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## Here's a Tip, Change the Law! Nerva v. United Kingdom

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# Here's a Tip, Change the Law!

## *Nerva v. United Kingdom*

### I. INTRODUCTION

Former restaurant employees Sandro Nerva, Jose Pulleiro, Jose Gigirey-Cabo, and Julio Rodriguez (“the Waiters”) initiated *Nerva v. United Kingdom* in 1994 against Paradiso e Inferno and Trota Blu (“the Restaurants”).<sup>1</sup> The Waiters claimed that during the six years prior to March 6, 1989, they were not paid the minimum wage that was mandated under UK law.<sup>2</sup> The Waiters’ breach of contract claims invoked violations of the Wages Council Act of 1979, as well as the Wages Act of 1986.<sup>3</sup>

The Restaurants argued that they were entitled to use credit card and check generated tips to pay down the state mandated minimum wage because the customers wrote out the credit card and check transactions payable to the Restaurants, and not the Waiters.<sup>4</sup> Thus, the Restaurants maintained that those tips belonged to them.<sup>5</sup> On May 25, 1994, the High Court of England agreed with the Restaurants, holding that tips included in check and credit card transactions did properly count against the minimum remuneration requirement.<sup>6</sup> The court also rejected the Waiters’ contention that the Restaurants were holding the tips in trust for them.<sup>7</sup> Essentially, the court found that legal title to such

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1. See Catherine Elsworth, *Waiters Lose Fight Over Credit Card Tips*, THE DAILY TELEGRAPH, Sept. 25, 2002, available at <http://www.dailytelegraph.co.uk> (last visited Feb. 10, 2004); see also *Nerva v. United Kingdom*, 2002-VIII Eur. Ct. H.R. 3, 5-8.

2. *Nerva v. United Kingdom*, 2002-VIII Eur. Ct. H.R. at 7.

3. *Id.*

4. *Id.* at 11-12.

5. *Id.*

6. *Id.* at 7.

7. *Id.*

tips paid by credit card or check became the Restaurants' property, not the Waiters'.<sup>8</sup>

The Waiters took their case to the Court of Appeal.<sup>9</sup> Significantly, in their appeal, the Waiters accepted the proposition that legal title to non-cash tips first passed to the employer.<sup>10</sup> They "no longer relied on the argument that they were to be considered beneficiaries of money held on trust for them by the employer."<sup>11</sup> The Court of Appeal upheld the judgment of the High Court and the Waiters appealed to the House of Lords.<sup>12</sup> The House of Lords granted leave for an oral hearing; the Waiters' claims, however, were ultimately rejected.<sup>13</sup>

The Waiters subsequently took their case to the European Court of Human Rights (ECHR) arguing, inter alia, that Article 1 of Protocol 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") was violated because they experienced interference with their right to the peaceful enjoyment of their possessions.<sup>14</sup> The ECHR disagreed, holding that credit card<sup>15</sup> tips belonged to the Restaurants, not the Waiters.<sup>16</sup>

This Note argues that the ECHR was incorrect in its decision to grant the Restaurants the unfettered right to take non-cash tips left by customers, and consequently, to use those monies to pay down the statutorily mandated UK minimum wage. Part II outlines the relevant facts in *Nerva*. Part III introduces the non-legal rationales driving the practice of tip giving in restaurants. Part IV uses public policy, "commonsense" rationale, UK case

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8. *Nerva v. United Kingdom*, 2002-VIII Eur. Ct. H.R. at 7. The premise that the Waiters possessed an indivisible proprietary interest in cash tips was uncontested in the litigation. *Id.*

9. *Id.* at 7; see also *Nerva v. RL&G Ltd.*, 1996 INDUS. REL. L. REP. 461 (UK).

10. *Nerva v. United Kingdom*, 2002-VIII Eur. Ct. H.R. at 8.

11. *Id.* at 8-9. As will be discussed in detail, this concession may have proved fatal to the Waiters' case. Once the Waiters accepted that legal title had in fact transferred to the Restaurants, the court went further in the analysis to substantiate why, in light of the applicable minimum wage legislation, the Restaurants could use the "Restaurant owned" tips to pay down the minimum wage as "remuneration."

12. *Id.* at 9.

13. *Id.* The hearing was before a three-judge panel, yet, after five minutes of oral argument, the appeal was dismissed. *Id.*

14. *Id.* at 11.

