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RETROACTIVE APPLICATION OF THE TORTURE VICTIM PROTECTION ACT TO REDRESS PHILIPPINE HUMAN RIGHTS VIOLATIONS

Riza De Jesus

Abstract: The Torture Victim Protection Act (TVPA) was enacted in 1992 to establish an unambiguous basis for a cause of action in U.S. courts for torture committed in foreign nations. Because the statutory language and legislative history did not address the issue of retroactivity, courts are left with the task of determining whether the TVPA applies to pending cases and pre-enactment conduct. As demonstrated in In re Estate of Marcos Human Rights Litigation, a retroactive application of the statute does not result in manifest injustice. The TVPA does not alter substantive rights and liabilities and merely clarifies existing law prohibiting torture. In conformance with principles of equity and rules of statutory construction, the TVPA should apply retroactively to claims based on conduct that occurred prior to its enactment.

INTRODUCTION

Passage of the Torture Victim Protection Act (TVPA) sent a clear message to the international community that the United States denounces the use of torture regardless of where it occurs. By extending civil jurisdiction to acts of torture committed in foreign countries, the United States proclaimed that it will not provide a safe haven for torturers. The TVPA also set a standard for other nations to develop more effective domestic remedies in their human rights laws.

Passage of the Act, however, left unanswered the question of whether the TVPA provides a cause of action for victims that were tortured prior to its enactment. Pending and future cases based on pre-enactment conduct are relying on retroactive application of the law to seek redress for violations. In most cases, these victims have been deprived of justice within their own repressive legal systems.

At the time of the TVPA's enactment on March 12, 1992, the case of In re Estate of Ferdinand E. Marcos Human Rights Litigation was being

4 In Re Estate of Ferdinand E. Marcos Human Rights Litigation, MDL No. 840 (D. Haw. filed Sept. 13, 1990), appeal pending, No. 92-15526 (9th Cir.). The following cases were consolidated for trial: Ortigas v. Marcos, No. 86-0975 (N.D. Cal. filed Mar. 4, 1986); Clemente v. Marcos, No. 86-1449 (N.D. Cal. filed Mar. 20, 1986); Hilao v. Marcos, No. 86-0390 (D. Haw. filed June 3, 1986); De Vera v. Marcos,
tried by jury in federal court. It was the first class-action civil suit in the United States alleging human rights violations in a foreign country. Ten thousand plaintiffs sued the Marcos estate based on evidence documenting more than 2,500 summary executions, more than 5,500 acts of torture and 783 disappearances of opponents of the Marcos regime.\(^5\)

After Congress passed the Act, the issue arose in *Marcos* as to whether the TVPA should apply retroactively to violative conduct that occurred in the Philippines prior to 1992. The court allowed the TVPA claim,\(^6\) and the jury found the Marcos estate liable for human rights violations that took place during his administration.\(^7\)

Pending an appellate decision on the *Marcos* case, courts are still faced with interpreting a statute that is silent on the issue of retroactivity.\(^8\) Supreme Court precedents are conflicting. A final resolution of the issue is needed to guide the courts and to advise pending and future claimants in proceeding with their claims.\(^9\)

This Comment examines the retroactivity doctrine and its applicability to claims based on conduct that occurred prior to the enactment of the Torture Victim Protection Act. Part I presents an overview of the provisions and legislative history of the TVPA. Part II addresses the debate on whether congressional enactments and regulations should have retroactive or prospective application. Part III provides guidance from case law in reconciling the conflicting doctrines, focusing on the distinction


\(^6\) Pretrial Order No. 5: Case Management, *Marcos* (MDL No. 840) (granting plaintiffs' motion to amend the pleadings to include the Torture Victim Protection Act as a cause of action by plaintiff's joint pretrial statement filed on Jan. 13, 1992). The district court in *Marcos* is the first to allow a TVPA claim alleging acts that occurred prior to its passage; however, no written opinion was issued.

\(^7\) The bifurcated trial concluded the liability phase with a jury verdict on Sept. 24, 1992, but damages are still being determined.

\(^8\) Following *Marcos*, other cases were filed based on TVPA claims, including: Todd v. Panjaitan, No. 92-12255 WD (D.Mass. 1992) (action against Indonesian military commander for the summary execution of an Indonesian citizen); Xuncax v. Gramajo, No. 91-11564 WD (D. Mass. 1991) and Ortiz v. Gramajo, No. 91-11612 WD (D. Mass. 1991) (actions against Guatemalan official for gross human rights violations). The issue of retroactivity in these cases is still pending in the district courts. A TVPA claim was also made in Abebe-Jiri v. Negewo, No. 190-CV-2010-GET (N.D. Ga. 1992); however, the court did not decide the application of the TVPA and found jurisdiction under the Alien Tort Claims Act.

\(^9\) The Supreme Court has the opportunity to resolve the issue when it decides whether the 1991 Civil Rights Act is retroactive in Landgraf v. USI Film Products, 968 F.2d 427 (5th Cir. 1992), cert. granted, 61 U.S.L.W. 3558 (U.S. Feb. 22, 1993) (No. 92-757) and Rivers v. Roadway Express, 973 F.2d 490 (6th Cir. 1992), cert. granted, 61 U.S.L.W. 3558 (U.S. Feb. 22, 1993) (No. 92-938).
between substantive and procedural statutes in determining retroactivity. Part IV proposes an analytic framework to resolve the question of retroactivity of the TVPA and finds that a policy in favor of retroactive application is proper as demonstrated in *Marcos*. This Comment concludes that retroactivity of the TVPA is consistent with its procedural nature and therefore the statute should be applicable to pending cases.

I. **OVERVIEW OF THE TVPA**

   **A. Statutory Provisions**

   The Torture Victim Protection Act of 1992 provides a forum for victims to sue their torturers in U.S. federal courts, so long as personal jurisdiction can be exercised over the defendants. Civil liability under the TVPA extends to "an individual who, under actual or apparent authority, or color of law, of any foreign nation" subjects an individual to torture or extrajudicial killing. A person can be held liable for authorizing, tolerating or knowingly ignoring acts of torture. It is not necessary for the person to have personally performed or ordered the abuses.

   The TVPA incorporates the definition of torture and extrajudicial killing found in contemporary international law. Its definition of torture is drawn from the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Torture Convention) which was adopted by the United Nations in 1984. It also contains verbatim the

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11 Torture Victim Protection Act § 2 (a).
13 Id.

