PART I

EQUAL PROTECTION
As litigated, *Santa Clua Pueblo v. Martinez*\(^1\) presented a conflict between two inequalities, two hierarchies. One was visible as such, the other not. The conflict between the United States government and the governments of Native peoples was built into Julia Martinez’s choice of forum. This hierarchy—full sovereignty over qualified one—was not recognized as an inequality, but was fundamental to the politics of the case and to commentaries on it since. The case was litigated through the question, presented as technical, of whether a private right of action could be implied by Native peoples against their nations for violations of the Indian Civil Rights Act (ICRA).\(^2\) The other hierarchy in the case—men over women—was squarely posed by Julia Martinez’s substantive claim of sex discrimination. This inequality was recognized as such when the court of appeals held for Julia Martinez on this question.\(^3\) The United States Supreme Court necessarily ignored it in resolving the case on sovereignty grounds for Santa Clara, finding that the issue was not its to decide. But although the issue of sovereignty prevailed over the issue of sex, the hierarchy of sovereigns was no more explicitly faced than was the hierarchy of the sexes.

When the federal courts left Indian Civil Rights Act claims against Indian nations to their own courts, indigenous tribunals, in an important outpost of sovereignty upon which all Native peoples can build, won power over Native women’s equality claims, while providing an important outpost of sovereignty upon which all Native peoples could build. But the resolution of this case by the United States Supreme Court, recognizing the sovereignty of Santa Clara over Julia Martinez, was itself an exercise of sovereignty by the United States over Native peoples. If someone else can decide whether you are sovereign, in a very real sense you are not. If the US Supreme Court had decided this case the other way, as it could have, sovereignty is not really what Santa Clara won, although Native peoples emerged from
the case with more of it than they had before. If Julia Martinez was excoriated for her choice of forum in going to the United States government for a justice her tribe had not given her, when that same forum granted Santa Clara sovereignty over her, no one seemed to think that the power the tribe won was tainted by the forum in which it was won.

My initial engagement with the Martinez case, soon after it was decided, was at a talk in Red Earth, Minnesota that the women there requested. The piece took no position on the outcome of the case; among other things, it pointed out that the decision won an advance in sovereignty for Native peoples on the backs of Native women—which it did. For this finding, the analysis has been mischaracterized as “essentialist,” which means (to specify a slippery academic swear word) it presumes that women share the same universal essential identity simply by virtue of being biologically female. Having conceived the analysis that sexuality, in particular, is a social construct, definitive of women’s status, and having practiced that analysis since the early 1970s, I found this error surprising. Looking always to the social reality of the situation of women across history and culture, time, and space, my approach has been that if male dominance, however varied, is found there, it is an empirical generalization of social fact, not an assumption of any kind, and certainly not a biological one. Whenever this theory is not accurate, it is not valid. As a matter of fact, among the places where this widespread fact is demonstrably less acute, cultures indigenous to what is now called North America number prominently. To repeat the obvious, the fact that male dominance over women can be found to be socially real in most places at most times does not mean that a universal essential gender or sex identity is being assumed, or that those social relations are considered naturally or necessarily predetermined to be structured in that way. In such a world, social equality—my life’s work—would be science fiction.

For clarity, note that a blood quantum definition of what constitutes a tribal member is an essentialist definition of who an Indian is. A social membership definition is cultural, hence nonessentialist. Essentialism is not some politically correct line one has to stay on the right side of, necessarily, although being against it seems to be among the latest academic credentialing postures. Perhaps some find blood to be a proxy for culture; maybe one is assigned and treated as one is socially in substantial part because of who one is genetically. But to illustrate by example, a cultural definition—say, Julia Martinez’s children being arguably Santa Claran because they were raised Santa Claran traditionally and speak Tewa—is a nonessentialist definition of the tribal membership that they met. If one is comfortable with essentialist definitions of Indians and critical of essentialist definitions of women, an explanation is in order.

