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ARTICLES

CAN THE IRAQI SPECIAL TRIBUNAL FURTHER RECONCILIATION IN IRAQ?

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ABSTRACT

This article aims to answer the question of whether the Iraqi Special Tribunal has the potential to reconcile the Iraqi community with its past, and if so, whether this potential has been fulfilled.

The first section looks at lessons learned from previous international criminal tribunals to assess their potential to reconcile a community with its past. In theory, international criminal law has the opportunity to impact diverse goals crucial for the reconciliation process, namely installing a sense of justice in victims, playing a deterrent effect on wrongdoers, providing a statement of the facts, acknowledging officially what happened, and providing an important foundation moment for the society. Moreover, the impact of criminal justice on reconciliation can be increasingly assessed as despite the lack of a formal duty to prosecute, a generalized duty of broadly defined accountability is demonstrated in recent post-conflict countries.

In practice, the ad hoc international criminal tribunals for the former Yugoslavia and Rwanda have proven to have a successful impact on reconciliation as they have reached many of the necessary post-conflict goals. They have done this through substantially increasing their level of credibility, which is fundamental to achieving an impact on reconciliation, increasing their efficiency over time, and ensuring globally a positive impact on the post-conflict setting. In addition, these tribunals highlighted the importance of creating courts with a closer contact to the community to be more conducive to reconciliation. Subsequent tribunals therefore were set up as semi-internationalized tribunals aimed at having an increased impact on affected communi-

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ties, such as in Kosovo, East Timor, Cambodia, and Sierra Leone. The Iraqi Special Tribunal ("IST") thus benefited from past experience with regard to reconciliation from both international and semi-internationalized tribunals. The IST even took these lessons a step further as it was particularly close to the effected community with less internationalized elements. Therefore, the Iraqi Special Tribunal had the potential to contribute significantly to the reconciliation of the Iraqi people with their past.

The second section analyzes whether this potential for reconciliation has been achieved in Iraq. Because the Iraqi Special Tribunal has restricted the statement of the facts that is deemed important for the reconciliation process, legitimized the principle of retaliation, driven the convicted perpetrators into social and political isolation, and reinforced the culture of impunity because of its lack of fair trials, it has had a negative impact on reconciliation. Further, the IST has contributed a new prong to the accountability versus accommodation debate in that if accountability is chosen by a regime to deal with previous perpetrators of human right abuse, then this choice will only further peace if the trials are perceived as fair and legitimate.

Nevertheless, Iraq can stand to learn from other examples where tribunals have not contributed fully to the reconciliation process. Although amnesties are not a preferred means and tend not to advance reconciliation, previous examples show that criminal trials combined with truth and reconciliation commissions achieve the most effective results in terms of reconciliation. Because holding trials in Iraq has particularly hindered the reconciliation and peace process, there is an urgent need to counterbalance the effects of the IST with such a commission. This commission would need a particular focus on including Sunnis and should be coupled with political strategies of inclusion.

In conclusion one can argue that internationalized criminal tribunals do have the power to achieve reconciliation in post-conflict countries, although given the reverse impact the Iraqi Special Tribunal has had on Iraq, a combination with an Iraqi Truth and Reconciliation Commission should be sought. Finally, through lessons learned in Iraq, one can argue for the future use of the International Criminal Court ("ICC") in such situations as the ICC demonstrates the key elements needed to achieve a reconciliation process while rendering fair justice.

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I. INTRODUCTION

As the noose tightened around Saddam Hussein's neck on December 30, 2006, observers world-wide contemplated whether the potential of the Iraqi Special Tribunal to reconcile the Iraqi people with their past had been fulfilled.

International criminal law has only recently been used as a tool for prosecuting those responsible for gross human rights violations in post-conflict countries. For centuries, a state's tribunals

could only try crimes that were committed within the borders of that state.[1] After the Second World War, however, a consensus emerged on the duty of the international community to prosecute those responsible for gross human rights violations.[2] The Cold War then undermined the potential for subsequent development of international criminal law that thus remained essentially dormant for half a century.[3] The demise of the Cold War led to an unprecedented development of international criminal law: the end of the paralysis within the Security Council of the United Nations (the "UN") was coupled with an increasing need for international criminal law as the number of conflicts in the world amplified.[4]

The international community's first institutional efforts to impose individual criminal responsibility in the fifty years since the Nuremberg and Tokyo tribunals were embodied in the 1993-94 international criminal tribunals.[5] Indeed, the United Nations Security Council established ad hoc international criminal tribunals in response to the genocides in the former Yugoslavia (the "ICTY") and Rwanda (the "ICTR").[6] These tribunals "herald[ed] a transformation in individual accountability for violations of international humanitarian law."[7] Subsequently, other criminal tribunals were created to prosecute perpetrators of human rights abuse, namely the hybrid courts of Kosovo and East Timor, the Extraordinary Chambers in Cambodia, and the Special Court for Sierra Leone. More recently, the Iraqi Governing Council adopted the Statute of the Iraqi Special Tribunal (the "IST") on December 10, 2003, providing the legal foundation and laying out the jurisdiction and basic structure for the tribunal responsible for prosecuting acts

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1 *See* JACKSON NYAMUYA, STATE SOVEREIGNTY AND INTERNATIONAL CRIMINAL LAW: VERSAILLES TO ROME (2003).

2 *Id.*

3 Eva Bertram, *Reinventing Governments: The Promise and Perils of United Nations Peace Building*, 39 J. CONFLICT RESOL. 387 (1995).

4 *Id.*

5 *See* M. Cherif Bassiouni, *From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court*, 10 HARV. HUM. RTS. J. 11, 13 n.2 (1997).

6 *See* S.C. Res. 955, at 3, U.N. Doc. S/RES/955 (Nov. 8, 1994), 33 I.L.M. 1598, 1600 (1994) (establishing the International Tribunal of Rwanda); S.C. Res. 827, at 2, U.N. Doc. S/RES/827 (May 25, 2003) (establishing the International Tribunal for prosecution of violations of international humanitarian law in the former Yugoslavia).

7 *See Developments in the Law—International Criminal Law: II. The Promises of International Prosecution*, 114 HARV. L. REV. 1957, 1958 (2001).

of genocide, crimes against humanity, and war crimes committed in Iraq between 1968 and 2003.[8]

The use of these criminal tribunals where emerging regimes are dealing with past abuse demonstrates an increased focus on the aim of ensuring reconciliation within that community. Although criminal justice is traditionally advocated in such post-conflict situations because of its functions of punishment and deterrence,[9] the importance of a forum for reconciliation is increasingly recognized. Although reconciliation can have a different meaning depending on the culture in question, it is generally agreed that reconciliation "refers to a process by which people who were formally enemies put aside their memories of past wrongs, forego vengeance and give up their prior group aspirations in favor of a commitment to a communitarian ideal."[10] Post-conflict reconciliation is thus said to involve "a reconstitution of self-identity, of self-conception in the wake of trauma and cataclysm."[11]

The ad hoc international criminal tribunals were the first tribunals to aim at enhancing reconciliation in addition to the traditional criminal law goals of punishment and deterrence. Indeed, the Security Council Resolution creating the ICTR stated that prosecutions will contribute to "the process of national reconciliation . . . and [to] the restoration and maintenance of peace."[12] Similarly, one of the goals of the ICTY was to "assist in reconciliation."[13]

This has led scholars to assert that "[r]econciliation appears to have taken over from retribution as an aim in post-conflict re-

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[8] *See* The Statute of the Iraqi Special Tribunal, Dec. 10, 2003, *available at* http://www.cpa-iraq.org/human_rights/Statute.htm.

[9] *See generally* NEIL J. KRITZ, TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES (1995); GEOFFREY ROBERTSON, CRIMES AGAINST HUMANITY: THE STRUGGLE FOR GLOBAL JUSTICE (1999); GARY JONATHAN BASS, STAY THE HAND OF VENGEANCE: THE POLITICS OF WAR CRIMES TRIBUNALS (2000); PRISCILLA B. HAYNER, UNSPEAKABLE TRUTHS: CONFRONTING STATE TERROR AND ATROCITIES (2001).

[10] *See Report: Justice, Accountability and Social Reconstruction: An Interview Study of Bosnian Judges and Prosecutors*, 18 BERKELEY J. INT'L L. 102, 149 (2000).

[11] *See* Payam Akhavan, INTERNATIONAL WAR CRIMES TRIALS: MAKING A DIFFERENCE? PROCEEDINGS OF AN INTERDISCIPLINARY CONFERENCE AT THE UNIVERSITY OF TEXAS SCHOOL OF LAW 60 (Steven R. Ratner & James L. Bischoff eds., 2004), audio file *available at* www.utexas.edu/law/conferences/warcrimes/index.html.

[12] U.N. SCOR, 49th Sess., 3453rd mtg. at 2, U.N. Doc. S/PV.3453 (Nov. 8, 1994).

[13] International Criminal Tribunal for the former Yugoslavia, Office of the President, Outreach Program Proposal (1999) (unpublished report on file with the Berkeley Journal of International Law).

dress."[14] More and more, international criminal law must live up to the test of how "to change and transform [the post-conflict] country, so that the massive injustices . . . , which led to the violations, are corrected [and so] that the people who suffered so much historically can now get on with their lives and enjoy their lives and feel full, free human beings" and not "who gets paid out what, or who goes to jail for how long."[15] The use of international criminal justice to reconcile a post-conflict community with its past is especially important in Iraq in light of its past three decades of human rights abuses.[16]

This article aims to answer the question of whether the Iraqi Special Tribunal has the potential to reconcile the Iraqi community with its past, and if so, whether this potential can be fulfilled.

The first section looks at lessons learned from previous international criminal tribunals to assess their potential to reconcile a community with its past. In theory, international criminal law has the opportunity to impact diverse goals crucial for the reconciliation process, namely installing a sense of justice in victims, playing a deterrent effect on wrongdoers, providing a statement of the facts, acknowledging officially what happened, and providing an important foundation moment for the society. Moreover, the impact of criminal justice on reconciliation can be increasingly assessed as despite the lack of a formal duty to prosecute, a generalized duty of broadly defined accountability is demonstrated in recent post-conflict countries.

In practice, the ad hoc international criminal tribunals for the former Yugoslavia and Rwanda have proven to have a successful impact on reconciliation as they have reached many of the necessary post-conflict goals. They have done this through substantially increasing their level of credibility, which is fundamental to achieving an impact on reconciliation, increasing their efficiency over time, and ensuring globally a positive impact on the post-conflict setting. In addition, these tribunals highlighted the importance of creating courts with a closer contact to the community in order to

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14 *See* Jennifer L. Balint, *Accountability for International Crime and Serious Violation of Fundamental Human Right: The Place of Law in Addressing Internal Regime* Conflicts, 59 LAW & CONTEMP. PROBS. 103, 121 (1996).

15 Albie Sachs, *Truth and Reconciliation*, 52 SMU L. REV. 1563, 1577 (1999).

16 *See* AMNESTY INTERNATIONAL, IRAQI SPECIAL TRIBUNAL-FAIR TRIALS NOT GUARANTEED (2005), http://web.amnesty.org/library/pdf/MDE140072005ENGLISH/$File/MDE1400705.pdf (last visited Apr. 27, 2007).

be more conducive to reconciliation. Subsequent tribunals therefore were set up as semi-internationalized tribunals that aimed at having an increased impact on affected communities, such as in Kosovo, East Timor, Cambodia, and Sierra Leone. The Iraqi Special Tribunal thus benefited from past experience with regard to reconciliation from both international and semi-internationalized tribunals. The IST even took these lessons a step further as it was particularly close to the affected community with less internationalized elements. Therefore, the Iraqi Special Tribunal had the potential to contribute significantly to the reconciliation of the Iraqi people with their past.

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II. The Potential of the Iraqi Special Tribunal to Promote Reconciliation

A. *The Potential of the Increase in Prosecution to Further Reconciliation Goals*

Prosecution in post-conflict situations has consistently been described by scholars as fulfilling certain objectives necessary for reconciliation. Moreover, these reconciliation goals have greater potential for being achieved as criminal trials are increasingly used in post-conflict situations.

1. *Reconciliation Goals Targeted by International Criminal Law*

Accountability, which "refers to a process for holding individuals personally responsible for human rights abuses they have committed,"[17] has been described by many scholars as advancing key reconciliation goals. Indeed, accountability plays a role in reconciliation as it installs a sense of justice in victims, plays a deterrent effect on wrongdoers, can provide a statement of the facts, acknowledges officially what happened, and can be an important foundation moment for society.

First, proponents assert that punishment fulfils a society's duty "to honor and redeem the suffering of the individual victim"[18] and therefore contributes to the rehabilitation of victims of past violations. Hence, holding individuals accountable is described as a "critical component of the process of national reconciliation . . . . Without some sense of justice for citizens who have either suffered under severely abusive regimes or who are bitterly divided by ethnic slaughter or civil war, the prospects for an enduring peace and for national reconciliation are greatly diminished."[19] In addition, the international criminal tribunals' respect for procedural human rights helps promote the rule of law in the post-conflict country.[20]

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[17] Steven R. Ratner, *New Democracies, Old Atrocities: An Inquiry in International Law*, 87 Geo. L. J. 707, 707 (1999).

[18] Aryeh Neier, *What Should Be Done About The Guilty?* 37 N.Y. Rev. Books, Feb. 1, 1990, at 32.

[19] *See* The Stanley Foundation, Post-Conflict Justice: The Role of the International Community (1997), *available at* http://www.stanleyfoundation.org/resources.cfm?id=150 (last visited Jan, 28 2007).

[20] *See* Paul J. Magnarella, *The Consequences of the War Crimes Tribunals and an International Criminal Court for Human Rights in Transition Societies*, *in* Human Rights and Societies In Transition: Causes, Consequences, Responses 119, 132 (Shale Horowitz & Albrecht Schnabel eds., 2004); *see also* Aloys Habimana, *Judicial Responses to Mass Violence: Is the International Criminal Tribunal For Rwanda Making a Difference Towards*

Second, when wrongdoers are not held accountable for their crimes, then the deterrent effect of prosecution is weakened, which in turn will hinder all potential for reconciliation.[21] The value of accountability as a means of avoiding renewal of conflict is recognized by many scholars. Diane Orentlicher, former United Nations Expert on Combating Impunity, asserts, "By laying bare the truth about violations of the past and condemning them, prosecutions can deter potential lawbreakers and inoculate the public against future temptation to be complicit in state-sponsored violence."[22] According to David Crocker, Senior Research Scholar on the topic, "Those contemplating crimes against humanity are deterred—if at all—only when they know such acts seriously risk severe punishment."[23] The international community has furthermore been faced with examples of the "calamitous consequences" of the culture of impunity, for example, in Sierra Leone.[24] Also, prosecution of those responsible for the gross human rights violations in the conflict avoids unbridled private revenge which would counter reconciliation.[25] Limiting the danger of renewed violence and terror is therefore necessary to establish coexistence, which is the first step towards reconciliation.[26]

Reconciliation in Rwanda? in INTERNATIONAL WAR CRIMES TRIALS: MAKING A DIFFERENCE? PROCEEDINGS OF AN INTERDISCIPLINARY CONFERENCE AT THE UNIVERSITY OF TEXAS SCHOOL OF LAW 89 (Steven R. Ratner & James L. Bischoff eds., 2004), audio file *available at* www.utexas.edu/law/conferences/warcrimes/index.html. (stating that the tribunal's full respect for the principles of presumption of innocence and the individual nature of criminal responsibility are both good messages for the Rwandans as to what fair justice should look like.).

21 CYNTHIA J. ARNSON, COMPARATIVE PEACE PROCESSES IN LATIN AMERICA 10-11 (1999).

22 Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537, 2542 (1991).

23 David A. Crocker, *Democracy and Punishment: Punishment, Reconciliation, and Democratic Deliberation*, 5 BUFF. CRIM. L. REV. 509, 537 (2002); *see also* GARY JONATHAN BASS, STAY THE HAND OF VENGEANCE: THE POLITICS OF WAR CRIMES TRIBUNALS 147-205 (2000).

24 *See* Crocker, *supra* note 23 (stating that in Sierra Leone, Foday Sankoh, leader of the main rebel group, was awarded amnesty during peace agreements in July 1999 and this encouraged him to recommence and widen his atrocities when Sierra Leone's coalition government collapsed ten months after the amnesty). **R**

25 *See* Luc Huyse, *Justice*, *in* RECONCILIATION AFTER VIOLENT CONFLICT: A HANDBOOK (David Bloomfield et al. eds. 2003), *available at* http://www.idea.int/publications/reconciliation/upload/reconciliation_chap07.pdf (last visited Jan. 28, 2007).

26 *Id*.

Third, international criminal tribunals can "provide a statement of the facts of what has happened."[27] The importance of establishing an accurate historical record after a conflict was recognized after the Second World War.[28] This statement of facts can help the victims of genocide to reconcile with the past, especially when the causes of the conflict are not clear to the victims. Legal proceedings therefore confer legitimacy on otherwise contestable facts.[29] In Rwanda, for example, many reasons have been given to the conflict, and therefore if

> the tribunal were to prove . . . that the genocide was not, as many analysts and politicians contend, a mere result of prolonged tribal hatred, but was instead a well-orchestrated exploitation of ethnic differences by egoistic rulers who wanted to hold onto their power, such proof could be a solid groundwork for the reconciliation of Rwandans with themselves.[30]

Fourth, international criminal justice can provide "[official] acknowledgement of what has happened."[31] Official acknowledgement is particularly important for victims in order to begin an acceptance of the conflict. Richard Goldstone, former Chief prosecutor for international criminal tribunals, noted the importance of the Nuremberg trials as an "official acknowledgement of what befell [the victims of the Holocaust]."[32] According to counselors for victims in former Yugoslavia, validation of a trauma victim's experiences is one of the most important functions of therapy. The International Criminal Tribunal for the former Yugoslavia, by establishing how, by whom, and under what circumstances the crimes were carried out, validates the experience of victims in an international forum.[33] Likewise, the International Criminal Tribu-

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[27] Balint, *supra* note 14, at 116. **R**

[28] *See Report to the President from Justice Robert H. Jackson, Chief of Counsel for the United States in the Prosecution of Axis War Criminals*, 39 AM. J. INT'L L. 178 (Supp. 1945) (The Chief Prosecutor at Nuremberg, Justice Robert Jackson, stated that one of the most important legacies of the Nuremberg trials was that they documented the Nazi atrocities).

[29] *See* PAUL R. WILLIAMS & MICHAEL P. SCHARF, PEACE WITH JUSTICE? WAR CRIMES AND ACCOUNTABILITY IN THE FORMER YUGOSLAVIA 19 (2002).

[30] Habimana, *supra* note 20, at 89. **R**

[31] Balint, *supra* note 14, at 116. **R**

[32] *See* RICHARD J. GOLDSTONE, *50 Years after Nuremberg: A New International Criminal Tribunal for Human Rights Criminals*, *in* CONTEMPORARY GENOCIDES: CAUSES, CASES, CONSEQUENCES 215 (Albert J. Jongman ed., 1996).

[33] *See* Lepa Mladjenovic, *The ICTY: The Validation of the Experiences of Survivors*, *in* INTERNATIONAL WAR CRIMES TRIALS: MAKING A DIFFERENCE? PROCEEDINGS OF AN INTERNATIONAL CONFERENCE HELD AT THE UNIVERSITY OF TEXAS SCHOOL OF LAW 60 (Steven R. Ratner & James L. Bischoff eds., 2004).

nal for Rwanda is said to have had the positive role of formally recognizing the Rwandan tragedy as genocide, a real assault on humanity.[34]

Finally, international criminal trials can be "a foundation moment for the society and thereby an important basis for further societal healing and reconciliation."[35] Justice provides "a foundation for dismantling institutions and discrediting leaders and their ideology that have promoted war crimes."[36] The creation of a legal mechanism marks the transition. "This is done through the creation of a record, the stating that wrongs have been done, the institutionalization of such a statement, and the gathering of evidence."[37] This created record also removes the guilt from the innocent so that they may heal and rebuild.[38] The marking of the transition from conflict to post-conflict thereby plays a role in the reconciliation of the victims and society as a whole.

The value of prosecution in post-conflict situations has thus been consistently reaffirmed by scholars. Moreover, there is further potential to achieve these reconciliation goals due to the increase in criminal trials in post-conflict situations.

2. *Increased use of Prosecution in Post-Conflict Situations*

International criminal law is "increasingly being called upon as a tool to address the post-conflict situation and facilitate societal changes . . . ."[39] Although the normative value of the duty to prosecute remains unclear in international law, states are increasingly accepting the necessity of a broader form of accountability.[40] This in turn enables the development of lessons that can be learnt from the impact of international criminal justice on reconciliation.

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[34] *See* Habimana, *supra* note 20, at 88; *see also* Louise Mushikiwabo, INTERNATIONAL WAR CRIMES TRIALS: MAKING A DIFFERENCE? PROCEEDINGS OF AN INTERNATIONAL CONFERENCE HELD AT THE UNIVERSITY OF TEXAS SCHOOL OF LAW (Steven R. Ratner & James L. Bischoff eds., 2004) audio file *available at* www.utexas.edu/law/conferences/warcrimes/index.html. (stating that international validation is the most important achievement of the ICTR). R

[35] Balint, *supra* note 14, at 116. R

[36] WILLIAMS & SCHARF, *supra* note 29, at 17. R

[37] Balint, *supra* note 14, at 118. R

[38] *See* Magnarella, *supra* note 20. R

[39] Balint, *supra* note 14, at 105. R

[40] *See* Steven R. Ratner, *New Democracies, Old Atrocities: An Inquiry in International Law*, 87 GEO. L. J. 707, 708-09 (1999).

Certain international conventions state a specific duty for the state to punish those guilty of a particular crime. For example, the Convention on the Prevention and Punishment of Genocide of 1948 obligates state parties to punish those who commit, attempt to commit, conspire, or who incite others to commit genocide.[41] The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment also compels state parties to ensure that all acts of torture are offenses under their internal laws and to provide effective remedies.[42]

However, none of the key universal human rights treaties state obligations to prosecute violators of human rights.[43] The International Covenant on Civil and Political Rights (the "ICCPR"), The European Convention for the Protection of Human Rights and Fundamental Freedoms (the "European Convention"), and the American Convention on Human Rights (the "American Convention") only contain less precise obligations such as to ensure the rights recognized in the conventions or to provide an effective remedy.

Nevertheless, despite the lack of a formal obligation to prosecute, human rights bodies in charge of interpreting these treaties have stressed the importance of prosecution. The Human Rights Committee, the body in charge of interpreting the ICCPR, has found that states have a duty to prosecute[44] and has condemned blanket amnesties.[45] The Inter-American Court of Human Rights has also stated that each party to the American Convention has a duty "to use the means at its disposal to carry out a serious investigation of [human rights] violations committed within its jurisdic-

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41 *See* Convention on the Prevention and Punishment of the Crime of Genocide, art. 4, Dec. 9, 1948, 78 U.N.T.S. 277; *see also* Evelyn Bradley, *In Search for Justice–A Truth in Reconciliation Commission for Rwanda*, 7 D.C.L. J. INT'L L. & PRAC. 129, 148-49 (1998) (stating that failure to punish genocide by granting amnesty would clearly be a violation of this convention).

