GANDHI'S NIGHTMARE: BHOPAL AND THE NEED FOR A MINDFUL JURISPRUDENCE

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ABSTRACT

For decades, activists and academics have been lamenting the disparate impact of global environmental decay on populations less endowed with legal resources. However, the implicit biases of legal theory itself remain unchallenged even when global resource disparities are addressed. Little attention has been given in transnational jurisprudence to how the thought sub-structures of modern legal theory contain dispositions that advantage privileged interests and hamper transnational environmental justice efforts.

How can transnational jurisprudence change to become more mindful of the environmental impacts disproportionately experienced by the disempowered, and what conception of global society shall the law embody such that it earns the voluntary submission of the people? We explore these questions with a speculation on how Gandhi's thought applies to transnational environmental jurisprudence. Gandhi's thought contains four components that contain the necessary ingredients to evaluate the dominant frames that debilitate global environmental justice efforts. First, Gandhi presented his own construction of the individual's relationship to the physical and social environments. Second, Gandhi's thought defines the relationships between societies in a way that is free of Western assumptions of global governance. Third, his thought contains a critique of industrialization and presents a powerful alternative. Fourth, his thought contains a reconstruction of the purpose and function of law and legal systems for a world in which "progress" includes social equality and environmental protection. Comprehensively, Gandhi's thought reinvigorates a decayed relationship between global environmental justice and transnational environmental jurisprudence by simultaneously redefining the human-environment relationship, legal theory, and dominant Western assumptions of the relationships between nations.

We directly apply Gandhi's thought to the case law that resulted from the Bhopal chemical disaster, which is widely considered the worst industrial disaster in world history. Applying Gandhi's thought to the Bhopal cases is useful for two reasons. First, the Bhopal cases contain several core legal doctrines that appear regularly in transnational cases. Second, there is a profound power imbalance between the civilians and the corporation that highlights the case's relevance to global environmental justice. Through our analysis of the legal principles and the parties' arguments in

this case law, we illustrate our conception of a mindful jurisprudence of the transnational environment.

> ***"I should not care for the asphyxiating gases capable of killing masses of men at a time[2]. . . Asphyxiating gas and such other abominations have not advanced us by an inch."[3] —Mahatma Gandhi***

I. INTRODUCTION

Bhopal resident Rashida Bee described the night of December 3, 1984, as horrific and confusing, filled with suffering people who were "begging to die."[4] That night, a sense of doom fell over her, as if an unimaginable horror was about to strike and there was no escape from its inevitability. Her heart began to race as she felt a terrible sting in her eyes. She quickly closed them, and when she finally opened her eyes, she saw people choking and falling down all around her in the streets. People were in a state of panic. A large cloud of poison had traveled from a nearby pesticide plant and into their neighborhoods. They were trapped and unable to assume any control over their circumstances. Rashida lost six family members that night and in the aftermath of the Bhopal tragedy.[5]

The night of December 3, 1984, was a living nightmare for those like Rashida Bee who suffered through this disaster. It also was a nightmare for the ghost of Mahatma Gandhi. A man who dedicated virtually his entire adult life to the implementation of non-violence and love into the fabric of social life, Gandhi was uniquely sensitive to the oppressive qualities of the modern regimes of his time. His campaigns of non-cooperation against British rule are legendary, and his mobilization of masses of people to resist oppression has inspired people to challenge injustices around the world. However, what is most insidious about the Bhopal aftermath is the manner in which existing laws were manipulated by the state and its courts to increase short-term convenience to the government and corporation at the expense of the long-term well-being of those who were poisoned. To many in the legal community, the Bhopal jurisprudence was a breakdown in the court's ability to manage conflict. For the victims, the Bhopal cases were a breach of justice that has never been remedied. The Bhopal disaster was Gandhi's Nightmare.

A. The Facts

On December 3, 1984, the largest industrial disaster in the world (in terms of number of fatalities) occurred in Bhopal, India.[6] An American corporation named Union Carbide Corporation ("Union Carbide" or

2. 67 *Collected Works of Mahatma Gandhi* 184–185, GANDHISERVE FOUND, http://www.gandhiserve.org/e/cwmg/cwmg.htm [hereinafter *CWMG*].
3. *Id.* at 13.
4. *Seconds From Disaster: Bhopal Nightmare* (National Geographic Channel television broadcast 2011).
5. *Id.*
6. DOMINIQUE LAPIERRE AND JAVIER MORO, FIVE PAST MIDNIGHT IN BHOPAL: THE EPIC STORY OF THE WORLD'S DEADLIEST INDUSTRIAL DISASTER (Hachette Digital, Inc. 2009).

UCC) owned a subsidiary named Union Carbide India Limited (UCIL). UCIL's pesticide plant leaked methyl isocyanate, which led to thousands of deaths that night and tens of thousands more subsequently. Many theories have arisen about the cause of the gas leak. However, it is clear that substandard safety measures at the plant allowed water to enter the methyl isocyanate (MIC) storage tank, causing an exothermic reaction to occur and the tank to explode.[7] UCC maintained that water entered the tank due to sabotage by a disgruntled employee at the plant.[8] Union Carbide also claimed that safety measures were up to date and functional at the time of the leak.[9] Research into the industrial disaster has found that preceding the leak, Union Carbide ignored many technological and safety failures.[10] These failures included the unsafe storage of large amounts of MIC, a "'pipe washing' procedure" that resulted in water entering the MIC tanks, reduced employee numbers in order to save money, and the lack of emergency evacuation plans.[11] Although scientists are studying the effects of the gas leak, Union Carbide never released information about the composition of the gas. The Indian government does not financially support research into this topic, and international scientists who seek information already gathered by the government on this topic encounter great resistance.[12]

The legal aftermath seems as chaotic as the physical disaster itself. The government of India passed a legislative act (The Bhopal Act[13]) that gave the Union of India the sole ability to represent the victims, and provided the appearance that the government was doing its part to serve the people of India. Despite India's attempt to restrict civil litigation, many separate lawsuits were filed in India.[14] However, victims were rarely mentioned in these suits, despite such a large death toll. Instead, courts focused on the appropriate forum to try the case, attorneys' fees, and

7. *Seconds From Disaster: Bhopal Nightmare*, *supra* note 4.
8. *Id.* Employees of Union Carbide responded to the remarks about the Bhopal disaster by claiming that it was the result of a foreign saboteur. Wil Lepkowski, *The Restructuring of Union Carbide*, *in* LEARNING FROM DISASTER: RISK MANAGEMENT AFTER BHOPAL 22, 25 (Sheila Jasanoff ed., 1994).
9. UCC set up a website to answer questions about the disaster; this website includes UCC's claims of sabotage and an explanation of the plant's safety system. *Frequently Asked Questions regarding the Bhopal Tragedy of 1984*, BHOPAL INFO. CENTER, www.bhopal.com/faq (last visited Nov. 2013).
10. Paul Shrivastava, *Societal Contradictions and Industrial Crises*, *in* LEARNING FROM DISASTER, *supra* note 8, at 254; *Seconds from Disaster: Bhopal Nightmare*, *supra* note 4.
11. *Id.* at 254–255.
12. BHOPAL: THE SEARCH FOR JUSTICE (White Pine Pictures 2004).
13. "In 1985, the Bhopal Gas Leak Disaster (Processing of claims) Act was passed." Sudhir K. Chopra, *Multinational Corporations in the Aftermath of Bhopal: The Need for a New Comprehensive Global Regime for Transnational Corporate Activity*, 29 VAL. U. L. REV. 235, 250 n.64 (1994) (citing UPENDRA BAXI & THOMAS PAUL, MASS DISASTERS AND MULTINATIONAL LIABILITY: THE BHOPAL CASE 11–16 (1986) [hereinafter MASS DISASTERS]). For further records of Bhopal litigations, see UPENDRA BAXI, INCONVENIENT FORUM AND CONVENIENT CATASTROPHE: THE BHOPAL CASE (1986) [hereinafter INCONVENIENT FORUM]; UPENDRA BAXI & AMITA DHANDA, VALIANT VICTIMS AND LETHAL LITIGATION: THE BHOPAL CASE (1990) [hereinafter VALIENT VICTIMS].
14. In the Indian Supreme Court, the official death toll was set at three thousand. BHOPAL: THE SEARCH FOR JUSTICE, *supra* note 12.

whether or not plaintiffs had a right to sue. To end litigation in India, the Supreme Court of India approved a settlement between the Union of India and Union Carbide for $470 million.[15] However, the settlement figure does not cover the costs of the disaster, which include ongoing multigenerational medical care, care for widows and orphans, lost wages, emotional and psychological distress, and environmental clean-up. Victims' groups lamented that the Indian government settled the claim without much consideration of the victims' additional demands and concerns, and that The Bhopal Act precluded any subsequent litigation in India.

After the $470 million settlement with the Indian government, Union Carbide sold parts of UCIL to other companies including, but not limited to, Ralston Purina, Thone-Poulenc, and Praxair.[16] Eventually, Union Carbide was purchased by Dow Chemical Company and is now a wholly owned subsidiary of Dow.[17] Dow denies any responsibility to the Bhopal victims, citing the fact that it acquired Union Carbide long after the disaster.[18]

Although an exact number is not available, the most accurate counts claim that approximately 3,500 people died immediately, and ten thousand people died within the first month after the disaster.[19] A $470 million settlement sounds sizable, but when divided among the tens of thousands of victims, compensation amounted to approximately five hundred dollars per person.[20] Moreover, many Indian legal elites believed that the Bhopal case was too complex to be handled properly in Indian courts.[21] Therefore, there was great support among the Indian legal elite for pursuing this case in the United States.[22]

B. Scholarly Analyses of the Legal Aftermath

Professor Marc Galanter attempted to explain the legal dysfunction that ensued in the aftermath by examining the legal response in a comparative context. He examined the capacities of the Indian and American tort systems and highlighted the shortcomings of the Indian system. Galanter noted that the Indian tort system's deficiencies led victims to sue in U.S. courts. Galanter discussed five reasons why most litigation surrounding the Bhopal disaster occurred in the United States instead of India. First, because most lawyers practice individually in India, there is not a large incentive to specialize in a particular type of law,[23] such as

15. *See* Union Carbide Corporation v. Union of India, Civil Appeal Numbers 3187-88 of 1988, order dated Feb. 14, 1989, at 2, *in* VALIANT VICTIMS, *supra* note 13, at 527–28.
16. Lepkowski, *supra* note 8, at 22, 26. "Interestingly, breaking the company down and selling pieces to other companies could have been avoided if Union Carbide settled with the Indian government for $600 million early in the litigation process, an amount much higher than the eventual settlement of $470 million." *Id.*
17. UNION CARBIDE CORP., http://www.unioncarbide.com/ (last visited April 3, 2014).
18. BHOPAL: THE SEARCH FOR JUSTICE, *supra* note 12.
19. *Id.*
20. *Id.*
21. Marc Galanter, *Legal Torpor: Why So Little Has Happened in India After the Bhopal Tragedy*, 20 TEX. INT'L L.J. 273, 287 (1985).
22. *Id.*
23. *Id.* at 279.

environmental torts or multinational corporate law. Second, there are no juries in civil cases, and there is no expectation of compensation for injuries through the Indian legal system.[24] Third, the number of courts in India is approximately one-tenth of the number of courts in the U.S.[25] Fourth, at the time of the accident, India's tort law was rarely used; consequently, not much development had occurred in tort doctrine. Fifth, long delays were common in the courts, even when the cases were not complicated.[26] Therefore, Galanter concurred with many of the Indian legal elite: the Bhopal litigation was too large and complicated for the Indian legal system and it would be more efficient to try the case in the United States.

Scholars also have criticized the Indian government for supporting corporate crime by privileging the powerful and wealthy at the expense of the masses in India.[27] For instance, Baxi discussed the ways in which the Bhopal disaster justifies criminality. Baxi referred to the industry-based crime in Bhopal as "progressive" criminality to distinguish it from the "regressive" criminality of other behaviors considered unfit for civil society. According to Baxi, the idea of penalizing "progressive" criminality is dismissed by powerful parties under a belief system that prioritizes a belief in a Weberian progression of developmental rationality.[28] As a result, the 'law and development' paradigm that underlies "progressive" criminality forces individuals to believe that the disaster in Bhopal was simply an unfortunate episode that did not warrant a criminal sanction for the responsible organizations.

Therefore, the Bhopal disaster not only was a tragedy due to loss of human life; it also reflected the inequalities and injustices of the modern political economy.[29] The toleration of progressive criminality is the result of a hegemonic belief system that buttresses dominant interests. According to Baxi, alternative views, such as feminist or critical race viewpoints, threaten dominant interests and are often stifled. As a result, present democratic practices are destroyed by organized white-collar crime and the deviance of the privileged class, and despite Gandhi's example, the aftermath of the Bhopal tragedy illustrated a protection of corporate vio-

24. *Id.* at 276–280.

25. As a result, the court system is not able to handle the rare tort cases that are brought in India, and tort cases are unlikely to be successful. Marc Galanter, *The Transnational Traffic in Legal Remedies, in* LEARNING FROM DISASTER: RISK MANAGEMENT AFTER BHOPAL, *supra* note 8, at 133, 145.

26. *Id.* at 149. Furthermore, Galanter noted that using courts to curb safety issues is both expensive and inefficient. Victims are awarded compensation long after a disaster, and there is not much preventive value.

27. *See* UPENDRA BAXI, INHUMAN WRONGS AND HUMAN RIGHTS (1994); *see also* JAMIE CASSELS, THE UNCERTAIN PROMISE OF LAW: LESSONS FROM BHOPAL (1993).