   (1) the term "torture" means any act, directed against an individual in the offender's custody or physical control, by which severe pain or suffering (other than pain arising only from or inherent in, or incidental to, lawful sanctions), whether physical or mental, is intentionally inflicted on that individual for such purposes as obtaining from that individual or a third person information or a confession, punishing that individual for an act that individual or a third person has committed or is suspected of having committed, intimidating or coercing that individual or a third person, or for any reason based on discrimination of any kind; and

   (2) mental pain or suffering refers to prolonged mental harm caused by or resulting from

      A) the intentional infliction or threatened infliction of severe physical pain or suffering;

      B) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality;

      C) the threat of imminent death; or
understandings included in the definition by the Senate when it ratified the Torture Convention in 1990.\textsuperscript{15} Extrajudicial killing, as defined in the statute, conforms with the definition contained in the Geneva Conventions of 1949.\textsuperscript{16} The principle that the right to life may not be extinguished by extrajudicial means is embodied in several other international instruments.\textsuperscript{17}

To guard against a flood of litigation, the TVPA provides for a ten-year statute of limitations.\textsuperscript{18} A claimant must have exhausted all available remedies in the country in which the torture occurred before federal court jurisdiction can be granted.\textsuperscript{19} Furthermore, the defendant must have "minimum contacts" with the forum state before he or she can be sued in federal court.\textsuperscript{20}

B. Legislative History and Intent

Following a series of hearings before the House and the Senate on the continuing problem of torture, the United States adopted a joint resolution on torture in 1984. The resolution undertook to develop concrete mechanisms to help combat torture throughout the world. It specifically called for the "enactment and vigorous implementation of laws intended to reinforce the United States policies with respect to torture."\textsuperscript{21} Passage of the TVPA was a step toward fulfillment of that mandate.\textsuperscript{22}

\textsuperscript{15} 136 CONG. REC. S17,491, understandings 1(a)-(b) (daily ed. Oct. 27, 1990).
\textsuperscript{16} Geneva Convention for the Amelioration of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, art. 3, 6 U.S.T. 3114, T.I.A.S. No. 3362, 75 U.N.T.S. 31; Torture Victim Protection Act § 3(a):

For the purposes of this Act, the term "extrajudicial killing" means a deliberate killing not authorized by a previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples. Such term, however, does not include any such killing that, under international law, is lawfully carried out under the authority of a foreign nation.


\textsuperscript{18} Torture Victim Protection Act § 2(c).
\textsuperscript{19} Id. at § 2(b).
\textsuperscript{22} S. Rep. No. 249 at 3.
The Act was intended to clarify and expand existing law under the Alien Tort Claims Act, which allows federal district courts to adjudicate claims by aliens for torts committed "in violation of the law of nations." In the landmark decision in *Filartiga v. Pena-Irala*, the Alien Tort Claims Act was found to be a proper basis for subject matter jurisdiction over alien perpetrators of torture. Citizens of Paraguay brought suit in federal court against a former Paraguayan official for torturing to death a family member of the plaintiffs. The district court dismissed the complaint for lack of jurisdiction. The Court of Appeals reversed the lower court's ruling. It construed the "law of nations" to apply broadly, recognizing that the universal condemnation of torture had ripened into a rule of customary international law such that torture falls squarely within the language of the statute.

Despite the decision in *Filartiga*, there remained the question of whether the Alien Tort Claims Act was in fact an appropriate basis for a cause of action against torture, absent an explicit grant from Congress. Judge Robert H. Bork raised this concern in his concurrence in *Tel-Oren v. Libyan Arab Republic*, where he reasoned that the separation of powers doctrine mandated such an explicit grant in cases affecting foreign relations.

In effect, the Torture Victim Protection Act provided such a grant. It codified the *Filartiga* ruling, establishing an unambiguous basis for actions previously maintained under the Alien Tort Claims Act. The TVPA made it explicit that individual victims have a private right of action in U.S. courts. It specifically addressed official torture and summary executions, recognizing their devastating effects. At the same time, the TVPA expanded the availability of the remedy. Whereas the Alien Tort Claims Act afforded a remedy for tort claims of aliens only, the TVPA extended the civil remedy to U.S. citizens who were victims of torture in foreign countries.

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23 Id. at 4-5.
25 *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).
26 Id. at 884-85.
27 *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 798-808 (D.C. Cir. 1984). In a *per curiam* decision, the court affirmed the dismissal of a claim against the perpetrators of a terrorist attack in Israel. Each member of the panel in the D.C. Circuit Court wrote a separate concurring opinion, urging dismissal on other grounds.
29 Id. at 5.
Nevertheless, the TVPA was not meant to supplant the existing law. Claims based on torture and summary executions are not the only actions covered by the Alien Tort Claims Act. That statute remains intact to allow suits based on violations of other international legal norms.

C. Congress' Authority to Confer Jurisdiction

The power of Congress to grant jurisdiction to federal courts over alien victims of torture is derived from the Constitution. Article III of the Constitution provides that the federal judiciary has the power to adjudicate cases 'arising under' the laws of the United States. The 'arising under' clause authorizes Congress to confer jurisdiction on U.S. courts to hear claims brought by foreign plaintiffs against foreign defendants. Furthermore, the Constitution authorizes Congress "to define and punish . . . Offenses against the Law of Nations." International law also provides an underlying basis for the power of Congress to enact the TVPA. The Supreme Court has held that international law is part of U.S. law. The doctrine of universal jurisdiction provides that the courts of all nations have jurisdiction over offenses of universal concern. Filartiga construed this doctrine to allow U.S. courts to hear a civil suit by a victim of torture that occurred overseas. The Torture Convention, which requires adherent states including the United States to adopt measures against human rights abusers, is a clear statement that international law condemns torture and extrajudicial killings. Congress' enactment of the TVPA serves to implement the terms of the Convention.

30 Id.
33 The Paquete Habana, 175 U.S. 677, 700 (1900).
35 Filartiga, 630 F.2d 876.
37 S. Rep. No. 249 at 3. In Trajano v. Marcos, 978 F.2d 493, 499-500 (9th Cir. 1992), the defendant-appellant pointed out that the Senate attached an understanding to Article 14 of the Torture Convention that required a state to provide a right of action only for torture committed in territory under its jurisdiction. See 136 CONG. REC. S17,486 (daily ed. Oct. 27, 1990). While this mandates the United States to enforce the rights of victims of torture occurring within its borders, the court found that the understanding does not go so far as to prohibit the United States from providing a forum for claims by aliens for torture occurring elsewhere.
The embodiment of the key provisions of the TVPA in international law is a clear indication of universal acceptance of its principles. Torture is of such fundamental concern to the international community that the legal principles guarding against it have acquired the status of *jus cogens*, or a peremptory norm of international law.\(^3\) The right of the individual to be free from torture has existed long before the passage of the TVPA. Accordingly, in determining whether the statute should apply retroactively, it is important to consider that the TVPA redresses conduct that has been widely condemned under established law.