42 *See* Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 4, Dec. 10, 1984, 1465 U.N.T.S. 85, entered into force June 26, 1987.

43 *See* Diane F. Orentlicher, supra note 22, at 2563-82 (1991). **R**

44 Human Rights Committee, Comments on Nigeria, ¶ 284, *in Report of the Human Rights Committee*, U.N. Doc. A/51/40 (1997); Human Rights Committee, Bautista de Arellana v. Colombia, ¶ 8.6, U.N. Doc. CCPR/C/55/D/563/1993 (1995).

45 Human Rights Committee, Preliminary Observations on Peru, ¶ 9, U.N. Doc. CCPR/C/79/Add.67 (1996); Human Rights Committee, Comments on Argentina, ¶¶ 153, 158, *in Report of the Human Rights Committee*, U.N. GAOR, 50th Sess., Supp No. 40, at 31, 32, U.N. Doc. A/50/40 (1995); Human Rights Committee, Hugo Rodriguez v. Uruguay, ¶ 12.3, U.N. Doc. CCPR/C/51/D/322/1988 (1994).

tion, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation."[46] The Inter-American Commission has even pronounced general amnesties incompatible with the American Convention on Human Rights and emphasized prosecution.[47] The European Court and Commission of Human Rights have also made clear that punishment plays a part in Contracting States' fulfillment of duties under the European Convention.[48]

In order for a normative duty to prosecute to emerge from these treaties, the interpretations of these human rights bodies would need to be combined with the practice of states. In effect, according to the Vienna Convention on the Law of Treaties, the practice of the states is central to interpreting treaties, combined with their plain meaning, context, subsequent agreements, and relevant rules of law.[49] However, states have not followed these human rights bodies' rulings, and most transitional democracies have passed broad amnesty laws in the last ten years, or honored amnesties of prior regimes.[50] These practices show that states are not prepared to interpret these conventions to provide for a duty to prosecute all serious violations of human rights.[51]

Moreover, the practice of states is relevant as an indicator of customary law and weighs against a customary duty to prosecute.[52] This is reinforced by the fact that the second element of customary law, opinio juris—"the subjective view of states that accountability is legally required"[53]—seems difficult to deduce from the state's arguments for, or against, prosecution.

Therefore, neither treaties nor customs support a generalized duty of criminal accountability for abuses committed by the current

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46 Velasquez Rodriguez Case, Inter-Am. Ct. H. R., (ser. C) No. 4, at 155 (July 29, 1988) (judgment) (however, the Court did not specifically mention prosecution as the exclusive method of punishment).

47 Hermosilla v. Chile, Case 10.843, Inter-Am. C.H.R., Report No. 36/96, OEA/Ser.L/V/II.95, doc. 7 rev., ¶111 (1996)

48 X and Y v. Netherlands, 91 Eur. Ct. H.R. (ser. A), ¶ 24 (1985) (judgment).

49 *See* IAN SINCLAIR, THE VIENNA CONVENTION ON THE LAW OF TREATIES 138 (2d ed. 1984).

50 *See* Ratner, *supra* note 17, at 722. **R**

51 *See* Ratner, *supra* note 17, at 726. **R**

52 *See* Statute of the International Court of Justice, art. 38; *see also* North Sea Continental Shelf (F.R.G. v. Den.; F.R.G. v. Neth.), 1969 I.C.J. 3, 45 (Feb. 20).

53 Ratner, *supra* note 17, at 727. **R**

or the prior regime.[54] Nevertheless, scholars argue that "even if a generalized duty of criminal accountability is only in a very nascent stage, a generalized duty of broadly defined accountability seems to have more support."[55] States are increasingly accepting a broader form of accountability based on "knowledge of the crimes . . . by the public, acknowledgement by the state, and sanction in some form against key offenders."[56]

The fact that accountability is increasingly accepted as a means to address human rights abuses of former regimes is demonstrated by the recent proliferation of criminal tribunals in post-conflict situations. This was confirmed in Iraq where one of the first acts of the Coalition Provisional Authority was to work on establishing the Iraqi Special Tribunal.[57] This confirms the international trend towards ensuring that key offenders responsible for acts of genocide, crimes against humanity, and war crimes do not go unpunished.

International criminal law's potential role in promoting reconciliation has been demonstrated in practice by the ad hoc international criminal tribunals whose operations have led to a further adaptation of tribunals to enhance reconciliation.

B. *Iraqi Special Tribunal as a Result of Lessons Learned on Enhancing Reconciliation*

Experiences from the International Criminal Tribunals for the former Yugoslavia and Rwanda reveal that these Courts do have a role to play in reconciliation, although a closer contact with affected communities is necessary. This has been taken into account in the structure of subsequent tribunals, particularly in the Iraqi Special Tribunal, which thus has great potential to play a role in reconciliation.

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54 *See* John Dugard, *Is the Truth and Reconciliation Process Compatible with International Law? An Unanswered Question*, 13 S. AFR. J. HUM. RTS. 258, 267 (1997); Carla Edelenbos, *Human Rights Violations: A Duty to Prosecute?*, 7 LEIDEN J. INT'L L. 5, 20 (1994).

55 Ratner, *supra* note 17, at 730. **R**

56 Ratner, *supra* note 17, at 731. **R**

57 The Coalition Provisional Authority was established as a transitional government for Iraq from April 21, 2003 until June 28, 2004. The Statute of the Iraqi Special Tribunal was issued under the Coalition Provisional Authority on December 10, 2003 and subsequently reaffirmed under the jurisdiction of the Iraqi Interim Government.

1. *Lessons Learned From the International Criminal Tribunals in Reconciliation*

Both the ICTY and the ICTR have had successes in addressing the needs of a post-conflict country, combined with certain shortcomings. Lessons learned from the assessment of these two tribunals' impact on reconciliation have influenced subsequent tribunals, including Iraq.

These ad hoc criminal tribunals have demonstrated three key successes with respect to reconciliation. First, both tribunals managed to substantially increase their level of credibility, which was fundamental to their acceptance by the affected communities. The tribunals' credibility was initially questioned as they were created by Security Council resolutions.[58] The performance of the tribunals, however, led to an increasing acceptance by the communities affected. The International Criminal Tribunal for the former Yugoslavia "achieved a level of credibility previously unforeseen" when former Yugoslav President Slobodan Milosevic was arrested and transferred to the Hague by the Serbian authorities.[59] Similarly, the International Criminal Tribunal for Rwanda was increasingly accepted by the Rwandan government who initially disagreed on several aspects of the ICTR statute.[60] Thus, this acceptance by the affected communities enabled the criminal trials to play a role in the official acknowledgement of what happened, a key element in the reconciliation process.

Second, both international criminal tribunals have increased their efficiency over time. At the beginning, the ICTY was charged with doing "little to contribute to the cessation of hostilities."[61] It has, however, "painstakingly administered trials that are widely perceived as fair."[62] The International Criminal Tribunal of Rwanda has also adapted to become more efficient with developments that indicate "that the ICTR is continuing to make greater

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[58] *See* Prosecutor v. Tadic, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction (Oct. 2, 1995), *available at* http://www.uniorg/icty/tadic/appeal/decision-e/51002.htm.

[59] *See* David Tolbert, *The Evolving Architecture of International Law: The International Criminal Tribunal for the Former Yugoslavia: Unforeseen Successes and Foreseeable Shortcomings*, 26 FLETCHER F. WORLD AFF. 7, 7 (2002).

[60] *See* Christina M. Carroll, *An Assessment of the Role and Effectiveness of the International Criminal Tribunal for Rwanda and the Rwandan National Justice System in Dealing with the Mass Atrocities of 1994*, 18 B.U. INT'L L. J. 163, 175-82 (2000).

[61] *See* Magnarella, *supra* note 20, at 132. R

[62] *See* Tolbert, *supra* note 59, at 8. R

and greater progress in achieving its goals."[63] The frequency of trials has increased and changes have been made to improve the functioning of the tribunals.[64] For example, ad litem judges were allowed to serve in trial chambers when the ICTR statute was amended, a separate prosecutor was appointed for the ICTR, and senior posts in the ICTR Office of the Prosecutor were filled.[65] Therefore, this increased perception that the trials were fair installed a sense of justice in victims that could help them move forward in their grieving, acceptance, and forgiveness stages.

Third, the international tribunals have globally had a positive impact on the post-conflict setting. The tribunals have given the concerned countries "the chance to take strong, concrete steps towards building a society based on the rule of law through a process that is seen to be fair and law-based."[66] Moreover, they have "developed a set of workable procedures and rules of evidence, drawing from both civil law and common law traditions."[67] They do not fall prey to the criticisms of the Nuremberg trials as representing victors' justice.[68] They are therefore praised by many as laying the "foundation for the establishment of a practical and permanent system of international criminal justice,"[69] which is particularly important in a post-conflict situation. This achievement satisfies the deterrent effect of prosecution needed to advance reconciliation and, at the same time, provides a foundation moment that marks the transition between the conflict and the post-conflict phases.

Nevertheless, the international tribunals' operations have also highlighted shortcomings with regard to reconciliation. The main criticism to these tribunals was their lack of impact on domestic judicial proceedings, which hinders the potential role these tribu-

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63 Carroll, *supra* note 60, at 179-80. **R**

64 *See* Richard Dicker & Elise Keppler, *Beyond the Hague: The Challenges of International Justice*, *in* HUMAN RIGHTS WATCH WORLD REPORT 2004, *available at* http://hrw.org/wr2k4/10.htm (last visited May 7, 2005).

65 *Id.*

66 Huyse, *supra* note 25, at 100. **R**

67 Tolbert, *supra* note 59, at 17-18. **R**

68 Tolbert, *supra* note 59, at 17. **R**

69 Sixth Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Former Yugoslavia Since 1991, UN GAOR, ¶¶ 205-212, UN Doc. A/54/187 (Aug. 25, 1999) (report by Judge Kirk McDonald when retiring as the tribunal's president); *see also* Carroll, *supra* note 60, at 166 (commenting positively on the achievements of the ICTR). **R**

nals have in reconciliation.[70] This can be explained in part by the physical distance between the people affected by the conflict and the tribunals located in the Hague (for the ICTY) and Arusha (for the ICTR). Commentators have argued that since trials of the International Criminal Tribunal for the Rwanda are being held in Arusha, "out of range for the majority of Rwandans, there will be no shared social drama."[71] Also, the tribunals' mandates were not to construct or improve the domestic justice systems but to restore peace and security in a region.[72] However, domestic trials "may be a central part of this foundation moment."[73] The Rwandan government has even developed its own national judicial systems and established traditional gacaca trials to deal with lower level offenders, which are often described as being more conducive to reconciliation.[74]

The criticisms of the international tribunals have influenced the creation of subsequent institutions. In effect, since the establishment of these two tribunals, "[a]pproaches to war crimes in other post-conflict situations that have been addressed . . . seem to be more cognizant of the importance of developing the local legal systems."[75] Subsequent international criminal law tribunals are therefore structured so as to enable a closer link between local and international judges and prosecutors. Thus, the key lesson that has been applied to subsequent criminal tribunals, and particularly the Iraqi Special Tribunal, is that the task of reconciliation "has to necessarily involve those who are most directly affected."[76]

2. *Hybrid Courts More Conducive to Reconciliation*

Semi-internationalized courts have been created to adjudicate international criminal cases in response to the realization that the inclusion of domestic elements is important to the reconciliation process.[77] Examples include the tribunals for Kosovo, East Timor, Cambodia, Sierra Leone, and Iraq. The creation of hybrid courts

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[70] *See*, *e.g.,* Tolbert, *supra* note 59, at 8. (stating that the tribunal's long-term impact on the systems of justice in the area of conflict has been minimal); *see also* Carroll, *supra* note 60, at 190. R

[71] *See* Balint, *supra* note 14, at 118. R

[72] *See* Tolbert, *supra* note 59, at 12. R

[73] *See* Balint, *supra* note 14, at 118. R

[74] *See* Carroll, *supra* note 60, at 190. R

[75] *See* Tolbert, *supra* note 59, at 16. R

[76] *See* Akhavan, *supra* note 11. R

[77] *See* Tolbert, *supra* note 59, at 16. R

also responded to country-specific challenges: an ad hoc international tribunal was either impractical when combined with the inability of the domestic judiciary to deal with the complexity and caseload[78] (as in East Timor, Sierra Leone, Cambodia, and Iraq) or an international tribunal existed but couldn't deal with the large number of cases[79] (as was the case in Kosovo). This hybrid model is thereby a "newly emerging form of accountability and reconciliation."[80] These semi-internationalized tribunals are in addition seen as a "significant development in the enforcement of international criminal law . . . ."[81]

Each hybrid court model responds to a different reality and is structured differently. Nevertheless, a comparison of these various semi-internationalized tribunals reveals that the Iraqi Special Tribunal is the least internationalized tribunal of them all.

All of the tribunals, except for the Iraqi Special Tribunal, were created within the United Nations' system. The tribunals in Kosovo and East Timor were created within the framework of a UN Transitional Administration, and the tribunals in Sierra Leone and Cambodia were created on the basis of a bilateral agreement between the UN and the affected state.[82] The Iraqi Tribunal, however, was created by the adoption of an internal Tribunal Statute.

With the increasing emergence of these tribunals, scholars have identified three common features.[83] Even though these features are relevant to all semi-internationalized tribunals, the Iraqi Special Tribunal is the most domestic with regard to all three features. First these internationalized criminal courts exercise a judicial function: they are composed of penal judges who are to comply with international rules, principles, and standards.[84] Second, they are characterized by combined international and internal elements. "[B]oth the institutional apparatus and the applicable law consist

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78 *See* Laura A. Dickinson, *The Promise of Hybrid Courts*, *97* AM. J. INT'L L. 295, 295 (2003).

79 *Id.*

80 *Id.*

81 *See* William W. Burke-White, *Regionalization of International Criminal Law Enforcement: A Preliminary Exploration*, 38 TEX. INT'L L. J. 729, 753 (2003).

82 *See* NEW APPROACHES IN INTERNATIONAL CRIMINAL JUSTICE: KOSOVO, EAST TIMOR, SIERRA LEONE AND CAMBODIA (Kai Ambros & Mohamed Othman eds., 2003).

83 *See* Luigi Condorelli & Theo Boutruche, *Internationalized Criminal Courts and Tribunals: Are They Necessary? in* INTERNATIONALIZED CRIMINAL COURTS AND TRIBUNALS: SIERRA LEONE, EAST TIMOR, KOSOVO, AND CAMBODIA 428-429 (Cesare P.R. Romano et al. eds. 2004).

84 *Id.* at 428.

of a blend of the international and the domestic."[85] In most cases, foreign judges sit with domestic judges, and the law applied has been reformed to accord with international standards.[86] The possibilities range from a quasi-international tribunal with some national components, such as in Sierra Leone, to a domestic system with some internationalized elements, as in Iraq.[87] Third, these courts are created on an ad hoc basis to respond to specific situations, which explains each tribunal's uniqueness.[88]

In Kosovo and East Timor, temporary UN administrations were created to fulfill state functions within a territory that was not yet a state (East Timor) or where the government was not carrying out its duties (Kosovo).[89] The United Nations' administrations were given the power "to exercise virtually all functions of government: legislative and executive authority as well as the administration of justice—a role unprecedented in the history of the United Nations."[90] They thereby created the Kosovo and East Timor courts as part of the performance of basic civilian administrative functions.[91] These courts therefore may concern any issue, not just gross human rights violations.[92] The judges in the courts are both foreign and domestic judges[93]

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85 Dickinson, *supra* note 78, at 235. **R**

86 *See* Dickinson, *supra* note 78, at 235. **R**

87 Condorelli & Boutruche, *supra* note 83, at 428. **R**

88 Condorelli & Boutruche, *supra* note 83, at 428. **R**

89 *See* S.C. Res. 1244, U.N. Doc S/RES/1244 (June 10, 1999) (establishing the United Nations Administration in Kosovo, UNMIK); S.C. Res. 1272, U.N. Doc S/RES/1272 (Oct. 25, 1999) (establishing the United Nations Transitional Administration in East Timor, UNTAET).

90 *See* Hansjörg Strohmeyer, *Making Multilateral Interventions Work: The U.N. and the Creation of Transitional Justice Systems in Kosovo and East Timor*, 25 FLETCHER F. WORLD AFF. 107, 109 (2001).

91 *See* Condorelli & Boutruche, *supra* note 83, at 430. **R**

92 *See* Condorelli & Boutruche, *supra* note 83, at 431. **R**

93 *See* Wendy S. Betts et al., *The Post-Conflict Transitional Administration of Kosovo and the Lessons Learned in Efforts to Establish a Judiciary and Rule of La*w, 22 MICH. J. INT'L L. 371, 381 (2001) (stating that in Kosovo, foreign judges are to sit alongside domestic judges in local Kosovar courts and foreign lawyers are to team up with domestic lawyers); *see also* U.N. Transitional Admin. in E. Timor [UNTAET], *Regulation No. 2000/11 on the Organization of Courts in East Timor*, § 10, UNTAET/REG/200/11 (Mar. 6, 2000) (prepared by Sergio Vieira de Mello); U.N. Transitional Admin. in E. Timor [UNTAET], *Regulation No. 2000/15 on the Establishment of Panels with Exclusive Jurisdiction Over Serious Criminal Offenses*, § 22, UNTAET/REG/2000/15 (June 6, 2000) (prepared by Sergio Vieira de Mello) (stating that "serious crimes" would be tried by two international judges and one East Timorese judge).

and the applicable law is a mix of local and international law.[94]

In Cambodia, the Extraordinary Chambers were difficult to put into place due to a lack of agreement between the United Nations who wanted a predominantly international tribunal and the Cambodian government who wished for a national tribunal with the UN's assistance.[95] Consequently, the Cambodian Tribunal is close to Iraq in being one of the least internationalized tribunals; it is a Cambodian domestic criminal tribunal with certain specific international elements.[96] The Agreement setting up the Cambodian Tribunal provides for international and Cambodian judges in a way that ensures a Cambodian judicial majority with at least one non-Cambodian vote in each majority decision.[97] There are also to be Cambodian and international co-prosecutors and investigating judges.[98] The applicable law is largely international as the definitions of the crimes prosecuted are the same as those adopted in international conventions.[99] The procedural law is Cambodian, but in the case of a gap, uncertainty or inconsistency, "guidance may also be sought in procedural rules established at the international level."[100]

In Sierra Leone, the tribunal created is the most international of the hybrid tribunals.[101] It "operates outside the national court

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94 *See* Dickinson, *supra* note 78, at 297 (*stating that in both cases, the applicable law* was to be a hybrid of pre-existing local law and international standards. Local law was only applicable to the extent that it did not conflict with international human rights norms.). **R**

95 *See generally* Daniel Kemper Donovan, *Joint U.N.-Cambodia Efforts to Establish a Khmer Rouge Tribunal*, 44 HARV. INT'L L.J. 551, 553-564 (2003) (for a history of discussions between U.N. and Cambodia since 1989); *see also* Draft Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea, Mar. 17, 2003, *available at* http://www.yale.edu/cgp/Cambodia%20Draft%20Agreement%2017-03-03.doc (hard copy on file with the Harvard International Law Journal) [hereinafter March Agreement]; Khmer Rouge Trials, G.A. Res. 57/228 B, U.N. Doc. A/Res/57/228 B (May 22, 2003) (General Assembly Resolution that adopted the Agreement). The United Nations and the Cambodian government signed the agreement on June 6, 2003, and the Cambodian government ratified on October 4, 2004. The UN Member States agreed to pledge money towards the establishment of the Extraordinary Chambers on March 28, 2005.

96 Condorelli & Boutruche, *supra* note 83, at 432; *see also* Donovan, *supra* note 95. **R**

97 *See* March Agreement, *supra* note 95, at arts. 3-4. **R**

98 *See* March Agreement, *supra* note 95, at art. 7. **R**

99 *See* March Agreement, *supra* note 95, at art. 9. **R**

100 *See* March Agreement, *supra* note 95, at art.12. **R**

101 *See* Condorelli & Boutruche, *supra* note 83, at 433 (stating that the Sierra Leone tribunal comes very close to a true international tribunal). **R**

system"[102] but has hybrid institutional features. The Chambers are composed of both international and domestic judges.[103] Additionally, "the applicable law is a blend of the international and the domestic, because the court has jurisdiction to consider cases both under international humanitarian law and under domestic Sierra Leonean law."[104] Additionally, the court is "guided by" both the decisions of the ICTY and ICTR and the decisions of the Supreme Court of Sierra Leone.[105]

The Iraqi Special Tribunal created in December 2003[106] places the greatest focus on domestic prosecution compared to the other tribunals, with judges and investigative judges being Iraqi nationals.[107] Non-Iraqi judges with experience in dealing with crimes against humanity, genocide, war crimes, and crimes under Iraqi law can be appointed if necessary, but this is merely an option.[108] Non-Iraqis have a compulsory role to play in advisory capacities or as observers.[109] Applicable law is the national law that applied prior to Saddam Hussein's government.[110] In addition, the statute includes certain international definitions borrowed from the International Criminal Court's statute.[111]

Thus, the hybrid court modality that has been used in different post-conflict settings over the past several years has been applied

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[102] *See* Dickinson, *supra* note 78, at 299. **R**

[103] *See* Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, Jan. 16, 2002, Appendix II, UN Doc. S/2002/246 [hereinafter Special Court Agreement] (the two trial chambers and the appellate chamber are composed of both international judges appointed by the UN Secretary-General and domestic judges appointed by the government of Sierra Leone).

[104] Dickinson, *supra* note 78, at 300; *see also* Statute of the Special Court for Sierra Leone, art. 1, Mar. 8, 2002, Attachment, U.N. Doc S/2002/246 [hereinafter Statute of the Special Court]. **R**

[105] *See id.* art. 20.

[106] *See* Edith Lederer, *New Iraqi War Crimes Tribunal Ironically Emulates International Court US Opposes*, http://www.globalpolicy.org/intljustice/general/2003/1220ironic.htm (last visited Jan. 28, 2007) (stating that the Statute of the Iraqi Special Tribunal was approved by the Iraqi Governing Council and signed into law on Dec. 10, 2003 by Paul Bremer, the U.S. administrator in Iraq, on behalf of the U.S.-led Coalition Provisional Authority).

[107] *See* The Statute of the Iraqi Special Tribunal, arts. 4, 6, Dec. 10, 2003, *available at* http://www.cpa-iraq.org/human_rights/Statute.htm (last visited May 7, 2005).

[108] *See* Human Rights First, *Iraqi Special Tribunal: Questions & Answers* (2003) http://www.humanrightsfirst.org/international_justice/w_context/w_cont_10.htm, (last visited May 7, 2005).