Another widespread misunderstanding and mischaracterization of my work in this area—unlike the first, neither an outright lie nor a careerist distortion—is the notion that my work on sex discrimination, and sex discrimination as a claim generally, is anchored in an individual rights framework. In this critique, sex equality
rights are presumed to be individual rights, whereas indigenous people’s rights are presumed to be collective rights. This criticism can accurately be leveled at conventional approaches to discrimination, but it does not apply to mine. In all of my work on sex equality, indeed, in the approach I originated, whenever a woman is discriminated against as a woman, she is discriminated against as a member of a social group. To be a woman, in this view, is to be a member of a group with a social designation and a social experience, a group made up of a multitude of social designations and experiences, including race and ethnicity and heritage. The same is true for men as such. Whatever or whoever one is as a woman is not who one is as an individual in the one-at-a-time sense. Womanhood is intrinsically a collective and group-based designation, attribution, and experience. This designation is indelibly true in situations of discrimination. If you are not hired for a job because you are a woman, for example, that treatment has nothing to do with who you are as an individual and everything to do with the fact that you are a member of the group “women.” I would claim the same for being raped. The meaning of these experiences of discrimination as a woman is an intrinsically collective social meaning. Every individual who is harmed as a woman is harmed as a member of this group, even if the damage is done to her alone at this time. This approach applies a collective rights concept even in individual cases. Women are my people. This belief, not an individual rights legal framework, is the ground of my work.

The third idea in the literature that, by its attention, honors my early work on Julia Martinez’s case is the view that to criticize male dominance is a Western or white idea. I have been waiting for evidence of this contention for some time. What Western country is actually critical of male dominance? Where is it acceptable to criticize it? Where does it no longer exist? Though the critique of male dominance has more traction in some places than in others, the few people who make it unapologetically—some in the West, some in the East, some in the North, some in the South—are not mainstream in any place of which I am aware. Nowhere does the criticism of male supremacy predominate as culture—and even far less does sex equality exist. In reality, although some Western countries and cultures purport to favor equality or even to have attained it, there is nothing Western about criticizing male dominance or about the vision of equality as an end to status hierarchies based on group membership. Women originated this critique from their own lives. It is indigenous to women everywhere. Nor is it outdated (don’t we wish). Some women resist and resent being kept down and out; some connect with others who are on the same wavelength elsewhere; together we support each other and organize for change with all workable tools at our disposal. What we see and, crucially, how we approach change is defined by everything about who and where we are, which includes our cultures and systems in each particularity. Approached this way, women globally form a culture.

These three erroneous notions cover up, and stand in for, something real. Closer to what may be their underlying impulse is the view that it is important to talk
about women’s issues, but never to forget the larger context, with the related view that individual rights like those sought by Julia Martinez are valuable, but not when asserted against the whole. These views generate real questions: What is the larger context? What is the whole? Unlike the prior criticisms, these questions frame a conversation worth having.

Shall we agree that no context is whole simply because it includes men? And that it is not necessarily larger just because it is more numerous? That no unit is too small because it is not as big as the group of all women, nor is it whole simply because men are in it? Suppose women bring every specificity with them. We do not speak of Native women as women as if they are not also Indians. If “women” has a collective definition, women’s identifications with all groups can inclusively comprise their membership in the group “women,” rather than contradict or qualify it. Down this path, with common forms of subordination identified, women become a kind of whole.

No one says that it is irrelevant to the question in Martinez that Julia Martinez is Santa Claran. The fact that the people who created the rule challenged in the case were Native people operating under particular conditions that included conquest and expropriation, minimally, is not ignored. But the case is often discussed as if it is not relevant that Julia and her daughter, Audrey, are women in the social sense: women among women who, when treated in these particular ways familiar to male-dominant systems—namely, having families they form not treated as families of their communities when the men’s are—connect with other women in other places and times who have long been and are still being treated in similar, sometimes identical, interconnected ways. Instead of being neither part of a community nor constituting one, each woman, seen as a woman, is, in some sense, every woman, and “women” can form a larger context.