II. **CONFLICT IN THE COURTS: RETROACTIVITY VS. PROSPECTIVITY**

Rules of statutory construction require courts to discern the intent of the legislature by examining the plain language of the statute and its legislative history.\(^3\) Absent clear legislative intent, it is not settled in the law whether a congressional enactment should apply retroactively or prospectively. Federal courts seeking guidance from Supreme Court precedents are faced with conflicting approaches on the retroactivity doctrine. The rules are embodied in two distinct lines of cases—one holding that retroactivity is disfavored, and the other establishing a presumption of retroactive application.\(^4\)

A. **The Bowen Line of Reasoning**

The historical presumption against retroactivity was articulated by the court in *Bowen v. Georgetown University Hospital*, which held that

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38 *Filartiga*, 630 F.2d at 890 (“[F]or purposes of civil liability, the torturer has become—like the pirate and the slave trader before him—*hostis humani generis*, an enemy of all mankind”).

39 Sutherland Stat Const §§ 47.01, 48.03 (5th ed. 1992).


For courts applying the *Bradley* line of precedent in favor of retroactivity, see *Aledo-Garcia v. Puerto Rico Nat'l Guard Fund*, Inc., 887 F.2d 354, 355 (1st Cir. 1989); *Scarboro v. First American Nat'l Bank of Nashville*, 619 F.2d 62, 622 (6th Cir. 1980); *FDIC v. Wright*, 942 F.2d 354, 1095-97 (7th Cir. 1991); *Kruso v. Int'l Tel. & Tel. Corp.*, 872 F.2d 1416, 1424-25 (9th Cir. 1989); *United States v. Peppertree Apartments*, 942 F.2d 1555, 1560-61 (11th Cir. 1991). For courts adopting the *Bowen* line of reasoning against retroactivity, see *Leland v. Federal Ins. Adm'r*, 934 F.2d 524, 527 (4th Cir. 1991); *Simmons v. Lockhart*, 931 F.2d 1226, 1230 (8th Cir. 1991); *De Vargas v. Mason & Hanger-Silas Mason Co.*, 911 F.2d 1377, 1390 (10th Cir. 1990); *Wagner Seed Co. v. Bush*, 946 F.2d 918, 924 (D.C. Cir. 1991); *Sargisson v. United States*, 913 F.2d 918, 922-23 (Fed. Cir. 1990). For a list of district courts that have decided either in favor of or against retroactivity, see *Fray v. Omaha World Herald Co.*, 960 F.2d 1370, app. at 1383-84 (8th Cir. 1992).
"retroactivity is not favored in the law." In Bowen, several hospitals providing Medicare services challenged a regulation issued by the Secretary of Health and Human Services that altered the 1981 wage-index rule used to calculate reimbursable wage costs. The Medicare Act authorized the Secretary to promulgate regulations setting limits on reimbursable Medicare costs, but did not expressly sanction retroactive rulemaking. Absent such an explicit grant, the Bowen court held that the Secretary of Health and Human Services was not authorized to promulgate retroactive cost-limit rules.

The Court further stated that because the effect of extending regulation to the past is drastic, it should not be allowed unless Congress expressly provides to that effect. An examination of the statutory language showed that the retroactivity provision applied only to case-by-case adjudication by the agency, not to the general power of rulemaking. Further, the legislative history indicated that Congress considered the need for making retroactive corrective adjustments, yet did not make any express authorization for retroactive cost-limit rules. The Court concluded that had Congress intended the Secretary to promulgate retroactive regulations, this intent would have been made explicit.

Bowen plainly refers to "the principle that statutes operate only prospectively, while judicial decisions operate retrospectively." Unless Congress directs otherwise, the unyielding rule is that "legislation must be considered as addressed to the future, not to the past." Thus, under Bowen, retroactive application is not permitted without a clear statement by Congress to this effect.

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42 The Court of Appeals for the District of Columbia Circuit upheld a district court decision that the rule is invalid in recouping funds from Medicare service providers. The Supreme Court affirmed the ruling of the lower court.
43 Bowen, 488 U.S. at 208-09. The Supreme Court stated: "Even where some substantial justification for retroactive rulemaking is present, courts should be reluctant to find such authority absent an express statutory grant."
44 Id. at 208.
45 Id.
46 Id.
47 Id.
49 Id. [quoting Union Pacific R.R. Co. v. Laramie Stock Yards Co., 281 U.S. 190, 199 (1913)].
B. The Bradley Line of Reasoning

In *Bradley v. Richmond School Board*, the Supreme Court endorsed the opposite presumption. It held that "a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." *Bradley* involved a class action brought by parents against the School Board of Richmond, Virginia, to desegregate the public schools. The Board appealed the award of attorney's fees made by the District Court. While the appeal was pending, Congress enacted the Education Amendments of 1972, which granted federal courts authority to award attorney's fees in desegregation cases. The Supreme Court upheld the propriety of the fee award.

The decision in *Bradley* reiterated the earlier case of *Thorpe v. Housing Authority of Durham*. The *Bradley* court concluded from *Thorpe* that even when the law does not explicitly provide that it is to be applied to pending cases, it must be given effect. Insofar as the legislative history of the Amendment was inconclusive, *Bradley* found that there was at least implicit support for the application of the statute to pending cases.

Following the *Thorpe* decision, *Bradley* observed that exceptions to the general rule of retroactive application had been made to prevent manifest injustice.

In determining "manifest injustice" that would preclude retroactive application of a statute, the Court examined three factors: (1) the nature and identity of the parties; (2) the nature of the rights affected; and (3) the impact of the change in law on pre-existing rights.

In considering the first factor, the Court noted that a school desegregation case such as *Bradley* is different from "mere private cases between individuals." A disparity exists between the School Board and the students-plaintiffs in their respective abilities to protect their interests.

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50 *Bradley*, 416 U.S. at 711.
51 *Id.*
52 *Id.* at 724.
53 *Thorpe* v. Housing Auth. of Durham, 393 U.S. 268, 281 (1969). *Thorpe* stated the basic principle that "an appellate court must apply the law in effect at the time it renders its decision."
54 *Bradley*, 416 U.S. at 715.
55 *Id.* at 716 n.23, 717. The Court stated that while there is no explicit statement that the provision for attorney's fees awards may be applied to services rendered prior to enactment, the Court was "reluctant specifically to read into the statute the very fee limitation that Congress eliminated."
56 *Id.* at 716-717.
57 *Id.* at 717-721.
58 *Id.* at 718.
The Court also referred to *United States v. Schooner Peggy*, which concluded that in matters of "great national concerns . . . the court must decide according to existing laws."\(^{59}\) The numerous concerns expressed in Congress on the significance of the Education Amendments Act supported its status as a matter of "great national concern" according to the *Bradley* court.