28. UPENDRA BAXI, MAMBRINO'S HELMET?: HUMAN RIGHTS FOR A CHANGING WORLD 56 (1994) [hereinafter MAMBRINO'S HELMET?].

29. *See* INCONVENIENT FORUM, *supra* note 13; *see also* MASS DISASTERS, *supra* note 13; VALIENT VICTIMS, *supra* note 13. For comparisons of corporate violence case law in India, see *M.C. Mehta v. Union of India*, [1986] S.C.R. 819 (India) (discussing state oversight and strict liability for industrial activity).

lence rather than an opportunity to legally address the underlying pervasive social inequality.[30]

Most recent scholarship has reiterated Baxi's conclusions about the Bhopal disaster. Consider the following facts about the Bhopal disaster written by Cooper:

> "1. Twenty-two thousand people have died either in the immediate aftermath of the toxic release or in the years since;
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> 2. one hundred thousand survivors suffer chronic and serious health problems because of their exposure to the toxic release;
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> 3. the site of the plant has not been cleaned up, so its toxins continue to pollute the environment and the water;
>
> 4. no one has been held to be responsible for what happened in Bhopal;
>
> 5. as of September, 2004, only about $140 million of the $470 million settlement paid by Union Carbide Corporation (UCC) had been paid to actual victims."[31]

Cooper argued that Bhopal victims "were simply re-victimized by a legal system, or two legal systems, that failed them."[32] Cooper further explained that:

> "The adversarial process did not work well for victims in Bhopal. This is evidenced by the fact that twenty years after the disaster there were thousands of victims who had yet to be compensated. In addition, there are questions as to whether any system has been created to treat victims with continuing medical problems from the release of the chemicals that night or to clean up the site."[33]

Overriding retributive or utilitarian principles attempt to encourage general or specific deterrence, but Cooper challenged this approach by asking "whether our American legal system, based primarily on either retributive or utilitarian theories of justice, can lead to justice for victims in this context."[34] Cooper concluded that "[w]ithout question, any process that considers the questions posed by Restorative Justice will be a much better process for bringing justice to victims of disasters such as Bhopal."[35] Additionally, it was noted that "[u]nderlying Restorative Justice are the values of interconnectedness and respect."[36]

Similarly, Crowe explained that the Bhopal chemical disaster was one of two cases "in which a foreign corporation caused large-scale environmental damage [and] demonstrate[d] the current application of forum

30. *Id.* at 30.
31. Davalene Cooper, *Thinking About Justice "Outside of the Box": Could Restorative Justice Practices Create Justice For Victims of Int'l Disasters?*, 42 NEW ENG. L. REV. 693, 693–94 (2008).
32. *Id.* at 693.
33. *Id.* at 698.
34. *Id.* at 693.
35. *Id.* at 700.
36. *Id.* at 696.

non conveniens law."[37] Crowe argued that "[i]f the case had not been dismissed from United States federal district court on forum non conveniens grounds, these impediments may have been mitigated."[38] Therefore, Crowe stated that, "The current formulation of United States forum non conveniens law is inadequate when applied to large-scale environmental disasters."[39]

Reiterating Crowe's arguments, Rolle extended the appropriate forum analysis to argue for a new legal order for transnational environmental disasters. Rolle stated: "Rather than focusing on the doctrines that lie in the way of a plaintiff's success, attempting to find one 'appropriate' domestic forum, law, or corporate protection, the international community should work toward creating a new, separate and distinct forum."[40] As we will illustrate, our analysis of Bhopal jurisprudence using Gandhi's thought furthers the call from prior scholars that new thinking is needed for managing transnational environmental disasters, but we add the demand that necessary changes cannot arise without including the voices of the survivors themselves.

Many scholars have called for structural changes in the legal system to handle the problems in our transnational regime that led to the Bhopal disaster. Some scholars have called for using the International Criminal Court, while others have called for the formation of international treaties between nation-states to develop an international tort system. Although we admire such structural efforts to create more responsive legal regimes, such discussion often devalues the efforts of the Bhopal victims, who overwhelmingly have chosen non-cooperation over systemic reform.[41] We present an analysis skeptical of the notion that a responsive international legal system would be created by nation-states that already have paid such little attention to the voices of disaster survivors. In such a system, the millions of disempowered people in the world still are likely to have limited control over their own destinies and well-being. Therefore, in this Article, we attempt not to present a reform recommendation for policy analysts; instead, we aim to illustrate that, from the standpoint of the suffering masses, current disaster jurisprudence is so broken that without serious change in transnational legal thought, many of the disempowered in Bhopal will continue to view Satyagraha (non-violent resistance) as a necessary mechanism to seek dialogue.

37. Kathleen Crowe, *Cleaning Up the Mess: Forum Non Conveniens and Civil Liability for Large-Scale Transnational Environmental Disasters*, 24 GEO. INT'L ENVTL. L. REV. 449, 453 (2011–2012).

38. *Id.* at 453.

39. *Id.* at 451.

40. Mary Elliot Rolle, *Unravelling Accountability: Contesting Legal and Procedural Barriers in International Toxic tort Cases*, GEO. INT'L ENVTL. L. REV.,135, 201 (2002–2003).

41. For a description of various strategies and tactics chosen by Bhopal activists and advocates, see BHOPAL: THE SEARCH FOR JUSTICE, *supra* note 12.

II. A SUMMARY OF THE BHOPAL LITIGATIONS

The legal torpor[42] following the Bhopal disaster is significant for both its failure to benefit the victims and its simultaneous protection of government and corporate interests. A close doctrine-by-doctrine examination of the cases in the aftermath of the Bhopal disaster reveals clear and consistent rejections of victims' claims for redress. We argue these rejections originate in part from underlying conceptual architecture in legal thought that privileges modern notions of industrial "progress," giving victims few realistic avenues of argumentation. This inherently biased architecture of legal thought not only prevents courts from being realistic avenues for redress but also makes courts a virtually impossible arena in which to establish any robust and defensible form of transnational corporate social responsibility.

Strangely, although Bhopal was the worst industrial disaster in history and occurred in India, there has been no scholarship to this date that has extensively examined this disaster jurisprudence in light of one of India's most revered social architects: Mahatma Gandhi. Victims' movements have employed Gandhi's constructions of non-cooperation and public protest to fuel the movement for justice in Bhopal[43]; however, Gandhi—a trained lawyer with his own conceptions of law, economy, and the state—has not been a relevant figure inside of legal debates.[44] Furthermore, with the exception of the social movement for justice in Bhopal (itself a constantly marginalized effort), there is no serious effort by Indian or American lawyers, judges, politicians, or academics to utilize Gandhi's thought to remedy and prevent disasters.[45]

Gandhi, however, was a central figure in the development of a modern independent India and in social critique worldwide, particularly within peace movements and non-violent resistance campaigns (Satyagrahas). His life and writings are full of explanations of modern civilization's oppressive qualities and the exploitative characteristics of industrialization. His thought even influences modern corporate social responsibility discourse in India. Therefore, Gandhi's influence to date and the need to engage his thought in light of the Bhopal aftermath warrants attention.

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42. The term "legal torpor" is adopted from Marc Galanter, *supra* note 21, at 273–94 (1985). Legal Torpor refers to the lack of action and slow and ineffective pursuit of justice following the tragedy.
43. *See* Raymond Ronamai, *Bhopal Gas Tragedy Victims Protest before IOA President*, INT'L BUS. TIMES, (Apr. 10, 2012), http://www.ibtimes.co.in/articles/326078/20120410/bhopal-gas-tragedy-victims-protest-london-olympics.htm.
44. *See* Nehal A. Patel & Lauren Vella, *A Mindful Environmental Jurisprudence?: Speculations on the Application of Gandhi's Thought to* MCWC v. Nestlé, 30 PACE ENVTL. L. REV. 1116 (2013).
45. Gandhi, a practicing lawyer in early adulthood, wrote extensively about industrialization & law and influenced culture and social movements, both internationally and in the American Civil Rights Movement. Therefore, we found it surprising that his influence is absent in legal studies. *See* AJIT ATRI, GANDHI'S VIEW OF LEGAL JUSTICE (2007); V.R. KRISHNA IYER, JURISPRUDENCE AND JURISCONSCIENCE A LA GANDHI (1976); Venkatraman Subray Hedge, Gandhi's Philosophy of Law (1977) (Revision of author's thesis, 1983).

Before applying Gandhi's thought to the Bhopal cases, we summarize the American jurisprudence arising from the Bhopal disaster. In this section, we divide the U.S. cases into three main groups: the *Sahu* cases, which discuss the corporate veil; the *Chesley* cases, which discuss *parens patriae* and *forum non conveniens*; and the *Bano* and *Bi* cases, which discuss the fugitive disentitlement doctrine, doctrine of standing, and the continuing tort doctrine.

A. The Sahu *Cases: The Corporate Veil*

In *Sahu v. Union Carbide*,[46] the plaintiffs filed a class action complaint against defendants UCC and then-Chief Executive Officer Warren Anderson. The plaintiffs argued that the defendants were responsible for the actions of a subsidiary, UCIL, for environmental pollution surrounding the UCIL plant in Bhopal.[47] *Sahu* focused on similar legal principles as other Bhopal cases, but is unique in its emphasis on "the corporate veil."[48] In order to pierce the corporate veil, and thereby hold individual officers and parent companies liable, two conditions must be met.[49] First, plaintiffs must show "that the owner exercised complete domination over the corporation with respect to the transaction at issue."[50] Second, the plaintiffs must establish "that such domination was used to commit a fraud or wrong that injured the party seeking to pierce the veil."[51]

The plaintiffs argued that the first condition of UCC's "domination" of UCIL was established by UCC's status as the parent company of UCIL. On the second condition of "fraud or wrong," they argued that UCC "was a direct participant and joint tortfeasor in the activities that resulted in the environmental pollution."[52] To satisfy the second condition, the plaintiffs referred to the UCIL Capital Budget Proposal and claimed that UCC collaborated with UCIL to worsen and hide the pollution by transferring "inadequate technology to UCIL."[53]

The defendants made four points to show that the plaintiffs had failed to provide valid reasons for piercing the corporate veil. First, the defendants noted that after the gas leak, UCIL was sold and renamed Eveready Industries India Limited (EIIL).[54] Defendants argued that in order to pierce the corporate veil, there must be a "need to prevent fraud or achieve justice because EIIL is a 'financially viable corporation, fully capable of responding to plaintiffs' claims.'"[55] The defendants claimed, therefore, that there was no need to prevent fraud by UCC or achieve justice against UCC because EIIL was an independent corporation, and

46. For the related proceeding, see Sahu v. Union Carbide Corp., 418 F. Supp. 2d 407 (S.D.N.Y. 2005).
47. *Id.* at 409.
48. *Id.* at 409–416.
49. *Id.* at 412.
50. *Id.*
51. *Id.*
52. *Id.* at 409.
53. *Id.* at 412.
54. *Id.* at 409. Eventually, EIIL was sold to Dow Chemical. *See* UNION CARBIDE CORP., *supra* note 17.
55. *Sahu*, 418 F. Supp. 2d at 409.

UCC no longer had a connection to the corporation.[56] Second, the defendants argued that neither UCC nor Warren Anderson caused the pollution at the center of this case. Instead, they argued, that the pollution was caused by UCIL.[57] Third, the defendants argued that the plaintiffs could not corroborate the claim that UCC helped create or cover up the pollution. The defendants argued that the plaintiffs did not provide any records or witnesses illustrating corroboration by any UCC employee with employees of UCIL.[58] The court asserted that the Capital Budget Proposal was a UCIL document and therefore did not establish a connection between UCC and the disaster.[59] Fourth, the defendants argued that UCIL made independent decisions, such as budget proposals, and as a result UCC was not responsible for problems created by UCIL.[60] Consequently, the defendants argued that the plaintiffs did not satisfy necessary conditions to pierce the corporate veil.

The District Court held that UCC could not be considered a direct or joint tortfeasor. The court found that the document belonged to UCIL; therefore, UCC was not responsible for any inadequacies in the proposal, and the document could not be used as evidence that UCC helped hide the pollution problem.[61] However, the court also acknowledged that the plaintiffs would need more time to gather evidence on the corporate veil issue[62] and granted them "sixty days for additional discovery related exclusively to this issue."[63]

After the sixty-day period, UCC moved for summary judgment on the plaintiffs' veil piercing claim, arguing that the corporate veil could not be pierced for three reasons.[64] First, they argued that EIIL was able to respond to plaintiffs' claims as a party separate from UCC, since EIIL was fully capable of defending themselves and operating independently. Second, EIIL was financially independent, and therefore could not constitute part of UCC for the purposes of litigation.[65] Third, the plaintiffs had reasoned that UCIL merely changed its name to EIIL, and the defendants already argued in a prior hearing that UCIL was an entity separate from the parent corporation.

In the subsequent proceeding, the District Court ruled that although UCIL was UCC's subsidiary, the subsidiary-parent relationship *per se* does not establish culpability for UCC.[66] Citing *Maltz v. Union Carbide*,[67]

56. *Id.*
57. *Id.* at 409.
58. *Id.*
59. *Id.* at 413.
60. *Sahu*, 418 F. Supp. 2d at 409; *see also* Sahu v. Union Carbide Corp., 2006 U.S. Dist. LEXIS 84475, at *17 (S.D.N.Y. Nov. 20, 2006).
61. *Sahu*, 418 F. Supp. 2d at 412.
62. *Id.* at 410.
63. *Id.*
64. Sahu v. Union Carbide Corp., 2006 U.S. Dist. LEXIS 714, at *1–2 (S.D.N.Y. Jan. 9, 2006).
65. *Id.* at *2.
66. The procedural history of this case is more complex than our brief summary explains. In a subsequent hearing, the court of appeals vacated and remanded the district court's dismissal of the plaintiffs' corporate veil piercing claim for further proceedings. *See* Sahu v. Union Carbide Corp., 548 F.3d 59 (2d Cir. 2008). On re-

the court reasoned: "the mere establishment of a subsidiary, for the purpose of financial gain, in and of itself [does not] establish 'control' or 'domination' on the part of the parent." [68] Therefore, the court concluded that the second requirement of corporate veil piercing—using domination to commit a wrong—could not be met when such domination already failed to exist.[69]

B. *The* Chesley *Cases: Parens Patriae & Forum Non-Conveniens*

We summarize the Court of Appeals review of two issues in the *Chesley* cases: (1) whether the *parens patriae* doctrine precludes any party other than the Union of India to file suits on behalf of the victims, and (2) where the cases should be tried (*forum non-conveniens*).[70] In the following section, we briefly describe the *parens patriae* doctrine and provide a summary of *forum non conveniens* and the court's holding and reasoning.

1. *Parens patriae.*

The *parens patriae* doctrine originates from English common law and is Latin for "parent of the country."[71] Feudal kings exercised the doctrine to assert their power as guardians of the people.[72] In U.S. jurisprudence, courts traditionally have used *parens patriae* to assert the state's position as guardian of society's children and the doctrine "has had its greatest application in the treatment of children, mentally ill persons, and other individuals who are legally incompetent to manage their affairs."[73]

After the Bhopal disaster, the Indian state used *parens patriae* to monopolize standing to sue for the horrifying personal injuries suffered by its citizens. To consolidate government control over Bhopal's legal aftermath, the Indian Parliament incorporated the doctrine of *parens patriae* into the Bhopal Gas Leak Disaster (Processing of Claims) Act[74] on March 29, 1985 (also called the Bhopal Act).[75] The Bhopal Act grants the Indian government the "exclusive right to represent, and act in place of (whether within or outside India) every person who has made, or is entitled to make, a [Bhopal-related] claim."[76] In *Chesley v. Union Carbide Chemicals & Plastics Co.*,[77] the court noted that the Union of India used this Act to ar-

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mand, the district court held in favor of the defendants, as explained in the above text.