15. The term "credit card" will be utilized to imply both credit card and check transactions.

16. *Nerva v. United Kingdom*, 2002-VIII Eur. Ct. H.R. at 13.

law, and ECHR case law to argue that (1) waiters have a legitimate expectation to receive title in credit card tips and (2) customers intend to give tips to waiters, not restaurants. Thus, the decision in *Nerva* deprives the Waiters' right to peaceful enjoyment of their possessions. Allowing restaurant owners to hold legal title in tips is, therefore, a violation of Article 1 of the Convention. Part V applies U.S. statutory law to the facts in *Nerva*, primarily to recommend ways in which legislative reform can enhance the financial security of service employees within the United Kingdom. Part VI concludes that the House of Commons should adopt a pending amendment that would reverse the *Nerva* line of cases—at last placing the disputed tips in the hands of their rightful owners.

## II. FACTS

When the Waiters in *Nerva* started working for the Restaurants, it was customary for tips received in cash to be placed in a box called a “tronc.”<sup>17</sup> At the end of the week, a “troncmaster” distributed the tips proportionally to the Waiters.<sup>18</sup> Similarly, every time tips were received through credit cards, an equivalent cash amount was removed from the cash register and placed into the tronc.<sup>19</sup>

In 1979, the Restaurants were forced by tax authorities to abide by the “Pay-As-You-Earn” system.<sup>20</sup> Under this system, the Restaurants became responsible to ensure that tips left via credit cards were subject to income and national insurance tax, and that the Restaurants' own national insurance contribution reflected those totaled sums.<sup>21</sup> Rather than putting the cash equivalent of the non-cash tips in the tronc as before, the Restaurants decided to operate on a different system.<sup>22</sup>

The Restaurants' new system included an “additional pay” section on the Waiters' weekly pay slips.<sup>23</sup> This additional pay section was supposed to reflect the credit card tips earned by the

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17. *Id.* at 6.

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Nerva v. United Kingdom*, 2002-VIII Eur. Ct. H.R. at 6.

23. *Id.*

Waiters.<sup>24</sup> The Waiters initially opposed this system, but predictably<sup>25</sup> they acquiesced to the Restaurants' new management scheme.<sup>26</sup>

Yet, this new system contained a hidden change not previously discussed with the Waiters.<sup>27</sup> Although the Restaurants purportedly paid the non-cash tips to the Waiters in full, they were using these sums as payment against their minimum wage obligations under the UK Wages Councils Acts.<sup>28</sup>

### III. BACKGROUND

Before delving into the ECHR's legal rationale, it is important to evaluate the practice of tipping from a non-legal perspective. Without understanding the socio-cultural context within which customers traditionally give tips, certain inherent flaws of the ECHR's holding cannot be fully understood.

Consider a common hypothetical regarding the average restaurant customer. After a customer finishes her meal, she prepares to pay the bill with her credit card. While awaiting the receipt, the customer may evaluate how pleased she was with her waiter in order to gauge the amount of tip deserved. Alternatively, she may have turned into a human calculator, figuring out a predetermined percentage that she gives to all waiters. In that entire process, the customer never reflects on the precise question—“To whom am I giving this gratuity?”

Typically, when customers give a tip in addition to what they pay for food or drink, they intend the gratuity to be given directly to the person who served them.<sup>29</sup> The most common rationale for tipping is to thank the waiter, acknowledge the service, and provide a little extra compensation.<sup>30</sup>

24. *Id.*

25. The word “predictably” is used because service employees commonly possess little bargaining power relative to their employers. See MARK A. ROTHSTEIN & LANCE LIEBMAN, *EMPLOYMENT LAW* 986 (5th ed. 2003).

26. *Nerva v. United Kingdom*, 2002-VIII Eur. Ct. H.R. at 7.

27. *Id.*

28. *Id.*

29. “[M]ost customers believe that when they leave a credit card tip it goes to the waiter.” Cyril Dixon, *Here's a Tip, Give in Cash*, THE DAILY EXPRESS, Sept. 25, 2002, available at 2002 WL 101128187 (quoting Solicitor Catherine Scrivens who represented the Waiters in *Nerva*).

30. Thompsons Solicitors, *Subsidising Low Pay*, 73 LAB. & EUR. L. REV. 2 (2002) available at <http://www.thompsons.law.co.uk/>.

Another reason for giving tips is to comply with the cultural norms of a given country, city, or state.<sup>31</sup> In New York and Los Angeles, for example, as in much of the United States, it is customary to give no less than a 15-20 percent gratuity.<sup>32</sup> In Europe, however, there is less of a tipping culture<sup>33</sup> and the practice is optional on much of the continent.<sup>34</sup> Yet, one of the better established tipping cultures within Europe is in London, England,<sup>35</sup> where it is customary to give anywhere between a 10-15 percent gratuity in restaurants.<sup>36</sup>

#### IV. THE ECHR'S PROBLEMATIC ANALYSIS

Public policy and “commonsense” rationale suggest that (1) waiters have a legitimate expectation to receive title to credit card tips and (2) customers intend to give tips to waiters, not restaurants. A look at ECHR and UK case law also supports this proposition.

