advantage.

Even when a litigant fails to convince a court that her loss is the other side's gain, she still has a chance of prevailing under the applicable scrutiny analysis, whether exacting or intermediate. For instance, in Melchert-Dinkel, the assisting suicide provision survived strict scrutiny. However, if and when courts determine that strict scrutiny is the appropriate standard of review, chances of success are low, as strict scrutiny is often characterized as "fatal in fact". Thus, litigants who wish to prevail in cases of fraud where no material advantage seems to exist probably have the best chance of success if they argue, in the first instance, that since Justice Kennedy wrote that false claims lack protection when they are "made to effect a fraud or secure moneys or other valuable considerations", fraud is always categorically exempt from First Amendment protection.

(HARVARD LAW REVIEW)

Complete the test:

1. Recently, in State v. Melchert-Dinkel, the Minnesota Supreme Court upheld a prohibition on speech that..., but struck down a prohibition on speech that....

a) assists suicide … advises or encourages suicide
b) advises or encourages suicide ... assists suicide
c) assists suicide … encourages suicide

2. ... of the individuals with whom Melchert-Dinkel corresponded committed suicide

a) five
b) ten
c) two

3. Beginning with the facial challenge, Judge Ross stated that the covered speech was ...

a) "an integral part of another's suicide"
b) "an advice to commit the suicide"
c) "for nothing in committed suicides"

4. Justice Anderson held that the statute's prohibition on assisting suicide was constitutional but that its prohibitions on advising and encouraging ...

a) were confirmed
b) were not quite clear
c) were not

5. He determined that …

a) the criminalization of suicide proved
b) the decriminalization of suicide proved

c) the encouraging to suicide proved

6. The restriction would be upheld only if it "(1) were justified by a ... and (2) were narrowly drawn to serve that interest".

a) compelling government interest
b) assisting suicide
c) preserving human life

7. In Melchert-Dinkel, Justice Anderson seems to have interpreted the Alvarez plurality opinion as ...to the fraud exception.

a) a false statement made at any time
b) false claims
c) attaching a material-advantage requirement

8. The use of ... indicates that the "securing moneys or other valuable consideration", inquiry is separate from any relevant fraud inquiry.

a) "and"
b) "or"
c) "but"

9. Justice Kennedy seemed to indicate that the plurality ... settled doctrine.

a) intended to disturb
b) prohibited to disturb
c) intended not to disturb

10. However, if and when courts determine that strict scrutiny is the appropriate standard of review, chances of success are ...

a) low
b) high
c) important

SECURITIES REGULATION

SEC V. CITIGROUP GLOBAL MARKETS, INC.

Second Circuit Clarifies that a Court's Review of an SEC Settlement Should Focus on Procedural Propriety.

As the American economy recovers from the financial crisis, courts and agencies continue to debate how best to sanction the conduct that sparked the collapse. In its postcrisis response, the Securities and Exchange Commission (SEC) has used consent decrees as a tool of choice. Designed to promote prompt resolution of disputes and efficient use of judicial resources, consent decrees are court-approved settlements that combine judicial enforcement power with agency settlement discretion. Although the use of consent decrees is an established practice, in most contexts courts have struggled to define the appropriate level of deference due when they review decrees. Recently, in *SEC v. Citigroup Global Markets, Inc* the Second Circuit clarified its standard of review for consent decrees, emphasizing that district courts should focus on ensuring that the decree is "procedurally proper". The court rightly vacated the lower court's rejection of the settlement at issue. By reformulating the standard of review as a highly deferential procedural test, however, the Second Circuit overcorrected the district court's exacting substantive review. An ideal standard would split the difference between the two approaches and review the substantive merits of the decree with a deferential posture.

In October 2011, after a four-year investigation, the SEC filed a complaint against Citigroup Global Markets, Inc. (Citigroup), alleging that the firm negligently misrepresented its role and economic interest in creating a billion-dollar fund. Citigroup marketed the fund's assets as sound investments selected by an independent adviser, but, according to the complaint, the firm packed the portfolio with dubious assets and then shorted the securities it had helped select. On the same day that it filed the complaint, the SEC filed a proposed consent decree to settle its claims against Citigroup. The decree permanently restrained Citigroup from future violations of the Securities Act of 1933 and required the firm to pay $285 million in disgorged profits and civil penalties. Absent from the settlement was any admission of culpability.

The district court refused to approve the consent decree. Although Judge Rakoff recognized the "substantial deference" owed to an administrative body, he concluded that the court must still satisfy itself that the settlement is "fair, reasonable, adequate, and in the public interest". Turning to these factors, he noted the asymmetry

between the SEC's suggestions of and its decision to charge Citigroup with only negligence. Further, Judge Rakoff criticized the settlement's $95 million civil penalty as "pocket change to any entity as large as Citigroup" and wondered what the SEC was getting from the deal, "other than a quick headline".