[109] *See* The Statute of the Iraqi Special Tribunal, *supra* note 107, arts. 6-7. **R**

[110] *See* The Statute of the Iraqi Special Tribunal, *supra* note 107, art. 17. **R**

[111] *See* Lederer, *supra* note 106. **R**

to the situation in Iraq. Incorporating aspects of international criminal justice while seeking to include local actors and develop local norms has been judged beneficial in addressing post-conflict reconciliation.[112] The Iraqi Special Tribunal therefore represents an important innovation in international criminal law as it combines the need to strengthen domestic judicial capacity with international supervision.

Previous semi-internationalized tribunals have mostly had positive results in their first years of existence.[113] As the Iraqi Special Tribunal integrates lessons learned from past tribunals in dealing with post-conflict situations, it does indeed have great potential to reconcile the Iraqi community with its past. Nevertheless, this reconciliation process is not automatic and can only happen if certain conditions are met.

III. Iraqi Special Tribunal as an Impediment to National Reconciliation

A. *Iraqi Special Tribunal Flaws Hinder Reconciliation and Peace*

Despite findings that international criminal law can contribute to reconciling a post-conflict community with its past, criminal trials can also have the opposite effect on a country. The example of the Iraqi Special Tribunal highlights the fact that these hybrid tribunals can run counter to reconciliation, and even counter to promoting peace, if the tribunal's legitimacy is questioned.

1. *The Questionable Contribution of the Iraqi Special Tribunal to Reconciliation*

Analysts who question the success of international criminal law in reconciling a community with past atrocities advance various arguments. All of these arguments apply in the case of the Iraqi Special Tribunal to demonstrate the reverse impact the Tribunal

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[112] *See* Dickinson, *supra* note 78, at 300. **R**

[113] *See*, *e.g.,* Organization for Security and Co-operation in Europe: Mission in Kosovo, Department of Human Rights and Rule of Law, Legal Systems Monitoring Section, *Kosovo's War Crimes Trials: A Review*, Sept. 2002, *available at* http://www.osce.org/documents/milk/2002/09/857-en.pdf (last visited Jan. 28, 2007) (stating that in Kosovo, international judges and prosecutors have been particularly active, and the presence of international actors is said to have improved the delivery of justice); *see also* Dickinson, *supra* note 78, at *299 (*stating that in East Timor, trials are proceeding, and it appears that the hybrid court will continue to play a significant role in the process of accountability for human rights abuses). **R**

has had on reconciliation. The IST has restricted the statement of the facts that is deemed important for the reconciliation process, legitimized the principle of retaliation, driven the convicted perpetrators into social and political isolation, and reinforced the culture of impunity because of its lack of fair trials. Thus, both the organization and conduct of the trials in Iraq have lead to missed opportunities for reconciliation among the Iraqi people.

First, the statement of the facts in criminal cases, which is deemed important for the reconciliation process, can be restricted. "[T]elling the full story of what has happened is not the primary aim of the trial. . . . [P]rosecutions tell only one part of the story: They focus on a person and their role in the facts of the story."[114] Also to arrive at clear verdicts, the courts "restrict the amount of information that is processed."[115] These shortcomings particularly apply to the situation in Iraq. The Iraqi Special Tribunal drew on lessons learnt from the Milosevic trial to concentrate on a few key events rather than covering the full range of alleged atrocities during Hussein's 24-year rule.[116] The IST thus decided to prosecute and execute Saddam Hussein only on the basis of the 1982 retaliatory attack on the town of Dujail and the torture and murder of one hundred and forty-three of its inhabitants.[117] This judgment did not delve deeper into other alleged atrocities, such as the Iran-Iraq war or the use of gas against the Kurdish population. This has led scholars to question the use of the judgment. Saddam's trial and execution has been described as "built for speed—not truth, reconciliation or accountability."[118]

Second, the criminal trials may conflict with the culture of a post-conflict society, which would therefore disenable reconciliation. According to one Rwandan author, "the retributive understanding of crime and justice, upon which the ICTR is founded, is discordant with the world view of many African communities. To emphasize retribution is the surest way to poison the seeds of rec-

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114 *See* Balint, *supra* note 14, at 118-19. **R**

115 *See* Huyse, *supra* note 25, at 104. **R**

116 Gwynn Mac Carrick, *Lessons from the Milosevic Trial* (April 26, 2006), http://www.onlineopinion.com.au/view.asp?article=4394 (last visited April 27, 2007).

117 *See* English Translation of the Dujail Judgment (Mizna Management LLC Unofficial Translation) (2006) *available at* http://law.case.edu/saddamtrial/dujail/opinion.asp.

118 Bruce Shapiro, *Rule of Noose*, THE NATION, Dec. 31, 2006, *available at* http://www.thenation.com/doc/20070108/rule-of-noose.

onciliation."[119] Desmond Tutu, Chair of the South African Truth and Reconciliation Commission, also argues that retributive justice does not conform to Africans' perception of justice, which emphasizes healing and seeks to rehabilitate both the victim and the perpetrator.[120] Punishing the perpetrator could therefore make reconciliation more difficult in this kind of a society.

Although criminal trials do not appear to conflict with the Iraqi culture, one could argue that punishing Saddam Hussein by death legitimizes the principle of retaliation at a time when healing and forgiveness is particularly needed in Iraq. During Saddam Hussein's trial, many scholars reflected on the impact retributive justice could have on reconciliation in the country. For example, the United States Institute for Peace warned of the negative impact the "death penalty could have on the reconciliation process in Iraq if most of those prosecuted are from one particular ethnic or religious group."[121] The trial and execution of Saddam, "which was originally billed as an exercise in reconciliation," has been described instead of having "only inflamed sectarian tensions."[122] Reconciliation efforts are said to have been set back since the execution, as "the two communities [of Shia and Sunni] have moved further apart"[123]

Third, a "prolonged physical and social expulsion of certain sections of the population, based on criminal court decisions, may obstruct democratic consolidation by driving the convicted perpetrators into social and political isolation."[124] Commentators consequently question the possibility of nation-building when perpetrators are excluded, stating that "[n]o society can afford to fail in seeking the appeasement and/or reintegration of perpetrators into society."[125] In addition, cross-examinations during trials

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119 *See* Babu Ayindo, *Retribution or Restoration for Rwanda?* AFRICA NEWS, Jan., 1998, at 4, *available at* http://www.peacelink.it/afrinews/22<uscore>issue/p4.html (last visited Jan. 28, 2007) (stating that truth telling is at the heart of most African traditional justice systems that aim to reintegrate both the offender and victim back into society).

120 *See* Huyse, *supra* note 25. **R**

121 LAUREL MILLER, BUILDING THE IRAQI SPECIAL TRIBUNAL: LESSONS FROM EXPERIENCES IN INTERNATIONAL CRIMINAL JUSTICE, United States Institute of Peace (2004).

122 LIONEL BEEHNER, IMPEDIMENTS TO NATIONAL RECONCILIATION IN IRAQ, Council on Foreign Relations (2007), *available at* http://www.cfr.org/publication/12347/.

123 *Id.*

124 *Id.*

125 *See* Charles Villa-Vicencio, *Why Perpetrators Should Not Always Be Prosecuted: Where the International Criminal Court and Truth Commissions Meet*, 49 EMORY L.J. 205, 209 (2000).

and the hostile environment of a courtroom could lead to a re-victimization of the victims.[126]

The Iraqi Special Tribunal has put Saddam Hussein, Ali Hassan al-Majid, former Vice President Taha Yassin Ramadan, former deputy Prime Minister Tariq Aziz, and other former senior officials in the deposed Ba'athist regime on trial. The trials focus on Ba'athist leaders, which is reinforced by the fact that Ba'athists are excluded from all court proceedings. The tribunal's statute states, "No officer, prosecutor, investigative judge, [trial] judge or other personnel of the Tribunal shall have been a member of the Ba'ath Party."[127] Hence, this leads to a systematic exclusion of the former members of the Ba'ath party from the operations of the Iraqi Special Tribunal and any impact it could have on reconciliation.

Finally, when fair trials are not guaranteed, then the culture of impunity remains. According to David Crane, former Chief Prosecutor of the Special Court for Sierra Leone, when trials are badly conducted, instead of installing a respect of the rule of law, the risk is that the population resort to other means than the rule of law to reconstruct their society.[128] Therefore, the fairness and legitimacy of a criminal law proceeding will have a direct impact on the way the community embraces the rule of law and reconciles with its past.

According to David Crane, if the key principles of "fairness, openness, and respect of international norms" are not respected, then "we will see a step backwards" in Iraq.[129] Nonetheless, the lack of fairness of the trials conducted in Iraq has been affirmed by many international scholars and organizations.[130] In particular, the day after the sentencing of Saddam Hussein by hanging, the UN

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126 *See* Huyse, *supra* note 25. **R**

127 *See* The Statute of the Iraqi Special Tribunal, *supra* note 107, art. 33. **R**

128 David Crane, *The Iraqi Special Tribunal: One Chance to Get It Right*, JURIST (Feb. 24, 2006), *available at* http://jurist.law.pitt.edu/forumy/2006/02/iraqi-special-tribunal-one-chance-to.php (last visited Jan. 28, 2007).

129 *Id.*

130 *See, e.g.,* Human Rights Watch, *Iraq: Saddam Hussein Put to Death—Hanging After Flawed Trial Undermines Rule of Law* (Dec. 30, 2006), http://hrw.org/english/docs/2006/12/30/iraq14950.htm (last visited April 27, 2007); Richard Dicker, *Iraq's Shallow Justice: Saddam's Trial Has Been a Missed Opportunity for the Government to Respect Human Rights*, The Guardian (Dec. 29, 2006), *available at* http://www.guardian.co.uk/commentisfree/story/0,,1979726,00.html (last visited April 27, 2007); FIDH, *The FIDH Condemns the Death Sentence Against Saddam Hussein, and Unfair Trial (*Nov. 5, 2006), http://www.fidh.org/article.php3?id_article=3784 (last visited April 27, 2007); AMNESTY INTERNATIONAL, *supra* note 16. **R**

made the following statement, "the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy, reiterates his strong objections regarding the conduct of the trial and expresses his concern about the consequences this judgment may have over the situation in Iraq and in the region."[131]

The lack of fairness of the trials is explained in part by the fact that numerous provisions of the Statute of the Iraqi Special Tribunal (the "Statute") and Rules of Procedures and Evidence (the "Rules") are not fully consistent with international law and standards, nor do they reflect recent developments in international law.[132] For example, no reference has been made to Iraq's obligations under international human rights treaties and standards, which apply notwithstanding the change in government.[133] Both the temporal and personal jurisdiction have also been criticized as leading to a statute of limitations for genocide, crimes against humanity, and war crimes that is prohibited under international law.[134]

Furthermore, article 14 of the International Covenant on Civil and Political Rights ("ICCPR"), which has been ratified by Iraq, provides that any person charged with a criminal offense is entitled to "a fair and public hearing by a competent, independent and impartial tribunal established by law."[135] When compared to the international standards, however, the Statute and Rules reveal an inappropriate standard of proof, inadequate protections against self-incrimination, inadequate procedural and substantive steps to ensure adequate defense, and limited assurances that judges are impartial and independent.[136] In addition, there is no prohibition

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131 UN Press Release, Expert on Judiciary Expresses Concern About Saddam Hussein Trial and Verdict and Calls for International Tribunal, (Nov. 6, 2006), *available at* http://www.unog.ch/unog/website/news_media.nsf/(httpNewsByYear_en)/C176BF7643E82A84C125721E005FB813?OpenDocument (last visited April 27, 2007).

132 Amnesty International, *supra* note 16. **R**

133 Office of the United Nations High Commissioner for Human Rights, General Comment No. 26: Continuity of Obligations, ¶ 4, CCPR/C/21/Rev.1/Add.8/Rev.1, (Dec. 8, 1997).

134 For details on jurisdiction, see The Statute of the Iraqi Special Tribunal, *supra* note 107, art. 1(b). Temporal jurisdiction excludes the possibility of prosecution for crimes during the U.S.-led occupation after May 1, 2003, and personal jurisdiction is limited to an Iraqi national or a resident of Iraq. **R**

135 International Covenant on Civil and Political Rights art. 14(1), Dec. 16, 1966, 999 U.N.T.S. 171. For a list of these rights, see ICCPR art. 14(3) (a)-(g).

136 HUMAN RIGHTS WATCH, THE FORMER IRAQI GOVERNMENT ON TRIAL (2006), http://hrw.org/backgrounder/mena/iraq1005/ (last visited April 27, 2007).

on the use of any form of torture, coercion, duress, or threat or any other form of cruel, inhuman, or degrading treatment or punishment during the pre-trial arrest and investigation period.[137]

The lack of fairness, portrayed by many international legal scholars and human rights organizations, is perceived by the population and limits the impact of this tribunal on reconciliation. For example, Saleh Mutlaq, head of the Iraqi Front for National Dialogue, the second largest Sunni party in Iraq's parliament, expressed this sentiment: "We do not think this government is fair or this judge and this court are fair. The best thing is to take Saddam outside Iraq and question him in a respectable court" as this "is an insult for the Iraqis and it is an insult to the law in Iraq."[138]

The lack of respect of certain international criminal principles can thus deter reconciliation, as is the case in Iraq. "It signifies justice denied for countless victims who endured unspeakable suffering during [Saddam Hussein's] regime, and now have been denied their right to see justice served,"[139] according to Larry Cox, Executive Director of Amnesty International USA. He added, "It will doubtless have a devastating impact on other related trials, as the key witness who could most compellingly shed light on the chain of command will have been silenced."[140]

Therefore, "just as prosecutions have the potential to facilitate reconciliation, they can also produce inadequate results that could actually harm reconciliation."[141] This is therefore a lost opportunity in terms of the potential impact of international criminal justice on reconciliation in Iraq.[142]

2. *The Iraqi Special Tribunal as Countering the Peace Process*

International criminal law can in certain post-conflict situations run counter to peace, which necessarily hinders reconciliation

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137 AMNESTY INTERNATIONAL, *supra* note 16. R

138 Brian Conley & Omar Abdullah, *Saddam's Execution Likely, Fair Trial Less So*, INTER PRESS SERVICE, June 27, 2006.

139 Larry Cox, Statement of Executive Director of Amnesty International USA on the Impending Execution of Saddam Hussein (Dec. 29, 2006), http://www.amnestyusa.org/countries/iraq/index.do (last visited April 27, 2007)

140 *Id.*

141 Huyse, *supra* note 25, at 102. R

142 Crane, *supra* note 128. R

as the latter can not start before the end of conflict.[143] The potentially negative role of international trials on peace is most obvious when the conflict is ongoing, but is also present when the conflict is over. The Iraqi Special Tribunal was set up at a time when the Ba'athist leaders accused of human rights violations had been deposed yet great ethnic tensions remained between the three main ethnic groups: the Sunni, Shia and Kurds.

The tension between trying to end a war by peaceful means, and ensuring accountability for heinous crimes committed during a conflict has been described by scholars as one of the most difficult dilemmas to resolve in international law and foreign policy.[144] On the one hand, it is desirable to bring together all the opponents in the conflict to reach a peace agreement, but on the other hand it is also desirable to keep out those who have violated rights in order to later prosecute them.[145] The debate is therefore traditionally known as a conflict between accountability of those responsible for atrocities in the conflict and accommodation of the interests of adversarial parties in order to help stop the violence.[146] The International Criminal Tribunal for the former Yugoslavia was created at the height of the Bosnia-Herzegovina conflict and was therefore faced with the peace versus accountability debate.[147] Some asserted that is was necessary to accommodate those who were responsible for atrocities,[148] whereas others argued that failure to prosecute previous conflicts encouraged the Serbs to launch their policy of ethnic cleansing, thinking that they would not be held accountable.[149]

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143 *See, e.g.*, OECD DEVELOPMENT ASSITANCE COMMITTTE, MAINSTREAMING CONFLCICT PREVENTION (2005), *available at* http://www.oecd.org/dataoecd/13/28/35034360.pdf.

144 *See* WILLIAMS & SCHARF, *supra* note 29. **R**

145 *See* Christian Ahlund, *Nation-Building: Lessons from the Past and the Challenges Ahead: Major Obstacles to Building the Rule of Law in a Post-Conflict Environment*, 39 NEW ENG. L. REV. 39, 39 (2004).

146 *See* WILLIAMS & SCHARF, *supra* note 29, at 17, 24. **R**

147 *See* Jean E. Manas, *The Impossible Trade-off: "Peace" versus "Justice" in Settling Yugoslavia's War*, *in* THE WORLD AND YUGOSLAVIA'S WARS (Richard H. Ulman ed., 1996).

148 *See* WILLIAMS & SCHARF, *supra* note 29, at 17 (referring to Richard Holbroke *in* TO END A WAR 367 (1997)). **R**

149 *See id.* at 17 (referring to Richard J. Goldstone, *Justice as a Tool for Peace-Making: Truth Commissions and International Criminal Tribunals*, 28 N.Y.U. J. INT'L L. & POL. 485, 485-86 (1996)).

When the conflict is not yet over, the need for criminal prosecution is debated. Some commentators argue that justice should have primacy and that accountability and peace are linked.[150] Impunity is thus viewed as a very serious impediment to establishing lasting peace. Other commentators argue that prosecution can undermine peace and should be eliminated or limited.[151] The international community should thus only concentrate on dealing with war criminals once local law and order are secured.[152] "[H]owever desirable the idea of war crimes accountability might appear in the abstract, pursuing the goal of a war crimes tribunal may simply result in prolonging a war of civilian atrocities."[153] Scholars accordingly have advanced the need to strike a balance between accountability and impunity when the conflict is ongoing.[154]

Even when the conflict has ceased, prosecution in some situations could have a highly destabilizing effect on the recent peace. This could occur when the peace settlement is a fragile one. For example, the young democracies in Latin America in the 1980s and 1990s rejected the use of punitive justice in order to consolidate the peace.[155] In this case, there is often fear about the power of the former regime, which "might react to the prospect of the trials of large numbers of its members . . . with a coup."[156] Views vary on the necessity of foregoing accountability when peace is fragile. Some argue that "returning to democracy [is] jeopardized by backward looking, finger pointing prosecutions and punishments."[157] Again, a balancing approach is advocated taking into account that since trials can be destabilizing, the link between accountability and democracy depends on what makes democracy self-sustaina-

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150 *See id.*

151 *See* Miriam Sapiro, *Recent Book on International Law: Book Review: Peace with Justice? War Crimes and Accountability in Former Yugoslavia, by Paul R. Williams and Michael P. Scharf*, 97 AM. J. INT'L. L. 1009, 1012 (2003).

152 *See generally* THE STANLEY FOUNDATION, *supra* note 19. R

153 Anthony D'Amato, *Peace vs. Accountability in Bosnia*, 88 AM. J. INT'L L. 500, 502 (1994).

154 *See* Balint, *supra* note 14, at 120 ("The balance that is necessary to strike here is between the immediate halt of the conflict and the probable saving of lives and the future consequences of immunity, which include a potential precedent for other human rights violators, illegitimacy for the institution of law (both nationally and internationally), and the possible reemergence of the conflict at a later stage."). R

155 *See* Huyse, *supra* note 27. R

156 *See* Ratner, *supra* note 17, at 734-35. R

157 *See* MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE 29-47 (1998).

ble.[158] "If one believes that self-interested motivations are enough, then the balance works heavily against retroactive justice. On the other hand, if one believes that impartial value judgments contribute to the consolidation of democracy, there is a compelling political case for retroactive justice."[159] Scholars with such views put the emphasis on democracy, with prosecution playing a role only if it "contributes to the making of a rights-based democracy."[160] Even firm believers in the duty of criminal accountability recognize that "in the interest of preserving democracy from legitimate threats, trials for past abusers can be limited to the most atrocious offenders."[161]

In Iraq, peace appears to be a far off prospect. According to former United Nations Secretary General Kofi Annan, the violence in Iraq is actually "much worse" than a civil war.[162] Moreover, the use of international criminal justice does not appear to have contributed to advancing peace. On the contrary, it appears that violence in Iraq has deepened since the execution of Saddam Hussein in December. The UN for example stated that "the verdict [of death] and its possible application will contribute to deepening the armed violence and the political and religious polarization in Iraq, bringing with it the almost certain risk that the crisis will spread to the entire region."[163] Amnesty International was also "concerned that Hussein's execution may inflame already volatile sectarian divisions."[164]

Therefore, the Iraqi case adds a new prong to the debate between accountability and accommodation. In light of past human rights abuses in Iraq, it is difficult to argue that Saddam Hussein and other perpetrators should not have been punished. Nevertheless, when a trial appears unfair to the population, it will be more difficult for followers of the perpetrators to accept the results of

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158 *See* CARLOS SANTIAGE NINO, RADICAL EVIL ON TRIAL (1996)(stating that key advisers on human rights for former Argentine President Alfonsin argue that a balancing approach is necessary).

159 *Id.* at 134

160 *See* Ratner, *supra* note 17, at 736. **R**

161 Ratner, *supra* note 17, at 740. **R**

162 BBC, *Iraq Prime Minister set Reconciliation Talks* (Dec. 5, 2006), *available at* http://news.bbc.co.uk/2/hi/middle_east/6208878.stm (last visited April 27, 2007).

163 Press Release, U.N. Office at Geneva, Expert on Judiciary Expresses Concern about Saddam Hussein Trial and Verdict and Calls for International Tribunal (Nov. 6, 2006), *available at* http://www.unog.ch/unog/website/news_media.nsf/(httpNewsByYear_en)/C176BF7643E82A84C125721E005FB813?OpenDocument (last visited Mar. 27, 2007).

164 Cox, *supra* note 139. **R**

the trial. Therefore, one can add to the debate that if accountability is the chosen path, it is especially important to ensure the conduct of fair trials to ensure progress towards peace.

B. *Complements to the Iraqi Special Tribunal to Enable Reconciliation*

The analysis of complements to international criminal law used in past post-conflict situations shows how the establishment of an Iraqi Truth and Reconciliation Commission could counter the Iraqi Special Tribunal's negative impact on reconciliation.

1. *Complements to International Criminal Law in Post-Conflict Situations*

Because of the shortcomings of using international criminal law as a tool for reconciliation in certain post-conflict situations, complementary approaches like amnesties and truth commissions have been utilized. In order to counter the reverse effect the Iraqi Special Tribunal has had on reconciliation, Iraq should look at these prior examples to help find solutions.

Amnesties refer to when the perpetrators of Human Rights violations are granted immunity for their offenses. Amnesties often accompanied the democratic transitions of Latin American countries in the 1980s.[165] Total amnesties are rare. Amnesty laws can specifically exclude crimes that fall under the country's international obligations, as was the case in Peru,[166] Uruguay[167] and Suriname.[168] Amnesties can also be subject to certain conditions. For instance, amnesty can be granted only after full exposure of the facts by the perpetrator of the crime, as was the case for the South African Truth and Reconciliation Commission.[169]

The legality of amnesties has often been the subject of debate among scholars and international institutions.[170] The United Na-

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[165] *See* Huyse, *supra* note 25. **R**

[166] Conceden amnistía general a personal militar, policial y civil para diversos casos [First Amnesty Law], June 14, 1995, Law No. 26479 (1995) (Peru).