##### A. *Legitimate Expectation and Customer Intent*

The UK Government (“the Government”) represented the defendant Restaurants because the ECHR proceeding implicated the validity of a UK domestic court judgment.<sup>37</sup> The Government argued that the Restaurants ultimately paid the tips to the Waiters while still complying with minimum wage requirements.<sup>38</sup> Thus, the Waiters ultimately obtained title in those sums.<sup>39</sup> Moreover, the

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31. ERIC A. POSNER, *LAW AND SOCIAL NORMS* 58 (Harvard U. Press 2000). Some scholars argue that the principal reason behind tipping is not to provide incentives or to reward for good service, but to assuage fears of social disapproval. See Leo P. Crespi, *The Implications of Tipping in America*, 11 PUB. OPINION Q. 424, 429 (1947), Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CAL. L. REV. 1051, 1129-30 (2000), Ofer H. Azar, *The Implications of Tipping for Economics and Management*, 30 INT'L J. SOC. ECON. 1084, 1088 (2003) (“[T]he reason[] for tipping is that tipping is a social norm and that disobeying the norm is associated with a disutility caused by feelings of unfairness and embarrassment.”).

32. See LYNN ARANY ET AL., *FODOR'S NEW YORK CITY 2005*, at 232 (2004); see also ERIKA LENKERT ET AL., *FROMMER'S CALIFORNIA 2004*, at 62 (2004).

33. See Virtual London, *Tipping*, at <http://www.a-london-guide.co.uk> (last visited Oct. 3, 2004) [hereinafter Virtual London].

34. *Id.*

35. *Id.*

36. *Id.*

37. *Nerva v. United Kingdom*, 2002-VIII Eur. Ct. H.R. at 6, 13.

38. *Id.* at 11.

39. *Id.*

Government argued, it was clear from the terms of the employment contract that the Waiters had a legitimate expectation that the tips would pass to them, but only after the tips had become the property of the employer.<sup>40</sup>

The ECHR stressed that the Waiters could not use the legitimate expectation principle to argue that the customers intended to transfer property in the tips directly to them without the tips first becoming their employer's property.<sup>41</sup> Furthermore, the ECHR stated that the Waiters could not have legitimately expected that the credit card tips would not be treated as remuneration because domestic law had always provided that, with the exception of an employee's business expenses, all payments by an employer would count as remuneration.<sup>42</sup>

In *The Former King of Greece v. Greece*, the ECHR held that the Former King of Greece had a legitimate expectation that he would be compensated for land that the new Greek dictator took from him.<sup>43</sup> He had a legitimate expectation because decades earlier, compensation was provided when the property was expropriated.<sup>44</sup>

By analogy, in *Nerva*, the previous Restaurant policy was to give all credit card tips in cash to the Waiters at the end of the week.<sup>45</sup> Accordingly, this prior practice would reasonably give rise to a legitimate expectation among the Waiters that they would receive their tips in addition to their contractual wage. It is indeed ironic that UK restaurants are permitted to shirk their minimum wage obligations after the enactment of domestic minimum wage legislation. The ECHR's interpretation of UK minimum wage laws implicates the ineffectiveness of the laws that were enacted to ensure that waiters earn no less than a minimum wage.

The notion of customer intent is also lost in the ECHR's reasoning. As stated by the court in *Nerva*:

[T]he [Waiters] cannot claim that they had a legitimate expectation that the tips at issue would not count towards remuneration. Such a view assumes that the customer intended that this would *not* be the case. However, this is too imprecise a

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40. *Id.* at 11-12.

41. *Id.* at 12.

42. *Id.*

43. *The Former King of Greece v. Greece*, 2000-XII Eur. Ct. H.R. 121, 149.

44. *Id.*

45. *Nerva v. United Kingdom*, 2002-VIII Eur. Ct. H.R. at 6.

basis on which to found a legitimate expectation which could give rise to “possessions” within the meaning of Article 1. . . .<sup>46</sup>

Firstly, it is doubtful that customers give credit card tips with the intention that legal title to the gratuities pass first through the Restaurants before reaching the Waiters’ pocketbooks. Secondly, it is highly improbable that customers ever leave tips with the intention of helping restaurants fulfill their minimum wage obligations under the law. The problem lies in the fact that customers never give any thought to such a question. Customers assume as axiomatic that tips will pass directly into the hands of the waiters who dutifully served them. As previously mentioned, the function of a tip is either to reward good service, or alternatively, to comply with cultural norms, or both.<sup>47</sup>

If posed with the question, however, a majority of patrons would account for the relatively large amount of money that they pay to the restaurant for the meal, and consequently declare a preference that title to the tips never pass to the restaurant. Public consensus and preference, therefore, would militate toward the Waiters’ direct receipt of tips in addition to the minimum wage. The ECHR, however, was unwilling to undertake an analysis of customer intent. It stated, in a most conclusory fashion, that the notion of customer intent is too “imprecise” a standard for determining whether the Waiters legitimately expected to receive their tips as “possessions.” In effect, this unwillingness created an insurmountable standard of proof for the Waiters attempting to show that their tips qualified as their own “possessions.”