Judge Rakoff also found particularly problematic the SEC's longstanding policy of settling claims with defendants who neither admit nor deny wrongdoing. The practice both deprived the court of the means to assess the factual basis for the requested relief and ignored the "overriding public interest in knowing the truth".

Therefore, without "cold, hard, solid facts, established either by admissions or by trials", the district court concluded that the consent decree was not fair, reasonable, adequate, or in the public interest.

The Second Circuit vacated and remanded. Writing for the panel, Judge Pooler_clarified that the proper standard for reviewing a proposed consent decree requires the district court to determine whether the settlement is "fair and reasonable", and, if the decree includes injunctive relief, that the "public interest would not be disserved" by the agreement. The Second Circuit explicitly excluded "adequacy" from the test. The court reasoned that the adequacy requirement was an interloper from the class action context: because a consent decree, unlike a class action judgment, does not bind future claimants, it "does not pose the same concerns regarding adequacy". Citing institutional competencies, the court also concluded that the "job of determining" the public interest "rests squarely with the S.E.C., and its decision merits significant deference". Judge Pooler acknowledged that "consent decrees vary", and in certain instances the district court "may need to make additional inquiry to ensure that the consent decree is fair and reasonable". Nevertheless, the Second Circuit emphasized that the "primary focus" of the district court's review should be "ensuring the consent decree is procedurally proper, using objective measures" such as whether the decree (1) is lawful, is clear,

(3) resolves the claims, and (4) is not "tainted by improper collusion".

After establishing the proper test for review, Judge Pooler determined that the district court abused its discretion. Recognizing that consent decrees "are primarily about pragmatism", she concluded, first, that the district court had no right to demand that the SEC establish the truth of the allegations in the consent decree. Second, she found that the district court incorrectly defined the public interest as "an overriding interest in knowing the truth" — a more appropriate inquiry would be, for example, whether the consent decree would bar private litigants from pursuing independent claims. Third, Judge Pool-

er stressed that second-guessing the charging and settlement decisions of an agency is "not the job of the courts".

Judge Lohier concurred, expressing his view that the four factors identified by the majority are the only factors a district court may consider in its "fair and reasonable" analysis. Judge Lohier also stated that he was inclined to reverse based on the factual record. Nevertheless, he saw no harm in remanding "to permit the very able and distinguished District Judge" to determine whether the decree met the court's standard.

The court was right to vacate Judge Rakoff's nondeferential decision. In an effort to curb the excesses below, however, the Second Circuit overcorrected by adopting a purely procedural test that will, practically speaking, result in the rubber-stamping of consent decrees. To restore a meaningful check on an agency subject to regulatory capture, the court should adopt a balanced standard of review, reincorporating a deferential adequacy requirement while rejecting general presumptions against no-admit/no-deny settlements.

The district court's rejection of the SEC settlement exceeded the bounds of precedent. First, Judge Rakoff overreached in his demand that the SEC establish the "truth" of the allegations against Citigroup. The Supreme Court has declared that a substantive inquiry has its limits: lower courts should not attempt to resolve the factual disputes of cases in their review of consent decrees. Moreover, the district court improperly considered the charges levied against the defendant. Again, courts have repeatedly held that the review of a consent decree is not the forum for a district judge to "reach beyond the complaint to evaluate claims that the government did not make".

Nonetheless, although the Second Circuit properly vacated Judge Rakoff's decision, it did so by effectively imposing a procedural standard of review for consent decrees. Judge Pooler established a default procedural norm, directing the district court to focus on "objective measures" of fairness and reasonableness. To be sure, the opinion suggested the possibility of substantive review in its recognition that "consent decrees vary", and that some may require "additional inquiry". However, between the court's explicit exclusion of the adequacy factor and its emphasis on procedural propriety, the court likely foreclosed all meaningful substantive review. Even though Judge Pooler retained the public interest inquiry, she offered only examples of a procedural review, and it is not clear how a district court could consider substantive factors — such as deterrence — if adequacy is beyond its purview.