Consider now Eva Petoskey’s moving response to my criticism of the Martinez case that sovereignty was gained on the backs of women. She said, “I would pay that price.” Let us honor how many women have paid the price for the survival of their communities, their generosity of body and spirit in doing so. So much is given, so much is taken, yet they stand undiminished. Julia and Audrey Martinez apparently made a different kind of choice, raising not only the question of whether others can make their choice for them, but also whether each choice does not do a great deal for women in women’s larger context, as well as for Native peoples as a whole. As a separate matter, it is worth noting that some of us work so that women don’t have to pay that price, asking who has set things up, and why, so that it is so often the women who pay. This is not to criticize the willingness to pay, but to point out that some of us make it our life’s work to ensure that women will not always be the ones who, again and again, over and over, are on the line to sacrifice their sovereignty as women for the sovereignty of their community among what are, in a larger sense, communities dominated by men. This dimension of the problem is obscured entirely when the Martinez loss is described as “Their individual loss . . . sustained to pro-
tect the Pueblo and its authority.” The women’s loss is framed as individual rather than as group-based, as the Pueblo’s authority to discriminate based on sex is affirmed with no sign of concern, raising a further question about the substance of the sovereignty that indigenous peoples win in communities built on defending a right to women’s inequality within them. Who will pay, or is paying itself the price for women’s sovereignty? When, where, and by whom is that fight being joined, if not by women like the Martinez women? Who will stand with them to share the price they pay?

Be all that as it may, Martinez gave Indian nations in the United States the chance to be worthy of the price paid. Tribal courts can redeem what it cost them, giving to the women of their communities whatever the US government might have, if Native women had won the right to sue their tribes for sex discrimination, and more. So, now accountable only to themselves on questions of civil rights, what women’s rights are tribes protecting? Not all the information necessary to answer this question is available. More rights and protections may exist in reality than on paper; the best remedies are often not written down. Without assuming by any means that the tribes are the primary oppressors of Native women, asking what remedies are available against them if they discriminate, as Santa Clara did against Julia Martinez, is still valid. Remembering that not everything needed to assess this issue is accessible by any means, inquiry into the meaning that tribal courts are giving to sex equality can begin.

From the cases I have seen, the approach being taken basically tracks Aristotle, a Greek man whose writings have been foundational to Western culture and whose approach has dominated equality law and theory in most places. The standard sameness/difference approach predicated on his philosophy in the West considers equality a matter of treating likes alike, unlikes unalike. Jurisdictions that know better are Canada, South Africa building on the Canadian approach, and some international forums. To the extent that this approach prevails, tribal courts are dispensing justice on sex equality in a very similar way to the US federal courts, with all its disappointing and unnecessary limitations. We see a good deal of the familiar “similarly situated” language, approaches to sexual harassment as an individual issue, and selective enforcement in a statutory rape case treated in the conventional way.

A real opportunity is missed here: to go beyond the US federal courts’ approach to equality. Perhaps unavailable cases in tribal courts see through the “likes alike, unlikes unalike” notion that supported racial segregation, permitted the Holocaust, and continues to obstruct needed claims and remedies toward real equality worldwide. Perhaps they do not ignore dominance and subordination, the real dynamic of inequality, as Native peoples well know from direct experience.

This critique of the Aristotelian approach is not academic or abstract at its base, but grounded in the concrete, lived experience of what women need and do not

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have, inspired by the black civil rights movement’s path to social equality through legal equality. The existing concept of legal equality permits people who are seen as socially different to get less, when typically the lines of difference are lines inscribed by social forces of hierarchy. So long as dominant groups set the standard, subordinated groups are seen as different from that standard, and so can be treated worse, given less, kept down and out—all the way from unequal pay to genocide—and the conventional approach sees no inequality problem. This logic, outmoded at best, is still being used in courts in the United States legal system. Asking whether tribal courts post-\textit{Martinez} are giving women what US federal courts would have given them may thus be asking the wrong question. The right one is: are tribal courts giving Native women equality? From what little is available, tribal courts appear, on the whole, to be using the same approach to equality as US federal courts, which have not delivered equality to women. Nothing says that Indian nations have to follow them. That is what sovereignty means.

An alternate approach to equality inspires a paragraph in the preamble to the Declaration on Indigenous Peoples’ rights,\cite{22} paralleling the Convention on the Elimination of All Forms of Racial Discrimination (CERD).\cite{23} It embodies an anti-hierarchical approach, opposing the superiority of people based on race, religion, ethnicity, or national origin as “racist, scientifically false, legally invalid, morally condemnable and socially unjust.”\cite{24} The superiority of some peoples, the inferiority of others, is rejected. The Convention on the Elimination of all Forms of Discrimination Against Women,\cite{25} largely modeled on CERD, has no such prefatory paragraph. It does not say that male domination and female subordination is the real name for sex inequality, of which discrimination is the central practice. Women remain stuck having to be the same as men, when men almost never have to be the same as women to get or keep what men have. If we realize that equality is not about sameness, and inequality is not about difference—no more or less with women than with racial and ethnic groups—then we can see that inequality is about more and less, higher and lower, better and worse, superior and inferior, and that equality is about an end to the social order predicated on such status and treatment.