An implied minor premise of the ECHR’s resultant reasoning is that customers would overtly pronounce an intention to give credit card tips to waiters if they actually possessed such an intention.<sup>48</sup> In other words, if a customer states precise words to the effect of “I hereby intend to bequeath to you, my waiter, the whole sum of this credit card gratuity,” then the waiter would own the tips apart from remuneration under the UK Wages Act. The reasoning follows that, because customers never voiced such a precise intention, one cannot be implied.

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46. *Id.* at 14 (emphasis added).

47. See POSNER, *supra* note 31, at 58; see Virtual London, *supra* note 33; see also Mark Wilkinson & Chris Millar, *British Waiters Get European Court Ruling on Tipping By Credit Card*, EVENING STANDARD, Sept. 24, 2002, available at [http://www.hotel-online.com/News/PR2002\\_3rd/Sept02\\_BritTips.html](http://www.hotel-online.com/News/PR2002_3rd/Sept02_BritTips.html).

48. *Nerva v. United Kingdom*, 2002-VIII Eur. Ct. H.R. at 8.



As previously mentioned, the answer to this customer intent conundrum is rooted deeply in notions of commonsense and universal practice rather than established European jurisprudence. One would think that these justices have never been patrons, or at least tipping patrons, at a restaurant. If they had, a moment of self-reflection before signing the credit card receipt for the meal would have undoubtedly answered the "legal" question of whether tips qualify as possessions under Article 1 of the Convention.<sup>49</sup>

### *B. United Kingdom Domestic Law and Customer Intent*

In its analysis, the ECHR shows great deference to UK domestic courts by pronouncing that those courts are the appropriate interpreters of UK minimum wage legislation.<sup>50</sup> This statement, of course, contains a glaring exception. When a domestic court's interpretation of its own legislation conflicts with one's right to peaceful possession of property,<sup>51</sup> the ECHR may remedy the errant domestic court ruling.<sup>52</sup> In *Nerva*, the ECHR missed a golden opportunity to use UK domestic precedent to hold that the Waiters were deprived of their possessions in accordance with Article 1.

#### *1. Wrottesley v. Regent Street Florida Restaurant*<sup>53</sup>

Both the UK domestic courts and ECHR majority ignored a prominent King's Bench ruling that could have resolved this case

49. *Id.*

50. *Id.* ("[I]t would observe in this connection that that the interpretation and application of domestic legislation in a given dispute is a matter for the domestic courts.").

51. *Id.* at 11 (Article 1 of Protocol 1 of the Convention states: "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provision shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the uses of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.").

52. *Id.* at 13. The ECHR may not, however, impair the UK's right to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties. The ECHR did not use any of these exceptions to show why the UK could take property away from its residents because such cases usually concern the taking of real property for governmental use. *See The Former King of Greece v. Greece*, 2000-XII Eur. Ct. H.R. at 121.

53. *Wrottesley v. Regent St. Fla. Rest.*, 2 K.B. 277 (1951).

in the first instance.<sup>54</sup> While notions of commonsense and public policy may be unsatisfactory bases to resolve the issue of customer intent in *Nerva*, *Wrottesley* puts legal teeth into the argument that customers intend to vest tips directly into the hands of Waiters.

In *Wrottesley*, the Regent Street Florida Restaurant (“Regent”) orally agreed with the waiters to put all their tips into a locked box to be distributed solely to the waiters at the end of the applicable pay period.<sup>55</sup> As in *Nerva*, the waiters in *Wrottesley* received a pay greater than that mandated by the Wages Regulation Act at the time.<sup>56</sup> The problem, however, was that Regent attempted to use the tips left for the waiters to offset the minimum wage it was obligated to pay by law.<sup>57</sup>

The magistrate in the lower court felt that the minimum wage legislation at issue would have explicitly stated any intention for tips not to be calculated as remuneration.<sup>58</sup> The magistrate then held that as long as the waiter’s pay exceeded the mandated minimum wage, the sources of the funds did not matter.<sup>59</sup> This decision led the way for Regent and other restaurants to keep for themselves the amount in excess of the minimum wage earned by the waiters in tips.