[167] Law of National Pacification, Mar. 8 1985, Law No. 15.737 (Uru.).

[168] Amnesty Act 1989, Aug. 19, 1992 (Surin.).

[169] Promotion of National Unity and Reconciliation Act 34 of 1995, at 3(1)(b) *available at* http://www.doj.gov.za/trc/legal/act9534.htm (last visited Jan. 28, 2007) [hereinafter TRC Act] (stating that amnesty would only be granted for full disclosure of all the relevant facts relating to acts associated with a political objective and complying with the requirements of this Act).

[170] *See* Huyse, *supra* note 25. **R**

tions has been reluctant to condemn amnesties[171] yet it has rejected the possibility of amnesty when it comes to crimes of genocide, crimes against humanity, war crimes, and other serious violations of international law committed during the conflict.[172] International human rights bodies have declared that impunity is a serious impediment to efforts undertaken to consolidate democracy.[173] Yet the situation is different when amnesty is the price to pay in order to negotiate peace.[174] In this case, amnesty could be acceptable, but strict conditions must be met such as "a public debate preceding the enactment of an amnesty law, as much truth-seeking and reparation as possible, and full respect for a state's international obligations under any human rights treaty."[175]

In Iraq, an offer of amnesty to insurgents not guilty of targeting civilians was announced by Prime Minister Nouri al-Maliki in June 2006. This amnesty would entail insurgents coming forward, turning over their weapons, and renouncing violence in exchange for the promise of immunity from prosecution or imprisonment.

Some experts believed that amnesty could help the situation in Iraq. Indeed, "Maliki's declaration of openness to talks with some members of Sunni armed factions, and the prospect of pardons, are concessions that previous, interim governments had avoided. The statements marked the first time a leader from Iraq's governing Shiite religious parties publicly embraced national reconciliation, welcomed dialogue with armed groups and proposed a limited am-

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171 *See* SIMON CHESTERMAN, YOU, THE PEOPLE: THE UNITED NATIONS, TRANSITIONAL ADMINISTRATION, AND STATE-BUILDING 160 (2004).

172 The Secretary-General, *Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone,* ¶ 22, delivered to the Security Council, U.N. Doc. S/2000/915, (Oct. 4, 2000) *available at* http://www.un.org/Docs/sc/reports/2000/915e.pdf [hereinafter Report of the Secretary-General] (reporting to the Security Council that the consistent position of the United Nations is that amnesty cannot be granted in respect of international crimes, such as genocide, crimes against humanity or other serious violations of international humanitarian law); *see* also Peace Agreement Between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone, (Nov. 30, 1996), *available at* http://www.sierra-leone.org/abidjanaccord.html (last visited Jan. 28, 2005) (in which the United Nations explicitly added that the blanket and unconditional amnesty to all combatants for activities occurring after 1991 would not apply to these serious crimes of international law).

173 United Nations Human Rights Committee, Preliminary Observations on Peru ¶ 9, U.N. Doc. CCPR/C/79/Add.67 (1996).

174 *See* Huyse, *supra* note 25, at 110. **R**

175 Huyse, *supra* note 25, at 110. **R**

nesty."[176] Thus, this offer of amnesty could be viewed as a step forward in achieving reconciliation.

Nevertheless, other experts argue that amnesties are not enough to bring Sunnis into the political fold or to reduce the violence.[177] In fact, these offers of amnesty could even hinder reconciliation in Iraq as these offers of amnesty are limited to Iraqis that have not participated in attacks against civilians or against coalition or Iraqi forces, virtually ruling out all insurgents or militia members.[178]

Past post-conflict situations show that truth commissions are a preferred means for dealing with reconciliation. Truth commissions have indeed been used by several countries to deal with past governments' gross violations of human rights either as an alternative or as a complement to criminal trials. Their goal is not to prosecute or punish but to disclose the facts of what took place.[179] Many truth commissions were established in Latin American countries, such as Chile,[180] Argentina,[181] El Salvador,[182] and Guatemala,[183] to expose the truth after a conflict and achieve national reconciliation.

Commentators argue that truth commissions enable reconciliation in a way trials can not.[184] Truth commissions, for example, provide a more sympathetic forum for victims and witnesses to tell their story and are better suited to produce a full account of the past.[185] They also "constitute a particularly well-suited platform

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176 Ellen Knickmeyer & Jonathan Finer, *Iraq Amnesty Plan May Cover Attacks On U.S. Military*, WASH. POST, June 15, 2006, at A1, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2006/06/14/AR2006061402432.html.

177 Lionel Beehner, The Debate Over Granting Amnesty to Iraqi Insurgents, Council on Foreign Relations (June 22, 2006), http://www.cfr.org/publication/10965/ (last visited Jan 28, 2007)

178 *See id.*

179 *See* CHESTERMAN, *supra* note 171, at 157. **R**

180 *See* Mark Ensalaco, *Truth Commissions for Chile and El Salvador: A Report and Assessment*, 16 HUM. RTS. Q. 656 (1994).

181 *See* Jamie Malamud-Goti, *Punishing Human Rights Abuses in Fledging Democracies: The Case of Argentina*, *in* IMPUNITY AND HUMAN RIGHTS IN INTERNATIONAL LAW AND PRACTICE 161 (Naomi Roht-Arriaza ed., 1995).

182 *See* Thomas Buergenthal, *The United Nations Truth Commission for El Salvador*, 27 VAND. J. TRANSNAT'L L. 497 (1994).

183 *See* Christian Tomuschat, *Between National and International Law: Guatemala's Historical Clarification Commission*, *in* LIBER AMORICUM GUNTHER JAENICKE 991 (Volkmar Gotz et al. eds., 1998).

184 *See* MINOW, *supra* note 157, at 57. **R**

185 *See* MINOW, *supra* note 157, at 59-60. **R**

for the accounts of victims and . . . render justice to the victims by formally acknowledging the abuses committed and providing for alternative forms of accountability, ranging from monetary reparation to the public identification of perpetrators."[186] The focus of truth and reconciliation commissions on "promoting the narrative truth of victims—with the attendant therapeutic gains for those individuals—allows truth commissions to pursue a goal of restorative justice rather than retributive justice," and these commissions are thus considered "more suited to achieving social reconciliation than trials."[187]

In light of the benefits of truth and reconciliation commissions, many scholars have argued for a complementarity between prosecution and truth commissions to enhance reconciliation. According to Richard Goldstone, the "judicial process is essential for reconciliation to begin" but can not be expected to bring reconciliation in itself, being at best a trigger to a larger process that requires addressing the roots of conflict.[188] Gabrielle Kirk McDonald, former president of the ICTY, also recognized, "through this process [of international prosecution], it is our hope that we will deter the future commission of crimes and lay the groundwork for reconciliation. I do not expect the Tribunal to . . . somehow magically create reconciliation, but at least we can lay the groundwork."[189] According to Martha Minow, Professor of Law at Harvard Law School, trials should not be expected alone to create an "international moral and legal order, prevent genocide, or forge the political transformation of previously oppressive regimes."[190] International criminal tribunals therefore should be complemented to "provide the measure of societal healing needed to achieve community repair."[191]

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186 *See* Casten Stahn, *Accommodating Individual Criminal Responsibility and National Reconciliation : The UN Commission for East Timor*, 95 AM. J. INT'L. L. 952, 954 (2001).

187 *See* MINOW, *supra* note 157, at 70. **R**

188 Richard Goldstone, *Ethnic Reconciliation Needs the Help of a Truth Commission,* INT'L HERALD TRIB., Oct. 24, 1998, at 6.

189 Interview by Eric Stover and Christopher Joyce with Judge McDonald in The Hague, the Netherlands on July 26, 1999, *in* HUMAN RIGHTS CENTER INTERNATIONAL HUMAN RIGHTS LAW CLINIC, UNIVERSITY OF BERKELEY & UNIVERSITY OF SARAJEVO, JUSTICE, ACCOUNTABILITY AND SOCIAL RECONSTRUCTION: AN INTERVIEW STUDY OF BOSNIAN JUDGES AND PROSECUTORS 6, n.10 (2000), http://www.hrcberkeley.org/download/bosnia.00-1.pdf (last visited Jan. 28, 2007).

190 MINOW, *supra* note 157, at 49. **R**

191 MINOW, *supra* note 157, at 49. **R**

In practice, these commissions have been used both as an alternative to criminal justice, in South Africa for example, and as a complement to criminal justice, such as in Rwanda. Both situations demonstrate the positive effect these commissions can have on reconciliation. In South Africa, the Truth and Reconciliation Commission was generally seen as a success in terms of its impact on reconciliation.[192] For Judge Richard Goldstone, the success of the Truth and Reconciliation Commission "exceeded by far [his] expectations" in that the "evidence has stopped denials of the many serious human rights violations committed by the apartheid security forces."[193] The South African Truth and Reconciliation Commission has been described as essential to the project of reconciliation for several reasons:

> [I]t gave the victims of gross human rights violations the opportunity to be heard, and more importantly, to be compensated. . . . The country confronted the pain of those who were powerless in the face of an arbitrary abuse of power. [It also] allowed the stories of the victims, and the testimony of the perpetrators, to become part of official South African history. . . . [I]t provided South Africans with a kind of cathartic vehicle to testify to the substance, context, and memory of a dark phase in South Africa's history and to record such history for posterity.[194]

Rwanda would be a more relevant example for Iraq as a Commission was created to complement the International Criminal Tribunal for Rwanda because of the questioned impact of this Tribunal on reconciliation combined with the realization that commissions could impact reconciliation more effectively.[195] Despite the existence of the ICTR, many analysts urged for the creation of a reconciliation commission to work alongside the court system as this would "lay a strong foundation for true reconciliation and healing in Rwanda."[196] Such a commission would "relegate punishment to the realm of moral shame rather than to the arena of legal liability."[197] The National Unity and Reconciliation Commis-

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192 The South African Truth and Reconciliation Commission was created by the TRC Act, *supra* note 169. **R**

193 Richard J. Goldstone, *Foreword* to MINOW, *supra* note 157, at xii. **R**

194 Penelope E. Andrews, *Reparations for Apartheid's Victims: The Path to Reconciliation?* 53 DEPAUL L. REV. 1155, 1158-59 (2004).

195 *See* Bradley, *supra* note 41. **R**

196 Bradley, *supra* note 41, at 131. **R**

197 *Id.*

sion was thus created in 1999 to "become a platform where Rwandans of all social conditions can meet and discuss the real problems of the Nation, especially those related to the unity and reconciliation, culture of peace, tolerance, justice, democracy and development."[198] This Commission's objective was to "organize and oversee national public debates aimed at promoting national unity and reconciliation of the Rwandan people."[199]

Iraq can benefit from the Rwandan example of complementing criminal justice with a reconciliation commission.

2. *Advocating for an Iraqi Truth and Reconciliation Commission*

Since the successful example in Rwanda, subsequent semi-international tribunals have adopted the approach of combining prosecution with a truth commission. Lessons from East Timor and Sierra Leone could inspire Iraq's use of a Truth and Reconciliation Commission.

In East Timor, a Commission for Reception, Truth and Reconciliation (the "CRTR") was created in 2001 alongside the Special Panels dealing with prosecution.[200] This Commission has two functions: to establish the truth about the human rights violations committed in East Timor under Indonesian rule and to facilitate the acceptance and reintegration into East Timor of persons accused of having committed less serious crimes in the context of political conflicts.[201] These two functions of truth and acceptance are thus directly linked to the goal of reconciliation. The CRTR is complementary to the Special Panels: The Commission is not to deal with the "serious criminal offences" as these are reserved for the Special

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198 NATIONAL UNITY AND RECONCILIATION COMMISSION, PRESENTATION OF THE UNRC (1999), *available at* http://www.nurc.gov.rw/eng/presentationen.htm (last visited May, 7 2005).

199 EMILY HARPSTER, RWANDA: REPORT ON OTHER MEASURES OF RECONCILIATION (2002), *available at* http://ist-socrates.berkeley.edu/~warcrime/Rwanda/Rwanda_Other_Measures_of_Reconciliation.htm (last visited Jan. 28, 2005).

200 *See* United Nations Transitional Administration in East Timor (UNTAET), Regulation No. 2001/10: On the Establishment of a Commission for Reception, Truth and Reconciliation in East Timor, UNTAET/REG/2001/10 (July 13, 2001), *available at* http://www.un.org/peace/etimor/untaetR/UntaetR.htm (last visited Jan. 28, 2007) [hereinafter UNTAET Regulation]; S.C. Res. 1272, ¶ 1, U.N. Doc. S/RES/1272 (Oct. 25, 1999) (endowing UNTAET with "overall responsibility for the administration of East Timor" and the "exercise [of] all legislative and executive authority, including the administration of justice.").

201 *See* UNTAET Regulation, *supra* note 200, pts. III-IV. **R**

Panels.[202] This separation between serious and less serious crimes, however, can be difficult to evaluate and, according to some commentators, is not necessarily appropriate.[203]

The Commission for Reception, Truth and Reconciliation in East Timor presents important innovations compared to previous commissions. First, the CRTR "was created in a territory under transitional United Nations administration and accordingly was not established on the basis of a parliamentary law, but by a legal act of the United Nations."[204] Second, it focuses especially on conflict management.[205] Third, it seeks to "strike a balance between individual criminal responsibility for the commission of serious crimes and the grant of 'limited amnesties' for the sake of national unity."[206] Amnesties are limited to a strict minimum and are only granted if the perpetrator performs a visible act of remorse serving the interests of the people affected by the original offense.[207] Finally, it has a role of a quasi-judicial nature, contrarily to previous truth commissions, which were nonjudicial bodies.[208] This Commission has been described as "innovative" in "linking the need for reconciliation to the need for reconstruction."[209] Such innovation in the design of the CRTR in East Timor thus demonstrates the flexibility of such truth commissions, which could be adapted to the special needs of Iraq.

Similarly, a Truth and Reconciliation Commission (the "TRC") is used in Sierra Leone to further reconciliation alongside the Special Court for Sierra Leone. The Sierra Leone TRC was first proposed under the Lome peace agreement, a non international agreement between the government of Sierra Leone and the Revolutionary United Front.[210] The Truth and Reconciliation

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202 *See* United Nations Transitional Administration in East Timor, Regulation No. 2000/15: On the Establishment of Panels With Exclusive Jurisdiction Over Serious Criminal Offences, §§ 4-9, UNTAET/REG/2000/15 (June 6, 2000), *available at* http://www.un.org/peace/etimor/untaetR/UntaetR.htm (last visited Jan. 28, 2007).

203 *See* Stahn, *supra* note 186, at 958 (giving examples of why, in some cases, resorting to the reconciliation procedure may be more appropriate even though the act formally qualifies as a serious crime). R

204 *Id.* at 956.

205 *Id*.

206 *Id.*

207 *Id.* at 963.

208 *Id*. at 958-59.

209 *See* CHESTERMAN, *supra* note 171, at 158. R

210 *See* Peace Agreement Between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone, art. XXVI (July 7, 1999), *available at* http://www.

Commission was then created by national law.[211] The uniqueness here is that Sierra Leone combines an international UN sanctioned Special Court and a national truth and reconciliation commission,[212] even though the TRC includes citizens of Sierra Leone and non-nationals.[213] The aims of the Truth and Reconciliation Commission are "to create an impartial historical record of violations and abuses of human rights and international humanitarian law . . . to address impunity, to respond to the needs of the victims, to promote healing and reconciliation, and to prevent a repetition of the violations and abuses suffered."[214]

The Sierra Leone example is particularly interesting in terms of demonstrating complementarity between international criminal justice and national reconciliation. At the time the TRC Act was enacted, the Special Court had not been contemplated and therefore the complementary arrangement between the two institutions was not envisioned.[215] As the subsequent agreement establishing the Special Court remains silent on the relationship between the two institutions,[216] there has been much debate on the ways of ensuring complementarity.[217]

Both the Special Court and the Truth and Reconciliation Commission for Sierra Leone have "related functions and the same common goals: ensuring accountability in Sierra Leone, bringing sustainable peace to the country, and building a culture of respect for human rights."[218] They "have the same general mandate of

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sierra-leone.org/home/lomeaccord/html (last visited April 27, 2007) [hereinafter Lome Agreement] ("A Truth and Reconciliation Commission shall be established to address impunity, break the cycle of violence, provide a forum for both the victims and perpetrators of human rights violations to tell their story, get a clear picture of the past in order to facilitate genuine healing and reconciliation.").

211 *See* The Truth and Reconciliation Act, § 2(1) (2000) (Sierra Leone) [hereinafter TRC Act], *available at* http://www.sierra-leone.org/trcact2000.html (last visited Jan 28, 2007).

212 *See* Abdul Tejan-Cole, *The Complementary and Conflicting Relationship Between the Special Court for Sierra Leone and the Truth and Reconciliation Commission*, 6 YALE H.R. & DEV. L.J. 139, 143 (2003).

213 *See* TRC Act, *supra* note 211, at § *3*(1) (providing for four citizens of Sierra Leone and three non-nationals). R

214 TRC Act, *supra* note 211, at § 6(1). R

215 *See* Tejan-Cole, *supra* note 212, at 150 (stating that the TRC Act was enacted four months before the president's request to the U.N. concerning the Special Court). R

216 *See* Report of the Secretary-General, *supra* note 172. R

217 *See*, *e.g.,* Tejan-Cole, *supra* note 212, at 150-58. (discussing the relationship between the TRC and the Special Court). R

218 *See* Tejan-Cole, *supra* note 212, at 150. R

truth and accountability, with substantially the same subject matter jurisdiction."[219] As the TRC is not considered as a national court, it does not have the obligation to defer its competence to the Special Court on request.[220] However, the Truth and Reconciliation Commission has the obligation to cooperate with the Special Court.[221] The main difference between the Special Court and the TRC is that "while the Special Court will prosecute only very few defendants who 'bear the greatest responsibility,' the TRC will be able to reach a much larger section of the population."[222]

The Special Court and the TRC are therefore viewed as "two institutions working for the same purpose and applying different methods to different people: the Special Court for the few who meet the personal jurisdiction requirements, the TRC for everybody else."[223] This combination is said to have the "potential to contribute greatly to the ends of justice and reconciliation in Sierra Leone."[224]

These past examples of combining criminal justice with reconciliation commissions to promote healing and reconciliation can benefit Iraq. The need to complement the Iraqi Special Tribunal with a truth commission focused on bringing together the Sunni, Shia, and Kurds is particularly important given the negative impact the IST has had on reconciliation. Shortly after the fall of Baghdad, there was indeed discussion around establishing a South Africa-like truth and reconciliation commission. However, this discussion never materialized because of the increase in sectarian violence in the country.[225] All subsequent discussion in Iraq confirms the need for an entity focused on achieving the goal of reconciliation.

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219 OFFICE OF THE ATTORNEY GENERAL AND MINISTRY OF JUSTICE SPECIAL COURT TASK FORCE, BRIEFING PAPER ON: RELATIONSHIP BETWEEN THE SPECIAL COURT AND THE TRUTH AND RECONCILIATION COMMISSION 8 (2002), *available at* http://www.specialcourt.org/documents/PlanningMission/BriefingPapers/SLGovTRC_SpCt_Relationship.doc (last visited Jan., 28 2007).

220 *See* Report of the Secretary-General, *supra* note 172, art. 8(2). **R**

221 *See* Statute of the Special Court, *supra* note 104, at art. 17. **R**

222 OFFICE OF THE ATTORNEY GENERAL AND MINISTRY OF JUSTICE SPECIAL COURT TASK FORCE, *supra* note 219, at 8. **R**

223 OFFICE OF THE ATTORNEY GENERAL AND MINISTRY OF JUSTICE SPECIAL COURT TASK FORCE, *supra* note 219, at 8. **R**

224 Laura R. Hall and Nahal Kazemi, *Prospects for Justice and Reconciliation in Sierra Leone*, 44 HARV. INT'L L.J. 287, 299 (2003).

225 *See* BEEHNER, *supra* note 122. **R**

In June 2006, Prime Minister Nouri al-Maliki announced the organization of a National Reconciliation Conference that would include all of Iraq's warring parties and the creation of a new Commission "to oversee the hoped for reconciliation process with branches in all of Iraq's provinces."[226] This reconciliation process was likened to the "reconciliation effort pioneered by South Africa after the collapse of apartheid" by Adnan Ali al-Kadhimi, a top adviser to Maliki.[227] The 30-member Commission to promote national reconciliation was then created in July 2006.[228]

This National Council for the Reconciliation and National Dialogue Plan included representatives of the government and parliament as well as religious authorities and tribes.[229] According to one Congressman, the fact that the Iraqi Reconciliation Commission planned to organize meetings of Sunni and Shia Islamic scholars offered "tangible hope that dialogue among feuding factions can mitigate escalating violence."[230] Therefore the Iraqi Reconciliation Commission has been described as "deserv[ing] more international support and attention than it has gotten thus far."[231] To date, results from this ambitious plan for reconciliation have yet to be seen. A National Reconciliation Conference did take place in Baghdad after several attempts on December 16-17 of 2006.[232] However, this conference did not lead to any concrete follow-up steps,[233] mostly as a result of the lack of representation from Iraq's most extreme factions.[234]

In addition, the next steps for Mr. Maliki to implement, although vital to contribute to a stabilization of the situation in Iraq,

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226 *Iraq PM Unveils Unity Proposals*, BBC, June 25, 2006, *available at* http://news.bbc.co.uk/2/hi/middle_east/5114014.stm.

227 Knickmeyer & Finer, *supra* note 176. **R**

228 *Iraq Announces National Reconciliation Commission*, AUSTRALIAN BROADCASTING CORPORATION, July 22, 2006, *available at* http://www.abc.net.au/news/newsitems/200607/s1694082.htm.

229 *Main Points of Iraq's Peace Plan*, BBC, June 25, 2006, *available at* http://news.bbc.co.uk/2/hi/middle_east/5114932.stm.

230 Press Release, Rep. Chris Smith, Smith Back from Iraq (Sept. 25, 2006), *available at* http://www.house.gov/list/press/nj04_smith/iraqtrip.html (last visited Jan 28, 2007).

231 *Id.*

232 *Iraq's National Reconciliation Conference opens in Baghdad* (Dec. 17, 2006), *available at* http://www.iraqupdates.com/p_articles.php/article/12718.

233 Ali Khaleel, *Reconciliation Conference Ends With Failure* (Dec. 18, 2006), *available at* http://www.iraqupdates.com/p_articles.php/article/12755.

234 *See* BEEHNER, *supra* note 122 (stating that Sadr's Mahdi Army and the Muslim Scholars Association, a powerful Sunni body with ties to the insurgency, were not present, which led to the failure of the conference). **R**

may not be sufficient to produce a real effect of rule of law on the Iraqi people. These measures include reaching out to the minority Sunni Arabs, allowing former Baathists to regain their jobs, finding a formula for dividing oil revenues between the different regions, bringing in amnesty for certain categories of Sunni insurgents, and revising the constitution to meet Sunni concerns.[235] The failure of the Iraqi Special Tribunal to achieve objectives needed in a post conflict situation makes it particularly important for these measures to include a commission focused on grieving, acceptance, and forgiveness of the past.