A real equality approach would oppose the superiority of men over women as false, there being no relation between being biologically male and having more resources, more voice, more power, more credibility, more access, or more dignity—except in the discriminatory societies that make it so. Is this arrangement legally invalid? Let’s hope, and work to make it so. Is it morally condemnable? Condemning something morally is a soapbox you stand on to elevate yourself to declare, “I say this is wrong.” Be my guest. Socially unjust? Demonstrably. This anti-hierarchical approach to equality, tribal courts, with long experience in its opposite, could consider and use.

As a key example, one issue notable for its absence in the conventional view of equality, both in tribal courts and generally, is sexual assault. Being the one who is sexually abused is paradigmatic of being the unequal. A primary way to make a
group subordinate is to rape its members. Men do this to other men as well as to women. Native governments, through their work on battering, have begun to recognize that violence against women needs to be addressed within the community. Rape, incest, and prostitution need more attention. If the US government says that the rate of rape of Native women is one in three, and the real data for all women is closer to one in two; if the reported rape figure for Native women is 70 percent, and Native women are far less likely than other women to report a rape to US authorities; what do you suppose the real rape rate of Native women and girls is? We need to know. We also need to know how many Native men and boys are sexually violated and by whom.

Apart from the staggering numbers, the other stunning feature of rape of Native women appears to be the dramatic percentage of sexual assaults perpetrated by non-members of the women’s own community. Most women are raped most often by men of their own racial and ethnic group. The rate of reported rape shows the interracial rape of Native women to be two to three times more frequent than for other groups. Maybe Native men are not raping Native women in substantial numbers; maybe Native women are not reporting Native men raping them in substantial numbers. Either way, the numbers taken together support what I have heard Native women say, which is that almost none of them knows a Native woman who has not been sexually violated. If you listen to most women you know that this situation is very often the case for women in general. The situation of Native women combines massive underreporting of a problem of monumental proportions with little federal, state, or tribal response. In particular, Native women in Indian country appear to be a free-fire zone for non-Indian men, who can go there, rape Indian women, and get away with it largely because the jurisdictional divide rarely results in criminal prosecution. Reversing this jurisdictional arrangement for sexual assaults at the very least, as the Tribal Law & Order Act of 2010 took some constructive steps toward but did not accomplish, would give tribal justice systems a problem on the other side of Martinez to solve: prosecuting non-Native men for raping Native women in Indian country. Standing with Native women in this respect would be an exercise of sovereignty, not a challenge to it.

But query sovereignty. Sovereignty is a Western idea deriving from feudal Europe, meaning a man’s home is his castle, his castle his domain. The sovereign has dominion over whatever is within his sphere, equal to others with entitlement to dominate whatever is within theirs—which is not to say that indigenous peoples necessarily should not have or want sovereignty. It is to say that sovereignty is neither an Indian idea nor a woman’s idea. Internationally, sovereignty supported the Holocaust; nobody was supposed to intervene in Germany’s internal affairs. Not until Germany invaded other countries was anything done because, until then, murdering Jews was an internal matter. Sovereignty means that what is done at home need not be accounted for outside of home. That does not mean this insulation is not worth having or fighting for under certain circumstances or that it may not be
used for positive ends. But sovereignty’s wholesale rejection of outside recourse has kept women under the domination of men. Sovereign authority, whether as head of household or of government, is insulated from accountability, including for abuse at home, which is where women are violated by men most.

To put this issue into context, few, if any, cultures or governments provide equality for women anywhere. Sex inequality is maintained partly by the tacit deal among men to let other men do what they want with “their women” there, so those other men will let them do what they want with “their women” here. Jurisdictionally, this deal is termed sovereignty, specified as federalism or state’s rights or margin of appreciation, or whatever tolerance for local discrimination is termed. Substantively, its content is called culture.