The Second Circuit's procedural standard of review starkly diverges from established practice. Indeed, courts have considered the

adequacy of consent decrees for more than three decades. Formerly, district courts "entered a consent decree . . . only after considering its substantive validity". Nor was the public interest inquiry always confined to questions of res judicata: courts had earlier determined whether the "proposed decree had an adequate deterrent effect for it to be in the public interest. An ideal standard of review would achieve a middle ground between the circuit and district court decisions. To guard against collusive settlements and protect the public's interest in deterrence, the Second Circuit should reincorporate a deferential adequacy requirement, which in turn should permit a more robust public interest inquiry, into its standard of review. The court should also eschew Judge Rakoff's general presumption against no-admit/no-deny settlements. Rather, district courts should deferentially review the adequacy of each individual settlement by comparing the penalty — and any admission of liability — against both the gains realized by the defendant and the losses suffered by investors. Although no magic formula exists, if the comparison drastically differs from the court's expectation, then in rare cases it may be appropriate for the court to hold further hearings or reject the decree. By avoiding the extremes of either court's approach, the proposed standard would be superior on grounds of both administrability and policy.

First, the Second Circuit's tidy procedural test will likely be difficult to administer. Procedure is not so easily divorced from substance, and thus certain elements of the court's procedural standard are not amenable to procedural definition. For instance, it is not clear how adequacy is severable from the court's definition of "fair and reasonable". Given the limited record before the district court, a lenient settlement may be the only evidence of improper collusion. A similar dissonance plagues the court's definition of the public interest inquiry. Because modest penalties may disserve the public interest by failing to deter misconduct, adequacy is the focal point of the public's interest in a consent decree. Thus, although the precise limits of the Second Circuit's standard will likely remain unclear, if judges err on the cautious side and consider only "procedural" factors, they will likely not test for collusion or examine the public interest concerns.

By contrast, a deferential adequacy requirement would be well within judicial competency. After all, courts painstakingly review consent decrees in other contexts. Under the Tunney Act, for instance, judges may consider a variety of substantive factors — including the "competitive impact of such judgment" and the "adequacy" of the remedy — when reviewing proposed antitrust settlements. Moreover, judges are well equipped to review even complex settlement arrangements. Indeed, when judges evaluate an injunction, they weigh

it in light of the whole package of relief: some combination of retrospective damages, prospective damages, and equitable relief. If judges can determine the adequacy of a bundle of remedies, they should also be competent to assess whether a single civil penalty is too light.

Second, as a matter of policy, the proposed standard of review would strike the appropriate balance between judicial deference and adequate oversight. On the one hand, the proposed standard would allow greater room for agency decision making than did the district court's exacting standard. Although Judge Rakoff did not explicitly proscribe no-admit/no-deny settlements as a matter of law, the import of his "truth" rhetoric set a prohibitive bar for this category of consent decrees. In so doing, the district court intruded on a policy-making function that inheres in the executive branch. After all, the SEC's policy of pursuing no-admit/no-deny settlements is informed by budgetary constraints and the strategic balancing of the costs of negotiating failure against any deterrence benefits that might flow from an admission of liability. If consent decrees were required to include admissions of culpability, scholars predict that private parties would be less likely to settle due to the threat of private litigation premised on such stipulations. Or the SEC and settling parties might prefer to settle through the SEC administrative process, avoiding federal courts altogether. The proposed deferential adequacy standard encourages transparent, efficient resolution of enforcement actions by respecting the SEC's expertise in crafting consent decrees. Unlike the district court's test, which all but fashioned a categorical rule that would restrict the SEC's general settlement strategy, the proposed standard would confine its review to the adequacy of the individual settlement package.

On the other hand, the Second Circuit's procedural test grants too much deference. A modest substantive review may be necessary to protect the public interest. In the antitrust field, scholars recognize that the Tunney Act "remains a significant deterrent" to sweetheart deals. In fact, "since the Act became law there appear to have been almost no controversies like the cries of foul play surrounding" the approval of earlier consent decrees. The SEC could similarly benefit from substantive judicial review. Scholars and government have both observed that the SEC is vulnerable to regulatory capture. A "revolving door" between the SEC and Wall Street creates significant conflicts of interest that can undermine the SEC's protection of investors. Lucrative job prospects in the private sector may encourage SEC staff to curry favor with potential employers by "soft-pedaling" cases. Thus, as the interests of SEC investigators might not always align with the

public interest, courts necessarily must provide an additional check on agency settlements.

Ultimately, the procedural review that the Second Circuit articulated both deviates from precedent and fails to recognize judicial competency to deferentially review the adequacy of civil penalties and guard against regulatory capture. Then again, the Citigroup decision is probably not a watershed in the court's consent-decree jurisprudence. Given the flurry of publicity generated by Judge Rakoff's opinion, and the rising tide of district courts emulating his expansive standard of review, the Second Circuit may have wanted to send a particularly clear statement regarding the proper test for consent decrees. Intent on differentiating itself from the excesses of the lower court, the Second Circuit then "overshot" and set up an unduly permissive test.