The *Wrottesley* court reversed, holding that the purpose of the Act was to establish a minimum wage for those in the catering industry, and tips are separate from “wages.”<sup>60</sup> Thus, it was plain that the word “remuneration” used in the Act equated to the word “wages.”<sup>61</sup> In spite of this holding, both the UK domestic courts and the ECHR in *Nerva* held that “remuneration” did not mean “wages” as written in the Wages Act.<sup>62</sup> This reasoning is difficult to

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54. *Id.* at 278. Although the ECHR is not always bound by UK domestic law, it could have used *Wrottesley* as persuasive reasoning considering the fact that there was no ECHR case on point as to tipping. Moreover, since the ECHR considers domestic law to be of paramount importance to the decision of cases before it, it stands to reason that *Wrottesley* should have been used as an indicator of how English courts have looked at the notion of customer intent in the restaurant context. Concededly, the case was decided in 1951 when credit cards were not in use. There is no legitimate basis, however, for distinguishing between a patron’s “customer intent” in the 1950s versus her intent today.

55. *Id.*

56. *Id.* at 279.

57. *Id.*

58. *Id.*

59. *Wrottesley*, 2 K.B. at 279.

60. *Id.* at 280.

61. *Id.*

62. *Nerva v. United Kingdom*, 2002-VIII Eur. Ct. H.R. at 8.

reconcile because the structure of the 1943 Catering Wages Act is wholly analogous to that of the 1979 and 1986 Wages Acts at issue in *Nerva*.<sup>63</sup>

Next, the *Wrottesley* court held that the employer was plainly the de facto custodian of the *tronc monies* and that the monies never became the employer's property.<sup>64</sup> The prosecution in *Wrottesley* enumerated this point by stating:

Certainly, a customer who tips a waiter intends that the property in the tip shall vest in the waiter: he does not intend to give anything to the employer, and there is no *other circumstance* in the present case to indicate that the property in the tips passed from the waiters to their employer.<sup>65</sup>

The next logical question is whether any "other circumstances" in *Nerva* indicate that the property passed directly to the employer.

The ECHR attempted to distinguish the reasoning in *Wrottesley* by stating that, since the Restaurant bore the burden of potential credit card fraud, they should have the right to consider such tips as their own.<sup>66</sup> Moreover, the ECHR highlighted the fact that the Waiters were not required to indemnify the Restaurants for failed credit card transactions. The ECHR accepted the validity of these distinctions without showing any pressing national need to protect restaurants from any type of epidemic financial loss caused by fraudulent credit card sales.<sup>67</sup>

To balance the interests of the Waiters and Restaurants, the ECHR should have at least required evidence of such supposed burdens upon the Restaurants. Moreover, it is highly probable that the Waiters would have agreed to wait until the credit companies

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63. The Acts are analogous because neither speaks to customer intent regarding restaurant tips to service employees. In other words, neither Act seeks to confine the parameters of the word "remuneration." *Wrottesley* discarded the argument that there is a presumption in favor of tips counting as remuneration when the applicable wage legislation is silent on the issue. See *Wrottesley*, 2 K.B. at 282. The holding in *Nerva* effectively created a legal fiction that presumed remuneration to include credit card tips.

64. *Wrottesley*, 2 K.B. at 283.

65. *Id.* at 280 (emphasis added). Assuming *arguendo* that tips became the property of the Restaurants, the Waiters may have incurred a "necessary expenditure," and thus, under the Act, such monies still could not be used as remuneration. Indeed, the Wage Act at issue here contains the same "necessary expenditure" language. This is yet another example of the parallels between the legislation at issue in *Wrottesley* versus the *Nerva* Wages Act. See National Minimum Wage Act, 1998, c. 39 (Eng.).

66. *Nerva v. United Kingdom*, 2002-VIII Eur. Ct. H.R. at 13.

67. *Id.*

made payment before receiving the cash equivalent of credit card tips left for them.<sup>68</sup> For the Waiters, this alternative would have been preferable to the unadulterated taking of all credit card tips that should be considered the Waiters' possessions. Thus, this "potential for credit card fraud" rationale is an insufficient basis for distinguishing *Wrottesley* from *Nerva*.