The second aspect of concern in *Bradley* pertained to the nature of the rights affected by the change in the law. The Court rejected the application of an intervening law to a pending claim where it has found that to do so would "infringe upon or deprive a person of a right that had matured or become unconditional."\(^{60}\) Since the School Board operated on taxpayers' funds, it could not be claimed that the Board had such a right to funds held in public trust.\(^{61}\)

The third concern that determined the *Bradley* decision was that the law did not impose new or unanticipated obligations on a party without notice or an opportunity to be heard.\(^{62}\) Under common law, the Board could have been liable for attorney's fees. The statute merely provided an additional basis upon which the Board's potential obligation to pay attorney's fees arises.\(^{63}\) Hence it was unlikely that the Board would have acted differently had the statute been operating.\(^{64}\) The substantive obligation of the parties remained unchanged. Moreover, no additional burden was imposed because the statutory provision did not alter the Board's responsibility to provide non-discriminatory education to the public.\(^{65}\)

Upon consideration of these factors, the *Bradley* court found no manifest injustice in applying the statute to a pending claim for services rendered prior to the enactment of the statute.

C. Unreconciled Doctrines

In *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, the court acknowledged the "apparent tension" in the *Bradley* and *Bowen* cases, but declined to follow either approach.\(^{66}\) The plaintiff in *Bonjorno* sought to have a post-judgment interest statute applied retroactively to his federal

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\(^{59}\) *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801).

\(^{60}\) *Bradley*, 416 U.S. at 720.

\(^{61}\) *Id.*

\(^{62}\) *Id.*

\(^{63}\) *Id.* at 721.

\(^{64}\) *Id.*

\(^{65}\) *Id.*

antitrust judgment. The Court simply found that the plain language of the statute showed clear congressional intent that the amended statute is not applicable to judgments entered before its enactment.67 Since under either the Bradley or Bowen view, "where congressional intent is clear, it governs," the Court obviated the need to reconcile the two lines of reasoning.68

As yet, the Supreme Court has failed to resolve the conflicting doctrines, instead allowing them to coexist.69 The foundations for the Bradley and Bowen presumptions have not been examined in depth to effect a clear policy. Without a clear directive from the Supreme Court, litigants are subject to the divided policy preferences of the federal courts.

III. CASE LAW SUPPORT FOR RETROACTIVITY

Without a statutory provision or legislative history on whether the TVPA should apply retroactively or prospectively, federal courts must turn to case law for guidance. While courts remain split on the issue, a wave of decisions concerning the Civil Rights Act, the Civil Rights Restoration Act and the Foreign Sovereign Immunities Act indicates an identifiable trend. One way that the courts have attempted to resolve the retroactivity dilemma is by distinguishing between substantive and procedural rights.

A. Substantive/Non-substantive Distinction

Courts have made a distinction between the substantive and procedural nature of statutes in order to reconcile Bradley and Bowen. These courts reasoned that Bradley dictates the retroactive application of statutes affecting procedural rights, while Bowen assumes prospective application of the law where it changes substantive rights.70

The Supreme Court in Winfree v. Northern Pacific Railway held that a statute is construed as substantive and not remedial where it "introduced a new policy and quite radically changed the existing law."71 In determining that a statute which repealed a common law limitation of liability should

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67 Id.
68 Id.
69 See supra note 9.
70 See Bennett v. New Jersey, 470 U.S. 632 (1985) (holding that substantive provisions of federal grant program do not apply retroactively where it would require repayment of funds received in prior years under different requirements); see also Kruso, 872 F.2d at 1425 (allowing retroactive application of statute that affects procedural rights).
have prospective effect only, it stated that the enactment "takes away material defenses, defenses which did something more than resist the remedy; they disproved the right of action. Such defenses the statute takes away, and that none may exist in the present case is immaterial. It is the operation of the statute which determines its character." 72

A non-substantive statute, on the other hand, merely affects procedures or remedies. 73 In operating remedially, it "neither enlarges nor impairs substantive rights but relates to the means and procedures for enforcement of those rights." 74 Some courts have further delineated non-substantive statutes from substantive statutes for purposes of analyzing their retroactivity by asking whether either party would have acted differently if the statute had been in effect at the time. 75 Notably, the First Circuit held that "the touchstone for deciding the question of retroactivity is whether retroactive application of a newly announced principle would alter substantive rules of conduct and disappoint private expectations." 76 This approach suggests a balancing of public interest in enforcement of new rules and private interest in confirming expectations.

The conflict between the Bradley and Bowen approaches may be resolved by distinguishing their factual bases. Bradley dealt with the issue of whether an attorney's fees statute enacted while a case was pending on appeal should apply retroactively. The statute did not create an additional source of liability. Because the statute did not change the substantive obligation of the parties, the Court allowed its retroactive application. On the other hand, Bowen involved the application of a cost-limit rule that required hospitals to return to the federal government money they had been paid under prior reimbursement standards. Prospective application is appropriate in Bowen where the new provision affected substantive rights and liabilities. 77

Federal courts have utilized the substantive-procedural distinction to resolve retroactivity issues in cases interpreting the Civil Rights Act and the Civil Rights Restoration Act, as well as the Foreign Sovereign Immunities Act. An examination of these cases highlights the significance of making such a distinction in interpreting the TVPA.

72 Id.
73 See Friel v. Cessna Aircraft, 751 F.2d 1037, 1039 (9th Cir. 1985).
75 Friel, 751 F.2d at 1039; Alexander v. Robinson, 756 F.2d 1153, 1156 (5th Cir. 1985).
77 See Bennett, 470 U.S. at 639-40.
1. Cases Involving the Civil Rights Laws

Faced with the dual approaches of Bradley and Bowen, federal courts struggled with the retroactivity dilemma in a series of cases involving the Civil Rights Restoration Act of 1987.78 The court in Lussier v. Dugger relied primarily on the fact that the purpose of the legislation was purely remedial.79 It held that the statute applied retroactively to permit the plaintiff to maintain an action against his former employer for employment discrimination.80 The court found that since the employer was a state governmental agency, the rights of private parties—the real concern of Bradley's manifest injustice exception—were not implicated by retroactive application of the amendment. Thus, retroactive application did not result in manifest injustice.81

The Civil Rights Restoration Act did not change prior legislation, but rather clarified judicial interpretations that unduly restricted the application of the civil rights laws.82 Lussier relied on language declaring that the statute will "restore" and "clarify" Congress' original intent and found this purpose consistent with retroactive application.83 Further, the Restoration Act did not change eligibility requirements under a pre-existing grant program. Its objective was wholly remedial, that is, to "assist in the struggle to eliminate discrimination from our society by ending federal subsidies of such discrimination."84

The fact that the Restoration Act was enacted specifically to overturn restrictive court rulings is accorded great weight in determining its retroactivity. The court in Ayers v. Allain pronounced the rule that retroactive legislation is proper "when Congress enacts the statute to clarify the Supreme Court's interpretation of previous legislation thereby returning the law to its previous posture."85 In Ayers, black citizens of Mississippi filed a class action against state officials alleging that the racially segregated system of education violated the Constitution and the 1964 Civil Rights Act. The district court dismissed the case, relying on a restrictive statutory interpretation. The Fifth Circuit reviewed the claim after the passage of the

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79 Lussier v. Dugger, 904 F.2d 661 (11th Cir. 1990).
80 Id.
81 Id. at 666.
82 Supra note 78.
83 Lussier, 904 F.2d at 666.
84 Id.
Restoration Act and upheld a retroactive application of the statute. Examining the legislative history of the Restoration Act, the court determined that Congress clearly intended to overturn earlier judicial misinterpretations. This restorative effect of the statute distinguishes it from a substantive law that results in inequities when applied retroactively.