67. Maltz v. Union Carbide Chemicals & Plastics Co., 992 F. Supp. 286, 302 (S.D.N.Y. 1998).
68. Sahu v. Union Carbide Corp., 2006 U.S. Dist. LEXIS 84475, at *18 (S.D.N.Y. Nov. 20, 2006).
69. *Id.* at *16, *18.
70. Chesley v. Union Carbide Chems. & Plastics Co., MDL No. 626, 1993 U.S. Dist. LEXIS 18227 (S.D.N.Y. Dec. 27, 1993).
71. 7 WEST'S ENCYCLOPEDIA OF AMERICAN LAW 357 (2d ed. 2005).
72. *Id.*
73. *Id.*
74. Bhopal Gas Leak Disaster (Processing of Claims) Act, 1985, No. 21, Acts of Parliament, 1985 (amended 1992) [hereinafter Bhopal Act, 1985].
75. *See In re* Union Carbide Corp. Gas Plant Disaster at Bhopal, 809 F.2d 195, 197–98 (2d Cir. 1987).
76. Bhopal Act, 1985, § 3.
77. 1993 U.S. Dist. LEXIS 18227 (S.D.N.Y. Dec. 27, 1993).

gue that it acted as *parens patriae* on behalf of the victims, and no other party could represent the claimants because the Indian Parliament passed the Bhopal Act.[78] Subsequently, the court denied review to the plaintiff-victims who sued on their own behalf.[79]

2. *Forum non conveniens.*

The doctrine of *forum non conveniens* was discussed frequently in the *Chesley* cases.[80] Courts invoke *forum non conveniens* when there are "circumstances in which a court has the power to hear a case but, for reasons of justice or efficiency, should not do so."[81] To determine whether the plaintiffs' claims should be heard in U.S. courts, the United States Court of Appeals for the Second Circuit reasoned that the proper forum for a Bhopal-related claim could be identified by determining whether or not the Indian court system was capable of thoroughly and fairly processing such a comprehensive case.[82]

The plaintiffs argued that the Indian court system was not capable of handling such a complicated case.[83] They relied on Professor Marc Galanter's testimony, in which he stated four points: (1) the Indian tort system was underdeveloped; (2) there are fewer judges, per citizen, in India than in the United States; (3) specialization is rare among Indian attorneys, and as result, (4) there would be few Indian attorneys qualified to handle the complexity of the cases.[84]

The United States District Court for the Southern District of New York disagreed and held that the Indian court system was capable of processing the litigation, and it would be appropriate to try the case in India as opposed to the United States.[85] The court made two points to explain this holding. First, the court held that administration would be less burdensome in India because of the availability of the relevant material and necessary evidence within that country.[86] Second, the court concluded that

78. *Id.* at *2. "A related suit filed by the Union of India ("UOI"), which acted as *parens patriae* on behalf of the Bhopal victims, was later consolidated with the other Bhopal actions. UOI derived its authority to bring suit on behalf of the victims from the Bhopal Gas Leak Disaster (Processing of Claims) Act promulgated by the Parliament of India on March 29, 1985, and maintained throughout the litigation that petitioners were not entitled to represent the claimants." *Id.* "The Supreme Court of India upheld the constitutionality of UOI's claim of exclusivity in a decision that the Court of Appeals for the Second Circuit recently relied upon to deny individual Bhopal claimants access to United States courts." *Id.* at *2 n.1 (citing Bi v. Union Carbide Chems. & Plastics Co., 984 F.2d 582, 584–86 (2d Cir. 1993).

79. Bi v. Union Carbide Chems. & Plastics Co., 984 F.2d 582 (2d Cir.), *cert. denied*, 510 U.S. 862 (1993).

80. *Chesley*, 1993 U.S. Dist. LEXIS 18227, at *4.

81. STEPHEN C. YEAZELL, CIVIL PROCEDURE 203 (5th ed. 2000); *accord* Kathleen Crowe, *Cleaning Up the Mess: Forum Non Conveniens and Civil Liability for Large-Scale Transnational Environmental Disasters*, 24 GEO. INT'L ENVTL. L. REV. 449, 450 (2012).

82. *See In re* Union Carbide Corp. Gas Plant Disaster at Bhopal, 809 F.2d 195, 202 (2d Cir. 1987).

83. *In re* Union Carbide Corp. Gas Plant Disaster at Bhopal, India in December, 1984, 634 F. Supp. 842, 847 (S.D.N.Y. 1986).

84. *Id.* at 847–52.

85. *Id.* at 852.

86. *Id.* at 858.

"[n]o American interest in the outcome of the litigation outweigh[ed] the interest of India in applying Indian law and Indian values to the task of resolving this case."[87] Therefore, the court concluded that "[f]ar from exhibiting a tendency to be so 'inadequate or unsatisfactory' as to provide 'no remedy at all,' the courts of India appear to be well up to the task of handling this case."[88]

Finally, the Second Circuit denied the Bhopal victims' motions to recover attorney's fees and expenses in two different opinions[89] In the first opinion[90] the Second Circuit stated that due to the prior *forum non conveniens* dismissal of the case, it did not have subject matter jurisdiction to rule on the issue of attorney's fees.[91] In the second opinion,[92] pursuant to N.Y. Jud. Law § 475 (1983), the plaintiffs requested a determination of attorney's fees owed by defendants.[93] The Second Circuit ruled that the plaintiffs should have first tried their arguments in Indian courts.[94]

In summary, the Second Circuit dismissed the *Chesley* cases and consistently concluded that it did not have the jurisdiction to rule on *parens patriae, forum non-conveniens,* and attorney fees.

C. *The* Bano *&* Bi *Cases: Fugitive Disentitlement Doctrine, Doctrine of Standing, and the Continuing Tort Doctrine*

In this section, we will summarize the U.S. courts' analysis of three doctrines in the *Bano & Bi* cases: the fugitive disentitlement doctrine, standing, and the continuing tort doctrine, which includes a discussion of the statute of limitations.

Facts. In *Bano v. Union Carbide Corp.*,[95] the district court considered a consolidated action of 145 claims filed in U.S. courts by approximately 200,000 plaintiffs.[96] The court noted that the Indian government had filed "the same causes of action"[97] against Union Carbide in the District Court

87. *Id.* at 867.
88. *Id.* at 852. In a subsequent case, the court of appeals affirmed its prior holding that the United States federal court was an inconvenient forum. The court concluded that Indian courts were capable of processing the case, and that India was in a better position to preside over the case because the evidence was located there. The Court ordered that the cases be tried in India for two main reasons. First, American interests were outweighed by Indian interests in this case. Second, India's court system was capable of handling the complex Bhopal disaster litigation
89. Chesley v. Union Carbide Corp., 927 F.2d 60, 64 (2d Cir. 1991).
90. *In re* Union Carbide Corp. Gas Plant Disaster at Bhopal, 809 F.2d 195 (2d Cir. 1987).
91. *Id.* at 205. In a subsequent proceeding, the Second Circuit affirmed the district court's prior holding that it could not award the attorneys who represented the Bhopal victims any compensation because it lacked jurisdiction to rule on the matter. *See Chesley*, 927 F.2d at 69.
92. *Chesley*, 927 F.2d 60.
93. *Id.* at 61–62. "The district court denied the motions on the ground that it lacked subject matter jurisdiction in view of the prior *forum non conveniens* dismissal. Appellants contend here that the motions should have been heard pursuant to the district court's ancillary jurisdiction." *Id.* at 62.
94. *Id.* at 68.
95. No. 99 Civ. 11329(JFK), 2000 U.S. Dist. LEXIS 12326 (S.D.N.Y. Aug. 28, 2000).
96. *Id.* at *3.
97. *Id.* at *4.

of Bhopal, which "proceeded for two and a half years."[98] The court also noted that petitions were brought in India challenging the constitutionality of the Bhopal Act and the adequacy of the settlement in achieving just compensation for the victims.[99] As a result, plaintiffs in *Bano* also questioned the application of the Act, arguing that the Bhopal Act required the Indian Government "to obtain permission from foreign courts in order to act as exclusive representative of Plaintiffs in courts outside of India."[100]

For the tort claims litigated in *Bi v. Union Carbide Chemicals and Plastics Co. Inc.*,[101] Bi alleged serious injuries due to the contaminated water she used from a well that was located near the Bhopal plant.[102] Bi claimed that she had experienced "chronic abdominal pains, severe burning sensations in her stomach as well as all over her body and recurrent, bleeding rashes on her limbs ever since she moved" to Atal Ayub Nagar, the sector of Bhopal adjacent to the UCC plant.[103] Bi believed these illnesses were due to the water she was using from the well, which even had a "strong, noxious smell of chemicals with an oily layer on top."[104]

Greenpeace tested the water in the well Bi was using on November 29, 1999 and discovered that it was contaminated.[105] The plaintiffs claimed that UCC and CEO Warren Anderson created this contamination due to "recklessly dumping, storing and abandoning large quantities of highly toxic pollutants at its plant in Bhopal."[106]

1. Fugitive Disentitlement Doctrine.[107]

The Fugitive Disentitlement Doctrine (FDD) is "an equitable doctrine that limits access to the courts."[108] Under the FDD, "appellate courts have the authority to dismiss an appeal . . . when the party seeking relief is a fugitive from justice."[109] The appellate courts in *Bano* and *Bi* followed the reasoning in *Ortega-Rodriguez v. United States*[110] by applying a disentitlement theory[111] wherein "an escape 'disentitles the defendant to call upon the resources of the Court for determination of his claims.'"[112]

98. *Id.*
99. *Id.* at *6–7.
100. *Id.* at *30.
101. 984 F.2d 582 (2d Cir. 1993).
102. Bano v. Union Carbide Corp., No. 99 Civ.11329 JFK, 2003 WL 1344884, at *2 (S.D.N.Y. Mar. 18, 2003) ("Bi alleges personal injuries based on alleged suffering from various ailments which she attributed to contamination of the local well water near her home in Atal Ayub Nagar, located next to the Bhopal plant. Her home is approximately 400 meters (1,312 feet; approximately one quarter mile) from the perimeter compound of the plant.").
103. *Id.*
104. *Id.* (internal quotation marks omitted).
105. *Id.*
106. *Id.*
107. Bano v. Union Carbide Corp., U.S. Dist. LEXIS 12326 (S.D.N.Y. 2000).
108. *Id.* at *15.
109. *Id.* at *16.
110. 507 U.S. 234 (1992) (holding the fugitive disentitlement rule valid).
111. Bano v. Union Carbide Corp., U.S. Dist. LEXIS 12326 (S.D.N.Y. 2000) at *16.
112. *Id.*

In *Bano*, the plaintiffs invoked the FDD, arguing that the defendants had disregarded the criminal charges in India and therefore should not be allowed to invoke the law in the United States. Plaintiff cross-motioned to deny defendant's motion to dismiss plaintiff's claim on summary judgment.[113] The defendants responded that the FDD could not be applied to this case because Union Carbide is an American corporation and does not fall under Indian jurisdiction.[114] The District Court agreed. On appeal, the Second Circuit affirmed the district court's denial of the plaintiffs' cross-motion based on the FDD.[115] Therefore, the court of appeals upheld the district court's holding that the FDD did not apply in this case.[116]

2. *Standing.*

In *Bano* and *Bi*, the defendants claimed that the plaintiffs did not have standing to sue. The defendants noted that the Bhopal Act, passed by the Parliament of India, declared the Union of India the only entity with the power to sue on behalf of the plaintiffs.[117] Therefore, the Bhopal Act barred plaintiffs from bringing suits on their own behalf.[118] Additionally, the defendants argued that due to the terms of the settlement between UCC and the Union of India, Plaintiffs could not bring any claims against UCC.[119]

In response, the plaintiffs argued that the Bhopal Act did not extend internationally, and that the Indian government must "obtain permission from foreign courts in order to act as exclusive representative of Plaintiffs in courts outside of India."[120] They cited the Bhopal Act (section 3),[121] which states that in courts outside of India, the Union of India can represent claimants only if such court or other authority so permits.[122]

The court held that the plaintiffs lacked standing, and that under the Bhopal Act, only the Union of India had standing to sue on behalf of the plaintiffs. The court reasoned that both section 3 of the Bhopal Act and an Indian Supreme Court decision[123] required the Indian Government "to

113. *Id.* at *1.
114. *Id.*
115. Bano v. Union Carbide Corp., 273 F.3d 120 (2d Cir. 2001).
116. *Id.* at 121 ("The district court was correct in recognizing that it had no authority to protect the dignity, efficiency, or efficacy of the courts of India by employing a doctrine that arises out of the court's power to protect its own dignity, efficiency, and efficacy.").
117. Bi v. Union Carbide Chems. & Plastics Co., 984 F.2d 582, 583 (2d Cir. 1993). Bi alleges personal injuries based on alleged suffering from various ailments which she attributed to contamination of the local well water near her home in Atal Ayub Nagar, located next to the Bhopal plant. Her home is approximately 400 meters (1,312 feet; approximately one quarter mile) from the perimeter compound of the plant. *Id.*
118. Bano v. Union Carbide Corp., U.S. Dist. LEXIS 12326, *1 (S.D.N.Y. 2000).
119. *Id.*
120. Bano v. Union Carbide Corp., 273 F.3d 120, 130 (2d Cir. 2001).
121. *Id.* at 120, 128.
122. *Id.*
123. Charan Lal Sahu et al. v. Union of India, A.I.R. 1990 S.C. 1480 (India); *see also* Sahu, A.I.R. 1990 (S.C.) 1533 (India), cited in Bano v. Union Carbide Corp., U.S. Dist. LEXIS 12326, *11 (S.D.N.Y. 2000).

obtain such permission only in cases that were pending prior to enactment of the Act."[124] However, the Indian parliament had passed the Bhopal Act in March 1985,[125] and the *Bano* plaintiffs had filed their claims *after* its enactment.[126] Consequently, the plaintiffs did not have standing.

a. Associational Standing.