When Bosnian Serbs exterminated and raped Bosnian Muslim and Croat women in Bosnia, they said it was their own internal business. Outside intervention violated their sovereignty. When my Bosnian Muslim and Croat women clients sued Radovan Karadzic, the Bosnian Serb fascist leader, in United States federal court under the Alien Tort Act, implementing customary international law for rape as an act of genocide in this conflict, Karadzic said the case violated his country’s sovereignty. Karadzic fought the case for seven years—not saying that what he led was not genocide, not saying that he did not lead it, not saying that the rapes did not happen, not even saying that he was not responsible for them. Rather, he argued we had no jurisdiction to hold him to account in the United States for whatever was done to women back home. In essence, he argued that those women should go back to Bosnia and deal with his (genocidal) regime. Many people supported him—not because they thought genocidal rape was a good idea or a practice of Serbian culture. Partly they thought he was going to win, and they recognized how nations are made. Mainly, they thought Bosnian problems should be dealt with in Bosnia.

Our view was, you raped her, she’s us. We do not respect the line drawn at the national border under these circumstances. Here, being a woman is global citizenship. We argued, in this instance of genocidal rape, that raping her destroys her community because she is her community, and rape shatters communities, which are built on identifications and relationships, as well as, and through, women themselves. Substantively, this case conceived and established rape as an act of genocide under law for the first time. Jurisdictionally, jurisdiction was established over this rogue regime leader in another country, securing an award to his victims of $745 million from a New York jury. The US federal court held that international law prohibited those violations as, among other things, acts of sex discrimination. In the process, Karadzic was delegitimized, had to flee, was eventually hunted down, and is being prosecuted internationally as well. In the meantime, Bosnian women established jurisdiction over him in another country and held him accountable to the women he hurt outside of Bosnia. And they used US federal courts to do it.

It helps, to say the least, that the United States never conducted genocide in Bosnia, nor colonized it, nor dispossessed its peoples, nor destroyed its culture. So
there was no precise *Martinez* problem with the forum. My clients wanted to sue in the United States courts because they sensed they would get a fair hearing, and they did. It is exactly because US federal courts offered accountability by men to women outside their national borders that these women wanted to use this forum. What they sought—and what they got—was exactly justice that is not indigenous. Bosnian sovereignty was not respected because it was in the hands of the women’s violators. The law that was applied was international, but the Karadzic case was not brought into an international forum, but into another national one.

Also worth recalling in this connection is the Sandra Lovelace case, in which Canada was held to account by the U.N. for imposing on First Nations the same rule that Santa Clara had imposed on Julia Martinez. After *Lovelace*, the rule was changed. Most indigenous people with whom I have discussed this issue have no problem with Santa Clara being answerable in an international forum for the rule Julia Martinez challenged. Because their nationhood is not yet internationally recognized nor is an analogous process available, such a forum is not yet possible.

Forum was fatal to the legitimacy of Julia Martinez’s claim as well as to its legality. What she possibly perceived as her only recourse may not only have doomed her claim but also have generated a durable dynamic of resistance to changing the rule when she lost. Santa Clara apparently has yet to equalize the marrying-out rule, although many people—including me and some members of the Santa Clara Pueblo—think it should go. Had it applied existing equal protection standards, the US Supreme Court would likely have found the rule to be sex discriminatory on the merits. Doubtless, whatever sex equality results are achieved through tribal courts are likely perceived as immeasurably more legitimate than any imposed by US courts. But whatever the benefits of the existing decision, having sovereignty achieved at the price of equality is disheartening, as is having the plaintiff derided for disloyalty and worse as a result of her choice of forum, as if the problem was who she asked, not what she asked for, and then to this day not to have had her own people grant the simple equality she sought. An international approach offers an external forum that can provide sex equality that is not imposed on a subordinated culture by a dominant one, but rather is predicated upon recognition of equal sovereignty. International fora can overcome both hierarchies at once, offering Native women sovereignty and equality too.

**NOTES**

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8. Long after this analysis was foundational to sexual harassment as a legal claim as well as accepted in Canada, (See Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143 (establishing that laws must promote equality to be nondiscriminatory), and R. v. Kegitsa, [1990] 3 S.C.R. 697 (holding a race hate propaganda law constitutional on equality grounds)) it was articulated in Catharine A. MacKinnon, Toward a New Theory of Equality, in WOMEN’S LIVES, MEN’S LAWS, supra note 5, at 44 (2005).