Like the Restoration Act, the Civil Rights Act of 1991 sought to remedy the Supreme Court's narrow reading of the civil rights statutes. Nonetheless, the 1991 Act made no reference to retroactivity in its statutory language or legislative history. It contained ambiguous language as to the effective date of the amendments. Consequently, federal courts construing the Act did not have a clear guide as to its application to pending cases. In Vogel v. City of Cincinnati, the court held that the Civil Rights Act did not apply retroactively because it affected the parties' "substantive rights and liabilities." Vogel involved a discrimination action seeking retroactive benefits for a plaintiff who had been initially denied employment by the police department but who eventually joined later recruits. The court declined to apply the 1991 Act to the plaintiff's claim for damages resulting from the affirmative action hiring policy that the police department adopted pursuant to a 1981 consent decree.

The Vogel court did not explain how it reached its finding that "clearly, retroactive application of the 1991 Act would affect substantive rights and liabilities of the parties to this action." Nonetheless, it expressed reliance upon its earlier decision in United States v. Murphy, involving a statutory amendment that changed the showing of knowledge required for imposition of civil liability. The Sixth Circuit denied retroactive application in Murphy because the amendment created an additional source of liability in relation to a past transaction, thereby affecting substantive rights and liabilities.

In sum, these holdings recognize a distinction between statutes that effect changes in substantive areas and those that serve a clarifying or

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86 Id.
88 The effective date provision of the Civil Rights Act states that "[e]xcept as otherwise specifically provided, this Act and the amendments made by this Act shall take effect upon enactment." Civil Rights Act of 1991 § 402(a).
89 Vogel v. City of Cincinnati, 959 F.2d 594, 598 (6th Cir. 1992).
90 Id.
91 Id.
92 Vogel, 959 F.2d at 598. The concurring judge declined to join the majority opinion on retroactivity because the issue had not been addressed by the parties.
93 United States v. Murphy, 937 F.2d 1032, 1038 (6th Cir. 1991).
94 Id.
restorative purpose. Statutes that alter substantive rights and liabilities would result in manifest injustice if they are permitted retroactive application. Thus, they are presumed to apply prospectively only. On the other hand, statutes that are remedial or procedural in nature apply retroactively, in accordance with the traditional principle that courts are to apply the law in effect at the time of decision.

2. Retroactivity of the Foreign Sovereign Immunities Act

The question of retroactivity has also arisen in the context of applicability of the Foreign Sovereign Immunities Act of 1976 (FSIA), which confers subject matter jurisdiction over foreign sovereigns. The language and legislative history of the FSIA do not provide a clear mandate for retroactivity. Without such an unequivocal statement, some courts have held that the FSIA does not apply retroactively.

The leading case on the issue of retroactivity of the FSIA is Jackson v. People's Republic of China, where U.S. plaintiffs sued to recover on bonds issued by the Chinese government in 1911, relying on the FSIA to deny immunity. The Chinese government failed to make interest payments on the bonds long before 1976, when the FSIA was enacted. The district court vacated a default judgment for the plaintiffs in light of U.S. foreign policy interests, ultimately dismissing the suit for lack of subject matter jurisdiction. The Court of Appeals affirmed the lower court ruling that the FSIA did not apply to transactions that predated 1952. Examining the effect of retroactivity on antecedent rights of China, the court concluded that it would be "manifestly unfair for the United States to modify the immunity afforded a foreign state in 1911 by the enactment of a statute nearly three quarters of a century later."

As Jackson indicates, in claims involving acts that occurred prior to 1952, retroactive application of the FSIA would interfere with antecedent

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95 National Wildlife Federation v. Marsh, 747 F.2d 616, 620-21 (11th Cir. 1984) (holding that a housing development grant recipient had a vested right which could not be disturbed by retroactive application of an amended statute without causing manifest injustice).
96 Bennett, 470 U.S. at 639.
97 United States v. Vanella, 619 F.2d 384, 386 (5th Cir. 1980).
101 Id. at 1497.
102 Id.
rights because U.S. courts granted foreign sovereigns absolute immunity from suit during that period. However, the significance of the court's ruling is limited to the time frame within which the underlying transactions occurred. *Jackson* addressed the issue of retroactivity only in cases involving pre-1952 events. It leaves open the question of whether the FSIA should apply retroactively to claims arising from activities that took place between 1952 and January 1977, the effective date of the FSIA. In 1952, the State Department, through the "Tate Letter," adopted the restrictive theory of sovereign immunity, directing that a foreign state be granted immunity only for its public acts and not for its commercial acts. Enactment of the FSIA in 1976 codified and clarified this post-1952 practice. Hence, between 1952 and 1977 foreign states could no longer reasonably rely on expectations of absolute immunity. No expectation interests would be defeated by retroactive application of the statute to transactions that occurred during this latter period.

Whereas the FSIA can not be applied retroactively to a case such as *Jackson* where the operative events occurred before 1952, it has a formally retroactive effect on events occurring thereafter. The FSIA effected a change in process by shifting the determination of the entitlement of foreign states to immunity from the State Department to the judiciary. In substance, however, it did not alter the generally applicable rules of immunities law. A cause of action against foreign sovereigns for their non-public activities existed even before enactment of the FSIA. It was the Tate Letter's adoption of the restrictive doctrine of sovereign immunity that created a cause of action that had not existed before, against foreign states for their commercial activities. Thus, to deny retroactive effect to the

103 *Insurance Co. of N. America v. Marina Salina Cruz*, 649 F.2d 1266, 1272 (9th Cir. 1981) (stating that in actions arising under the FSIA, the court must determine "whether that Act gives such clear notice to foreign countries as to remove, as a reasonableness factor, the expectations of immunity of agencies of foreign countries performing commercial functions").


105 *Slade*, 617 F. Supp. at 357; see *Verlinden*, 461 U.S. at 488.