The court also ruled on whether advocacy organizations, such as the Bhopal Gas Peedit Mahila Udyog Sabgathan, the Gas Peedit Nirashrit Pension Bhogi Sangharsh Morcha, Bhopal, and the Bhopal Gas Peedit Mahila Stationery Karmachari Sangh,[127] had standing to file the damage claims on behalf of victims. The court reviewed the test established in *Hunt v. Washington State Apple Cider Advertising Commission.*[128] Under *Hunt*, there are three requirements for associational standing. First, an organization must demonstrate that "its members would otherwise have standing to sue in their own right."[129] Second, the interests the organization seeks to protect must be "germane to the organization's purpose."[130] Third, "neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit" in order to "file a lawsuit on behalf of its membership."[131]

The district court ruled that the "plaintiff organizations lack standing to bring damages claims."[132] The court reasoned that since damage claims were not common to everyone in the organization, individual proof would be necessary and would require "the participation of individual members," thus failing the third prong of the *Hunt* test.[133] Moreover, because the contamination occurred over the course of approximately three decades, each member would have various damages depending on how much land was owned and other factors.[134]

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124. Bano v. Union Carbide Corp., U.S. Dist. LEXIS 12326, *1 (S.D.N.Y. 2000).
125. *See generally* Edward Broughton, *The Bhopal disaster and its aftermath: a review*, ENVTL. HEALTH 4:6 (2005), http://www.ehjournal.net/content/4/1/6 (providing background of the BhopalAct).
126. U.S. Dist. LEXIS 12326, *1 (S.D.N.Y. 2000). The Court reasoned that § 3 of the Bhopal Act applied "to any claim pending immediately before the commencement of this Act." *Id.*
127. Bano v. Union Carbide Corp., 2003 WL 1344884, *2 (S.D.N.Y. 2003).
128. 432 U.S. 333 (1977).
129. *Id.*
130. *Id.*
131. *Id.* "Plaintiff Organizations Lack Standing to Bring Damages Claims[:] Under the test set forth in *Hunt v. Washington State Apple Cider Adver. Comm'n*, 432 U.S. 333 (1977), to file a lawsuit on behalf of its membership under the doctrine of associational standing, an organization must demonstrate that: (1) its members would otherwise have standing to sue in their own right; (2) the interests it seeks to protect are germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." Bano v. Union Carbide Corp., 2003 WL 1344884, at *7 (S.D.N.Y. Mar. 18, 2003).
132. Bano v. Union Carbide Corp., 2003 WL 1344884, at *7 (S.D.N.Y. Mar. 18, 2003).
133. *Id.* at *7
134. *Id.* at *8. "Plaintiff organizations fail to meet the third prong of this test. The damages claims here are not common to the entire membership and determining the extent of injury would require individualized proof requiring the participation of individual members. The contamination of each member's property would have to

The court also reasoned that the suit was "directed at improper parties"[135] because Union Carbide had sold its shares of UCIL years prior to this case and cannot be held liable for current claims.[136] Therefore, the Court dismissed advocacy organizations' damage claims against UCC and CEO Warren Anderson due to a lack of standing.[137]

3. Continuing Tort Doctrine.

Plaintiff Bi's claims were barred by a three-year statute of limitations, but she argued that under the continuing tort doctrine, her claims were not time-barred.[138] She claimed "that the continuing tort doctrine preserve[d] her personal injury claims,"[139] because she continuously incurred injuries while living near the contaminated site.[140]

The court of appeals disagreed[141] and cited the "continuing wrong exception" in section 214 of the New York Code.[142] This exception "treats continuing harms as creating separate, successive causes of action."[143] The court of appeals further reasoned that the continuing tort doctrine applies to property damage and not personal injuries.[144] However, although Bi has a potential property claim, the court held that the continuing tort doctrine applies only to *injunctive* relief in property claims. Therefore, the doctrine cannot be used to seek a damage award, and Bi's property damage claims were dismissed.[145]

a. Statute of Limitations.

Under New York Code Civil Practice Law and Rules 214, "a personal injury action must be commenced within three years of the date of ac-

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be assessed as well as the required remediation procedures. The exposure took place over a thirty-one year period. Logically the members were exposed in different ways and amounts. The amount of damages each member would be entitled to would vary based on amount of land owned, proximity to plant and other variables. The damage to their property would be similarly varied and difficult, if not impossible, to ascertain." *Id.*

135. *Id.* at *9. Furthermore, the Court also invoked the statute of limitations, stating that the claims were "untimely." *Id.*
136. *Id.*
137. *Id.* "Accordingly, plaintiff organizations' money damage claims are dismissed." *Id.* "Plaintiffs' claims are untimely and directed at improper parties. Union Carbide has met its obligations to clean up the contamination in and near the Bhopal plant. Having sold their shares long ago and having no connection to or authority over the plant, they cannot be held responsible at this time. The claims against Andersen are also dismissed. Defendants' motion is granted in its entirety. This case is closed and the Court directs the Clerk of the Court to remove it from its active docket." *Id.*
138. Bano v. Union Carbide Corp., 2003 WL 1344884, at *6 (S.D.N.Y. Mar. 18, 2003).
139. *Id.* at *6.
140. *Id.* at *2.
141. *Id.* at *6.
142. *Id.*
143. *Id.*
144. Bano v. Union Carbide Corp., 2003 WL 1344884, at *7 (S.D.N.Y. Mar. 18, 2003). "Plaintiff claims that Bi under the continuing harm doctrine her action was timely filed. However, her claim fails as that doctrine preserves claims for damage to property, not to persons." *Id.*
145. *Id.* at *7.

crual, i.e., the date of the injury."[146] Therefore, in *Bi*, the defendants argued that the statute of limitations barred Bi's environmental common-law claims.[147] To strengthen their argument for dismissal of claims, the defendants further argued that "plaintiffs' claims should be dismissed"[148] because in 1999 when Greenpeace discovered contaminated groundwater at the site, Union Carbide did not own UCIL stock and did not have ownership or control over the land.[149]

Furthermore, in order for the statute of limitations to apply in this case, Bi's injuries had to be categorized as patent rather than latent.[150] For an injury to be patent, it must have occurred immediately after the exposure. The plaintiffs argued that Bi's injuries were patent because she suffered from symptoms just a few weeks after moving into Atal Ayub Nagar, a neighborhood in Bhopal next to where the plant was located; therefore, "there was no interval between the exposure and the resulting harm."[151] In contrast, the defendants argued that Bi's injuries were latent because "the adverse effects of exposure to a toxin did not immediately manifest themselves after the exposure took place."[152] Because Bi stated that the injuries took a few weeks to manifest, the defendants argued that Bi had admitted to an interval between her exposure to the contaminated water and the injuries she experienced and that this interval made the injury latent.[153] Though the district court ruled in favor of the defendants and found that Bi's injuries were latent,[154] this ruling proved to be irrelevant because Bi filed the suit ten years after her symptoms became apparent and the statute of limitations under New York law for patent injuries is three years after the discovery of the injuries.[155]

146. *Id.* at *5 ("Under N.Y.C.P.L.R. 214-c(2), Bi was required to file a claim by 1993, three years after she moved to Atal Ayub Nagar and began suffering from these ailments. The Amended Complaint was filed on January 4, 2000, some ten years after she first discovered her injuries. Bi's claims filed are therefore time-barred.").
147. *Id.* at *3–4 ("Bi's Environmental Claims Seeking Money Damages are Barred by the Statute of Limitations. . . . New York courts dismiss toxic exposure claims where the pleadings or record demonstrate that plaintiff discovered or should have discovered her injury more than three years prior to the filing of the complaint.").
148. *Id.* at *3.
149. *Id.* at *3 ("Defendants contend that Union Carbide has not owned any stock in UCIL for over seven years and the Madhya Pradesh state government has had exclusive ownership, possession and control of the land for nearly four years, including 1999, the year in which Greenpeace first claimed to have found groundwater contamination at the former UCIL plant site. Therefore, defendants urge, plaintiffs' claims should be dismissed. . . . For the reasons set forth below, defendants' motion is granted in its entirety.").
150. *Id.* at *4.
151. *Id.*
152. *Id.*
153. *Id.*
154. *Id.* at *5 ("The Court finds that Bi's injuries are latent. While I recognize that the period between exposure and manifestation was not of great duration, the injuries did not manifest themselves immediately. Therefore, the statute of limitations began to run not upon exposure to the toxins, but after the latent injury manifested itself.").
155. *Id.* at *5 ("Nonetheless, if this Court found that Bi's injuries were patent, they would still be time-barred. Where the injury is patent, CPLR 214 applies. Under that provision, a personal injury action must be commenced within three years of the date

On appeal, the Second Circuit affirmed the district court's ruling almost entirely.[156] The U.S. Court of Appeals' only exception to the district court's holdings related to Bi's claims for property damage.[157] The court distinguished between personal and property injuries and held that Bi's knowledge of her personal injuries did not imply that Bi had knowledge of damage to her property.[158] Therefore, Bi's case could proceed, but only in relation to her property damage.

III. THE CHALLENGE TO CREATE A MINDFUL JURISPRUDENCE FOR TRANSNATIONAL ENVIRONMENTAL LAW

Contrasting Legal Doctrine and Gandhi's Thought. There are several divergences between Bhopal jurisprudence and Gandhi's thought, and a direct contrast between them reveals a troubling lop-sidedness in the Bhopal case law. In virtually every major doctrinal decision reached by an American court, the conclusion was the same: victims have no legal redress. To a casual observer, the victims' lack of success would appear to indicate that the victims' suits were frivolous. However, what accounts for such an overwhelmingly one-sided series of decisions is not actually a fair-minded, even-handed winnowing through arguments to arrive at formalistic truth. Rather, our analysis via Gandhi's thought reveals a bias in the thought sub-structure of jurisprudence which, from the victims' perspectives, leads courts to such crushing conclusions.

In order to understand why UCC handily won the Bhopal cases, we must analyze the manner in which jurisprudence itself inhibits a broad view of social problems. For a half-century, critical legal theorists already have emphasized the "law is politics" view of legal reasoning and have argued that modern legal theory restricts social justice arguments regarding race, poverty, and inequality.[159] To ease those restrictions, they have called for a legal theory that mixes social theory with legal reasoning.[160]

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of accrual, i.e., the date of the injury. This traditional rule applies even where the result is to deprive injured plaintiffs of their day in court. Bi's [sic] stated that her injuries manifested in 1990; therefore, her suit should have commenced by 1993. Because her suit was filed in 2000, it is time-barred." (citations omitted) (quoting another source) (internal quotation marks omitted)).

156. *See* Bi v. Union Carbide Corp., 361 F.3d 696, 717 (2d Cir. 2004).

157. *Id.* ("[T]he matter is remanded for further proceedings with respect to those [property damage] claims, including consideration of whether Bi may prosecute those claims in a class action. The court is also free, consistent with this opinion, to reconsider, prior to the entry of a final judgment, plaintiffs' request for relief in the form of remediation of the former UCIL plant site.").

158. *Id.* at 711–12.

159. Mark V. Tushnet, *Critical Legal Theory, in* THE BLACKWELL GUIDE TO THE PHILOSOPHY OF LAW AND LEGAL THEORY 80, 80 (Martin P. Golding & William A. Edmundson eds., 2005). *See generally* THE POLITICS OF LAW (David Kairys ed., 1982); Peter Gabel & Duncan Kennedy, *Roll Over Beethoven*, 36 STAN. L. REV. 1 (1984); Duncan Kennedy, Carter Professor of Gen. Jurisprudence, Harvard Law Sch., Lecture at Harvard Law School: The Social Justice Element in Legal Education in the United States (Mar. 19, 2002).

160. Tushnet, *supra* note 159, at 81. *See generally* Duncan Kennedy, *Liberal Values in Legal Education*, 10 NOVA L.J. 603 (1986); Duncan Kennedy, *Radical Intellectuals in American Culture and Politics, or My Talk at the Gramsci Institute*, 1 RETHINKING MARXISM no. 3 at 100 (Fall 1988). For a discussion that situates Gandhi into jurisprudence and so-

Similarly, Gandhi, a turn-of-the-century lawyer, effectively illuminated the foundation of law in politics. In fact, he created social doctrines that meet the needs of problems that critical legal theorists later identified.

The following chart lists the legal doctrines examined by the American courts in the left column and shows corresponding aspects of Gandhi's thought in the right column. The right column represents our view of a jurisprudence that uses Gandhi's principles to consider the broader implications of the Bhopal cases:

Legal Doctrine	**Mindful Jurisprudence via Gandhi's Thought**
The Corporate Veil	Gandhi's Theory of Trusteeship & *Sarvodaya*
Parens Patriae (The Bhopal Act)	Gandhi's Theory of the State & *Sarvodaya*
Doctrine of Standing	Gandhi's Theory of the State & *Ahimsa*
Fugitive Disentitlement Doctrine (FDD)	Gandhi's Theory of Rights & *Ahimsa*
Forum non conveniens	*Swaraj*
Continuing Tort Doctrine (Statute of Limitations)	*Ahimsa* & *Swaraj*

The following discussion engages Gandhi's central concepts with modern legal doctrine from the Bhopal jurisprudence. By engaging Gandhi's thought, we hope to stimulate speculation on how jurisprudence that more constructively handles suffering may be formulated.[161] We call this mode of thought "mindful jurisprudence."

A. The Corporate Veil in Light of Gandhi's Theory of Trusteeship and Sarvodaya

One of Gandhi's most celebrated and widely discussed theories is his Theory of Trusteeship.[162] In his theory, wealth is not understood as an object indefinitely owned exclusively by a private party.[163] Rather, Gandhi saw wealth as only temporarily held by its possessor.[164] In the Upanishadic world-view that influenced Gandhi, individual lives are seen as existing for a speck of time relative to the life of a society, and one's existence and well-being is bound to the existence and well-being of others

cial theory, see Yxta Maya Murray, *A Jurisprudence of Nonviolence*, 9 CONN. PUB. INT'L L.J. 65 (2009); *see also* Lester R. Kurtz, Gandhi and His Legacies, *in* ENCYCLOPEDIA OF VIOLENCE, PEACE, AND CONFLICT 837 (2d ed. 2008).

161. We focus especially on mass suffering resulting from the conduct of large organizations, such as corporate and governmental behavior in the Bhopal disaster.

162. Sethi understands Gandhi's theory of trusteeship as originating from swaraj, ahimsa, and equality; Ravindra Varma understands Gandhi's theory of trusteeship as emanating from ahimsa and aparigraha. *See* Anil Dutta Mishra, *Trusteeship: A New Economic Concept*, *in* 4 GANDHIAN ALTERNATIVE 197, 200 (V.K. Natraj, Kamlesh Misra, Neeru Kapoor eds., 2005); *see also* Raghavan Iyer, *Gandhian Trusteeship in Theory and Practice*, GANDHI MARG, Nov.–Dec. 1985, at 466.