## 2. *Saavedra v. Aceground*<sup>69</sup>

In *Saavedra*, a restaurant owner kept for himself a portion of tips left by customers.<sup>70</sup> He considered the portion a self-entitled "service charge."<sup>71</sup> The Employment Appeal Tribunal held that, although the owner had discretion to allocate tronc monies to workers as he saw fit, he did not have the legal right to allocate any of that money to himself.<sup>72</sup> He therefore violated the Wages Act of 1986.<sup>73</sup>

Similarly, in *Nerva*, the Restaurants used the Waiters' tips to help pay down the required minimum wage.<sup>74</sup> The holding in *Saavedra* did not discriminate between credit card and cash tips<sup>75</sup> and as a result, its per se holding encompassed both types of tips.<sup>76</sup>

Indeed, where a statute such as the Wages Act of 1986 does not mention "credit card tips," it is reasonable to infer that such tips were not meant to be included as "remuneration." Although the absence of an applicable credit card provision may imply a legislative intent to exclude such tips as remuneration, such absence may never imply an intent to include credit card tips as remuneration. The *Saavedra* decision epitomizes judicial restraint by demonstrating a refusal to create statutory law where none exists. After all, it was for the Wages Council or Parliament to decide to include credit card tips as remuneration, not the

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68. See *Nerva v. United Kingdom*, 2002-VIII Eur. Ct. H.R. at 18 (Loucaides, J., dissenting)("[T]here is no reason why the employer could not request its employees to forego their right to any tips included in the sums of which it was defrauded and did not receive as a consequence.").

69. *Saavedra v. Aceground Ltd T/A Terazza Est*, 1995 INDUS. REL. L. REP. 198.

70. *Id.* at 198.

71. *Id.*

72. *Id.*

73. *Id.* at 198-99.

74. *Nerva v. United Kingdom*, 2002-VIII Eur. Ct. H.R. at 7.

75. See *Saavedra*, 1995 INDUS. REL. L. REP. at 199.

76. See generally *id.*

*Saavedra* Court, not the Court of Appeal, and now, not the ECHR.

*C. Avoiding the ECHR's Takings Jurisprudence Under Article 1*

The ECHR crafted its holding in *Nerva* to elude the heightened scrutiny of its own takings jurisprudence.

By the time *Nerva* went before the ECHR, the attorneys for the Waiters had changed strategies.<sup>77</sup> They decided to abandon the position that the credit card tips passed directly to the Waiters.<sup>78</sup> Rather, they assumed arguendo that legal title to the tips first passed to the Restaurant which was then duty bound to distribute the entirety of the funds to the Waiters as beneficiaries.<sup>79</sup>

The court used this concession to further the proposition that the credit card tips became the Restaurants' possessions because the customer-signed vouchers were made out to the Restaurant, and were cleared through its accounts.<sup>80</sup>

By interpreting the tips as Restaurant-owned possessions, the ECHR was able to circumvent the increased scrutiny of its own takings jurisprudence. After all, if the tips never belonged to the Waiters, there could never have been a taking.<sup>81</sup> If the court had assumed that a taking had occurred, based on its own precedent, the taking of the tips would necessarily be deemed a violation of Article 1. ECHR precedent requires that a state deprivation of possessions must be in accord with some societal "general interest."<sup>82</sup> It would be difficult, if not impossible, to argue that the tips were allocated in furtherance of some societal general interest. Certainly, allowing restaurants to escape minimum wage obligations does not qualify.

VI. A PROPOSAL FOR THE FUTURE OF UK WAGE LEGISLATION

If desired, Parliament may amend its domestic minimum wage laws to abrogate the holding in *Nerva*. To that end,

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77. *Nerva v. United Kingdom*, 2002-VIII Eur. Ct. H.R. at 12.

78. *Id.*

79. *Id.*

80. *Id.* at 13. For further discussion, see *supra* note 11.

81. *Id.*

82. See *James v. United Kingdom*, 98 Eur. Ct. H.R. (ser. A) 14, 33 (1986); see also *The Former King of Greece v. Greece*, 2000-XII, Eur. Ct. H.R. at 145-46; *Cyprus v. Turkey*, 2001-IV Eur. Ct. H.R. 1, 47; *Jokela v. Finland*, 2002-IV Eur. Ct. H.R. 3, 13.

Parliament may look to well-crafted, comprehensive tipping statutes already operating in other common law jurisdictions.

Within the United States, California has enacted a tipping statute that, if applied to the United Kingdom, would address the concerns created by *Nerva*-like reasoning.