(HARVARD LAW REVIEW)

Answer the questions:

1. Why do courts and agencies continue to debate how best to sanction the conduct that sparked the collapse?
2. When did the SEC file a complaint against Citigroup Global Markets, Inc?
3. What did Judge Rakoff recognize?
4. What did Judge Pooler clarify?
5. What did she conclude after recognizing that consent decrees "are primarily about pragmatism"?
6. What did the Second Circuit overcorrect in an effort to curb the excesses below?
7. For how many times have courts considered the adequacy of consent decrees?
8. What would the proposed standard of review strike as a matter of policy?
9. Why may modest substantive review be necessary?
10. What does the procedural review that the Second Circuit articulated do?

Winning at all costs?

The spirit of the Olympic Games has always been clear: "The important thing is not winning but taking part". In recent times, however, the desire to win has been taken to extremes.

People still remember the incident in the 1984 Los Angeles Olympics when South African-born runner Zola Budd appeared to trip her rival and medal favorite, Mary Decker in the 5,000 metres, causing her to fall and lose the race. Nor can the international sporting public forget the shame brought to the Olympic ideal by Canadian Ben Johnson`s use of steroids in the 100 metre final in the 1988 Seoul Olympics.

Athletics is not the only sporting event in which competitors cheat. Weightlifting, football, boxing and even women`s shotputting have all attracted their fair share of scandal. During the Winter Olympics in Lillehammer in 1994, the world of competitive ice skating was shocked by an incident involving two American figure skaters, Tonya Harding and Nancy Kerrigan, the favorite to win a medal. While training in Detroit, Nancy was mysteriously attacked on the knees by a man with an iron bar. Tonya was accused of conspiring with her ex-husband and her former bodyguard to injure Nancy.

Tonya eventually confessed to her involvement in the crime and has since seen her skating career destroyed. Although she escaped a prison sentence, she has paid a high price for her part in the scandal. She was fined $100,000 and given 500 hours of community service. She was also made to resign from the US Figure Skating Association. However, she has already earned $600,000 by giving an exclusive television interview and has been offered two million dollars to move to Tokyo to become a wrestler.

For Tonya Harding, fame and fortune have finally been achieved but at what cost?

Read and answer.

Read the article. Then copy and complete the chart about the three people involved in sports scandals.

Name	
Nationality	
Sporting event	
City	
Year	
Scandal	

How was Tonya Harding punished?

How did Tonya gain from her crime?

How would you explain the last line of the text?

How do you think, the punishment was justified?

Do you know of any major scandals involving sports personalities?

Do you think top sports personalities should make such large sums of money?

Speaking:

A) With a partner, act out the roles of attorneys for the defense and prosecution on Tonya Harding`s affair. Make your arguments to defense/ prosecute Tonya Harding;

During the lesson perform Tonya`s court process. Choose your role: plaintiff, defendant, judge, attorney, prosecutor, jury, witness. Make your arguments/ proofs/ prosecution speech/ verdict etc.

SUPPLEMENT

In pairs, ask and answer the questions to complete the questionnaire on the opposite page for your partner. Then check your scores to find out how assertive he/ she is.

How assertive are you?

What would you do in these situations?

Complete the questionnaire and check your scores.

If someone lit up a cigarette in non-smoking area, would you tell them to put it out?

If someone parked their car in your parking space, would you ask them to move it?

If you where in a shop and wanted change for a $10 note, would you buy something small first before asking for change?

If you badly wanted a glass of water while you were in town, would you go into a restaurant and ask for it?

If a group of friends wanted you to go out with them, would you do so, even if you fell too tired?

If you were late for a flight, would you go to the front of the check-in queue without waiting your turn?

If someone pushed in front of you in a queue at the bank, would you say something to them?

If you bought a pair of shoes and the heels came loose after a week, would you take them back to the shop and complain?

If you weren`t enjoying a play at the theatre, would you stay until the end?

If a good friend asked to borrow a large sum of money, would you lend it if you had it?

SCORING

Questions 1, 2, 4, 6, 7, 8 Yes = 2 points No = 0 points.

Questions 3, 5, 9, 10 No = 2 points Yes = 0 points.

The higher your score, the more assertive you are.

Fourteen or over: You have a strong personality. You insist on other people respecting your rights. Some people may think you are "pushy" and aggressive.

Eight or under: You have a submissive personality and like to follow rather than to lead. People often take advantage of your good nature.

TALKING POINT

If you knew you could devote your life to any single occupation – in music, writing, acting, business, politics, medicine, jurisprudence, etc – and be among the best and most successful in the world at it, what would you choose and why?