163. MAHENDRA S. KANTHI, GANDHIAN ECONOMIC THEORY 45 (1988).

164. *Id.*

who live before, during, and after one's own earthly existence.[165] Therefore, it is illogical to conceive of wealth as being one's "own," or to "own" exclusively, because such a possessive view contradicts the eternal view of time and the view of collective connectedness at the heart of Upanishadic reality.[166] Because material wealth is destined to be temporary for any of us,[167] it is unproductive to be preoccupied solely with self-interested ownership. Furthermore, because the experience of enlightenment (*moksha* or *nirvana*) reveals a reality constituted by collective connectedness, to own exclusively is to own at the expense of others.[168] Therefore, to Gandhi, it was more enlightened to view one's wealth as being held in trust for everyone, and that one's actions with that wealth — if governed by enlightened principles — would be only for the well-being of all (*sarvodaya*).[169] In *Sahu*, UCC convinced the court that UCIL's corporate veil should not be pierced in order to reach its assets.

However, when the *Sahu* decision is seen through Gandhi's Theory of Trusteeship, it becomes clear that the *Sahu* Court missed the opportunity to pull corporations into the role of being the trustees of society. In the Bhopal disaster, it is painfully apparent that Gandhi's Theory of Trusteeship plays no role in UCC's behavior; rather, UCC's arguments for the corporate veil illustrate a strong reluctance to view its wealth in trust and for social benefit. If courts mandated that wealthy entities follow Gandhi's Theory of Trusteeship, then UCC would have been expected to come out from behind the corporate veil and use its trust money for the social good of ending the suffering that began from its own pesticide production. In such a radical shift in thinking, the core jurisprudential issue would have been how UCC could use its remaining assets for minimizing suffering and maximizing the welfare of all involved in Bhopal. Instead, the corporate veil allowed UCC to admit no responsibility and contribute as little as possible to Bhopal's renovation and recovery.

B. *Parens Patriae in Light of Gandhi's Theory of the State and* Sarvodaya

Gandhi's Theory of the State emphasizes the village as a basic unit of society and focuses on maximizing self-governance.[170] He described his vision of society as concentric circles, in which the individual rested at the center of power:

> In this structure composed of innumerable villages there will be ever-widening, ever-ascending circles. Life will not be a pyramid with the apex sustained by the bottom. But it will be an oceanic circle whose center will be the individual always ready to perish for the village, the latter ready to perish for the circle of villages,

165. *See* SURENDRA VERMA, METAPHYSICAL FOUNDATION OF MAHATMA GANDHI'S THOUGHT 51, 53 (1970).
166. *Id.* at 49–54.
167. *Id.*
168. *Id.*
169. *Id.*; THOMAS WEBER, *Gandhi's Moral Economics: The Sins of Wealth Without Work and Commerce Without Morality*, *in* THE CAMBRIDGE COMPANION TO GANDHI 135, 144–46 (Judith M. Brown & Anthony Parel eds., 2011).
170. *See* SHRIMAN NARAYAN AGARWAL, GANDHIAN CONSTITUTION FOR FREE INDIA (1946).

> till at last the whole becomes one life composed of individuals. . . sharing the majesty of the oceanic circle of which they are integral units. Therefore, the outermost circumference will not wield power to crush the inner circle, but will give strength to all within and derive its own strength from it.[171]

The state rested in the outer region of Gandhi's concentric circles, and its primary function was to enhance individual power. In Gandhi's ideal, institutions at the periphery do not oppress individuals because peripheral institutions derive their strength from individuals. In other words, in Gandhi's conception, governments operate with awareness that hurting the people means hurting the source of its own strength.

In contrast, India's treatment of the aftermath of the Bhopal tragedy illustrates its position at the center of power, or in Gandhi's terms, at "the apex of India's pyramid." In justifying the settlement with UCC, the Union of India invoked the doctrine of *parens patriae*, arguing that the state is the parent of the people and therefore the proper representative of the claimants. This parent-child metaphor explicitly created a hierarchical relationship that placed the state in a position of power over the individual. Therefore, in *Chesley*, the state was the center of power, and the state's invocation of *parens patriae* was in direct juxtaposition to Gandhi's view of the individual as the center of power. Rather than being a conduit for individual power as Gandhi envisioned, the state positioned itself as the major voice in the Bhopal litigation. Once the state assumed this position of power over the individual, the individual's ability to assert her own will over the situation disappeared. As a result, the state eliminated the individual's ability to address her own suffering through legal channels. Instead of the state exercising its power to minimize the people's suffering, the state dictated negotiations with the defendant through its own interest in maintaining amicable relations with the corporate sector.

Therefore, in *Chesley*, *parens patriae* was not a metaphor to represent the state's careful consideration of its people's interests, as a parent cares for children. The Union of India might have argued that the government catalyzed redress by using its sovereign power against UCC. In a circumstance in which the victims are indigent, the government may argue that victims may not have had an opportunity for redress without government representation. However, because victims have been filing their own suits for thirty years, it seems that the state and the corporation used *parens patriae* to reduce disaster victims to the legal status of children who are unable to make their own decisions.[172] By dismissing the people's

171. Timothy L. Fort and Cindy A. Schipani, *The Role of the Corporation in Fostering Sustainable Peace*, 35 VAND. J. TRANSNAT'L L. 389, 436 n.272 (2002) (quoting Michael N. Nagler, *Ideas of World Order and the Map of Peace*, *in* APPROACHES TO PEACE: AN INTELLECTUAL MAP 380–81 (W. Scott Thompson & Kenneth M. Jensen eds., 1992)). *See generally* Afra Afsharipour, *Directors as Trustees of the Nation? India's Corporate Governance and Corporate Social Responsibility Reform Efforts*, 34 SEATTLE U. L. REV. 995 (2011).

172. The powerless client's interest runs the risk of being compromised when the state claims to represent them against corporations and also in other contexts, such as

ability to represent themselves, the state and corporation successfully made themselves the important parties, and the victims' suffering became a side note in the jurisprudence. The *Chesley* court did not consider the implication that the parent-child metaphor at the heart of *parens patriae* may have required the state to function as the victims' zealous guardian. By ignoring this possibility, the court allowed the state to use the *parens patriae* doctrine to protect its interest in maintaining a mutually satisfying relationship with the multinational corporate sector at the expense of "child's" well-being.

This result is disheartening when one considers Gandhi's conception of humanity as a family. Through his use of non-violence (*ahimsa*), Gandhi concluded that "for a non-violent person, the whole world is one family."[173] To Gandhi, the view of the world as a family was the logical result of a life lived through *ahimsa*. In addition, according to Gandhi, *ahimsa* was necessary to attain enlightenment, a state of consciousness in which the individual is submerged into intense identification with all other things.[174] Therefore, to Gandhi, the view of the world as a family is the social manifestation of the Sanskrit axiom "So-ham ham-sah" ("I am He, He is I").[175] In other words, the practice of *ahimsa* led to the enlightened view that the state must act for the benefit of its entire family, including family members who have been affected by corporate violence. Simply stated, since the world is a family, the state must act for the welfare of all who suffer (*Sarvodaya*). Although the state could argue that it acted for its "family" by invoking *parens patriae*, the victims' individual suits and continued protests suggest that the state has not acted in its full capacity as the parent of the people. This leaves victims and critics in need of a comprehensive family-based state theory, rather than a doctrine used by the state purely to unilaterally proclaim closure after a disaster.

Gandhi's evolved conception of the family influenced his Theory of the State. His theory is based in a worldview that recognizes the universe as a single entity, of which the pieces appear different but fundamentally

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prosecutor/defense attorney contexts. Prior research has shown that clients' interests are harmed when the party representing them has stronger interests in maintaining relationships with the adversarial party. Sudnow argues that prosecutors and defense attorneys often have a common view of a "normal crime" and tend to quickly dispose of cases to ease their workloads rather than examining individual client circumstances. David Sudnow, *Normal Crimes: Sociological Features of the Penal Code in a Public Defender's Office*, 12 SOC. PROBS. 255, 273 (1965). Blumberg also found defense attorneys engaging in a "Confidence game" that earns client trust with little meaningful representation, since their interest is in cooperating with prosecutors to complete cases quickly and earn more fees. Abraham S. Blumberg, *The Practice of Law as a Confidence Game: Organizational Cooptation of a Profession*, 1 LAW & SOC'Y REV. 15, 31 (1967). Several attempts have been made to restructure and redesign legal proceedings and often fall under the discourse of alternative dispute resolution (such as arbitration or mediation), restorative justice, or mindfulness-based lawyering. *See generally* EDWARD J. BRUNET, CHARLES B. CRAVER, & ELLEN E. DEASON, ALTERNATIVE DISPUTE RESOLUTION (4th ed. 2011); GERRY JOHNSTONE, RESTORATIVE JUSTICE (2d ed., 2002); Scott L. Rodgers, *The Mindful Law School: An Integrative Approach to Transforming Legal Education*, 28 TOURO L. REV.1189 (2012).

173. *Non-Violence*, *in* THE QUINTESSENCE OF GANDHI IN HIS OWN WORDS 5, 48 (1984).

174. *See* Patel & Vella, *supra* note 45, at 1140.

175. *See* BANSI PANDIT, THE HINDU MIND 306–07 (3d ed. 1998).

are the same. As a result, all people have a duty to care for the world as one family, and the state plays a significant role in caring for its family members due to its unparalleled potential to foster individual dignity.[176] Therefore, under Gandhi's Theory of the State, the doctrine of *parens patriae* would limit state power strictly to assist in the protection and care of all (*Sarvodaya*). Because the Union of India used the family-based metaphor embedded in *parens patriae*, the court should have expected the state to act as a family member toward its ailing loved ones, with far more passion and assertive vigor than the victims feel the settlement indicates.[177]

However, when viewed via Gandhi's Theory of the State, the current use of *parens patriae* disgraces the parent-child metaphor and tortures the language of family at the expense of the people and for the sake of the state's protection.[178] In the dominant western conception, the state is a "father" that possesses the power to speak for its children.[179] In contrast, Gandhi's Theory of the State places the state farthest from the power center (the individual), where the state can only act by the will of the suffering masses. Therefore, if viewed via Gandhi's Theory of the State, any invocation of *parens patriae* is valid only if it reflects the voices of the suffering and affirms the dignity of all people (*Sarvodaya*).

In the Bhopal cases, the Union of India argued that the state was the proper entity to represent the people's interest, and U.S. courts upheld UCC's argument that only the state could file suit against the corporation because only the state could represent the people. However, if *parens patriae* is read by its plain meaning — as the state being the parent of the people — then the doctrine raises the question of why India has not done more to end the suffering of its "children," and why the U.S. government has not reprimanded its own "child" (UCC).[180] If *parens patriae* is interpreted in light of *Sarvodaya*, the Union of India committed child neglect in

176. Along similar lines, if *parens patriae* was extended more broadly, then there must be an acceptance that the parent company ultimately holds liability for its 'child' if it also seeks profit and interest expansion through the child. A worldview with different underlying assumptions from those in the dominant modern paradigm allows for such new perspectives. *See* Patel & Vella, *supra* note 45, at 1140. For a broader discussion of mind and world-view from cognitive social science, see Nehal Ambalal Patel, Consciousness in the Environmental Movement (2009) (unpublished Ph.D. dissertation, Northwestern University) (on file with Northwestern University Library); *see also* Nehal Patel, *Blending Law: How Environmental Activists Incorporate Legal Consciousness into Cognitive Schemas* (Law and Society Ass'n Annual Meeting, June 3, 2012), *available at* http://citation.allacademic.com/meta/p557555_index.html.

177. The blatant contrast between Gandhi's view of the welfare of all (*Sarvodaya*) and the Union of India's invocation of *parens patriae* also raises the question of how India must act to exemplify the parental uplift of all.

178. For a discussion of the problems with the parent-child metaphor in legal doctrine, see generally Susanna Lee, *Resisting the Parent-Child Analogy: Implications for Law and Judgment*, 8 LAW, CULTURE, AND THE HUMANITIES 195 (2012).

179. *Id. See* note 46.

180. Along similar lines, Gandhi's theory of trusteeship begs the question of why a wealthy 'sibling' (the corporation) would not use its wealth first and foremost to end the suffering of the struggling 'sibling' (the victims).

Bhopal, and the U.S. government practiced willful blindness while its child abused India's children.

C. *Standing in Light of Gandhi's Theory of the State & Ahimsa*

In his Theory of the State, Gandhi sought to reconcile his critique of the modern state with his belief that a state could be reformed to be more just and fair.[181] On one hand, Gandhi was uncomfortable with the modern state's machine-like qualities.[182] He saw the state as an excessively bureaucratic system of rules that were blindly followed.[183] To Gandhi, modern bureaucratic states replaced emotional insight with cold, robotic applications of rules and procedures; as a result, modern bureaucracies made both people and government coldly impersonal and indifferent to the suffering of others.[184] In other words, the modern state stunted people's moral development and robbed individuals of the capacity to exercise sound moral judgment.[185] As a result, the modern state was fundamentally flawed and in need of revolutionary change in order to positively influence moral development and address human need.[186]

Gandhi's view of the state also influenced his view of the state's laws. Gandhi viewed the law as a reflection of the character of a state, and therefore, his view of the law paralleled his view of the state as in need of sound moral development and emotional insight.[187] Laws that violated the human conscience and were administered robotically lacked the requisite character to justify obedience to the state.[188] Therefore, if a law violated the conscience of a well-intentioned citizen, that citizen owed a duty to himself and others to disobey that law.[189]

Because of its power to interpret the state's laws, Gandhi viewed the judicial branch as equally responsible for the perpetuation of the state's corrupt practices. For example, Gandhi concluded that "at least ninety-five per cent of convictions were wholly bad"[190] as Indians were arrested and tried during a British declaration of martial law. According to political theorist Bhikhu Parekh, ordinary cases were equally discriminatory: "In nine out of ten cases the condemned men were totally innocent, and in the cases involving Europeans the accused Indians were denied justice in almost all cases. The courts had ceased to dispense justice and were

181. *See* BHIKHU PAREKH, GANDHI'S POLITICAL PHILOSOPHY 110–41 (1989).
182. M. K. GANDHI, HIND SWARAJ AND OTHER WRITINGS 164–170 (Anthony J. Parel ed. 1997).
183. PAREKH, *supra* note 181, at 110–15.
184. *Id.*
185. *Id.*
186. *Id.*
187. *Id.* at 125.
188. "You assist an administration most effectively by obeying its orders and decrees. An evil administration never deserves such allegiance. Allegiance to it means partaking of the evil. A good man will therefore resist an evil system or administration with his whole soul. Disobedience of the law of an evil State is therefore a duty." 48 *CWMG*, *supra* note 2, at 485; *see also* PAREKH, *supra* note 181, at 125–35 (1989).
189. PAREKH, *supra* note 181, at 129.
190. *Id.* at 128.