106 At least one court has recognized that after 1952, it was "reasonable for a foreign sovereign to anticipate being sued in the United States on commercial transactions." *Carl Marks*, 841 F.2d at 27.

107 GARY B. BORN AND DAVID WESTIN, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 453 (2d ed. 1992).

108 *Id.*

109 *Schmidt v. Polish People's Republic*, 742 F.2d 1022, 1025 (D.C. Cir. 1982) ("[S]ince the 'Tate' Letter of 1952 . . . foreign sovereign immunity had not extended to the commercial activity of a foreign state").
FSIA in claims arising after 1952 would be to revert to the rule of absolute immunity, not to the pre-1977 state of the law.

A significant analogy exists between the FSIA and the TVPA: the FSIA codified the principles embodied in the Tate Letter, while the TVPA clarified the law established under the Alien Tort Claims Act. For purposes of analyzing the retroactive application of the TVPA to events that occurred since the passage of the Alien Tort Claims Act, a parallel can be drawn from cases arising under the FSIA where the cause of action accrued after the issuance of the Tate Letter.

The FSIA has been applied retroactively to claims where the underlying transactions occurred after 1952. In *Yessenin-Volpin v. Novosti Press Agency*, foreign agencies were sued in a libel action based on articles published in 1976 and circulated in the United States. The court held that applying the FSIA to a claim where the cause of action accrued before its effective date would not interfere with the antecedent rights of the parties. It reasoned that the FSIA does not create new rights but merely codifies the restrictive rule of sovereign immunity, which has been followed by the courts and the executive branch ever since its adoption by the Department of State. The FSIA affects the rights of parties only to the extent that it expands the ability of plaintiffs to obtain judgments against foreign states.

Overall, in making a distinction between the substantive and non-substantive effect of statutes, courts are able to minimize the potentially harsh effects of retroactivity. The absence of manifest injustice in situations involving non-substantive changes in rights sets aside the need for Bowen's clear-statement requirement for retroactivity. Certainly, with respect to statutes that regulate new areas, retroactivity is problematic. But where a

110 See supra note 105 and accompanying text.
111 See supra note 23 and accompanying text.
114 Id. at 851 n.1.
115 Id.
116 Id. The court further determined that applying the FSIA to *Yessenin* gives effect to congressional intent, relying on the language of the Preamble which states that "henceforth," claims of immunity should be decided in accordance with the principles of the FSIA. See 28 U.S.C. 1602. But cf. *Corporacion Venezolana de Fomento v. Vintero Sales Corp.*, 629 F.2d 786, 790 (2d Cir. 1980) (holding that the language in the Preamble was intended to apply only to the substantive law of foreign sovereign immunity and declining to give the jurisdictional provisions retroactive effect).
117 See *FDIC*, 942 F.2d at 1095 n.6.
statute does not interfere with substantive legal rights and obligations, its application to pre-enactment conduct is appropriate.

IV. RESOLVING THE ISSUE OF RETROACTIVITY IN THE TVPA

Applying the Bradley doctrine in determining retroactivity of the Torture Victim Protection Act would lead to well-reasoned decisions because Bradley does not mandate a result and instead follows a deliberative approach. To balance public and private interests, this Comment suggests a second prong to the Bradley approach that would ensure a more equitable outcome. Under the proposed analytic framework, the application of the statute to pending cases is consistent with fundamental fairness.

A. Bradley: The Better Rule

The Bowen line of cases directs the courts to apply statutes prospectively, absent a clear congressional mandate of retroactivity. Thus, under Bowen, the TVPA would simply not apply to pending cases because its statutory language and legislative history does not address the issue of retroactivity. However, for a statute to apply to a pending case, it is not necessary to find explicit support for retroactive application in its language or legislative history.\(^{118}\) Statutes are enacted for different purposes, yet the clear-statement rule of Bowen gives them uniform treatment.\(^{119}\) Bowen's clear-statement requirement is flawed in its imposition of a strict presumption without searching for statutory meaning.\(^{120}\)

More specifically, the Bowen approach is unavailing in TVPA cases because it presumes prospectivity without an examination of the statute's implications in the human rights context. The Bradley rule is more appropriate because it does not mandate a result and takes into account fairness concerns by employing a manifest injustice test on a case-by-case basis. Further, the Bradley rule minimizes the potentially harsh impact of retroactivity by providing two exceptions to retroactive application. The presumption that courts are to apply the law in effect at the time of decision


\(^{120}\) A clear-statement rule requires explicit authorization in order to ascertain intent, thereby disenabling courts from reasoning from a statute's legislative history. Courts that operate under this rule reach a substantive decision without critically examining the choices involved in that decision. See generally Note, Intent, Clear Statements, and the Common Law: Statutory Interpretation in the Supreme Court, 95 Harv. L. Rev. 892, 898 (1982).
does not govern where doing so would result in manifest injustice, or where there is legislative intent to the contrary.\textsuperscript{121}

Thus, whereas \textit{Bowen} applies a strict test without due consideration of the implications of particular laws, the \textit{Bradley} test relies on more substantial justification in interpreting statutes. When a court, lacking justification, applies the clear-statement rule to a vague statute, it shuns its judicial obligation to interpret laws.\textsuperscript{122} In this respect, \textit{Bradley} is the better rule in that its manifest injustice test involves more rigorous examination.

Furthermore, the TVPA's grant of a jurisdictional forum over foreign defendants is analogous in effect to the statutory provision in \textit{Bradley}, where the rights involved were more procedural than substantive in nature. Like the attorney's fees provision in \textit{Bradley}, the TVPA merely provides an additional basis for liability that was embodied in already existing law. In \textit{Bradley}, the fee award had a common-law basis; in the TVPA, the cause of action existed under the Alien Tort Claims Act.\textsuperscript{123} Finally, both the TVPA and the regulation in \textit{Bradley} were ambiguous on the subject of retroactivity, whereas the statutory language and legislative history in \textit{Bowen} were indicative of congressional intent. These facts suggest that the TVPA should be subject to scrutiny as outlined by the \textit{Bradley} court.

\section*{B. Bases for Retroactive Application of the TVPA}

\subsection*{1. Applying the TVPA Retroactively Would Not Create Manifest Injustice}

An examination of \textit{Marcos} in light of the \textit{Bradley} rule demonstrates the appropriateness of a ruling of retroactivity governing TVPA claims. Under the \textit{Bradley} presumption, the TVPA properly applies to \textit{Marcos} since the statute's legislative history does not evince an intent for prospective application only. Further, using the three-part test in \textit{Bradley}, no manifest injustice results from applying the statute retroactively to \textit{Marcos}.