Furthermore, promoting and protecting current human rights violations in Iraq may not remedy the past lack of accountability. Indeed, "the independent national human rights commission which is to be established by the Council of Representatives" with the help of the United Nations Assistance Mission for Iraq (the "UNAMI")[236] is welcomed as a means to "contribute to building a culture of human rights and offer ways and means to redress human rights violations."[237] This Human Rights Commission could help the current situation in Iraq as "full realization of all human rights are important factors for stability in Iraq."[238]

Nevertheless, the UNAMI report stated in December, "the root causes of the sectarian violence lie in revenge killings and lack of accountability for past crimes as well as in the growing sense of impunity for on-going human rights violations."[239] This lack of accountability and increase in revenge killings are a direct result of the failure of the criminal justice system to provide any sense of relief for victims. "You need some kind of justice,"[240] says Joost Hiltermann, Middle East project director of the International Crisis Group. "So many Iraqi families don't have a clue what happened to their loved ones."[241] "The trial of Saddam Hussein was

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235 Roger Hardy, *Can Iraq's Maliki deliver?* BBC (Jan. 12, 2007), *available at* http://news.bbc.co.uk/2/hi/middle_east/6254869.stm.

236 *See* U.N. Assistance Mission for Iraq (UNAMI), *Human Rights Report for November 1 – December 31, 2006,* at 1 (2006), *available at* http://www.uniraq.org/FileLib/misc/HR%20Report%20Nov%20Dec%202006%20EN.pdf [hereinafter UNAMI Report].

237 *See* Office of the United Nations High Commissioner for Human Rights (OHCHR), *OHCHR in Iraq: Background*, http://www.ohchr.org/english/countries/iq/summary.htm.

238 *See* Khaleej Times, *Human Rights Commission Planned for Iraq* (Oct. 18, 2006), http://www.globalpolicy.org/security/issues/iraq/unrole/2006/1018comm.htm.

239 UNAMI Report, *supra* note 236, at 1-2. **R**

240 BEEHNER, *supra* note 122. **R**

241 BEEHNER, *supra* note 122 (quoting Hilterman). **R**

supposed to provide a public airing of the former regime's atrocities but instead became embroiled in sectarian politics, culminating with the controversial execution of the Iraqi dictator."[242]

Therefore, the involvement of the Sunni minorities in the political process should be complemented with their involvement in an Iraqi truth and reconciliation commission. Stability is of course the first goal for Iraq given the chaos of the present situation. Nevertheless, the creation of a commission that is seen as fair and representative of all ethnic groups in Iraq would enhance reconciliation, which would in turn contribute to peace in the country.

IV. CONCLUSION

International criminal law has in the past decade increasingly been used as a tool for reconciliation after conflict, especially as international criminal law has evolved to become closer to the affected communities. Semi-internationalized tribunals offer a unique opportunity to combine the advantages of international criminal justice with a proximity to the affected population. Moreover, there is a trend towards complementing international criminal justice with truth and reconciliation commissions, which provide additional benefits for reconciliation unattainable by prosecution.

In light of these past lessons, the Iraqi Special Tribunal had the potential to contribute greatly to the reconciliation of the Iraqi ethnic groups with their past. Nevertheless, the structure of the Tribunal, the organization of its proceedings, and the execution of Saddam Hussein in contestable conditions have in fact hindered the reconciliation process. By giving an impression of being unfair to the Sunnis, this Tribunal has moved Iraqi factions further apart. Therefore, building on recent innovations in Rwanda, East Timor, and Sierra Leone, an Iraqi Truth and Reconciliation Commission with a particular focus on including the Sunnis could contribute to necessary reconciliation. To be the most effective, such a Truth and Reconciliation Commission would need to be combined with a political process of enhancing dialogue between all Iraqi groups.

The experience of the Iraqi Special Tribunal provides an additional lesson for post-conflict reconciliation. Although we have learned from previous criminal tribunals that reconciliation hap-

[242] BEEHNER, *supra* note 122. **R**

pens when trials take place closer to the affected population, the Iraqi Special Tribunal teaches us that reconciliation is only achieved when the judicial proceedings are fair and legitimate with regard to all factions in the country.

In the future, this balance between country ownership and compliance with international judicial standards would best be achieved through the use of the International Criminal Court. The International Criminal Court recognizes the importance of international criminal justice in post-conflict proceedings, while giving priority to local justice through the principle of complementarity. In addition, truth commissions can work together with the ICC, enabling a stronger focus on reconciliation. Therefore, a country wishing to hold perpetrators of previous human rights abuse accountable should opt for the use of the International Criminal Court, which stays close to the affected community while respecting internationally recognized standards.

CORPORATE SOCIAL ACCOUNTABILITY STANDARDS IN THE GLOBAL SUPPLY CHAIN: RESISTANCE, RECONSIDERATION, AND RESOLUTION IN CHINA

*Li-Wen Lin**

ABSTRACT

This Article provides a view on corporate social accountability standards from a Chinese perspective, a slightly different angle from that of legal scholars in the United States. The legal literature in the United States typically only focuses on the importance and effectiveness of corporate social accountability standards to regulate the conduct of multinational companies in the era of globalization. However, the views of the outsourced companies in the developing countries, on which the multinational companies impose the standards, have seldom received attention. This Article tries to fill this void by examining the situation in China. As shown in this Article, effective implementation of corporate social accountability standards requires a refined approach that considers local circumstances in developing countries.

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I. INTRODUCTION

Numerous definitions of globalization scatter the landscapes of policy discussions and everyday conversations. The definitions might be intentionally constructed to fit in a particular context or to achieve a particular purpose. Notwithstanding different contexts and purposes, economic factors and concerns are at the center of the definition of globalization both for pro- and anti-globalization groups. Martin Wolf, associate editor and chief economics commentator at the *Financial Times*, states in his book *Why Globalization Works*:

> Globalization is defined in what follows as integration of economic activities, via markets. The driving forces are technological and policy changes — falling costs of transport and communications and greater reliance on market forces. The economic globalization discussed here has cultural, social and political consequences (and preconditions). But those

> consequences and preconditions are neither part of its definition nor a focus of our attention.[1]

Although the meaning of globalization is limited to the economic sense, the controversy of globalization usually revolves around its social consequences.[2]

The emergence of the global supply chain demonstrates a typical example of economic integration and the accompanying social consequences. With the great reduction in transportation costs and the help of international trade agreements, goods may be produced in locations with competitive advantages, and they may be sold around the world "through complex production and distribution systems under a variety of organizational and legal arrangements."[3] To utilize the competitive advantages of a location for manufacturing a certain product, foreign companies do not have to set up their own facilities in that location. Direct investment in a country with unfamiliar cultural and business environments is costly. By contracting with the local manufacturers, foreign companies can tap the resources in the host country without the pain and risks associated with direct investment. This is exactly what multinational companies such as Nike are doing in this era of economic integration. They outsource the supply chain operations in developing countries to produce products at competitive prices and then sell the products to markets around the world, largely to developed countries. This type of business strategy has some important legal implications. First, without directly controlling factories and hiring workers in the host country, foreign companies are not constrained by the environmental regulations and labor protection laws in the host country. Second, although one may argue that foreign companies may be subject to the laws of their home countries in regulating their business activities abroad, U.S. experience casts doubt on the effectiveness of this approach.[4] Third, multinational companies

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1 MARTIN WOLF, WHY GLOBALIZATION WORKS 19 (2004).

2 *See* JAGDISH BHAGWATI, IN DEFENSE OF GLOBALIZATION (2004) (debating whether globalization harms or helps children, women, labor, culture, democracy, and the environment).

3 PHILIP B. SCHARY & TAGE SKJOTT-LARSEN, MANAGING THE GLOBAL SUPPLY CHAIN 16 (1998) (explaining the concept of the global supply chain).

4 *See* Cynthia A. Williams, *Corporate Social Responsibility in an Era of Economic Globalization*, 35 U.C. DAVIS L. REV. 705, 750–72 (2002) (arguing that, at the moment, the Alien Tort Claims Act imposes weak constraints on corporate activities because of problems relating to the construction of causes of action, state sovereignty, forum non conveniens, and personal jurisdiction over defendants); *see also* David Kinley & Junko

are not constrained by international law either. Traditionally, multinational companies have not been directly subject to international law because they lack an international legal personality. Although there are some international legal instruments asserting that multinational companies have a duty to the community, they are either non-binding declarations or lack enforcement and monitoring mechanisms.[5]

The supply manufacturers in developing countries that contract with multinational companies are usually small companies measured on an international scale. These small manufacturers profit from the multinationals' cost-reduction strategy. They make profits not from selling advanced knowledge, but from selling cheap labor. To be competitive and profitable, these suppliers do not pay much attention to labor protection concerns and sometimes even egregiously violate laws, gaining profits at the expense of workers' health and lives. Meanwhile, the product market in the developed countries has become so competitive that multinational companies are pressed to squeeze every penny out of their operations, including their supply chains. Therefore, multinational companies do not have strong incentives to consider the production processes of their suppliers in developing countries. Price is their primary, if not only, concern. Workers' rights suffer in this unregulated global supply chain.

The plight of workers in developing countries in the global supply chain has been revealed through numerous reports, which have raised consumer awareness in developed countries and resulted in movements against goods produced in sweatshops. In response, multinational companies are incorporating corporate social accountability standards into their supply chain operations. These standards can be internal voluntary codes of conduct established by a multinational company itself or external voluntary standards established by non-governmental organizations. This Article focuses on the latter. Examples of the external standards are: SA8000, established by Social Accountability International (SAI); the Workplace Code of Conduct by the Fair Labor Association (FLA); and the Apparel Certification Program by Worldwide Responsible Apparel Production (WRAP). Although the details of these stan-

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Tadaki, *From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law*, 44 VA. J. INT'L L. 931, 939–44 (2004).

[5] See Kinley & Tadaki, *supra* note 4, at 947–51. **R**

dards are different, they share some general commonalities. They are based on the International Labor Organization (ILO) Declaration on Fundamental Principles and Rights at Work, and they are structured with a monitoring system.[6]

The legal literature in the United States typically focuses on the importance or insufficiency of corporate social accountability standards to regulate the conduct of multinational companies.[7] The manner in which the people working in the outsourced factories in the developing world view these standards has seldom been discussed. This Article aims to fill this vacuum.

China, characterized as "the world's factory," plays an important role in the global supply chain. Since the corporate social accountability standards, whether internal or external, are largely implemented in factories, incorporation of such standards into the global supply chain unsurprisingly has great impact on the manufacturers in China.[8] Major newspapers in China have frequently reported anecdotes of factories losing business from multinational companies because they failed to meet corporate social accounta-

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[6] *See* COMMITTEE ON MONITORING INTERNATIONAL LABOR STANDARDS, NATIONAL RESEARCH COUNCIL, MONITORING INTERNATIONAL LABOR STANDARDS: TECHNIQUES AND SOURCES OF INFORMATION 78–84 (2004) (comparing FLA, SA8000, and WRAP standards).

[7] *See, e.g.*, Sean D. Murphy, *Taking Multinational Corporate Codes of Conduct to the Next Level*, 43 COLUM. J. TRANSNAT'L L. 389, 433 (2005) (arguing that governments should provide "carrots" and "sticks" for corporate codes of conduct to be effective); Kinley & Tadaki, *supra* note 4, at 952–60 (explaining the impact of corporate codes of conduct); **R**
Beth Stephens, *The Amorality of Profit: Transnational Corporations and Human Rights*, 20 BERKELEY J. INT'L. L. 45, 78–81 (2002) (explaining the partially binding aspect of voluntary codes of conduct). *See generally* Mark B. Baker, *Tightening the Toothless Vise: Codes of Conduct and the American Multinational Enterprise*, 20 WIS. INT'L L.J. 89 (2001); Lance Compa & Tashia Hinchliffe-Darricarrere, *Enforcing International Labor Rights Through Corporate Codes of Conduct*, 33 COLUM. J. TRANSNAT'L L. 663 (1995); Thomas F. McInerney et al., *Putting Regulation Before Responsibility: The Limits of Voluntary Corporate Social Responsibility*, *in* 2 VOICES OF DEVELOPMENT JURISTS (2005), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=658081; Charles Sabel et al., *Ratcheting Labor Standards: Regulation for Continuous Improvement in the Global Workplace*, *in* SOCIAL PROTECTION DISCUSSION PAPER SERIES (May 2000), *available at* http://siteresources.worldbank.org/SOCIALPROTECTION/Resources/SP-Discussion-papers/Labor-Market-DP/0011.pdf.

[8] *See* KUA GUO GONG SI DE SHE HUI ZE REN YU ZHONGGUO SHE HUI [SOCIAL RESPONSIBILITY OF TRANSNATIONAL CORPORATIONS & THE CHINESE SOCIETY] 19 (Tan Shen & Liu Kaiming eds., 2003) [hereinafter SOCIAL RESPONSIBILITY OF TRANSNAT. CORPS.] (roughly estimating that at least 8000 factories in the coastal area have been investigated by multinational companies about corporate social practices since 1995 to the time of this research). The report was part of the labor research series conducted by Tsinghua University in Beijing, supported by the Ford Foundation. *Id.*

bility standards. The most popular external social accountability standard for manufacturers in China is SA8000, although currently the number of factories certified under SA8000 is relatively small compared to the total number of factories in China.[9] SA8000 has raised a heated debate in China.[10] There are two competing opinions in China about the role of corporate social accountability standards in the global supply chain. The standards are widely viewed as creating either a technical trade barrier in favor of developed countries or a passport to the global market. Opponents criticize the protectionism, commercialization, and value-imperialism of corporate social accountability standards, while proponents view these standards not as external pressure but as internalized values that promote sustainable growth. Scholars, companies, and the Chinese government regularly exchange opinions with regard to this issue.

This Article provides an overview of the changing attitude toward corporate social accountability standards in China ? from uncompromising resistance, to reconsideration, and then to promising resolution. Part II explains the formation of corporate social accountability standards and their function in the global supply chain. Part III discusses criticisms of the standards and the causes of resistance in China. Part IV analyzes the criticisms in Part III and identifies benefits from the implementation of corporate social accountability standards in China. Part V describes the attitude of the Chinese government and the responses of the companies in China. Part VI gives recommendations on how to overcome the resistance in China and turn the external pressure into internalized values. Although this Article examines the situation in China, the analysis may also apply to other developing countries where corporate social accountability standards are struggling to become accepted.

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[9] According to Social Accountability International, there are 129 certified facilities in China as of September 30, 2006. There are 1112 facilities certified around the world. Italy has the most facilities certified (395), followed by India (141) and then China (129). *See* Social Accountability International, http://www.sa-intl.org (follow "SA8000" hyperlink; then follow "Certified SA8000 facilities" hyperlink) (last visited Apr. 15, 2007).

[10] The debate has been raised by news reports since 2003. *Mei yu xiang wo tui SA8000 dabang, zhusanjiao kong cheng zhong zhaiqu* [*The United States Wants to Use the Stick of SA8000, the Pearl Delta Likely to be a Disaster Zone*] GD HK INFO DAILY (P.R.C.), Dec. 11, 2003. This news report planted an important seed of the debate.

II. Corporate Social Accountability Standards

A. *Formation: SA8000*

With the great reduction in transportation costs, multinational companies can manufacture products in developing countries where labor cost is substantially lower than in developed countries and then sell the products around the world at a competitive price. The low labor cost in developing countries is *partly* due to low levels of labor protection because of either lack of regulation or lack of enforcement by the local governments.[11] Since the 1990s, the media has frequently exposed sweatshop practices in developing countries by multinational companies or their suppliers.[12] Multinational companies, mainly driven by enlightened self-interest, have adopted corporate social accountability standards responsively, to repair their tarnished images, or preventively, to maintain customer goodwill.[13] The standards can be internal codes of conduct established by a company itself or external standards usually set by non-governmental organizations and sometimes accompanied by verification mechanisms. SA8000 falls into the latter group. Although there are many external corporate social accountability standards in the world, this Article selects SA8000 as an example because it is the most hotly discussed standard in China.

SA8000 is a set of auditable corporate social accountability standards established in 1997 by the Council on Economic Priori-

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[11] Note that this is just one of the reasons for low labor costs. Low living expenses in developing countries result in lower wages, but this does not necessitate labor exploitation.

[12] *See, e.g.,* Philip Shenon, *Made in the U.S.A.?—Hard Labor on a Pacific Island/A Special Report; Saipan Sweatshops Are No American Dream*, N.Y. Times, July 18, 1993, at A1 (reporting that labor exploitations were found in the suppliers for Arrow, Liz Claiborne, The Gap, Montgomery Ward, Geoffrey Beene, Eddie Bauer, and Levi Strauss).

[13] *See* Robert J. Liubicic, *Corporate Codes of Conduct and Product Labeling Schemes: The Limits and Possibilities of Promoting International Labor Rights Through Private Initiatives*, 30 Law & Pol'y Int'l Bus 111, 114–15 (1998) (arguing that self-interest motivation is the predominant reason multinational companies adopt codes of conduct); Harvey L. Pitt & Karl A. Groskaufmanis, *Minimizing Corporate Civil and Criminal Liability: A Second Look at Corporate Codes of Conduct,* 78 Geo. L.J. 1559, 1573–1600 (1990) (providing a historical review of the growth of codes of conduct fostered by scandals); Murphy, *supra* note 7, at 397–403 (explaining the impetus for the proliferation of codes of conduct); Kimberly Ann Elliott & Richard B. Freeman, Can Labor Standards Improve Under Globalization? 42–46 (2003) (describing firms' practice of adopting codes of conduct because they believe that "consumers will penalize them if they do not undertake corrective action" and analyzing firms' cost-and-benefit calculation of adopting higher labor standards). **R**

ties Accreditation Association (CEPAA) and now supervised by Social Accountability International (SAI).[14] SA8000 addresses national law compliance and incorporates International Labor Organization conventions, the Universal Declaration of Human Rights, and the UN Convention of the Rights of the Child.[15] To measure the performance of a company with regard to labor protection, SA8000 provides criteria in nine different areas: child labor, forced labor, health and safety, freedom of association and right to collective bargaining, discrimination, discipline, working hours, compensation, and management systems.[16]

In addition to establishing standards, an important feature of SA8000 is its verification system, which was designed to overcome the criticisms about monitoring insufficiencies that usually discredit voluntary corporate social accountability standards. As of November 2007, SAI had accredited seventeen auditing companies to conduct monitoring and certification.[17] To be certified under the SA8000 standard, a facility must first conduct a preliminary internal assessment of compliance with SA8000 and make any changes to conditions or policies as required by the standard. Then, an auditing company accredited by the SAI will conduct an initial assessment and provide corrective action requests for the applicant facility. After making changes in accordance with the corrective action requests, the facility may contact the auditing company to arrange a full certification audit. If it passes the audit, the facility will be certified. An SA8000 certification is good for three years. There will be surveillance audits every six months, or once a year if the certification auditor deems that the facility is performing very well in complying with the standard.[18] The cost of obtaining a SA8000 certification is comprised of certification fees as well as corrective/compliance costs.[19] The amount of the corrective com-

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14 CEPAA changed its name to SAI in 2000.

15 *See* Social Accountability 8000, art. II (2001), *available at* http://www.sa-intl.org/index.cfm?fuseaction=Page.viewPage&pageId=710&parentID=540&grandparentID=473&nodeID=1 (follow "Official English Version" hyperlink; then follow "PDF" hyperlink) (last visited Apr. 15, 2007).

16 *See* Social Accountability International, Overview of SA8000, http://www.sa-intl.org/index.cfm?fuseaction=Page.viewPage&pageId=473 (last visited Nov. 26, 2007).

17 *See* Social Accountability International, SA8000 Accredited Certification Bodies, http://www.sa-intl.org/index.cfm?fuseaction=Page.viewPage&pageId=702 (last visited Oct. 28, 2007).

18 *See id.*

19 *See* YOU-HUAN LI, SA8000 ZHONGGUO QIYESHEHUI ZHEREN JIANSHE [SA 8000 AND THE CONSTRUCTION OF CHINESE CORPORATE SOCIAL RESPONSIBILITY] 178 (2004).

pliance costs vary from facility to facility depending on the degree of non-compliance and on the number of workers.

B. *Function in the Global Supply Chain: The Perspective of Multinational Companies*

Prior to globalization, companies only competed with other domestic companies who were subject to the same cost basis and regulatory environment. However, globalization has forced companies to compete with one another, regardless of size, origin, and industry. In order to survive in the competitive global market, companies have adopted new business management methods, primarily focusing on reshaping supply chains for cost reduction.[20] In the last decade, companies have "shifted responsibility for production and materials managements, whenever possible, to their suppliers" in order to reduce inventory carrying costs and shorten product cycle time.[21] Since companies do not have direct control over their suppliers' factories, supply chain management is important to ensure the smooth flow of supply. Supply chain management typically focuses on price, delivery speed, quality, and reliability.

For the most part, the suppliers are located in those developing countries that offer cheap labor and regulatory exemption privileges. From a multinational company's standpoint, there are multiple layers of suppliers: from its first-tier suppliers over which it has great visibility to its suppliers' suppliers over which it has minimal visibility or control. Each company, regardless of its size, only occupies a fragment of the global supply chain.[22] Therefore, multinational companies may very well argue that they are incapable of controlling their suppliers, in particular, those hidden under multiple layers of contracting. Ostensibly, the shift of manufacturing to suppliers in developing countries and the invisibility of those suppliers may also offer a justification to shift the labor and environmental protection costs associated with the manufacturing process to the suppliers. This is an important economic reason for multinational companies to expansively utilize suppliers in the developing countries. However, revelations about sweatshop practices hidden in the extended and entangled supply chain and traced

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[20] *See* DALE NEEF, THE SUPPLY CHAIN IMPERATIVE: HOW TO ENSURE ETHICAL BEHAVIORAL IN YOUR GLOBAL SUPPLIERS 36 (2004).

[21] *See id.* at 35.

[22] *See id.* at 42–57.

back to multinational companies has brought a deluge of condemnation by consumers in major markets. This suggests that the objective of supply chain management should be to obtain not only high quality products at low prices with timely delivery but also to do so in a socially responsible manner. Corporate social accountability standards are a tool for multinational companies to manage risks arising from socially irresponsible conduct by their suppliers in the global supply chain.[23] In sum, from the multinational companies' perspective, the basic function of corporate social accountability standards is to assure that labor rights are respected in the process of production and to control legal and reputation risks. The assurance process may be done internally by the employee auditors of multinational companies or externally by third parties, such as auditing firms or non-governmental organizations.