'prostituted' in the interests of the government."[191] For Gandhi, a law was not an isolated phenomenon; laws and courts reflected the integrity of the regime itself.[192]

We view the doctrine of standing as central to people's relationship to the state and to the just administration of law. When a party has standing, the state—through its judicial body—recognizes the party's right to seek redress of its grievances; similarly, when a party lacks standing, the state denies a party's claim to redress its grievances. Therefore, the state and its courts can use the doctrine of standing to recognize some harm and ignore others.

With respect to *Bano* and *Bi*, we argue that the Court's denial of plaintiff standing violates Gandhi's Doctrine of *Ahimsa*, which minimizes suffering and promotes equal dignity. *Ahimsa* was a pillar of Gandhi's vision of society in which he conceived of the world as a family. The metaphor of the family is salient in Gandhi's thought because it emphasizes the importance of meaningful bonds between people and the need to exercise non-injury with all family members. Therefore, any court that would accept the Doctrine of *Ahimsa* and Gandhi's vision of the global family would not dismiss the Bhopal plaintiffs' claims through traditional notions of standing. The doctrine of standing can fulfill certain goals of the judicial system, such as assuring that redress is limited to plaintiffs that suffer actual injury, and such limitations can promote an efficient administration of justice. Especially in such a complex case, the court may have validly limited advocacy organizations under the doctrine of associational standing, and the fact that UCC's shares had not entirely gone to Dow raises questions regarding exactly which parties can legitimately be sued. However, in the Bhopal cases, the actual victims were denied standing because of the exclusive representation provision of the Bhopal Act rather than a failure to illustrate actual injury. Therefore, we find the court's application of the doctrine of standing consistent with Gandhi's description of the modern state as cold and impersonal rather than humane and sympathetic.

When viewed via Gandhi's Theory of the State, the *Bano* and *Bi* jurisprudence also reflects the modern state's tendency to stifle moral judgment. To Gandhi, in the modern state moral thought seemed irrelevant and subservient to the robotic administration of impersonal traditions of thought. Therefore, when viewed via Gandhi's Theory of the State, the court's impersonal application of law is a reflection of the inhuman characteristics of the modern state. The courts' decisions appear to be "logical" applications of law only because legal reasoning is conducted within the confines of a thought tradition that does not hold *ahimsa* and human interconnectedness as core phenomenological principles. In other words, in a state without a foundation of *ahimsa* and interconnectedness, court decisions seem reasonable despite their overt function to absolve the state

191. *Id.*
192. *Id.* at 125.

and wealthy private parties from the suffering of hundreds of thousands of disempowered individuals.[193]

In *Bano* and *Bi*, UCC cleverly manipulated the grey world between national jurisdictions. By arguing that the case is closed in India and that U.S. courts lacked jurisdiction, UCC hid between two cold, impersonal bureaucratic states. Although many landmark cases have limited or repudiated the conduct of big businesses,[194] our view of Gandhi's Theory of the State suggests that UCC's strategy was successful partly because U.S. (and Indian) courts used a doctrinally constrained jurisprudence that favored state and corporate interests. In contrast, in a mindful jurisprudence of standing, the abatement of suffering would be the primary underlying issue, *ahimsa* would be the applicable legal doctrine, and familial interconnectedness would define legal discourse. To people who suffer, the question of whether they have standing in the courts of India or the United States is irrelevant; what is relevant is the question of where and how their suffering can be abated. Tragically, the courts' technical interpretations of standing in *Bano* and *Bi* were helpful for courts, corporations, and the state, but not for those who suffered.

D. Fugitive Disentitlement Doctrine in Light of Gandhi's Theory of Rights.

In *Bano* and *Bi*, the plaintiffs were not allowed to use the Fugitive Disentitlement Doctrine (FDD) to prevent UCC from filing motions. The court ruled in favor of the defendant because the court concluded that the defendant's status as a fugitive in India did not affect its status in U.S. courts.[195] The court did not provide much more reasoning beyond the aforementioned points, leaving a novice reader to conclude that there is not much more that is relevant to the FDD issue. However, Gandhi's thought unearths the issues rendered invisible by the court's short discussion and contains a theory of rights that is relevant to this case in two ways.

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193. For a discussion of how the use of formal reasoning sharply curtails American courts' capacity to redress harms, see generally DUNCAN M. KENNEDY, *Legal Education as Training For Hierarchy, in* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE (David Kairys ed., 1st ed. 1982); MARK V. TUSHNET, *Critical Legal Theory, in* THE BLACKWELL GUIDE TO THE PHILOSOPHY OF LAW AND LEGAL THEORY (Martin P. Golding and William A. Edmundson, eds. 2005); LOUIS E. WOLCHER, BEYOND TRANSCENDENCE IN LAW AND PHILOSOPHY (2005) ("a philosophical work that limits itself to 'law' in the popular or academic sense has already sold its soul, as it were, to conventional ways of thinking."); Marc Galanter, *Why The "Haves" Come Out Ahead: Speculations On The Limits Of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974); RETHINKING MARXISM, *supra* note 160, at 101).

194. One example of such a case is *Federal Trade Commission v. Sperry & Hutchinson Trading Stamp Co.*, 405 U.S. 233 (1972) (holding that regardless of whether or not a business's practices fall into the category of an antitrust violation, the FTC can regulate a company's business practices if they are deemed unfair). For environmental law examples chronicling successful challenges to large companies, see generally JONATHAN HARR, A CIVIL ACTION, (1996); GERALD M. STERN, THE BUFFALO CREEK DISASTER (2008).

195. Bano, *supra* note 85, at 10–11.

1. Gandhi emphasized duties over rights.

First, in Gandhi's Theory of Rights, every right has a corresponding duty. Rights are of paramount importance, and the dignity of individuals and of oppressed groups depends on the protection of such rights. However, Gandhi placed an even greater emphasis on duty.[196]

Gandhi's Theory of Rights highlights the duty of every legal person to recognize the authority of the state to maintain order through law.[197] Although the need for rule of law suggests faithful individual compliance, Gandhi also emphasized that conscience was the ultimate mechanism for deciding proper conduct.[198] Conscience and law, therefore, were bound to conflict. At those moments, one owed the duty to civilly disobey and simultaneously protect the rule of law by accepting punishment. Gandhi explained: "Indeed whilst on the one hand civil disobedience authorizes disobedience of unjust laws or unmoral laws of a state which one seeks to overthrow, it requires meek and willing submission to the penalty of disobedience and, therefore, cheerful acceptance of the jail discipline and its attendant hardships."[199]

The duties to obey law and accept punishment, therefore, were not contradictory to Gandhi. As a form of order, the rule of law could be honored while the moral failures of the state could be confronted and exposed. Therefore, in Gandhi's thought, accepting punishment is not acceptance of oppression; rather, accepting punishment is the endorsement of the principle of the rule of law. In other words, civil disobedience exposes the sovereign's oppressive use of its laws, but the principle of the rule of law is preserved by accepting punishment. Gandhi expected adherents of non-violent civil disobedience to show respect for the rule of law by accepting punishment. His conclusion came from his belief in the value of law as a tool for order in society and the subsequent duty of people to obey law as a valid source of social order.[200] Under Gandhi's Theory of Rights, parties that wish to use courts must accept the law's function in maintaining order; therefore, if UCC wishes to file motions, it must consent to being tried for its criminal charges.[201]

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196. "[A] consciousness that we are doing what we consider to be our duty to the best of our ability is the highest reward." 2 *CWMG*, *supra* note 2, at 477. For a deeper discussion, see generally AJIT K. DASGUPTA, GANDHI'S ECONOMIC THOUGHT, 44–63 (1996).
197. *See* V.S. HEDGE, GANDHI'S PHILOSOPHY OF LAW (1983). *See generally* M.K. GANDHI, NON-VIOLENT RESISTANCE (SATYAGRAHA) (2001).
198. *See* HEDGE, *supra* note 197.
199. 25 *CWMG*, *supra* note 2, at 356.
200. For a deeper discussion, see Hedge, *supra* note 202.
201. It could be argued that victims must follow the law, including those doctrines that are not favorable to them, if the victims wish to use the courts. There are two problems with this argument. First, it was UCC, not the victims, that refused to comply with prior legal orders to appear in Indian courts. Because Gandhi's Theory of Rights makes compliance with the principle of the rule of law a duty, UCC's refusal to accept punishment for its prior law-breaking makes its demand for relief in U.S. courts problematic. Second, Gandhi believed that parties must honor the law even when courts do not hold in their favor; however, this honoring of law was consistent with civil disobedience, and therefore, the law could continue to be challenged. Although many commentators view civil disobedience as an act against

However, in *Bano* and *Bi*, the courts deviated from Gandhi's Theory of Rights for two reasons. First, the Court drew a clear line between UCC's status in the United States versus its status in India. By drawing a bright line between U.S. and Indian law, the Court could have addressed the question of how transnational corporations must balance rights and duties across countries. There have been several attempts to reform environmental transnational corporate rights and duties among scholars,[202] but in our view, the court did not adequately use the opportunity presented in the Bhopal cases to address the issue. In transnational contexts, courts already award corporations enjoyment of the rights arising from legal personhood. If courts amply recognize corporate rights, it is inconsistent for courts to limit application of law when discussing transnational corporate duties.

Second, the Court failed to recognize the current cultural and legal context in which corporations easily avoid the label of "fugitive." Especially in an age of treason, terrorism, and espionage, people more easily label individuals as "traitors," "terrorists," or "fugitives" than they label corporations with such terms. For example, in India, much attention has been given to Warren Anderson as an *individual* absconding from the law. Bhopal activists often note that Mr. Anderson became a fugitive from criminal charges after absconding to the United States, and footage of Anderson ignoring reporters while fleeing India has become a popular concrete image of an absconder.[203] Between 1987 and 1992, UCC similarly was served with a summons to appear for criminal charges in Bhopal but never appeared.[204] Unlike the widely released footage of Mr. Anderson, there is no footage of UCC's representatives absconding from justice that

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law, Gandhi viewed civil disobedience as a duty for anyone who believed in the legitimacy of law. His reasoning was based on the belief that the highest law emanates from our conscience. If the state's law violates that which one's conscience demands, then a party must act to conform the state's law to the highest law. Simultaneously, to preserve the legitimacy of the state's law, parties who subsequently engage in civil disobedience must also accept the state's punishments. As Gandhi stated, "Every law gives the subject an option to obey the primary sanction or the secondary, and I venture to suggest that the Satyagrahi by inviting the secondary sanction, obeys the law." GANDHI FOR THE 21ST CENTURY: THE SCIENCE OF SATYAGRAHA, MUMBAI, BHARATIYA VIDYA BHAVAN 59 (A. Hingorani ed., 1998). Therefore, by accepting punishment, unjust decisions could be challenged, and parties preserve their right to seek redress through courts by accepting the state's punishments for their prior violations. In this manner, both civil disobedience and seeking subsequent redress from courts remain options for parties in Gandhi's thought. However, in the Bhopal FDD rulings, the burden would be on the corporation to show that its law-breaking emanates from an interest in making state law consistent with the highest law of the conscience. For a deeper discussion *see also* VINIT HASKAR, RIGHTS, COMMUNITIES AND DISOBEDIENCE: LIBERALISM AND GANDHI (2001).

202. For attempts to close the transnational gap in corporate governance, see Timothy L. Fort & Cindy A. Schipani, *Corporate Governance, Stakeholder Accountability, and Sustainable Peace: The Role of the Corporation in Fostering Sustainable Peace*, 35 VAND. J. TRANSNAT'L L. 389, 436 n.272 (2002); see also Afsharipour, *supra* note 171.

203. *See* BHOPAL: THE SEARCH FOR JUSTICE, *supra* note 12.

204. Sanford Lewis, *The Bhopal Chemical Disaster: Twenty Years Without Justice*, YOUTUBE (Mar. 7, 2007), http://www.youtube.com/watch?v=0csW97x8d24 (reproducing a video interview with Rajan Sharma at 5:50 of the video).

are etched into the public imagination, and there also is limited public discussion of UCC's criminal charges. Both the emphasis on Warren Anderson as an individual fugitive and the lack of media emphasis on corporate criminality feeds the notion that U.S. courts are not obliged to view UCC as a fugitive. Even Dow CEO William S. Stavropoulos made a public statement showing ignorance of UCC's status as a fugitive, saying "[t]he only criminal charges that we are aware of is the one against the former CEO of Union Carbide [Warren Anderson], which has retired many many years ago. So, we don't know of any other criminal charges."[205] Without a discourse in which corporations can be fugitives, the public and politicians will not perceive corporations as absconding from justice. In addition, courts will not conceptualize UCC as a fugitive from transnational criminal charges, and therefore, UCC can continue to easily evade Gandhi's requirement to honor one's duty in order to secure rights.

2. The Doctrines of *Ahimsa* and Rule of Law Are Necessary to Fulfill Duties.

Second, central to Gandhi's thought is *ahimsa*, commonly translated as non-violence, non-injury or non-harm.[206] Because non-injury was Gandhi's mechanism to attain Truth, it is implicit within his system of thought that duties are more important to clarify than rights. The manner in which we treat others — through the vehicle of non-injury — is crucial to our own advancement toward self-realization. Therefore, while developing his Theory of Rights, Gandhi made great effort to articulate the need to do one's duty (*dharma*).[207]

When viewed via Gandhi's Theory of Rights, the FDD is important because it emphasizes the duty of the state to honor rights in exchange for the subject's duty to recognize the rule of law. By preventing absconders from using the courts, the FDD not only protects the courts' exercise of the rule of law, but it also subjects absconders to the *principle* of the rule of law. In other words, although a court exercises the rule of its own regime's law, the *principle* of the rule of law can be shared between two regimes. As a result, if a party absconds from a host nation that recognizes the rule of law in a manner similar to that of the home nation, that

205. *Id.*

206. "[T]his much I can say with assurance, as a result of all my experiments, that a perfect vision of Truth can only follow a complete realization of Ahimsa." M.K. GANDHI, THE STORY OF MY EXPERIMENTS WITH TRUTH 591 (Mahadev Haribhai Desai & Pyarelal Nair trans., 1929).