9. Possibly because the Martinez lawsuit “was perceived as an individual rights campaign, counter to the communal values and interests of the community” (Gloria Valencia-Weber, Three Stories in One: the Story of Martinez Revisited, Santa Clara Pueblo, in INDIAN LAW STORIES 482 (Carole Goldberg et al. eds., 2011)) this conceptual framework seems to have been attached to anyone seen as sympathetic to her position.

10. Robin Morgan’s well-known collection, SISTERHOOD IS GLOBAL (1st ed. 1984), can be seen to be animated by this spirit.

11. See, e.g., Valencia-Weber, Three Stories in One, supra note 9, at 486 n.114.

12. For one notion of “the whole,” see Rina Swentzell, Testimony of a Santa Clara Woman, 14 KAN. J. & PUB. POL’Y 97, 98 (2004).


15. It is worth noting that advocates of Santa Clara’s position typically do not deny that the rule challenged in Martinez is sex-discriminatory. See, e.g., id.


18. Although I had read these cases and others before the conference presentation on which this paper is based, all are discussed accessibly in the competent survey by Ann E. Tweedy, Sex Discrimination Under Tribal Law, 36 WM. MITCHELL L. REV. 392 (2010).


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24. DRIP, supra note 22, at 2.
26. See SARAH DEER ET AL., A VICTIM-CENTERED APPROACH TO DOMESTIC VIOLENCE AGAINST NATIVE WOMEN: RESOURCE GUIDE FOR DRAFTING OR REVISING TRIBAL LAWS AGAINST DOMESTIC VIOLENCE (2008). For additional information on programs and other resources being developed to address the pervasive problem of violence against women in Indian country, see the websites of the Tribal Law and Policy Institute, and the Indian Law Resource Center’s “Safe Women, Strong Nations” project, http://www.indianlaw.org/en/safewomen.
28. DIANA E.H. RUSSELL, SEXUAL EXPLOITATION: RAPE, CHILD SEXUAL ABUSE, AND WORKPLACE HARASSMENT 35 (1984) (discussing results of a San Francisco study in which 44 percent of respondents reported being victims of rape or attempted rape).
30. See, e.g., MENACHEM AMIR, PATTERNS IN FORCIBLE RAPE 44 (1971) (concluding that approximately 93 percent of rapes are intraracial); NAT’L COMM’N ON THE CAUSES & PREVENTION OF VIOLENCE, FINAL REPORT OF THE NATIONAL COMMISSION ON THE CAUSES AND PREVENTION OF VIOLENCE 210 (1969) (finding a rate of 90 percent).
31. An analysis of data collected by the Bureau of Justice Statistics noted that, while “violent crime against white and black victims was primarily intraracial,” the same did not hold true for Native Americans, particularly in the case of rape and sexual assault, where approximately 80 percent of assailants were described as white and another 10 percent as black. STEVEN W. PERRY, AMERICAN INDIANS AND CRIME: A BJS STATISTICAL PROFILE, 1992–2002, at 9 (2004).
32. This is further borne out in the Amnesty International report. See MAZE OF INJUSTICE, supra note 29, at 2 (“In the Standing Rock Sioux Reservation, for example, many of the women who agreed to be interviewed could not think of any Native women within their community who had not been subjected to sexual violence”); see also Sarah Deer, Sovereignty of the Soul: Exploring the Intersection of Rape Law Reform and Federal Indian Law, 38 SUFFOLK U. L. REV. 455, 456 (2005) (“Many of the elders that I have spoken with in Indian country tell me that they do not know any women in their community who have not experienced sexual violence”).
33. See Deer, Sovereignty of the Soul, supra note 32 at 462.


41. See Valencia-Weber, Three Stories in One, supra note 9, at 484 (documenting this through 2010).

42. Elder Noranjo takes this position. See id. at 482 n.104. For various views within the Pueblo on the question, including support for gender equality, see id. at 482–83.

43. The U.N. Declaration on the Rights of Indigenous Peoples, GA Res. 61/295 (Sept. 13, 2007) is a major step in this direction. See DRIP, supra note 22.