Section 351 of the California Labor Code states:

No employer or agent shall collect, take, or receive any gratuity or a part thereof that is paid, given to, or left for an employee by a patron, or deduct any amount from wages due an employee on account of a gratuity, or require an employee to credit the amount, or any part thereof, of a gratuity against and as a part of the wages due the employee from the employer. Every gratuity is hereby declared to be the sole property of the employee or employees to whom it was paid, given, or left for. An employer that permits patrons to pay gratuities by credit card shall pay the employees the full amount of the gratuity that the patron indicated on the credit card slip, without any deductions for any credit card payment processing fees or costs that may be charged to the employer by the credit card company.<sup>83</sup>

This statute is in stark contrast to the UK Wages Act of 1986 used to bolster the ECHR's reasoning. California has gone so far as to codify the proposition that *any* tip given by a restaurant patron is the *sole property* of the employee who waited the table.<sup>84</sup> This acknowledges the reality of the situation and speaks to the commonsense concept that customers intend to pass legal title of tips directly to waiters.<sup>85</sup> In effect, it abrogates any potential arguments that, because the credit card voucher is written out to

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83. CAL. LAB. CODE § 351 (West 2003). It is plausible to argue that the wording of this statute would eviscerate the tronc system used by the Restaurants because that system requires pooling of tips. Whether or not tips are pooled, however, the significance of such a statute is that it precludes employers from using any employee-earned tips to fulfill minimum wage obligations.

84. *Id.* (emphasis added).

85. "The purpose of section 351, as spelled out in the language of the statute, is to prevent an employer from collecting, taking, or receiving gratuity income or any part thereof, as his own part of his daily gross receipts, from deducting from an employee's wages any amount on account of such gratuity, and from requiring an employer to credit the amount of the gratuity or any part thereof against or as a part of his wages. And the legislative intent reflected in the history of the statute was to ensure that employees, not employers, receive the full benefit of gratuities that patrons intend for the sole benefit of those employees who serve them." *Searle v. Wyndham Int'l, Inc.*, 102 Cal. App. 4th 1327, 1332 (2002) (quoting *Leighton v. Old Heidelberg, Ltd.*, 219 Cal. App. 3d 1062, 1068 (1990)); *Indus.Welfare Comm'n v. Superior Court*, 27 Cal. 3d 690, 730 (1980).

the restaurant, title to such tips pass directly to the restaurant owner. The statute also preempts the argument that, since the restaurant bears the burden of failed transactions, the restaurant owner is entitled to the credit card tips as a "possession."

California Labor Code section 1199 states that:

Every employer or other person acting either individually or as an officer, agent, or employee of another person is guilty of a misdemeanor and is punishable by a fine of not less than one hundred dollars (\$100) or by imprisonment for not less than 30 days, or by both, who does any of the following: . . . (b) Pays or causes to be paid to any employee a wage less than the minimum fixed by an order of the commission.<sup>86</sup>

If Parliament enacted a parallel statutory framework, the UK courts would be compelled to hold the Restaurants criminally liable for avoiding payment of the minimum wage. Moreover, the move from civil fines to criminal punishments has undoubtedly increased the level of deterrence and as such, restaurants are less likely to willfully circumvent national wage laws.

As extreme as such laws may seem relative to the *Nerva* decision, they exist for good reason. These laws acknowledge the fact that historically, service employees worked sixty to eighty hours per week, often needing to endure long shifts just to earn a livable wage.<sup>87</sup> Even today, tips are a vital source of a waiter's income.<sup>88</sup>

Furthermore, it should be highlighted that over 1.8 million people work in the UK service industry.<sup>89</sup> Sixty-seven percent of these workers are women, and forty percent of them are under twenty-five years old.<sup>90</sup> Thus, the decision in *Nerva* may have a disparate impact on both younger people and women who make up the bulk of the UK service industry.<sup>91</sup>

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86. CAL. LAB. CODE § 1199 (b) (West 2003).

87. Dixon, *supra* note 29, available at 2002 WL 101128187.

88. *Id.*

89. 409 PARL. DEB., H.C. (6th ser.) (2003) 174.

90. *Id.* at 175.

91. Cf. Michael Shannon, *Minimum Wages and the Gender Wage Gap*, 28 APPLIED ECON. 1567-76 (1996); see generally Alison Wellington, *Effects of the Minimum Wage on the Employment Status of Youths: An Update*, 26 J. HUM. RESOURCES 27-46 (1991).

## VI. CONCLUSION

Public policy and legal precedent supports one of two conclusions as it pertains to *Nerva*: either (1) the Waiters were paid their credit card tips in full and the UK minimum wage was not paid, or (2) the minimum wage was paid and the credit card tips were not paid in full. The former clearly violates UK minimum wage law while the latter constitutes violations of Article 1 of the Convention. The *Nerva* line of cases escape both conclusions, thus perpetuating a cycle of inequity upon UK service workers.