207. Although the term 'enlightenment' can carry several meanings in various traditions, we understand Gandhi's view of self-realization as being parallel to Hindu and Buddhist views of moksha & nirvana, respectively. Regardless of the conception of enlightenment, it is important to note that for Gandhi, the fulfillment of 'individual' self-realization and a more enlightened social world went hand-in-hand; effectively, one necessarily followed from the other. Gandhi connected individual duty and social good through cause and effect, explaining that if we all attend to our duties, then peace and a better world will follow. Dasgupta explains, "[b]y exercising their rights individuals are enabled to develop their own potential to the full and by doing so contribute as best they can to the common good which it is their duty to do." DASGUPTA, *supra* note 196, at 59.

party violates the *principle* of the rule of law in both nations. Therefore, in the Bhopal cases, the U.S. courts' recognition of the similarities between the modern Indian and American court systems could have been seen as the very reason why U.S. courts should have considered UCC a fugitive.

Gandhi's Theory of Rights emphasizes a general duty to the principle of the rule of law and is not explicitly state-specific. In the Bhopal cases, if one considers the similar conceptions of the rule of law in both the U.S. and Indian legal systems, then UCC had a duty to the home country (the U.S.) to obey the rule of law in the host country (India). Under this reasoning, UCC's implicit claim that it had a legal right in U.S. courts to ignore its fugitive status in India violates Gandhi's Theory of Rights, in which rights are conditional to the duty to honor the principle of the rule of law. Therefore, under Gandhi's Theory of Rights, UCC's right to use courts that exercise the rule of law in its home nation (the U.S.) is conditional on UCC's duty to appear before the courts wherever a similar principle of the rule of law is recognized (in this case, India).

UCC may counter-argue that requiring U.S. courts to recognize fugitive status from a foreign jurisdiction would result in even worse moral failings if the absconder is fleeing for reasonable reasons. Perhaps UCC may argue that its refusal to entangle itself into Indian courts in part allows the Bhopal tragedy to focus on the appropriate parties in India, namely EIIL and the victims. Furthermore, UCC may argue that if it is declared a fugitive in U.S. courts, many reasonable circumstances for absconding also will be precluded, such as instances where people seek political refuge from an oppressive legal regime. In other words, if UCC is restricted from court access under the FDD, then under the principle of equal protection, U.S. courts would be required to restrict a person's access to courts if the person violated a law in an oppressive regime and absconded to the United States. However, although such circumstances do occur, the fugitives fleeing oppressive regimes will be real persons rather than "corporate persons." Furthermore, in cases of suspected corporate criminality in a foreign country, the corporation often will be accused of causing harm to people, as opposed to refugees fleeing from harm and often committing largely non-injurious violations. Therefore, although there would be a wide variety of political and economic circumstances, courts are more than able to exercise judgment when making factual distinctions between cases.

Bano and *Bi* present a circumstance in which corporate conduct has harmed real people, and because the Doctrine of *Ahimsa* is central to circumstances involving injury to others, UCC would be required to illustrate how it has satisfied its duty of non-harm under Gandhi's Theory of Rights. UCC could claim that it fulfilled its duty of non-harm by giving a suggestion to its subsidiary to create barriers between toxins and groundwater. However, rather than using this fact as evidence of UCC's failure to meaningfully assist in carrying out this plan, the court narrowly focused on UCC's use of its suggestion as evidence of its intent to prevent

harm.[208] As a result, the court conducted its analysis without an implicit expectation of corporate responsibility over its subsidiary to successfully practice the doctrine of non-harm (*ahimsa*). Therefore, the corporate imperative to avoid additional responsibility dominated the *Bano* and *Bi* jurisprudence, and any notion of corporate duty to *ahimsa* (non-harm) was non-existent.[209]

It should be no surprise, then, that UCC defended itself by arguing that it was not a fugitive in U.S. courts merely because of its status as a fugitive in India. Despite the massive scale of injury in Bhopal, UCC's argument implicitly conveys the message that it owes no duty to foreign states (and to victims in those states) to honor their rule of law. However, in a mindful jurisprudence, the court's disregard of UCC's fugitive status would violate Gandhi's Theory of Rights, in which UCC must earn the right to use the court. By ignoring its duty to stand trial and accept punishment under Gandhi's theory, UCC not only demeaned Indian criminal law and rendered the Indian criminal justice system invisible, but UCC also nullified the principle of the rule of law wherever it similarly exists. Under one view of Gandhi's theory, without realizing the implication, the U.S. court may have undermined its own reputation for upholding the principle of the rule of law.[210]

In summary, under Gandhi's Theory of Rights, corporations would be prevented from hiding in their home nations to avoid criminal charges in host nations. The duty to obey the *principle* of the rule of law would apply to transnational corporations wherever they conduct business, and courts would require corporations to exercise their duty to host nations before being allowed to exercise their right to access courts in the home nation. However, with the public more likely to recognize *individual* fugitives in current media footage of absconders, corporations are likely to avoid the label of 'fugitive from justice' in American political culture.[211]

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208. For related proceeding see *Sahu v. Union Carbide Corp.*, 418 F. Supp. 2d 407 (S.D.N.Y. 2005).

209. Incidentally, Dasgupta notes that law is the field of Gandhi's formal training, which perhaps explains why he focused his attention on duty, *supra* note 196, at 53.

210. We recognize the potential criticisms a judge could receive for being perceived as an 'activist' operating beyond the law's limits set forth in prior jurisprudence. As a result, a judge attempting to create jurisprudence germane to transnational contexts could be criticized as sacrificing the sovereignty of U.S. law. We are sympathetic to the judge's constrained position within the justice system and call for a broader debate in the legal community on transnational disasters of the type in Bhopal. We intend that the mindful jurisprudence we present in this article function as an example of the end result of a cultural change, not the product of the efforts of one judge in one case. Simultaneously, we apply Gandhi's view that the highest law emanates from our conscience, and we accept that judges, like any others, often are guided by their conscience when interpreting law. Therefore, in light of Gandhi's view, the role of a judge may be to make the state's law consistent with the highest law if the state's law violates that which the conscience demands. *See* HASKAR, *supra* note 205.

211. Especially since modern corporations seek positive public relations as they conduct business in developing nations with less well-developed legal systems, the label of "criminal" slides off of corporations in ways that the label more easily sticks to individuals. For further discussion, see MASS DISASTERS, *supra* note 13; Galanter, *supra* note 21.

Troublingly, by ignoring Gandhi's Theory of Rights, the Bano and Bi courts protected the corporate suspect and hampered social justice.[212]

E. Forum Non Conveniens *and* Swaraj

The court held in favor of the defendants on the *forum non conveniens* issue because the evidence and witnesses were in India. The court also noted that flying American businesspeople to India was much easier than shipping evidence and sending thousands of witnesses to the United States, regardless of plaintiffs' willingness to testify in the United States. Additionally, the court concluded that the Indian legal system had the sufficient infrastructure to handle the Bhopal cases. Therefore, the court saw U.S. jurisdiction as burdensome: This was an Indian problem and India was to be respected and left alone.

At first glance, the court seems to protect India's self-rule. A foreign court ruling on events occurring in India can seem imperialistic and patronizing, especially when it is the court of a western nation only a few decades after India ended its British colonization. In one sense, the court could be seen as upholding Indian jurisdiction when it stated that "American interests were outweighed by Indian interests in this case."[213] Especially when one considers the court's statement that "India's court system was capable of handling the complex Bhopal disaster litigation,"[214] the court seems to acknowledge the power of India's courts and reaffirm India's self-rule. In fact, self-rule (*swaraj*) is one of Gandhi's central concepts, and therefore, one may interpret the holding by the U.S. Court of Appeals as being consistent with Gandhi's thought. However, *swaraj* contains unique insights that arise from Gandhi's non-western influences, and a closer inspection of *swaraj* reveals a troubling pattern in the Bhopal jurisprudence that hinders self-rule.

Parel described *swaraj* as the individual and collective state of being to which Gandhi's Doctrine of *Ahimsa* ultimately leads.[215] Because *ahimsa* is so associated with Gandhi's name, scholars and the public are much more familiar with his philosophy of nonviolence than they are with his con-

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212. In Gandhi's theory of law and the state, it seems imperative to view governments claiming to follow a 'rule of law' as being in a shared mission to preserve the rule of law itself. When a corporation refuses to appear in a court of a host country, it seems that the home country would share the duty to compel compliance in Gandhi's thought. Although there are several reasons based on human rights to protect real persons from harm or death if they were to return to another country, there is no such concern in this corporate case. In the Bhopal cases, those suffering immediate bodily harm and suffering are the plaintiffs and not the fugitive defendant.

Moreover, for one regime to respect another regime's rule of law, it is more consistent to give the defendant UCC two options: Either UCC uses resources of US courts and accepts the punishment in India, or UCC is not permitted to use the resources of US courts. Ironically, although the Court argues that its non-interference preserves the respect of Indian courts, the current court decisions result in UCC gaining access to US courts without the responsibility to honor legal order in India.

213. *In re* Union Carbide Corp. Gas Plant Disaster at Bhopal, India, in December 1984, 634 F. Supp. 842, 847 (S.D.N.Y. 1986), *supra* note 85, at 852.

214. *Id.*

215. *See* GANDHI, FREEDOM, AND SELF-RULE (Anthony J. Parel, ed, 2000).

ception of self-rule. Both *ahimsa* and *swaraj*, however, cannot be understood adequately without a detailed understanding of their synthesis in Gandhi's thinking.

Through his own service to others (*karma-yoga*), Gandhi concluded that the practice of *ahimsa* was necessary to realize *satya*, or Truth. When one fully realizes *satya*, she experiences a state of mind, which is described in Sanskrit as 'sat-chit-ananda' (Truth-Consciousness-Bliss).[216] In many India's spiritual traditions, sat-chit-ananda describes the subjective experience of approaching enlightenment, and Gandhi dedicated himself to living this experience as much as any ordained monk. Therefore, Gandhi described *ahimsa* as the vehicle to achieve enlightenment (*or moksha*) and the mechanism to attain a full comprehension of Truth (*satya*).[217]

Gandhi often focused on his own daily life to develop practices that enhanced his individual self-realization. In fact, he referred to his entire life a series of "experiments with Truth,"[218] but his experiments were not limited to the domain of his personal life. Gandhi connected his personal insights to the common good and applied his discoveries to the domains of politics and society. Therefore, in his conception of *swaraj*, Gandhi uniquely connected the individual's mental state to the collective state.

Swaraj was Gandhi's term of choice to describe a world in which the individual mind *and social relations* were saturated with the wisdom of Truth (*satya*). He described *swaraj* as a "state of being of individuals and nations,"[219] and as such, *swaraj* is the social and political end result of using *ahimsa* (nonviolence) as a means of worldly action. *Swaraj*, therefore, defined Gandhi's vision of a society and politics, which operated through the dictates of *satya* (Truth).

Gandhi's description of *swaraj* had four components: (1) national sovereignty (the freedom of a group to live independent of foreign rule); (2) political freedom (the individual's freedom from oppression); (3) economic freedom (freedom from poverty and exploitation); and (4) spiritual freedom (inner self-rule).[220] Therefore, in a mindful jurisprudence of *forum non conveniens*, a test based on *swaraj* would require all four of Gandhi's conditions to be maximized. In other words, all decisionmaking—jurisprudential or otherwise—would have to be made with a consideration of the consequences on all four forms of freedom. In our analysis, we

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216. The root of the term "satya" (Truth) is the shortened Sanskrit term "sat."

217. "My uniform experience has convinced me that there is no other God than Truth. And if every page of these Chapters does not proclaim to the reader that the only means for the realization of Truth is Ahimsa, I shall deem all my labour in writing these chapters to have been in vain . . . . But this much I can say with assurance, as a result, of all my experiments, that a perfect vision of Truth can follow a complete realization of Ahimsa." GANDHI, *supra* note 206, at 590–591.

218. *Id.*

219. GANDHI, FREEDOM, AND SELF-RULE (Anthony J. Parel ed., 2000), at 1.

220. GANDHI, FREEDOM, AND SELF-RULE, *supra* note 215. We do not address the fourth prong in this analysis since its focus is on the individual's ability to provide for oneself the other dimensions of self-rule not accounted for in the first three prongs. We focus on the first three prongs due to their focus on the relationship between organizations and individuals.

focus on the two conditions that are most problematic in *Bano* and *Bi*: economic freedom and political freedom.

First, the Court's *forum non conveniens* analysis would fail the third of Gandhi's four conditions: economic freedom. In *Bano* and *Bi*, the ability of victims to exercise any of their own economic freedom is glaringly absent from the court's analysis. Not only are victims suffering ongoing financial damage as a result of the disaster, but they also have been prevented from using their own resources to hire their own counsel. This invisibility of victims' economic freedom allows corporate economic imperative to be the only economic interest under the court's consideration. As a result, in *Bano* and *Bi*, the economic freedom of the corporation blatantly is privileged over the relative poverty of the plaintiffs. By permitting this privilege, the court permits UCC to treat plaintiff harm as an externality. Therefore, in the court's style of jurisprudence, freedom from poverty and exploitation remain outside the scope of consideration.

The court's holding can be justified on purely practical grounds, such as the location of evidence and witnesses. However, this holding also functions as a way to relieve U.S. courts of the "inconvenience" and burden of administering justice when U.S. corporations are involved in disputes. In an age of internet and electronic communication, modern nation states and judicial systems cannot claim to be unable to work together to coordinate cases across borders, especially when victims continuously file cases and demand the courts' administration of justice. If individuals can send videos and texts in seconds across oceans, one easily can wonder why courts cannot utilize such technology to meet the challenges of modern transnational cases.

One may argue that allowing Indian courts to handle an "Indian" problem is a way to acknowledge India's self-rule, but in light of swaraj for Bhopal victims, this argument is ineffective. Although such an argument would satisfy Gandhi's first prong of national sovereignty, it leaves the other three prongs completely unaddressed. In other words, a court advancing *swaraj* would not advocate "self-rule" purely based on national sovereignty, because national sovereignty is a form of self-rule that only benefits those with the most domestic power. Gandhi, therefore, perceptively included his second and third prongs (political and economic freedom) to assure that *swaraj* contained several layers, all of which must be incorporated into an analysis of what genuine self-rule entails. Therefore, in a transnational case, it is not a genuine argument for *swaraj* to conclude that the suffering of hundreds of thousands of people at the hands of a large organization is "an Indian problem."

Second, the Court's holding fails Gandhi's second prong of political freedom. When courts systematically dismiss plaintiffs' claims when the deaths of 20,000 people are in question, it is difficult to argue against the assertion that courts are protecting the power of the state and business community by oppressing the political freedom of victims to seek adequate redress. The function of denying plaintiffs the resources of the court due to "inconvenience" is to relieve the courts of the burden of handling the messy and difficult questions that come with circumstances that oppress the will of hundreds of thousands of disaster bystanders.