The first factor in determining manifest injustice is concerned with the public versus private nature of the dispute between the parties.\textsuperscript{124} This

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{121} \textit{Bradley}, 416 U.S. at 711.
\item \textsuperscript{122} Estrin, supra note 119.
\item \textsuperscript{123} Although only aliens are entitled to invoke the Alien Tort Claims Act, U.S. citizens may be able to base jurisdiction over torture claims against foreign defendants on general federal question jurisdiction. 28 U.S.C. § 1331 (1988). Cases arising under international law are within the jurisdiction of the federal courts. \textit{Restatement (Third) of Foreign Relations Law} § 111(2) (1987).
\item \textsuperscript{124} \textit{Bradley}, 416 U.S. at 718-19.
\end{enumerate}
\end{footnotesize}
factor weighs heavily in support of retroactivity where issues of important public policy or national concern, rather than mere private disputes, are involved. In the case of the TVPA, its provisions address a major area of concern for the United States: the protection of human rights throughout the world. To this end, the enactment of the TVPA promotes deterrence of torture and extrajudicial killing by providing a forum for prosecuting violators. The Marcos case involves more than just an isolated act of torture. It involves a pattern of torture and extrajudicial killing involving thousands of private citizens. Clearly, it is a case which involves a matter of tremendous public concern.

The disadvantaged parties in Marcos are private individuals who have suffered grievous harm in the hands of the Philippine government and its ruling family. The public's substantial concern for human rights outweighs the private concerns of the defendant. Accordingly, an assessment of the nature and identity of the parties points in favor of retroactive application of the TVPA.

The second consideration, the nature of the rights, is intended to guard against infringing upon rights that have "matured or become unconditional." This case does not affect any antecedent rights vesting prior to the enactment date. No one, including the defendant, has a guaranteed right to commit torture with impunity. The TVPA merely expands the remedy previously available under the Alien Tort Claims Act to include both aliens and U.S. citizens. There is no matured or unconditional right which the defendant would lose through retroactive application of the Act.

The third criterion, the nature of the impact of the new law upon existing rights, addresses the possibility that new and unanticipated obligations may be imposed upon a party without notice or an opportunity to be heard. The issue is whether the new obligation imposed by the statute, if known, would have caused the defendant to alter his conduct.

The TVPA does not impose any new or unanticipated obligations upon any party in this case. Nor can it be seriously maintained that Marcos would have altered his conduct in light of the TVPA had he known of its

125 Id. at 717-18.
126 See, e.g., DeGurules v. Immigration and Naturalization Service, 833 F.2d 861, 863 (9th Cir. 1987) (noting that immigration policy is a matter of great national concern); Stender, 780 F. Supp. at 1307 (stating that remedying discrimination and promoting equality through the Civil Rights Act is of great public concern).
127 Bradley, 416 U.S. at 720.
128 See, e.g., Campbell v. United States, 809 F.2d 563, 575 (9th Cir. 1987).
129 Bradley, 416 U.S. at 721.
possible application at the time, judging from the pattern and gravity of the torturous acts committed during his regime. The fact that torture is a flagrant human rights violation should have come as no surprise. The Philippine Constitution prohibits torture and provides that the Philippines "adopts the generally accepted principles of international law as part of the law of the land." Clearly, the defendant had a legal obligation not to engage in torture even prior to enactment of the TVPA, yet he pursued his course of conduct with conscious knowledge of its potential for liability. Thus, under the Bradley criteria, retroactive application of the TVPA is appropriate in the Marcos case.

2. The TVPA Does Not Alter Substantive Rules of Conduct

The substantive/non-substantive distinction in statutes provides a basis by which to determine the TVPA’s application to pending cases. The court in Weise v. Syracuse University utilized this distinction in disallowing retroactivity of an amendment that imposed new substantive requirements and thereby "create[d] new rights where none had previously existed." The same court in an earlier case had held that retroactive application was proper where the amendment provided a new forum for the enforcement of pre-existing rights. By analogy, the TVPA provides a forum for litigants whose suits arise from acts that occurred abroad. It does not change the substantive law that existed before its enactment. As a jurisdictional statute, the TVPA is essentially non-substantive.

A statute applies retroactively if it relates to modes of procedure and does not otherwise alter substantive rights. In Denver R.G.W.R.R. v. Brotherhood of R.R. Trainmen, the court determined the applicability of a statute that expanded venue and found that it was completely procedural because it did not change the substantive law applicable to the suit. The court held that absent a contrary indication by Congress or any procedural

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130 1973 PHIL. CONST., art. II, § 3. The same text from the Marcos-era Constitution appears in art. II, § 2 of the 1987 Philippine Constitution. In Mejoff v. Director of Prisons, 90 Phil. 70 (1951), the Supreme Court of the Philippines held that international law is part of the law of the Philippines and includes such principles as enumerated in the Universal Declaration of Human Rights approved by the United Nations in 1948.

131 Weise v. Syracuse University, 522 F.2d 397, 410 (2d Cir. 1975).


134 Friel, 751 F.2d at 1039.
prejudice to the parties, the amendment should apply. Further, the First Circuit has held that "where Congress has expanded the jurisdiction of the courts in response to a perceived gap in a statutory jurisdictional scheme, it is proper . . . to apply" the presumption of retroactivity. Thus, insofar as the TVPA expands federal court jurisdiction by removing an ambiguity in the jurisdictional scheme, it must be held to be retroactive.

Besides being a jurisdictional statute, the TVPA can be construed as a codification in response to a perceived need to clarify existing law. Enactment of the statute was an explicit reaction to the concurrence by Judge Bork in Tel-Oren, contending that a cause of action must be expressly conferred by international law before a plaintiff can bring suit under the Alien Tort Claims Act. The TVPA addressed this concern by reaffirming the Filartiga principle that international law itself provides a right to a private remedy. To the extent that the TVPA was a pre-emptive strike against Judge Bork's cause-of-action theory, the statute did not make a substantive difference in enforceable rights and was primarily preventive in effect. As a mere codification of pre-existing law, therefore, the TVPA should be allowed retroactive application.

3. The TVPA Should Be Applied Retroactively Based on Rules of Statutory Construction and Principles of Equity

Because the TVPA is silent on retroactivity and legislative history is inconclusive on its application to pending cases, courts may rely on other statutory interpretation devices in construing legislative intent. A common approach is to consider the purpose of the legislative act as a whole to determine if an intent to apply the act retroactively may be inferred. A statute that was enacted to clarify or restore an existing law may be construed as indicative of legislative intent to support retroactive application.