*A. Tipping the Scales Toward an Equitable Balance*

“Tips are a reward for good service, not an excuse for employers to renege on their responsibility to pay wages. [*Nerva*] makes a mockery of the minimum wage, which by its very nature is supposed to be a minimum.”<sup>92</sup>

In response to this very valid line of criticism, Parliament is ostensibly moving in the right direction. Mr. Michael Connarty, a Labour Party member, has proposed an ambitious bill that would alter the latest version of the Wages Act.<sup>93</sup>

The bill was introduced with the aim of correcting a “legal anomaly” concerning tips distributed through payroll.<sup>94</sup> According to Connarty, “[t]he [b]ill would deliver the guaranteed national minimum wage for the 1.8 million people who are probably the most vulnerable workers in this nation . . . . It would ensure that, when tips are paid and by whatever method, they are for the staff as a little extra for themselves and not their employer.”<sup>95</sup>

To recap, under the current National Minimum Wage Regulations, tips paid directly by customers<sup>96</sup> do not count as wages for the purpose of the national minimum wage.<sup>97</sup> However, after *Nerva*, if the tips go through the employer’s payroll (such as service charges or credit card tips), those tips do count towards

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92. Dixon, *supra* note 29, available at 2002 WL 101128187.

93. See 409 PARL. DEB., H.C. (6th ser.) (2003) 174; see also UK NAT’L MINIMUM WAGE REGULATIONS (2003) SI 1999/584, reg 31.

94. See 409 PARL. DEB., H.C. (6th ser.) (2003) 174-76.

95. *Id.* at 175. This amendment would sound the death-knell for *Nerva*. As of this writing, Parliament has not promulgated any of these proposed changes to the UK Wages Act.

96. Cash tips exemplify tips paid “directly” by customers, yet, under current UK law, credit card tips are not. *Nerva v. United Kingdom*, 2002-VIII Eur. Ct. H.R. at 11.

97. UK NAT’L MINIMUM WAGE REGULATIONS (2003) SI 1999/584, reg 31.



calculating whether the employee has been paid the minimum wage.<sup>98</sup> If enacted, the bill would amend Regulation 31 such that tips, regardless of the manner of payment, could not be counted as national wage remuneration.<sup>99</sup>

Insofar as financial security for UK service employees is concerned, this is indeed a monumental step in the right direction. Legislators are now beginning to realize the flaws of the aforementioned domestic and ECHR rulings. They are looking at their own ineffectual wage regulations with an understanding of its adverse consequences in light of *Nerva*. In fact, millions of people may not be earning the wage they are entitled to. Unfortunately, the proposed law will do little to help Sandro Nerva, Jose Pulleiro, Jose Gigirey-Cabo and Julio Rodriguez since their claims are now moot. For future service employees, however, this law will provide a significant supplement to their salaries.<sup>100</sup>

Lastly, it is worth mentioning that promulgation of this proposed law may have the incidental benefit of increasing the level of service in UK restaurants.<sup>101</sup> Imagine the prospect of attentive waiters who, due to being paid a fair wage, rapidly bring forth a steaming plate of fish and chips before it becomes too cold to eat. Until that day arrives, however, the most prudent course of action, while dining in the United Kingdom, is to pay all tips in cash.

*Shawn Tafreshi\**

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98. *Nerva v. United Kingdom*, 2002-VIII Eur. Ct. H.R. at 14.

99. National Minimum Wage (Tips) Act 2003, H.C. BILL 150, available at <http://www.publications.parliament.uk/pa/cm200203/cmbills/150/2003150.pdf> (last visited Oct. 16, 2004).

100. Indeed, Professor Saul Levmore argues that the tipping norm is a socially valuable supplement to the employment contract between service providers and their employers. Saul Levmore, *Norms as Supplements*, 86 VA. L. REV. 1989, 1991-92 (2000).

101. It is not implied that the service in UK restaurants is relatively poor. It is only implied that extra incentives may increase the level of service when the amount of tips received by waiters more closely correlates to their performance.

\* J.D. Candidate, Loyola Law School, Los Angeles, 2005; B.A. Psychology, B.A. Criminology, Law and Society, *cum laude*, University of California, Irvine. One of the greatest people that ever lived, a lawyer by profession, once said that: "It is the law of love that rules mankind." For me, these words achieve significance through the open arms of many unique and caring individuals.

I must thank my incredible parents for their unconditional love and endless wisdom. My mother has always encouraged me to pursue my dreams passionately, but compassionately. Also, as a child, I remember my father frequently joking that "I could be

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anything I wished in this world . . . *as long as I became a lawyer.*” It is now clear to me that my parents have brainwashed me—and I am grateful that they did! I also want to thank my entire family, here at home and abroad, for their guidance and support. In addition, I want to express gratitude to my magnificent team at the *Loyola of Los Angeles International & Comparative Law Review*. It has been my honor to work with you. Last but certainly not least, I must thank my gorgeous muse, Brooke Bahar. Without you in my life, none of this would be worth it.