The court's decision to relieve itself of this burden is neither consistent with nor germane to the notion that courts provide a balanced forum in which social conflicts can be resolved.

Therefore, under Gandhi's four-pronged *swaraj* test, a court would be forbidden from using "inconvenience" as a basis for inaction. Gandhi's clarity on this matter cannot be understated: action advancing *swaraj* must be undertaken regardless of its level of convenience. Central to the advancement of *swaraj* is the duty of non-cooperation, a duty that hardly is convenient. When courts failed in their duty to fairly administer justice, Gandhi called for public non-cooperation. He explained, "[p]assive resistance has been described in the course of our discussion as truth-force. Truth, therefore, has necessarily to be followed and that at any cost."[221] In his descriptions of an ideal *satyagrahi* (non-violent resister), Gandhi advocated for developing firm resolve to withstand adversity: "Those alone can follow the path of passive resistance who are free from fear, whether as to their possessions, false honour, their relatives, the government, bodily injuries or death. These observances are not to be abandoned in the belief that they are difficult."[222]

If courts possessed the same resolve of a *satyagrahi* to face challenge at the expense of convenience, then courts would conduct a *forum non conveniens* analysis with careful attention to the Doctrine of Swaraj. If *swaraj*, *ahimsa*, and the cessation of suffering in Gandhi's vision of an enlightened social world mattered in legal discourse, then the court would have more seriously addressed the question of suffering rather than making convenience more important than *swaraj*. By claiming inconvenience, the court abandoned the challenge of directly facing plaintiff harm.

F. Continuing Tort Doctrine (Statute of Limitations) in Light of Ahimsa *and* Swaraj

The court's holding that the statute of limitations bars plaintiff claims also reflects the court's inability to produce any genuine conflict resolution after the Bhopal disaster. The court seemed to understand that the harm occurred, but under existing doctrinal principles, the court seemed unable to redress the harm and recognize that the continual presence of the toxins makes the Bhopal cases unique. In *Bano v. Union Carbide*,[223] Ms. Bi did not experience her reported health problems until shortly after moving into the vicinity of the plant site. Therefore, the question of whether the statute of limitations has expired seems inapplicable to a circumstance in which the relevant fact is the *ongoing presence* of the toxin.

Moreover, the court held that the plaintiffs' injuries were latent, meaning that the injuries did not appear immediately after toxic exposure. However, given that methyl isocyanate has been circulating through Bhopal for decades, it is unclear how long it would take for a person to become exposed, how much toxin a person absorbed, and how long it would take for injuries to appear. Even the court itself concluded that its

221. 10 *CWMG*, *supra* note 2, at 297.
222. *Id.*
223. *Bano v. Union Carbide Corp.*, 361 F.3d 696 (2d Cir. 2004).

patent/latent analysis was irrelevant, but the court came to this conclusion because the ten years since the accident already barred the plaintiff's suit. In this reasoning, the court still failed to acknowledge that over long periods of time, a person still can suffer harm from toxic exposure *as long as the toxin still is present at the site and able to move.* If addressing harm is part of the function of the court, the initial moment of toxic exposure seems hardly relevant to addressing harm connected to the toxin's ongoing presence and movement.

Gandhi's third prong of *swaraj* requires freedom from poverty and exploitation, and a mindful jurisprudence would require statute of limitations analyses to pass the third prong of *swaraj*. However, in *Bano* and *Bi*, the courts confined their analysis of the statute of limitations to the strict timeline for filing claims, regardless of the degree of poverty or exploitation preserved in the process of denying the claim. Rather than discussing the tremendous wealth imbalances between the plaintiffs and defendants, the court took a narrow view that avoided the broader issue of the wealth and power imbalance between transnational corporations and poor populations that reside near corporate plants.[224] By rejecting plaintiffs' claims under the statute of limitations, the Court resolved the issue of whether Bhopal plaintiffs claims had expired for *past* harms. However, the Court left unresolved the present and future suffering, oppression, and exploitation of marginalized plaintiffs. We recognize that if the court allowed the claim to be heard, the very problem of limitless claims that statutes of limitations are intended to bar would emerge. Therefore, in light of the Doctrine of Swaraj, any decision to allow a claim under the continuing tort doctrine would necessitate the construction of a test for determining when claims still would be barred.[225] Under the Doctrine of Swaraj, such a test would allow the statute of limitations to apply only when conditions of poverty and exploitation have been eradicated from the social context in which the ongoing harm in the case emerges.

The court's reasoning seems even more ineffective when we consider Gandhi's Doctrine of *Ahimsa* (non-injury), which demands that all action be directed toward eliminating or minimizing injury to all. When one considers *ahimsa*, it is unclear how the court's reasoning on the statute of limitations rectifies mass injury to plaintiffs, especially when many plaintiffs will be injured by the toxins more than ten years after the disaster. By allowing the injurious conditions to persist—such as permitting toxins at a plant site to remain unaddressed and leak into groundwater—the state and corporation have preserved the conditions of injury indefinitely. The fact that plaintiffs have experienced ongoing injury for decades and continue to file suits in the United States illustrates the legal system's in-

224. For discussions about the problem of transnational corporations' human rights and environmental abuses, see A. Sinden, *Power and Responsibility: Why Human Rights Should Address Corporate Environmental Wrongs, in* THE NEW CORPORATE ACCOUNTABILITY 501–03 (D. McBarnet, A. Voiculescu & T. Campbell eds., 2009) and Carmen G. Gonzalez, *Environmental justice and international environmental law, in* THE ROUTLEDGE HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW, *supra* note 202, at 77, 92.

225. We also could characterize the necessity for a test as a way of asking a court to use its equitable powers.

ability to adequately achieve Gandhi's goals of political and economic swaraj. Far from being a problem-solving or justice-advancing institution,[226] the court seems trapped in its own logic and unprepared to function as an institution prepared for calamities. Rather than promoting *ahimsa*, the court rejected the doctrine of non-injury and chose denial of injury by rejecting plaintiffs under the statute of limitations.

Consequently, the Bhopal tragedy revealed the ways that complex chemical disasters guarantee uncertainty, and the *Bano* and *Bi* jurisprudence illustrated how defendant corporations use the uncertainties of when and how exposure occurred to absolve themselves of any responsibility to promote self-rule or non-injury. *Bano* and *Bi* also reveal the manner in which dominant legal discourse systematically excludes the issues that are most important to addressing continuing suffering (*swaraj* and *ahimsa*).

IV. CONCLUSION

The Bhopal chemical spill remains the largest industrial disaster in history; yet, on the eve of its thirtieth anniversary, the city of Bhopal remains in peril. Methyl isocyanate has seeped from the ground of the pesticide plant into the city's groundwater, killing an estimated 17,000 people beyond the initial 3,500 people killed the night of the explosion. Survivors have received less than $500 per person in compensation, an amount which must cover medical bills and lost wages for a lifetime. Yet the Indian government maintains its thirty-year moratorium on individual lawsuits. Survivors have chased UCC (now Dow Chemical) to its home country by seeking redress in U.S. courts; yet, courts of the United States have rejected every argument for compensation raised by the victims.

The results of Bhopal illustrate the one-sidedness of our current transnational legal climate, in which corporations hold tremendous political and economic advantages over victims.[227] In cases involving multiple sovereign jurisdictions, the absence of a mindful jurisprudence creates a transnational gap in which corporations hide from responsibility. In this Article, we call on legal theorists to recognize that survivors continue to protest because current legal reforms have been ineffective. Conventional reform discourse often suggests there is a systemic solution to industrial disaster without a comprehensive evaluation of current legal reasoning; however, Gandhi's thought suggests that managing post-disaster crisis will not be possible without serious re-examination of current jurisprudence.

No prior policy reform recommendation has been bold enough for the change that is needed to dignify the deaths of tens of thousands of vic-

226. This belief seems ubiquitous in America's major legal organizations. However, the silence of many major American legal institutions on the Bhopal case further raises the question of whether our current conceptions of liberty and justice are too narrow for a transnational world.

227. *See* Carmen G. Gonzalez, *supra* note 224, at 83. For a deeper discussion of inequality between parties to lawsuits, see Galanter, *supra* note 193, at 97, 107; JONATHAN HARR, A CIVIL ACTION, (1996), *supra* note 198; GERALD M. STERN, THE BUFFALO CREEK DISASTER (2008), *supra* note 194.

tims. The goal of a transnational environmental law should be to create positive behavior by states and corporations that prevent ongoing environmental devastation and injustice. However, when there is chronic lack of response from the state and business sector, disempowered masses are left to use *Satyagraha* (non-violent resistance) to change their abject conditions. A mindful jurisprudence can make extra-legal efforts unnecessary, but creating such jurisprudence would demand a commitment from the legal community to make legal redress a technique for environmental justice that is as effective an option for the world's victims as *Satyagraha* already has been. The legal community has not made such a commitment after the Bhopal disaster; instead, the stimulus for legal reform largely has come from survivors who have expressed their views of the deficiencies of modern law and society. However, Gandhi's core principles give legal theorists a springboard from which to create a mindful jurisprudence that protects human dignity, ensures global environmental stewardship, and is responsive to the Bhopal survivors.

In this Article, we use relevant principles from Gandhi's thought to imagine a transnational environmental jurisprudence that would acknowledge the suffering of Bhopal survivors. We analyzed the core legal principles of the Bhopal jurisprudence in light of the corresponding principles in Gandhi's thought. We believe that the stark contrast between the actual Bhopal jurisprudence and a mindful jurisprudence informed by Gandhi reveals a wide gap between current legal theory and the changes necessary to minimize suffering in Bhopal.

First, the court held that the plaintiff could not pierce the corporate veil to hold the parent company liable for the pesticide spill. However, if viewed through Gandhi's Theory of Trusteeship, the court would have considered UCC's assets as held in trust for society's benefit and expected UCC to explain how the protection of its assets maximizes the welfare of all (*Sarvodaya*). Therefore, the party seeking to protect its assets must show that it is using its assets for the benefit of everyone. Instead, the court's holding privileges a private corporation's assets over public security.

Second, the state's claim to be a parent overseeing the children preserved state power rather than assuring adequate care. When viewed through Gandhi's Theory of the State and the Doctrine of *Sarvodaya*, the state's use of *parens patriae* limited the victims' ability to represent themselves and removed the survivors from the legal process rather than allowing for representation. Representation based on the welfare of all would not produce thirty years of inaction at the site of the toxin and a settlement that barely covers a fraction of medical costs.

Third, the court held that the plaintiffs lacked standing to sue in U.S. courts. However, when viewed via Gandhi's Theory of the State, the minimization of suffering would be a primary issue for a court to consider in a standing analysis. Under Gandhi's Theory of the State, the machine-like quality of the court's standing analysis reflects an abdication of moral judgment in modern transnational jurisprudence. *Ahimsa* and familial interconnectedness would be primary legal principles in a mindful jurisprudence; therefore, the Indian state's inability to protect its public and

the American state's reluctance to monitor and control the behavior of its multinational corporation would activate the people's right to represent themselves. As a result, multinational corporations would have much more difficulty using the hazy lines in transnational space to avoid court.

Fourth, the court held that the FDD could not preclude UCC from representing its interests in U.S. courts. However, when reinterpreted through Gandhi's Theory of Rights, the duty of corporations to exercise care for the environment and regard for local populations forms the basis of corporate rights. In particular, a corporation must show how it has applied the Doctrine of *Ahimsa* to ensure that non-injury is its primary focus in the aftermath of disaster.

Fifth, the court's *forum non conveniens* analysis is troubling when one considers Gandhi's Doctrine of *Swaraj*. The U.S. court had strong incentive to throw the case into Indian court to relieve itself of any responsibility over handling the matter. Thus, although the court alluded to condescension and imperialism as reasons *not* to provide forum in the United States, critics assert that the court merely masked the primary incentive of remaining uninvolved. Regardless of the intent, such a holding does little to ensure the *swaraj* of the hundreds of thousands who continue to suffer due partly to judicial reticence and fear of 'inconvenience.'

Sixth, the statute of limitations is a hollow reason to deny plaintiffs' claims when the toxic exposure they endured for thirty years is the result of corporate and state inaction. Gandhi's Doctrines of *Ahimsa* and *Swaraj* necessitate people's freedom from ongoing harm and the opportunity for people to create a healthy environment for themselves. Under an *ahimsa*-based view of the Continuing Tort Doctrine, courts must allow Bhopal victims to pursue redress in order to preserve the dignity that genuine *swaraj* demands.

In light of our analysis of the Bhopal litigations, we conclude that the needs of disempowered populations cannot be met within the confines of current jurisprudence. In contrast, Gandhi's thought provides the necessary conceptual frameworks for adequately addressing mass suffering of the type in Bhopal. Legal theory is in dire need of such fresh thinking to invigorate the legal doctrines applied to transnational environmental disasters and to prevent the legal torpor in Bhopal from occurring again. Gandhi's thought provides the reorientation that law and jurisprudence need.

However, Gandhi's thought is not a series of policy recommendations that rest upon the same unexamined assumptions as other popularly debated policy positions in the West. Gandhi sought to reexamine the underlying assumptions of social thought by revisiting life's fundamental questions and the ways that societies handled those questions. In this sense, Gandhi's thought is revolutionary and calls on us to summon the courage to re-examine our most taken-for-granted beliefs.

All societies have dominant cultural conceptions of human beings, social interaction, society, the universe, and a person's individual and collective place in the universe. These dominant conceptions are a society's conclusion about life's fundamental questions and influence what world we subsequently create. Rather than leaving the West's (and India's) con-

clusions on these fundamental questions untouched, Gandhi challenged the taken-for-granted attitudes that pervaded modern thought. He sought to create a new world by thinking beyond the cognitive traps of Western (and Indian) assumptions about the world, people's place in that world, and people's relation to the world and each other. At a time when crucial decisions will be made that determine the fate of billions of people and a planet, we cannot afford to shirk the duty to embrace Gandhi's critical perspective and re-examine our own fundamental assumptions.

There is a way to end nightmares. In Gandhi's thought, it starts with changing the mind, results in a change of action, and ends in fulfilling the world's potential for peace. Our Article is an effort to cure nightmares like the one in Bhopal, and to end the horrors of the incompetently handled aftermath. Gandhi's nightmare will continue if the same style of thinking persists in legal discourses. By incorporating Gandhi's thought into these discourses, this nightmare can end.