III. Resistance to Corporate Social Accountability Standards in China

In 1980, the seeds of the global supply chain were planted in China at four special economic zones.[24] Over the past two decades, they have grown and stretched beyond the fences of the designated zones and now cover a large part of China. With China's accession to the World Trade Organization (WTO), whose goal is to promote global economic integration, the global supply chain will certainly be more entrenched and rampant. Incorporation of corporate social accountability standards into the global supply chain certainly has great impact on China. As mentioned above, such incorporation grows out of consumer demand in Western countries. In the legal literature of the United States, the incorporation of corporate social accountability standards is usually touted as one of the important mechanisms to hold multinational companies responsible for their misconduct in developing countries.[25] However, this view is not popular in China, the world's third largest trader.[26] This section summarizes the arguments against corpo-

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[23] *See* Robert Spekman et al., *Corporate Social Responsibility and Global Supply Chain Management: A Normative Perspective* (Darden Graduate Sch. of Bus. Admin., Univ. of Virginia, Working Paper No. 04-05, June 2004), *available at* http://ssrn.com/abstract=655223.

[24] The Chinese government established four special economic zones: Shenzhen, Zhuhai, Shantou, and Xiamen.

[25] *See supra* note 7. **R**

[26] *See* World Trade Organization, International Trade Statistics 2005 at 1 (2005), *available at* http://www.wto.org/english/res_e/statis_e/its2005_e/its2005_e.pdf.

rate social accountability standards currently implemented in the global supply chain and discusses the causes of resistance in China. The resistance stems from four areas: protectionism, commercialization, imbalance of bargaining power, and lack of localization.

A. *Protectionism*

Incorporation of corporate social standards into the global supply chain has been stigmatized as a protectionist measure by the developed countries aimed at undercutting the competitiveness of developing countries. This view is pervasive among the industrial sectors and influences on every debate of corporate social standards in China.[27]

Opponents emphasize the susceptibility of corporate social accountability standards to protectionist abuse. The protectionist goal may be obtained by requiring developing countries to raise labor protection or else developed countries reject access to their markets, thereby protecting domestic industries and unskilled jobs in developed countries. Companies can usually save labor-related costs in developing countries where labor laws are not enforced or under-enforced. The lack of enforcement of labor laws may be the result of a combination of legislative vacuum, lack of resources, and government favoritism toward enterprises. However, companies in developing countries may not enjoy the same amount of savings from a regulatory advantage when corporate social accountability is a criterion of supplier selection by multinational companies in developed countries. The bodies supervising corporate social accountability standards are multinational companies themselves, auditing firms, or independent organizations. These multinational companies and auditing bodies, which are well-equipped with resources and have business reputations at stake, press suppliers in developing countries to meet certain social and legal standards harder than the local governments do. The difference between enforcement by the local government and enforce-

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[27] SA8000, the most hotly discussed corporate social accountability standard in Chinese newspapers and media, often has been described as a new technical trade barrier. *See, e.g.*, *Zhongguo zuohao zhunbei ying tiaozhan [China Gets Ready to Take Challenges]*, PEOPLE DAILY (P.R.C.), Oct. 22, 2004 (reporting that the US, EU, and Japan will continue to use technical trade barriers, intellectual property rights, and SA8000 to increase China's textile production costs and curtail China's competitiveness); *Fada guojia yu qiangxing tuixing SA8000 biaozhun renzheng [Developed Countries Want to Impose the SA8000 Certification]*, MARKET POST (P.R.C.), May 14, 2004.

ment by multinational companies or auditing organizations is the main concern of supplier companies in China. The inspections by local governments in China are perfunctory, which explains why SA8000 aroused so much anxiety among companies in China, even though the contents of SA8000 are not vastly different from the requirements of China's labor laws.[28] The supplier companies in China can no longer slash compliance costs by disregarding the labor rights protected by law and corporate social accountability standards. This may narrow the wide gap in the price of labor between China and developed countries and, hopefully, may alleviate the problem of unemployment among unskilled labor in developed countries. Supplier companies failing to comply with the corporate social accountability standards will lose business and thus be denied access to the markets in developed countries.[29]

In addition, many are skeptical about the intentions behind the adoption of corporate social accountability standards in the global supply chain given the low certification rate among companies in developed countries.[30] The SA8000 certified facilities are disproportionately located in developing countries.[31] Companies in countries where corporate social responsibility is zealously promoted are surprisingly absent from the certification list.[32] Although it may be argued that companies in developed countries

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28 *See* LI-QING LI & YAN-LING LI, QIYE SHEHUI ZEREN YANJIU [STUDIES ON ENTERPRISE'S SOCIAL ACCOUNTABILITY] 229 (2005).

29 Many anecdotes of supplier companies in China losing business from multinational companies were reported by the media. *See, e.g., Shehui zheren renzheng kauyan zhongguo chukou qiye [Corporate Social Certification Challenges Chinese Exporting Companies]* NANFANG DAILY (P.R.C.), Jun. 24, 2004 (reporting that a toy company having four factories and nearly 8000 workers in Shenzhen lost business from its multinational buyers and closed down in 2002 because of low wages, long working hours, and poor working conditions). *See also Chukou qiye zhi shehui renzheng* [Corporate Social Accountability Certification of Exporting Companies], NANFANG CITY (P.R.C.), Dec. 22, 2005 (reporting that in Zhongshen City of the Guangdong Province, a shoe factory with about 500 workers, was reported to have cancelled orders by its buyers for two months in 2002 because of noncompliance of the legal minimum wages requirement.)

30 *See* YOU-HUAN LI, *supra* note 19, at 69. **R**

31 *See id.* Countries listed are in order of the number of facilities certified as of December 31, 2006: Italy (503), India (190), China (140), Brazil (97), Pakistan (58), Vietnam (31), Thailand (22), Spain (16), Taiwan (9), France (7), Poland (7), Sri Lanka (7), Switzerland (6), Argentina (6), Greece (6), Israel (5), Philippines (5), Hong Kong (5), Indonesia (4), Portugal (4), Turkey (4), Belgium (4), Bolivia (4), UK (4), Costa Rica (3), Czech Republic (2), Korea (2), Romania (2), Bangladesh (2), Japan (2), Mauritius (2), Peru (2). Social Accountability International, http://www.saasaccreditation.org/facilities_by_country.htm (last visited Oct. 28, 2007).

32 *See* YOU-HUAN LI, *supra* note 19, at 69. **R**

already have better working conditions and labor rights, it is doubtful that they have perfected labor protection.[33] Further, the low rate of unionization among workers in the United States, where the SA8000 standard was established, casts doubt on the real intentions behind requiring companies in developing countries to establish freedom of association.[34]

B. *Commercialization*

High certification and consulting fees create an impression of commercialization of corporate social accountability standards in China. In order to be a certified supplier of a particular multinational company or to be certified under a particular set of corporate social standards established by a non-governmental organization, suppliers have to go through a complex certification procedure. Take the SA8000 certification as an example. The SAI does not provide any certification service directly to applicant companies. Rather, the SAI accredits certification firms to perform this task.[35] An applicant facility may submit its application and relevant documents directly to a certification firm.[36] If the certification firm finds the documents satisfactory, the certification firm will conduct on-site inspections to see if the applicant facility really meets the required standards.[37] Theoretically a certification will only be issued after the non-compliance items reported in inspections are corrected.[38] Unfamiliarity with the SA8000 standards and great volumes of documents usually force applicant facilities to seek help from consulting firms prior to the certification application in order to go through the certification process smoothly. The certification fees plus consulting fees, particularly the latter, may be very costly for a small company.[39] It is believed that the high consulting fees in China are products of the unregulated certifica-

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[33] *See id.*

[34] The U.S. Department of Labor's Bureau of Labor Statistics reported that 12.5% of wage and salary workers were union members in 2005. *See* Union Member Summary, http://www.bls.gov/news.release/union2.nr0.htm (last visited Jan. 6, 2007).

[35] *See* Social Accountability International, http://www.sa-intl.org (last visited Dec. 2, 2006).

[36] *Id.*

[37] *Id.*

[38] This is not always the reality in China. *See* discussion *infra*.

[39] *See* You-Huan Li, supra note 19, at 265–66. In China, a facility with 300 workers is charged around $9000 by a certification firm, but the consulting fees are usually several times the amount of the certification fees. *Id.* Surveyed companies spent over 500,000 RMB (about $62,500) for certification and consulting fees. *Id.* **R**

tion markets.[40] Applicant facilities unfamiliar with the SA8000 standards are vulnerable to unreasonable charges by consulting firms. This is a particularly serious problem when applicant facilities have difficulties complying with the standards.[41]

Further, incompetence of auditors in certification firms and easy manipulation by applicant facilities mar the good intentions of corporate social accountability standards and make the commercialization image more conspicuous. A large number of auditors in China are well-qualified to perform product quality certification but inexperienced and ill-trained in labor protection.[42] Notice of inspection is frequently given in advance, and thus inspected facilities have enough time to create the appearance of compliance.[43] The superficiality of the certification process makes many Chinese supplier companies believe that money can settle the matter.[44]

C. *Imbalance of Bargaining Power*

Currently, the main reason supplier companies in China implement social accountability standards is because buyers press them to do so.[45] These supplier companies are mostly in labor-intensive industries, particularly in apparel and toys manufacturing.[46] These industries are classic examples of buyer-driven commodity chains. "A commodity chain refers to the whole range of activities involved in the design, production, and marketing of a product."[47] "Buyer-driven commodity chains refer to those industries in which large retailers, branded marketers, and branded manufacturers play the pivotal roles in setting up decentralized

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[40] *See id.*, 19, at 259-68. **R**

[41] *See id.*, at 265–66.

[42] *See* SOCIAL RESPONSIBILITY OF TRANSNAT. CORPS., *supra* note 8, at 14. **R**

[43] *See id.*

[44] Not only do companies have such an impression, but labor protection experts in China also have such an impression. For example, Wang Lin, the Chief Technical Advisor to the International Labor Organization (ILO) in China, said that SAI is a consulting company that sets up its own standard and tries to sell it. Although Wang Lin misunderstood the role of SAI, her remark does reflect commercialization of SA8000 in China. *See Bei kuada le de SA8000 renzheng [The Exaggerated SA8000 Certification]*, 172 ECONOMIC OBSERVER (2004) (P.R.C.).

[45] See SOCIAL RESPONSIBILITY OF TRANSNAT. CORPS., *supra* note 8, at 73. **R**

[46] The SA8000 certified facilities in China are mostly in the apparel, toys, and accessories industries. *See* Social Accountability International, http://www.sa-intl.org/ (last visited Apr. 11, 2006). However, the labor-intensive characteristic does not seem applicable to Italy, where the certified facilities are usually in the transportation and services industries.

[47] Gary Gereffi, *International Trade and Industrial Upgrading in the Apparel Commodity Chain*, 48 J. INT'L ECON. 37, 38 (1999).

production networks in a variety of exporting countries," particularly developing countries.[48] Profits in the buyer-driven chains are gained from "unique combinations of high-value research, design, sales, marketing and financial services that allow the retailers, branded marketers and branded manufacturers to act as strategic brokers in linking overseas factories with evolving product niches in the main consumer markets."[49] With the power to shape consumer demands in markets through the use of brand names and strategic networks, the buyers (retailers, branded marketers, and branded manufacturers) have leverage in the price bargaining with suppliers in developing countries[50] and are able to press the suppliers to implement corporate social accountability standards at the suppliers' own costs. To attract consumers, the buyers usually advertise themselves as socially responsible companies and then shift the costs of implementation to the suppliers with weak bargaining power.[51]

These multinational buyers want to purchase products of high quality, at low prices, made in a socially responsible manner. However, low prices and socially responsible production do not always go together. Better working conditions involve increases in production costs, and such costs can not always be balanced by improved productivity *alone*. If the buyers do not reward the socially responsible suppliers by purchasing products with prices reflecting

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[48] *Id.* at 41–42.

[49] *Id.* at 43. As opposed to buyer-driven commodity chains, producer-driven commodity chains refer to "those in which large, usually transnational, manufacturers play the central roles in coordinating production networks." *Id.* at 41. The typical example of producer-driven commodity chains is the automobile industry. Profits in the producer commodity chain are gained from "scale, volume, and technological advances." *Id.* at 43.

[50] *Id.* at 43; *see also* SOCIAL RESPONSIBILITY OF TRANSNAT. CORPS., *supra* note 8, at 164–66. **R**

[51] *See, e.g.*, SOCIAL RESPONSIBILITY OF TRANSNAT. CORPS., *supra* note 8, at 81; Dexter Roberts & Pete Engardio, *Secrets, Lies and Sweatshops*, BUSINESSWEEK, Nov. 27, 2006, at 50; *Nike zjie yo "Baoshengong" sh chanyelien zhubu chengshou de biren ma? [Nike Discloses Its Suppliers. Is It Necessary for the Supply Chain to be Gradually Mature?]*, BUS. WATCH MAG., Jun. 7, 2005 (P.R.C.) (referencing the multinational branded companies' suppliers in Guangdong, China and reporting that the suppliers complained that they were struggling to generate profits under the price pressure and social accountability requirements from the multinational companies; also reporting that one of Nike's textile suppliers, with around 700 workers, confessed that it could not afford to fully implement the social accountability standards and therefore provided false information and only insured 50% of its workers); *Qiye shehui zheren de zhongguo zh lu [China's Road to Corporate Social Responsibility]* NANFANG WEEKEND (P.R.C.), July 21, 2005 (reporting that a Timberland clothes supplier confirmed that the price offered by Timberland had dropped by 30% over the past few years while its labor protection cost had risen by 30%). **R**

the increase in production costs, the suppliers, in order to survive, will likely create the appearance of social responsibility without actually making any improvements.[52] The burden of implementation costs is the main concern for the suppliers in China. Surveys show that the buyers do not effectively reward socially responsible suppliers.[53] This is because the decision to place an order with a supplier is controlled by the buyer's procurement department, which prefers low prices, while a supplier's compliance with social accountability standards is considered by another department, which does not influence the purchase decision.[54] Such policy schizophrenia of the buyers causes the suppliers to question the buyers' commitment to corporate social accountability. This schizophrenia also might encourage some suppliers to "buy" an appearance of social accountability.[55]

D. *Lack of Localization and Value Imperialism*

Consumer pressure in the developed countries is the major impetus for the multinational companies' adopting social accountability standards into their supplier selection criteria. Inevitably, multinational companies cater to the consumers' concern or interest in the developed countries. However, the interest of the consumers in the developed countries does not always dovetail with the need of the workers and the reality in the developing countries.

Many of the corporate social accountability standards, including SA8000, refer to freedom of association, one of the core labor rights in the ILO Declaration on Fundamental Principles and Rights at Work.[56] However, the reality in China is that indepen-

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[52] *See* HELLE BANK JØRGENSEN ET AL., WORLD BANK GROUP, STRENGTHENING IMPLEMENTATION OF CORPORATE SOCIAL RESPONSIBILITY IN GLOBAL SUPPLY CHAINS 20 (2003), *available at* http://siteresources.worldbank.org/INTPSD/Resources/CSR/Strengthening_Implementatio.pdf ("[s]ome apparel suppliers confessed that they skillfully had developed the art of seeming to be in compliance without making changes"); SOCIAL RESPONSIBILITY OF TRANSNAT. CORPS., *supra* note 8, at 186 (a Nike manager engaging in corporate social responsibility matters in China said in an interview that 40%-50% of information provided by China suppliers is false); Roberts & Engardio, *supra* note 51 (reporting on the pervasiveness of falsifying records). R

[53] *See* JØRGENSEN ET AL., *supra* note 52, at 27–29; SOCIAL RESPONSIBILITY OF TRANSNAT. CORPS., *supra* note 8, at 40–43. R R

[54] *See* SOCIAL RESPONSIBILITY OF TRANSNAT. CORPS., *supra* note 8, at 43. R

[55] *See supra* notes 51 & 52. R

[56] For more information, see ILO website, http://www.ilo.org/dyn/declaris/DECLARATIONWEB.ABOUTDECLARATIONHOME?var_language=EN (last visited Dec. 9, 2007).

dent organizations by workers are prohibited. Although unions may be formally created within a company, such unions should be subject to supervision of the All China Federation of Trade Unions, which is essentially an agent of the Chinese government.[57]

There is a common claim by the suppliers in China that requiring companies in China to comply with social accountability standards ignores the reality that most of the indigenous companies are still in early stages of development and accumulation of capital. During this stage, many companies lack the resources to devote to labor protection. Surveys show that only a company that has grown to a certain size can afford to consider labor protection issues.[58]

The resistance to corporate social accountability standards partly derives from differences in the underlying value of human resources. Such standards are the product of western civil societies in which the values of the division of labor and human resources have long been respected.[59] However, mainstream Chinese society traditionally has never shared these values. For thousands of years, Chinese society has held intellectuals (or those who earn their livelihood through knowledge) in high esteem and despised those who support themselves through labor. The concept of "men" in the Analects of Confucius mostly refers to intellectual persons, not to the uneducated commoners. Confucius stressed the hard-working virtue of the common people (peasants) in terms of benefits to the

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[57] *See* Stephen F. Diamond, *The "Race To The Bottom" Returns: China's Challenge To The International Labor Movement*, 10 U.C. DAVIS J. INT'L L. & POL'Y 39 (2003) (detailing the role of the All China Federation of Trade Unions).

[58] In China, companies with fewer than 1000 workers tend to object to corporate social accountability standards because of past management experience and low accumulation of capital; companies with between 1000 and 1500 workers tend to accept corporate social accountability standards; companies with over 1500 workers demonstrate an active and positive attitude toward social accountability standards if such measures stabilize the buyer-supplier relationships. *See* SOCIAL RESPONSIBILITY OF TRANSNAT. CORPS., *supra* note 8, at 42–43. The All China Federation of Trade Unions (ACFTU) also conducted a study on the conditions of labor protection in Shanghai, Tianjin, Jiangsu, and Zhejiang. The study shows that private companies above a certain size (100 workers or monthly revenue of 5 million RMB) have developed beyond the primitive accumulation stage and actively subject themselves to corporate social accountability standards. However, companies below that size are still in the primitive accumulation stage, disregarding labor protection while pursuing profits. *See Guanyu feigongyozh qiye zhgong laudong bauhu wenti de diaoyan baogao [Report on Labor Protection of Non-State-Owned Enterprises] (*P.R.C.) (2005) (released on May 31, 2005 by All China Federation of Trade Unions) (on file with author). R

[59] *See* LI-QING LI & YIAN-LING LI, *supra* note 28, at 301. R

ruling stratum, rather than in terms of the common people's moral qualities.[60] Mencius, one of the greatest philosophers in Chinese history stated that division of labor was a necessity.[61] He manifestly stated that intellectuals should rule and labor should be ruled.[62] Even in today's society, where the concept of the division of labor has evolved considerably, respect for intellectuals and disregard for laborers are still entrenched in Chinese society.[63]

The consumption habits of Chinese consumers may explain another dimension of the value imperialism implicit in the corporate social accountability standards established by Western societies. Currently, in China, the corporate social accountability standards are primarily implemented in export-oriented companies.[64] The impetus for these companies to adopt social accountability standards is the demand from buyers. As explained above, these buyers in turn are pushed by the consumer movements in the developed markets. Essentially, consumer demand is the cause of corporate social accountability standards in the global supply chain. The reason domestic-oriented companies in China are not affected by the wave of corporate social accountability standards is that there is no apparent demand from Chinese consumers for such standards.[65] Chinese consumers have long followed the rule of "live within one's income" and the virtue of thrift.[66] They care more about the physical conditions and functions of products than about the process through which those products were made.[67] Fur-

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60 *See* Edward Shils, *Reflections on Civil Society and Civility in the Chinese Intellectual Tradition*, *in* CONFUCIAN TRADITIONS IN EAST ASIAN MODERNITY 59-60 (Tu Wei-ming ed., 1996).

61 *See* LI-QING LI & YIAN-LING LI, *supra* note 28, at 301. **R**

62 *See id.*

63 This may be evidenced by the fact that Chinese students are vigorously pursuing elite schools and intellectual school performance.

64 *See* SOCIAL RESPONSIBILITY OF TRANSNAT. CORPS., *supra* note 8, at 1-91; LI-QING LI & YIAN-LING LI, *supra* note 28, at 184-207. **R** **R**

65 *See* Zheng Guanghuai, cong xiaofeizhe diaocha kan Zhongguo shehui gongzhong de fanying [The Chinese Society's Response to Corporate Social Responsibility: A Consumer Survey], in SOCIAL RESPONSIBILITY OF TRANSNAT. CORPS., *supra* note 8, 194-209. **R**

66 *See* LI-QING LI & YIAN-LING LI, *supra* note 28, at 221. **R**

67 *See* Douglas A. Kysar, *Preference for Process: The Process/Product Distinction and the Regulation of Consumer Choice*, 118 HARV. L. REV. 525, 529 (2004) (referring to "information regarding the manner in which goods are produced" as process information, including "the labor conditions of workers who produce a consumer good, the environmental effects of a good's production, the use of controversial engineering techniques such as genetic modification to create a good, or any number of other social, economic, or environmental circumstances that are related causally to a consumer product, but that do not necessarily manifest themselves in the product itself").

thermore, since Chinese consumers have long lived under planned consumption with relatively low consumption rates, the concept of consumer rights is still new to them.[68]

IV. Reconsideration of Corporate Social Accountability Standards in China

A. *Protection for Whom?*

Similar to the function of corporate social accountability standards in the global supply chain, the linkage of trade and labor standards is also often criticized as protectionism. The debate over whether the WTO should adopt social clauses into its trade agreements may shed some light on whether the protectionist abuse of the corporate social accountability standards is real. Opponents of linkage between trade and labor standards suspect the motives of proponents, in particular unions, and believe such a linkage will repeat the protectionist experience of the anti-dumping rules.[69] However, as shown by Economists Kimberly Ann Elliot and Richard Freeman, the practices of General System of Preference (GSP) and trade-labor agreements between the U.S. and other developing countries evidence that this fear is unfounded.[70] If the labor unions and other interest groups were completely motivated by protectionism, they would focus on cash standards; for example, minimum wages, working hours, and health and safety protection to immediately slash developing countries' competitiveness. However, the petitions filed by these groups under GSP have focused on violation of freedom of association.[71] Rather than dictating the substantive standards of wages and working hours, the groups leave the decision-making power to workers in developing countries. Further, if these petitioning labor unions and interest groups were completely protectionist, they would target large importing countries that take away their jobs on a ruthlessly large scale. Yet, the targeted countries under GSP only account for a small portion of imports.[72] Nevertheless, protectionist motives may not be completely eliminated. To eliminate protectionism-motivated mea-

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[68] *See* Li-Qing Li & Yian-Ling Li, *supra* note 28, at 221–22. **R**

[69] *See* Elliot & Freeman, *supra* note 13, at 80–92. **R**

[70] *See id.*

[71] *See id.* at 83.

[72] *See id.* However, note that the reason the large trade partners of the United States, such as China, are not targeted may be due to complex political and economic compromises. Currently, China is not eligible for the U.S. GSP.

sures, refinements of substantive requirements, procedural safeguards, and other technical assistance are suggested.[73]

Currently, incorporation of corporate social accountability standards into the global supply chain is a voluntary action by multinational companies rather than a mandate by states. The absence of direct state measures makes the protectionism arguments untenable in the WTO dispute system.