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137 S. Rep. No. 249 at 4-5; see generally Tel-Oren, 726 F.2d at 798-823.
139 See Mozee v. American Commercial Marine Serv. Co., 963 F.2d 929, 939 (7th Cir. 1992) (noting that the retroactive provision in Bradley was a "mere codification of the law as it existed prior to its enactment").
141 Lussier, 904 F.2d at 666.
Unlike the 1991 Civil Rights Act, which engendered debate on the restorative purpose of the Act, the TVPA was unchallenged in its characterization as a statute clarifying existing law. Proponents of prospective application of the Civil Rights Act have urged that in changing the standards and penalties for discriminatory employment practices, the Civil Rights Act has the substantive effect of an *ex post facto* law, that is, it punishes conduct that was not unlawful at the time of occurrence. By contrast, the TVPA does not alter the legal consequences of acts that occurred prior to its passage because the unlawfulness of the acts of torture and extrajudicial killing has long been established.

Courts may discern an intent to apply the statute retroactively when limiting it to prospective application would render it ineffective as to defeat its basic purpose. In the case of the TVPA, enactment was deemed necessary in order to correct the ambiguity of the centuries-old Alien Tort Claims Act. The legislative record of the TVPA contains numerous references to its purpose of clarifying existing law, evincing Congress' intent to make explicit that a means of civil redress exists for victims of torture. Accordingly, the TVPA was designed as specific and narrowly drawn legislation providing a strong deterrent against torture. If the primary aim of the statute is to be given legal effect, courts must allow its retroactive application.

An important canon of statutory construction requires that statutes that interfere with antecedent rights should not be given retroactive application unless the legislature clearly intended this effect. Nobody can argue that a person had a pre-existing right to commit torture and extrajudicial killing whether under Philippine law, United States law or international law. *Marcos* is distinguishable from *Jackson*, which found that it was fundamentally unfair to unexpectedly deprive a foreign state of its grant of immunity. At no time could Marcos claim reliance on immunity because he was amenable to suit under both the Alien Tort Claims Act and

142 Opponents of the TVPA's passage challenged it on other grounds such as inappropriateness of forum and difficulties with management of foreign policy. See Minority Views of Messrs. Simpson and Grassley, S. Rep. No. 249 at 13-15.
144 E.g., United States v. Northeastern Pharmaceutical & Chem. Co., 810 F.2d 726, 733 (8th Cir. 1986), cert. denied, 484 U.S. 848 (1987) ("In order to be effective, CERCLA must reach past conduct").
147 Id.
general federal question jurisdiction even prior to the TVPA's enactment. It is hardly conceivable that the defendant's conduct would have differed had he known that there was yet a third legal basis for bringing suit against him in U.S. courts. Marcos flagrantly committed the heinous acts in full awareness of the universal condemnation of torture according to established law.

Cases cited by the defendant in *Marcos* in arguing for prospectivity involved the application of legislation that diminishes property rights. In such cases, retroactivity may not be presumed because applying the change in the law would have resulted in unjustly depriving parties of rights that had matured. However, the defendant's interests in *Marcos* are not akin to a property right. Because Marcos did not have a pre-existing right to torture individuals, it cannot be claimed that applying the newly enacted law to the pending action would infringe upon any right of his that had matured. No rights were subject to deprivation in applying the TVPA retroactively in this case.

C. A Proposed Approach for Determining Retroactivity in TVPA Cases

The soundness of the *Bradley* decision supports its adoption in determining the retroactive application of the TVPA. However, this Comment's proposed framework would add a second prong to the *Bradley* approach. Instead of providing a presumption of retroactivity when the statute's application is determined not to result in manifest injustice, the next step would involve an equity determination.

Equity concerns underlie the debate on retroactivity. Potentially unjust results stemming from retroactive laws include thwarted expectations and deprivation of parties of notice. If these concerns are absent in retroactive application of a statute, then a court should apply the law to pending cases. Courts are hence able to make a reasoned judgment based on equity principles.

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149 See Defendant's Objection to and Motion to Strike Plaintiff's Second Amendment to Pre-trial Statements, *Marcos* (MDL No. 840); see also Bowen, 488 U.S. at 206-07 (noting that administrative authority to apply retroactive cost-limit rule would require health care providers to return reimbursement payments to the government); Security Industrial Bank, 459 U.S. at 79 (noting that retroactive application of lien avoidance statute would divest pre-existing property interests).

150 See *Bradley*, 416 U.S. at 720.

151 Opponents of laws with clear retroactive provisions have thus far unsuccessfully challenged their applicability on due process grounds. The lack of a constitutional basis for opposing retroactivity indicates that principles of equity may form the basis for a presumption against retroactivity. Estrin, *supra* note 119.

This approach naturally involves making a distinction between substantive statutes, which apply prospectively only, and remedial or procedural statutes, which apply retroactively. The predictability of the outcome is based on the premise that statutes that affect substantive rights are more likely to cause unfair surprise to parties who engaged in pre-Act conduct, than a statute like the TVPA, which merely confirms original expectations. Because the TVPA affords a remedy for an old wrong and does not change the underlying legal obligation not to commit torture, retroactive application is unlikely to produce an inequitable result.

In an equity determination, any disappointment of private expectations must be balanced against the public interest in enforcement of the statute. Defendants in TVPA claims may argue that they did not anticipate being haled into court in the United States. However, this contention ignores the fact that the substantive obligation not to commit torture never wavered, and therefore, regardless of the forum, defendants could not have reasonably relied on expectations that they were immune from suit for their violative acts. Torture with impunity is not a valid expectation interest. The public interest in deterring and punishing gross human rights violations greatly outweighs a minimal impact on the rights of defendants.

Thus, while equity principles prohibit applying a statute retroactively to punish conduct if the conduct was legal when it occurred, such is not the case in TVPA claims. As demonstrated in Marcos, retroactive application of the TVPA does not alter the legal consequences of acts that preceded the statute. Because torture and extrajudicial murder have been regarded as violations of the law of nations for decades, the TVPA can and should apply to claims for torture that occurred prior to the passage of the Act.

CONCLUSION

Since Supreme Court precedents are conflicting and the TVPA is silent as to its retroactive application, the courts need to make a clear directive on this issue. Courts should focus on the principles espoused in Bradley as well as on equity concerns which underlie the retroactivity debate. The distinction between the substantive and non-substantive nature of statutes should also factor into the determination of retroactivity of the TVPA.

153 Demars, 907 F.2d at 1240.
Application of the Torture Victim Protection Act to pending cases does not implicate any of the potential dangers associated with retroactivity. Because no pre-existing right to torture nor immunity from suit exists, the imposition of the TVPA does not itself upset settled expectations nor deprive parties of notice. The statute is primarily procedural, in providing torture victims a forum in federal courts after they have exhausted domestic alternatives. In its enactment, Congress has stated that it was reaffirming principles embodied in already existing law. Thus, the TVPA should apply retroactively if it is to achieve its stated objectives. Sound legal bases and principles of justice compel this conclusion.