One noteworthy point is that, generally, the proposed linkage of trade and labor standards is limited to the four core labor rights recognized by the ILO in 1998,[74] rather than the cash standards. However, the corporate social accountability standards in the global supply chain adopted by multinational companies are composed of many cash standards.[75] The cash standards carry non-negligible cost increases in production. This leads us to consider an important question ? who really benefits and who bears the costs of the corporate social accountability standards? Within developed countries, multinational companies typically are not supporters of protectionism. They can utilize the low-wage labor in developing countries to sell attractive low-price products. With strong bargaining power, they enjoy an apparently responsible reputation by shifting the implementation costs of social accountability to their

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73 *See, e.g.*, Kysar, *supra* note 67, at 545 n.62 (summarizing the typologies of process-based trade measures offered by scholars to reduce protectionist abuse). Although the typologies are all for environmental measures, they are useful to give some guidance for labor issues. *See* Sungjoon Cho, *Linkage of Free Trade and Social Regulation: Moving Beyond the Entropic Dilemma*, 5 CHI. J. INT'L L. 625, 645 (2005) (recommending financial and technical assistance from rich countries to poor countries); *see also* Frank Emmert, *Labor, Environment Standards and World Trade Law*, 10 U.C. DAVIS J. INT'L L. & POL'Y 75 (2003) (arguing that substantive labor standards should be based on the ILO Conventions and be prioritized; also arguing for the use of the WTO dispute mechanisms to reduce protectionist abuse and compensate developing countries). **R**

74 *See, e.g.*, Clyde Summers, *The Battle in Seattle: Free Trade, Labor Standards, and Societal Values*, 22 U. PA. J. INT'L ECON. L. 61, 87 (2001) (arguing that "[d]eveloping countries can retain their legitimate comparative advantages while recognizing at least minimum fundamental values"); Michael J. Trebilcock & Robert Howse, *Trade Policy & Labor Standards*, 14 MINN. J. GLOBAL TRADE 261, 279 (2005) (arguing that trade sanction should apply to violation of core labor standards and some generally accepted human rights; e.g., genocide, torture, and detention without trial); Daniel S. Ehrenberg, *The Labor Link: Applying The International Trading System to Enforce Violations of Forced and Child Labor*, 20 YALE J. INT'L L. 361 (1995).

75 For example, Nike's code of conduct is concerned with minimum wages, benefits, work hours, and health conditions. *See* Nikebiz.com, http://www.nike.com/nikebiz/nikebiz.jhtml?page=25&cat=code (last visited Jan.06, 2007). Wal-Mart's Standards for Suppliers includes wages, benefits, and work hours. *See* http://www.walmartstores.com/GlobalWMStoresWeb/navigate.do?catg=336 (last visited Apr. 15, 2007).

suppliers. Small companies that cannot relocate to developing countries and unskilled workers who lose jobs to the low-wage workers in developing countries might gain if the prices of imported products increase, thus making production in developing countries less competitive. However, since multinational companies refuse to reflect the cost of working condition improvements in their imported goods and place the cost on suppliers in developing countries, unskilled workers in developed countries are unlikely to benefit. Even if the increased costs for labor protection (the major costs are abiding by minimum wage laws and overtime pay laws) would be reflected in product prices, it is unlikely that the increase would be large enough to close or effectively narrow the disparity in labor costs between China and developed countries.[76] What's more fundamental is that even if the labor cost increases due to the implementation of corporate social accountability standards, the manufacture of labor intensive products will not move back to developed countries. Rather, it will move somewhere else that offers even cheaper labor.[77]

In developing countries, suppliers are forced to absorb the implementation costs while still being pressured to offer low prices. Workers in developing countries can gain *only if* the multinational companies (the buyers) effectively reward the suppliers, thereby giving suppliers incentives to honestly improve labor conditions. However, at least now, this is not the reality. In sum, currently, as multinational companies adopt corporate social accountability standards into the global supply chain, those companies obtain reputations of social responsibility without compromising their economic interests in low prices. Unskilled labor in developed countries gains little from such adoption. If the rewards of such standards are uncertain, suppliers in developing countries can maintain marginal profits by creating an appearance of social responsibility. Meanwhile, the workers in developing countries are

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[76] *See* LI-QING LI & YAN-LING LI, *supra* note 28, at 208 (reporting that wages in China are 1/30-1/50 of wages in developed countries); *see also The China Price*, BUSINESSWEEK, Dec. 6, 2004 (reporting that the manufacturing cost in China generally is 30%-50% less than in the United States and stating that China offers "cheap labor from $120-a-month production workers to $2000-a-month chip designers"). **R**

[77] This is evidenced by the fact that labor-intensive companies facing the labor cost increase in the coastal area of China are moving to the hinterland of China or Vietnam. *See* David Barboza, *Sharp Labor Shortage in China May Lead to World Trade Shift*, N.Y. TIMES, Apr. 3, 2006, at A1.

still at the mercy of others.[78] It leads us to consider whether workers in developing countries, the intended beneficiary of corporate social accountability standards in the global supply chain, desire and need such protection.

Before 2004, China had a seemingly inexhaustible supply of cheap labor from its rural areas. However, the labor shortage that has developed in major exporting areas since 2004 may herald the end of this situation. The Ministry of Labor and Social Security of China released a report in September 2004 on China's labor shortages.[79] According to the report, labor shortages are occurring in the major localities of processing industries, particularly affecting shoe, toy, electronics assembly, apparel, and plastic accessories industries. The labor shortage is also serious for small and medium sized companies and those companies constrained by low purchase prices offered by foreign buyers. The major reasons for labor shortages are low wages and poor working conditions.[80] Wages in the export-oriented sectors have remained static over the past dec-

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[78] For example, on April 21 and 23, 2004, there were protests by about two thousand workers in factories of Stella International Ltd., a shoe supplier of Nike, Reebok, Clarks, Timberland, and other branded companies. The workers protested the intensified workload, shortened working hours, and reduced wages. The protest resulted in arrests of over one thousand workers. All but ten of the arrested workers were released. These ten workers were prosecuted by the government. They were found guilty of vandalism and sentenced by a court to imprisonment ranging from 9 months to 3.5 years. However, under pressure from labor rights organizations and its clients, Stella wrote letters to the court requesting commutation for the prosecuted workers. The appellate court of the Dong Guan City overruled the decision by the trial court and found the defenders not guilty on December 31, 2004. *See Xingang xiechang gongren saoluan diaocha [A Report on the Stella's Workers' Protests]*, CHINA NEWSWEEK (P.R.C.), Oct. 25, 2004; *see also Zongguo zenfu gaibian panjue shfang xingang shjian beibu gongren [The Chinese Government Changed the Decision and Released the Workers Arrested in the Stella Event]*, CHINA LABOR WATCH (P.R.C.), Jan. 1, 2005, *available at* http://www.chinalaborwatch.org/php/web/article.php?article_id=158. Note that although Stella's clients, including Nike, Reebok, and Clark, are praised by many for helping to rescue the workers, the role of these multinational buyers in this event deserves deeper analysis. Stella's measures (intensifying workload, shortening working hours, and reducing wages) were a response to these multinational buyers' socially responsible demand. Stella claimed that it tried to shorten the working hours (giving two more holidays per month to its workers) in order to be consistent with the trend of corporate social accountability standards in the global supply chain. However, faced with the price pressure and competition, Stella passed the cost to its workers by shortening the working hours, which aroused protests by the workers. After this event, it was reported that Stella reverted to its original working hours and wage policies.

[79] *See* MINISTRY OF LABOR AND SOCIAL SECURITY, GUANYU MINGGONG DUANQUE DE DIAOCHA BAOGAO [REPORT ON LABOR SHORTAGE] (2004); Barboza, *supra* note 77. **R**

[80] *See* MINISTRY OF LABOR AND SOCIAL SECURITY, *supra* note 79. **R**

ade despite increased living expenses.[81] Meanwhile, wages in rural areas also have risen over the same period.[82] The gap between wages in the export-oriented areas and rural areas has been narrowing, and workers in rural areas will not migrate unless the wages in the export-oriented areas are high enough to offer a better living. Additionally, the costs of migrating to export-oriented areas are high under the household registration ("hukou") system in China.[83] Migrant workers are discriminated against by the local governments in export-oriented areas and have limited access to the social security system.[84] Additionally, local governments have made it difficult t change registration since they are concerned about the negative effects of an influx by migrant workers.[85] Therefore, if the working conditions subject them to high health risks, workers are unwilling to take the risk when social security is unavailable. Workers in developing countries are usually silent regarding their rights, particularly in China where freedom of association is prohibited. However, Chinese workers have voiced their anger through their exodus from sweatshops. The labor shortages in China's export-oriented industries signal the workers' preference for corporate social accountability standards. The suppliers must offer better working conditions in order to retain workers.[86] Thus, this creates a dilemma for some low-profit-margin supplier companies. Their buyers, who have strong bargaining power, refuse to raise purchase prices, while workers, empowered by the threat of an exodus, demand more perks. Therefore, some suppliers choose to close their factories or relocate to places more abun-

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81 *See id.*

82 *See id.* The wages in the Pearl River Delta region are less than 510 RMB ($64) per month.

83 "Hukou" is a system designed to restrict migration from the rural areas to the urban areas. In the original hukou system established in the 1950s, only urban hukou holders could receive state-subsidized housing, food, education, medical care, and employment within the cities; rural hukou holders received no such benefits and protections. Without these protections, peasants could not survive in the cities and thus were bound to remain in rural areas. Although there have been some relaxations of the hukou system in the recent years, migrant workers are forced to file voluminous documents with governments and pay expensive fees to urban governments in order to retain temporary residency permits. They are victims of exploitation by urban governments, and their legal status in the urban areas is capricious. *See* Xin Frank He, *Regulating Rural-Urban Migrants in Beijing: Institutional Conflict and Ineffective Campaigns*, 39 STAN. J. INT'L L. 177 (2003).

84 *See id.*

85 *See id.*

86 *See* Mei Fong, *Chinese Puzzle Surprising Shortage of Workers,* WALL ST. J., Aug. 16, 2004, at B1.

dant in low-waged labor.[87] Other suppliers choose to stay and provide the wages and benefits that the workers demand, but struggle for profits as a result.[88]

In sum, multinational companies that voluntarily adopt corporate social accountability standards in the supply chain are not motivated by protectionism. Labor unions are not purely protectionist and might gain little from the adoption. Workers in China have shown their desire for the standards. Meanwhile, supplier companies in China are not opposed to the standards if the rewards from being socially responsible are certain. Thus, if the rewards offered by multinational companies are sufficient, there would be little resistance to such standards. The pending question is how to structure effective rewards in the global supply chain.[89]

B. *Immature Supporting Mechanisms*

Admittedly, the implementation of corporate social accountability standards in China has been stained by too much fragmentation. The inexperience of social auditors and the lack of standardization make Chinese suppliers think that the adoption of corporate social accountability standards only creates a lucrative market for certification and consulting firms exploiting such change. The undesirable fragmentation and confusion about the standards can be attributed to the general infancy of social auditing, worldwide, and the chaos of the certification market in China, specifically.

Since the 1990s, multinational companies have begun to adopt corporate social accountability standards into the global supply chain on a large scale.[90] Social auditing and certification services

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[87] *See id.* (reporting that many low-margin manufacturers are relocating to China's hinterlands or Vietnam for cheap labor); *see also* Barboza, *supra* note 77. R

[88] *See* Mei Fong, *supra* note 86 (reporting that a musical toy manufacturer, of which Wal-Mart is a client, improved its working conditions while struggling for profits); *see also supra* notes 47 & 48. R

[89] *See infra* Part VI.

[90] For example, Reebok adopted Human Rights Protection Standards in 1992. *See* http://www.reebok.com/Static/global/initiatives/rights/text-only/business/. That same year, Wal-Mart developed Standards for Suppliers. *See* http://www.walmartstores.com/Files/proxy_2001/page12_proxy.html. The Gap developed Sourcing Guidelines in 1992 as well. *See* http://www.gapinc.com/public/SocialResponsibility/sr_fac_hist.shtml. In 1997, Mattel established Global Manufacturing Principles. *See* Mattel SEC filing DEF 14A, Mar. 26, 1998. In 1998, Adidas adopted Standards of Engagement. *See* ADIDAS-SALOMON, OUR WORLD: SOCIAL AND ENVIRONMENTAL REPORT 2000 at 12 (2000), *available at* http://www.corporateregister.com/a10723/as00-e&s-de.pdf. The SA8000 standard was launched in

thrive on the rise of these standards. Currently, corporate social accountability assurance services are primarily provided by quality certification firms and financial auditing firms, though more and more NGOs are joining in. For example, most of the certification bodies accredited by the SAI have well-established reputations and are experienced in one or more of the following areas: maritime risk management, product quality certification and testing, environmental safety qualifications, and other safety inspections.[91]

1997 and revised in 2001. http://www.sa-intl.org/index.cfm?fuseaction=Page.viewPage&pageId=473.

91 The certification companies accredited by the SAI, as of September 2007, are ALGI, BSI, BVQI (Bureau Veritas Quality International), CISE (Centro per l'Innovazione e lo Sviluppo Economico), CSCC (Cal Safety Compliance Corporation), DNV (Det Norske Veritas), ITS (Intertek Testing Services), RINA S.P.A (Registro Italiano Navale Group), SGS-ICS, TUV Asia Pacific Ltd., TUV Rheinland Group, TUV SUD Group, and UL (Underwriters Laboratories Inc.). *See* Social Accountability International, http://www.sa-intl.org/index.cfm?fuseaction=page.viewpage&pageid=702 (last visited Sept. 4, 2007). BSI, founded in 1901, now focuses on providing standards and software solutions, and certifying management systems and products. *See* About BSI, http://www.bsi-global.com/en/About-BIS/ (last visited Sept. 4, 2007). BVQI was formed in 1988 in response to the demand for the independent certification of Quality Management Systems. It primarily provides services of management systems certification, product certification, and service certification. *See* About Us, http://www.bvqi.com/ (last visited Mar. 27, 2007). DNV, established in 1864, provides services of risk management, certification, and consulting, in particular for maritime, oil and gas, and process and transportation industries. *See* About DNV, http://www.dnv.com/about_us/index.asp (last visited Sept. 4, 2007). Intertek, founded in 1885, was initially a maritime survey business that evolved to provide testing services. *See* Intertek History, http://www.intertek.com/aboutintertek/intertek_history.shtml/2lang=en (last visited Sept. 4, 2007). RINA (Registro Italiano Navale), a company established in 1861 in Genova, has been providing ship classification and certification services since its establishment. *See* RINA, http://www.rina.it/eng/shipping_classification/shipping_classification_certification.asp (last visited Sept. 4, 2007). SGS, originally founded in 1878 in Rouen as a French grain shipment inspection house and later registered in Geneva in 1919, provides inspection services of traded goods, product testing services, and certification services of products, systems, or services. *See* About SGS, http://www.sgs.com/about_sgs/in_brief.htm (last visited Sept. 4, 2007). TUV Asia Pacific provides consulting, testing and servicing activities in technical safety, environmental protection, and the conformity assessment of management systems and products. *See* TUV NORD Group, http://www.tuv-nord.com/english/189.asp (last visited Sept. 4, 2007). TUV Rheinland provides product testing, system assessment, product certification, and consulting and auditing of corporate social responsibility. *See* TUV Rheinland Group China, http://www.chn.tuv.com/eng/index.jsp (last visited Sept. 4, 2007). TUV SUD's "conventional services are periodic vehicle roadworthiness testing, testing and inspection of industrial plants, product testing, or expert opinions." About TUV SUD Brief Profile, http://www.tuev-sued.com/about_tuev_sued/about_us/brief-profile (last visited Sept. 4, 2007). UL primarily provides product testing. *See* About UL, http://www.ul.com/about/ (last visited Sept. 4, 2007). ALGI was formed in 1994 by former Labor Department Officers. ALGI is a certification firm that only provides SA8000 and WRAP product availability certifications. ALGI also provides security assessment services besides social accountability certification. *See* A.L.G.I. Ser-

Historically, such services have been their chief business. Their expansion of business to labor rights certification is a recent development. Although there may be shared auditing principles between product quality and labor protection, there are certainly significant differences between them, given the difference in subjects and purposes of the audits. Corporate social accountability standards in the global supply chain ? in contrast to the centuries-long evolvement of maritime survey certification[92] and the decades-long development of product quality management,[93] ? are still in their early stages and need time for improvement. Advanced and systematic auditor training and standardization on a sector-specific basis are needed to improve these standards.

The unregulated certification and consulting market is the reason for the fragmentation in China. This problem is not unique to social accountability certification. Rather, the chaos is common for the whole certification and consulting market in China, which is rife with illegal operations, unauthorized representations, bogus certifications, and sham auditors.[94] Recognizing these problems,

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vices, http://www.algi.net/en/cf.htm (last visited Sept. 4, 2007). Only ALGI, CISE and CSCC are companies primarily focusing their business on corporate social accountability certifications.

92 The maritime survey business can be traced to the 19th century. *See supra* note 91. **R**

93 The history of product quality management can be traced back to World War II when the UK Ministry of Defense sent inspectors to its munitions suppliers to supervise the production process. *See* JOHN SEDDON, THE CASE AGAINST ISO 9000 at 1 (2d ed. 2000). In 1959, the US government developed Mil-Q-9858a (Quality Program Requirement), a quality standards program for military procurement. *See id.* at 2. By 1962 NASA had developed "quality system requirements" for its suppliers as well. *Id.* In 1968, NATO (North Atlantic Treaty Organization) adopted the AQAP (Allied Quality Assurance Procedures) for its military procurement. *See id.* at 3. In 1969 the UK Central Electricity Generating Board and Ontario Hydro in Canada developed quality assurance standards for its suppliers. *See id.* "By this time, the idea of quality assurance had spread beyond the military." *Id.* In 1969 a UK committee report on the inspection and assessment of the UK military quality systems reinforced the need for quality assurance and recommended the generic standards of quality assurance. *See id.* at 4. In 1971, the British Standards Institute (BSI) published the first UK standards, BS 9000, for quality assurance for the electronic industry. *See id.* BSI further published BS 5179, Guidelines for Quality Assurance, in 1974 and BS 5750, for common contractual documents of product quality control, in 1979. *See id.* at 4–5. In 1987, the International Organization for Standardization (ISO) produced the ISO 9000 series. *See id.* at 12.

94 Fong-Qing Wang, the former Chair of the CNCA and now the Chair of CNAS, stated that the certification market has five problems: first, certification services are poor. Certification firms are charging unreasonable rates, inspecting perfunctorily, issuing certificates to unqualified clients, and even "trading" certificates. Second, the quality of auditors is poor. Some of the auditors take personal gifts and benefits from clients. If not satisfied with the gifts, they even refuse to issue certificates. Third, the conduct of the certification

the Chinese government established the Certification and Accreditation Administration (CNCA) in 2001 to supervise certification activities. [95] Later in 2003, the State Council enacted the Certification and Accreditation Act. The CNCA, under the authorization of the Act, promulgated Regulations of the People's Republic of China on Certification and Accreditation, launching the approval system and setting codes of conduct for certification firms.[96] The CNCA founded the China Certification and Accreditation Association (CCAA) in 2005 as a self-regulating association among the certification firms.[97] The CNCA also established the China National Accreditation Service for Conformity Assessment (CNAS) on March 31, 2006 to approve certification firms, testing laboratories, and inspection institutions.[98] Further, the CNCA announced that crackdowns on illegal certification and consultation services were the goal of the years 2006 and 2007. [99] Although the certification and consulting market will not improve overnight simply because of these newly established regulations and administrations, order in the market will be established over time through enforced regulations and competition among certification firms.

The infancy of social auditing and the disorder of the Chinese certification market do not undercut the merits of corporate social accountability standards in the supply chain. These technical problems can be overcome by improvement in social auditing skills and the development of certification markets.

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firms is unregulated. Fourth, many regulatory agencies are not yet instituted and are not capable of supervision. Fifth, forward-looking strategies and research are insufficient. *See Renzheng renke hangye qingli menhu [Cleaning the Certification and Accreditation Services],* ECON. INFO. DAILY (P.R.C.), Nov. 13, 2004.

95 *See* Certification and Accreditation Administration of the People's Republic of China, http://www.cnca.gov.cn/cnca/default.shtml (last visited Dec. 15, 2007).

96 *See* Regulations of the People's Republic of China on Certification and Accreditation (promulgated by the State Council of the People's Republic of China, Sep. 3, 2003, effective Nov. 1, 2003), *available at* http://eng.cnas.org.cn/extra/col1/1156832200.pdf

97 *See* China Certification & Accreditation Association, http://www.ccaa.org.cn/ccaa/xhjj/8563.shtml (last visited Dec 15, 2007).

98 *See* China National Accreditation Service for Conformity Assessment, http://eng.cnas.org.cn/col678/col681/article.htm1?artid=4600 (last visited Dec. 15, 2007).

99 *See 2007nian renzheng rengke gongzuo yaodian [The Main Goals of CNCA in 2007],* http://www.cnca.gov.cn/cnca/zwxx/jhgh/ndjh/16671.shtml; Guanyu yinfa 2006 nian *renzheng rengke gongzuo yaodian [Concerning the Main Goals of CNCA in 2006]*, http://www.cnca.gov.cn/cnca/zwxx/jhgh/ndjh/4555.shtml.

C. *A Changing Culture*

Cultural difference is a common explanation for resistance to foreign concepts. However, it is questionable whether traditional Chinese values make the corporate social accountability standards incongruent in China.

Even though traditional Chinese society undervalued those who earned their livelihood by labor, it is open to discussion how much traditional Chinese values have remained intact under the half-century rein of Communism, particularly following the Proletarian Cultural Revolution between 1966 and 1976. The Chinese Communist ideology celebrated workers. The Constitution of the People's Republic of China states that the country is led by the proletariat and based on the alliance of workers and peasants.[100] Before China opened itself to the rest of the world, the workers were a powerful political group with strong representation in the national and local people's congresses, thus influencing policy directions and resource distribution.[101] The workers participated in decision making within factories, particularly with regard to wages, benefits, and bonuses.[102] Nevertheless, the structure of the Chinese society has dramatically changed since China opened itself up to the outside world. In order to revive the state-owned enterprises, the government gave greater autonomy to management and took away workers' power over decision making and wage-setting.[103] Furthermore, the government adopted a layoff strategy to boost the state-owned enterprises.[104] The large-scale layoffs by state-owned enterprises and the waves of peasants seeking jobs in cities created an abundant supply of labor and tipped the labor market in favor of employers. The low social status of the workers is no surprise given that they are deprived of political power, faced with competitive markets, and without collective bargaining rights.

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100 *See* Xian Fa art. 1 (1982) (P.R.C.).

101 *See* DANG DAI ZHONGGUO SHE HUI JIE CENG YAN JIU BAO GAO [A RESEARCH REPORT ON SOCIAL STRUCTURE IN CONTEMPORARY CHINA] 141 (Xueyi Lu ed., 2002).

102 *See id.*

103 *See* JINGLIAN WU, UNDERSTANDING AND INTERPRETING CHINESE ECONOMIC REFORM 139–154 (2005); s*ee also* Guang-Jin Chen, *Five Waves of Social Mobility in Contemporary China*, *in* DANG DAI ZHONGGUO SHE HUI LIU DONG [SOCIAL MOBILITY IN CONTEMPORARY CHINA] 94 (Xueyi Lu ed., 2004), *available at* http://www.china.com.cn/zhuanti2005/txt/2004-10/08/content_5674427.htm.

104 The government adopted the layoff strategy in 1995 to revive the state-owned enterprises. *See* Guang-Jin Chen, *supra* note 103, at 95. **R**

The change in social status of merchants offers another example of the low value traditionally placed on vocations in contemporary China. Traditional Chinese society had a low opinion of commerce and despised merchants. Confucius and Mencius regard "merchants as small men because their understanding is focused on what is profitable."[105] Under the rule of the Chinese Communist Party (CCP), capitalists were deprived of their wealth and control over businesses.[106] Capitalists did not have any rights under the Constitution.[107] However, openness to the world market changed this structure. In 1988, private enterprises were first formally recognized through an amendment to the Constitution and the enactment of Provisional Regulations on Private Enterprises.[108] With the government's promotion of economic growth, private entrepreneurs in China today have high social status and political participation.[109]

Still a more fundamental problem of the cultural resistance argument is defining "culture." The concept of culture is "suspiciously flexible, maddeningly ambiguous, and ultimately elusive."[110] "Culture may instead represent a response to external conditions and change as those conditions change."[111] "Behind so many cultural attitudes, tastes, and preferences lie the political and

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105 *See* Shils, *supra* note 60, at 55, 59–60 (inferring that "for Confucius the only proper way to acquire wealth was to inherit it or to have it bestowed by the ruler"). R

106 Beginning in 1953, the CCP started its state ownership policy. The policy was implemented in two stages. Before 1955, an enterprise was structured in the form of co-operation by the state and private owners. The private owners could participate in profit distribution. Between 1955 and the end of 1956, the private owners only had rights to stated interests and did not have rights to profit distribution. After that, the private owners no longer had rights to stated interest. *See* Guang-Jin Chen, *supra* note 103, at 46. R

107 Note that capitalists were defined politically. *See id.* at 59.

108 *See* Xian Fa art. 11, (1982) (P.R.C.); *see also* Guang-Jin Chen, *The Formation of the Stratum of Private Entrepreneur*, *in* DANG DAI ZHONGGUO SHE HUI LIU DONG [SOCIAL MOBILITY IN CONTEMPORARY CHINA] 243–44 (Xueyi Lu ed., 2004).

109 *See* RANDALL PEERENBOOM, CHINA'S LONG MARCH TOWARD RULE OF LAW 197 (2002) (reporting that "[m]ore business owners are becoming members of the people's congresses and the Chinese Political Consultative Committee . . . [and] over 15% of private enterprises owners are Party members."); s*ee also* Guang-Jin Chen, *supra* note 108, at 241–65 (surveys of the economic, educational, and political backgrounds of the Chinese private entrepreneurs show expanding economic power, elitism, and active political participation). R

110 *See* Frank B. Cross, *Law and Economic Growth*, 80 TEX. L. REV. 1737, 1757 (2002) (quoting Peter H. Schuck, *Perpetual Motion*, 95 MICH. L. REV. 1738, 1745 (1997)).

111 *See id.* at 1758.

economic forces that shaped them."[112] As explained above, the contemporary institutional environment is dramatically different from that of traditional Chinese society. The weight of traditional values must be analyzed carefully.

In sum, at least the current downward movement in workers' status in China is more the result of institutional change and market forces than a legacy of values in traditional Chinese society.

D. *Potential Benefits: Sustainable Economic Growth*

For the Chinese government and companies to truthfully accept corporate social accountability standards, it is necessary to do more than just refute negative concerns. One must also show that such standards will have positive effects. However, one should be careful to avoid value imperialism when analyzing potential benefits. Positive contributions should be evaluated from the perspective of China itself rather than from the perspective of western countries.

China is zealously promoting economic growth.[113] Therefore, if there is a strong correlation between corporate social accountability standards and economic growth, the standards may be easily accepted in China out of self-interest. Corporate social accountability standards can contribute to sustainable economic growth in at least three ways: alleviation of inequality, dependence on the global market, and creation of accessible and predicable investment environments.

1. *Alleviation of Inequality*

China has developed economically at an unprecedented pace over the last two decades.[114] Simultaneous with this economic growth, there has been a drastic reduction in poverty levels. [115]

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[112] *See id.* (quoting HERNANDO DE SOTO, THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE 239–40 (2000)).

[113] *See* Zhonghua RenMin Gongheguo guomin jingji he shehui fazhan di sh yi ge wu nian guihua gangyao [The Guidelines of the 11th Five-Year Plan on National Economic and Social Development of the People's Republic of China], *available at* http://www.gov.cn/ztzl/2006-03/16/content_228841.htm, for a brief English version, see http://www.china.org.cn/english/features/guideline/156529.htm.

[114] According to the World Bank, average annual GDP growth between 1986 and 2006 was 9%. *See* China at a Glance, http://devdata.worldbank.org/AAG/chn_aag.pdf (last visited Dec 10, 2007).

[115] "[T]he number of people living in poverty (under $ 1 per day) fell from 634 million in 1981 to 212 million in 2001." WORLD BANK, WORLD DEVELOPMENT REPORT 2006: EQ-

However, economic development has also brought an increase in inequality.[116] It is believed by some that inequality is an inevitable price for economic development. However, the view that development requires a trade-off between poverty and inequality has been refuted by empirical studies on China.[117] Inequality is an impediment to further poverty reduction. In addition, the unrest among the poor has increased greatly in recent years due to disgruntlement about inequality.[118] This unrest has caused concern among investors.[119]

Not only are the poor, unskilled workers deserting the sweatshops, but a growing number of the well-off urbanites are seeking jobs in state-owned enterprises rather than in private companies.[120] People are looking for job security and social benefits.[121] Private companies in China notoriously do not provide insurance or pen-

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UITY AND DEVELOPMENT 122 (2005), *available at* http://www.worldbank.org (follow "Data & Research" hyperlink; then follow "Research" hyperlink; then follow "World Development Reports" hyperlink).

116 See, e.g., Ximing Wu & Jeffrey M. Perloff, *China's Income Distribution over Time: Reasons for Rising Inequalities*, (Department of Agricultural & Resource Economics, U. Cal. Berkeley CUDARE Working Papers, Paper No. 977, 2004), *available at* http://repositories.cdlib.org/are_ucb/977; *see also To Each According to His Abilities*, THE ECONOMIST, Jun. 2, 2001.

117 *See* Martin Ravallion, *A Poverty-Inequality Trade-Off?* 14 (World Bank Dev. Res. Group, Working Paper No. 3579, 2005), *available at* http://econ.worldbank.org (follow "Research" hyperlink; then follow "Working Papers" hyperlink) (finding that in China "the periods of more rapid growth did not bring more rapid increases in inequality; indeed, the periods of falling inequality (1981-85 and 1995-98) had the highest growth in average household income," and "the provinces that saw a more rapid rise in rural inequality saw less progress against poverty, not more"); *see also* Martin Ravallion & Shaohua Chen, *China's (Uneven) Progress Against Poverty* 4 (World Bank Dev. Res. Group, Working Paper No. 3408, 2004), *available at* http://econ.worldbank.org (follow "Research" hyperlink; then follow "Working Papers" hyperlink) ("At the outset of China's current transition period, levels of poverty were so high that inequality was not an important concern," but "more unequal provinces will face a double handicap in future poverty reduction; they will have lower growth *and* poverty will respond less to that growth.").

118 *See* Kathy Chen, *Free Market Rattles Chinese*, WALL ST. J., Jan. 26, 2006, at A9 ("According to Chinese police, 74,000 mass protests involving more than 100 people each occurred in 2004, compared with fewer than 10,000 a year in the mid-1990s.").

119 *See* Jason Dean, *China's Violent Protestors Worry Some Investors*, WALL ST. J., Jan 18, 2006, at A9 (demonstrators in Guangdong were demanding more compensation because land was taken from them to build a factory, but the more profound reason for the rise protests is social unrest due to the widening gap between the poor and the rich, leaving the poor disgruntled).

120 *See* Chen, *supra* note 118. **R**

121 *See id.*

sion plans.[122] The well-off urbanites cannot handle the medical risks and expenses without the social benefits; surely the poor migrant workers are not equipped for these challenges either. The avoidance of providing benefits by private companies harms economic growth, since the driving force of economic growth in China should be the lively private companies rather than the sluggish state-owned enterprises.

Corporate social accountability standards, accompanied by private monitoring mechanisms, may alleviate the tension surrounding the issue of inequality in Chinese society by ensuring that companies provide minimum wages, insurance, pensions, and other labor protection. In addition to creating a stable investment environment, corporate social accountability standards can help expand the middle-class, which would be propitious for the upgrading of all industries supported by the Chinese government, from labor-focused to knowledge-based industries.[123]

2. *Dependence on the Global Market*

Trade is an important reason for the remarkable economic growth in China. With its accession to the WTO, China has be-

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[122] According to a report released by the government of the Hunan Province, 397 of the 731 surveyed private enterprises in Hunan did not provide any pension insurance for their employees, accounting for 54.3% of all the surveyed companies in the year of 2003. Only 140 companies (19.2%) provided pension insurance for all of their employees. Of the 195,000 employees in the surveyed companies, only 70,000 (35.9%) were covered by pension insurance. However, in the same year, 96% of employees in state-owned enterprises nationwide were covered by pension insurance. *See* SUN QIXIANG ET AL, ZHONGGUO SHE HUI BAO ZHANG ZHI DU YAN JUI: SHE HUI BAO XIAN GUI GE YU SHANG YE BAO SIAN FA ZHAN [CHINA SOCIAL SECURITY SYSTEM RESEARCH] 41 (2005). Also, the Department of Statistics of the Guangdong province conducted a survey in 2002 on pension insurance in 600 private enterprises. The surveyed companies were subdivided into three types: domestic companies, companies owned by investors from Hong Kong, Macau, or Taiwan, and companies owned by foreigners. Of the 226 domestic companies, 192 provided pension insurance and the percentage of the 226 companies' employees covered by pension insurance was 39.1%. Of the 209 companies owned by investors from Hong Kong, Macau, or Taiwan, 191 provided pension insurance, and the percentage of the 209 companies' employees covered was 48.6%. 155 of the 165 companies owned by foreigners provided pension insurance and the percentage of their employees covered was 57.3%. *See* Zhao Qiong, *Guanyu gqiye shehui zeren de duihua [About Conversation of Corporate Social Responsibility]*, ECON. DAILY (P.R.C.), Feb.14, 2004.

[123] *See* Ministry of Education of the People's Republic of China, The Educational Development During the 10th 5-Year Plan and the Plans for the 11th 5-Year Plan, Feb. 28, 2006, *available at* http://www.moe.edu.cn/edoas/website18/info18515.htm (addressing industry restructuring and promoting technology development and education) (last visited Mar. 22, 2007).

come more integrated into the global economy.[124] This integration means not only that China has the power to affect the global market, but also that China has to adjust itself to the market. Sensitivity to demand in foreign markets is necessary to survive in the competition. The United States and the EU are the major export markets for China.[125] The consumer preferences in these markets "may be heavily influenced by information regarding the manner in which goods are produced."[126] There is a trend that the consumers in these markets demand products made in a socially responsible way.[127] If China as a seller does not satisfy consumer demands, other competitors will take over its market share.[128] To retain its global market share and sustain economic growth, China has to adapt to market demand.

3. *Creation of Fair, Accessible, and Predicable Investment Environments*

Advocates of the law and economic development theory hold that law is an important pillar of economic growth. This theory basically asserts that without the law providing property rights and enforcing contracts, people will not invest because they will not be able to capture the return from their investment.[129] Without such legal provisions transactions will be limited to the short-term. Impersonal transactions with third-party enforcement are essential for modern economic growth.[130] A number of empirical studies have shown that law is necessary though not sufficient for economic de-

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124 *See* NAT'L BUREAU OF STATISTICS OF CHINA, STATISTICAL COMMUNIQUÉ OF THE PEOPLE'S REPUBLIC OF CHINA ON THE 2005 NATIONAL ECONOMIC AND SOCIAL DEVELOPMENT VI (2006), *available at* http://www.stats.gov.cn/english/newsandcomingevents/t20060302_402308116.htm (reporting that the value of exports increased from $266.1 billion in 2001 to $762 billion in 2005).

125 *See id.*

126 Kysar, *supra* note 67, at 529. **R**

127 *See id.*

128 *See* HALINA WARD, WORLD BANK GROUP, PUBLIC SECTOR ROLES IN STRENGTHENING CORPORATE SOCIAL RESPONSIBILITY: TAKING STOCK 14 (2004), *available at* http://www.ifc.org/ifcext/economics.nsf/AttachmentsByTitle/CSR-Taking_Stock.pdf/$FILE/CSR-Taking_Stock.pdf ("Cambodia now accepts that its textile industry cannot compete with China simply on the basis of [labor] input costs. Instead, the country is seeking to position itself as a location for 'responsible' purchasing.").

129 *See* DOUGLASS C. NORTH, STRUCTURE AND CHANGE IN ECONOMIC HISTORY 5 (1981) ("the model assumes an incentive structure that will allow individuals to capture the returns to society of investment").

130 *See generally* DOUGLASS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE 35 (1990).

velopment.[131] At first glance, though, China seems to be a counter proof to the law and economic development theory. China has experienced remarkable economic growth despite its weak legal system. China's great economic performance has been attributed to cultural factors and informal alternatives to law. Under the weak legal system, economic participants have relied on extended family relationships, guilds, clan groups,[132] and client-like relationships with governmental officials to conduct their business.[133] However, this kind of relational capitalism has its limits for further economic development in China. First, such relational capitalism occurs among the Chinese themselves and other overseas Chinese. Foreign investors are unlikely to penetrate cultural and language barriers and establish the necessary relationships.[134] As opposed to the general accessibility of law, Chinese relational capitalism is essentially an investment barrier to foreign investors, even though foreign investment is important for China's further economic development.[135] Second, the relational capitalism, or "rule of relationships," does not "prevent the imposition of externalities on outsiders."[136] Environmental pollution[137] and labor exploitation causing social unrest are the costs of economic development. Third, the relational capitalism creates more opportunities for corruption and disfavors "the companies that are more economically efficient but lack the proper connections."[138]

The Chinese government has recognized the importance for economic growth of having a strong legal system. This recognition is evidenced by declarations of Chinese policymakers; by mass legislations, e.g., labor laws; and by the reforms in the legal profession

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131 *See* PEERENBOOM, *supra* note 109, at 458–62 (summarizing the empirical studies finding the correlation between the rule of law and economic development). **R**

132 *See* Tom Ginsburg, *Does Law Matter for Economic Development? Evidence from East Asia*, 34 LAW & SOC'Y REV. 829, 829–35 (2000) (book review).

133 *See* PEERENBOOM, *supra* note 109, at 466. **R**

134 *See id.* at 476 (explaining that in order to obtain the benefits of relationships, foreign investors would choose to partner with Chinese businesses by forming joint ventures).

135 *See id.* at 477 (stating that "[foreign investment enterprises] employ 10% of the non-agriculture work force, generate over 20% of total national industrial output, and account for over 48% of all trade" . . . [and] "[b]y some estimates, China needs 3.0 to 4.2% of GDP just to bail out banks, another 2 to 5% of GDP annually to clean up the environment, plus an additional US$744 billion, or about 8 to 9% of GDP annually, for electric power, telecommunications, transportation, water, and sanitation infrastructure projects").

136 *Id.* at 467.

137 *See id.*

138 *See id.* at 472; *see also* Ginsburg, *supra* note 132, at 850. **R**

and in education.[139] Corporate social accountability standards can contribute to economic growth by improving the enforcement of laws and creating rule-based investment environments.

Compliance with law is the fundamental requirement of all corporate social accountability standards. These standards tend to address the same items already broadly regulated by the Labor Law of the People's Republic of China.[140] In spite of the overlapping substance of such standards and China's labor laws, resistance to the standards has emerged. This resistance highlights the lack of enforcement of the laws on the books in China. The explanations for the lack of enforcement vary depending on context. In the context of the labor laws, the explanation may be due to the lack of clarity of the law, a paucity of administrative resources, or corruption.

Although the Chinese government has promulgated numerous laws since it opened up the markets,[141] the quality of the laws is poor. The laws are poorly drafted, excessively broad, vague, inconsistent, and opaque.[142] The reasons for the poor quality include unclear separation of powers and inexperience of the drafters, which arguably provides discretion in implementation to local governments to adjust to local situations.[143] The poor quality of the laws undermines certainty and predictability, increases costs for investors, and creates opportunities of corruption for officials.[144]

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139 *See* Eric W. Orts, *The Rule of Law in China*, 34 VAND. J. TRANSNAT'L L. 43, 111 (2001).

140 For example, SA8000 addresses child labor, forced labor, health and safety, freedom of association and rights to collective bargaining, discrimination, discipline, working hours, compensation, and management systems. Article 15 of China's Labor Law prohibits hiring persons under the age of 16. Article 17 and Article 32(2) addresses voluntary employment relationship. Article 52 requires employer set up health and safety protection for employees. Article 7 states that employees have rights to participate and establish unions. Article 8 deals with collective bargaining. Article 12 bans discrimination. Article 36 states that the working hours must not exceed 8 hours per day and 44 hours per week. Article 41 states that the overtime must not exceed 3 hours per day or 36 hours per month. Article 48 and 49 set forth the minimum wages. Labor Law of the People's Republic of China (promulgated by the President of the People's Republic of China, July 5, 1994, effective Jan. 1, 1995), *available at* http://trs.molss.gov.cn/was40/mainframe.htm.

141 *See* Peerenboom, *supra* note 109, at 239 ("More than 350 laws and 6,000 lower-level regulations have been passed since 1978."). **R**

142 *See id.* at 247–58 (explaining why the quality of the PRC's laws is poor).

143 *See id.*

144 *See id.*, at 251; *see also* Tong Xing, *Quanqiuhua xia zongguo laudong zhdu bianqian de guiji [The Track of the Changes of Chinese Labor System under Globalization]*, *in* SOCIAL RESPONSIBILITY OF TRANSNAT. CORPS., *supra* note 8, at 186–87 (reporting about an interview with a director of the CSR department of Nike who stated that the unclear laws **R**

Corporate social accountability standards can serve as a supplementary guide on how to implement the laws and regulations of labor protection in China. Through the gradual implementation of corporate social accountability standards in the global supply chain, the government can study approaches to the issue of corporate social responsibility. That the government is learning is evidenced by its recent measures, discussed below.

Lack of administrative resources is another reason for the non- or under-enforcement of labor laws. The number of labor protection supervisors falls short of the desired amount.[145] Thus, corporate social accountability standards structured with verification systems can assist the government's administration of the labor laws. Moreover, since the standards are monitored by multinational companies and private or non-governmental certification bodies rather than local governments, whether the laws are enforced won't be at the discretion of the local officials. The investment environment will be shaped more by international market rules than the opportunistic local officials.

V. RESOLUTION

A. *The Attitude of China's Central Government*

In the 1990s, the central and local levels of the Chinese government were passive with regard to corporate social accountability standards. The government's awareness of corporate social accountability standards was triggered by the media hype in the years after 2003.[146] As shown below, the central government places the issue far beyond the limited scope of setting social accountability standards for export-oriented industries. Rather, the government frames the issue in a broader context of corporate social responsibility for all companies.

1. *Recognition of Corporate Social Responsibility in Recent Legislation*

In 1993, the People's Republic of China first promulgated its Company Law, which took effect on July 1, 1994. The concept of

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are an obstacle to implementation of corporate social responsibility for its suppliers in China).

[145] The ratio of workers to labor rights administrators in China should be 8000:1, but is currently 25,000:1. *See* LI-QING LI & YAN-LING LI, *supra* note 28, at 154. R

[146] *See supra* note 10. R

corporate social responsibility was *partly* embedded in this law. The purpose of the 1994 Company Law was to protect the legal rights and interests of companies, shareholders, and creditors and to promote the development of the socialist markets.[147] The purpose of a company was set forth in Article 5, which addressed the economic nature and profit orientation of a company. Article 5 required that a company with its own assets "operate independently and be responsible for its own profits and losses."[148] It also required that a company, "under the macro-adjustment and control of the State, organize its production and operation independently in accordance with market demand for the purpose of raising economic benefits and labor productivity and maintaining and increasing the value of its assets."[149] The 1994 Company Law further required, in Article 14, that a company "abide by the law, *observe professional ethics*, strengthen the development of socialist culture and ideology, and subject itself to supervision by the government and *the public*."[150] Article 14 can be interpreted as the overarching rule for corporate social responsibility. Under Article 14, a company must not only comply with law but also observe business ethics. Moreover, a company is subject not only to the supervision of the government but also of the public. Public supervision may be understood to include supervision by consumers, communities, investors, and other stakeholders.[151]

The 1994 Company Law also placed much emphasis on labor protection, including employee training, safety in production, union, consultation, and representation on supervisory boards. It required that a company protect the legal rights and interests of its

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147 Company Law of People's Republic of China (promulgated by Presidential Order of the People's Republic of China, Dec. 29, 1993, effective July 1, 1994) P.R.C. LAWS, art. 1, *available at* http://www.jus.uio.no/lm/china.company.law.1993/doc#3 (hereinafter 1994 Company Law).

148 *Id.* at art. 5.

149 *Id.* at art. 5.

150 *Id.* at art. 14. In Chinese, 职业道德 [professional ethics] usually describes the notion of doing business in a manner consistent with the moral rules in the profession. For example, a lawyer is required to follow the rules of professional responsibility. The usage of the term seldom applies to companies. For companies, the common usage is 商业道德 [business ethics]. Therefore, the usage in the 1994 Company Law is improper. It was corrected in the 2005 Company Law.

151 *See* Jun-Hai Liu, *Qianghua gongsi shehui zeren de fali skau ji lifa jianyi [The Legal Justifications and Legislative Suggestions for Strengthening Corporate Social Responsibility]*, *in* KUAGUO GONGSI DE SHEHUI ZEREN YU ZHONGGUO SHEHUI [SOCIAL RESPONSIBILITY OF TRANSNATIONAL CORPORATIONS & THE CHINESE SOCIETY] 147 (Tan Shen & Liu Kaiming eds., 2003).

employees, strengthen labor protection, and realize safe production.[152] It stated that a company's workers "shall, in accordance with the law, organize a trade union to carry out the trade union activities" and protect the lawful rights and interests of workers.[153] A company also had to provide its trade union with the conditions necessary for carrying out its activities.[154] Wholly state-owned companies and limited liability companies invested or established by two or more state-owned enterprises should, through workers' congresses or other forms, "practice democratic management in accordance with the provisions of the Constitution and relevant laws."[155] The 1994 Company Law also required that a company hear the opinions of workers and invite worker representatives to the related meetings when deciding upon matters that affected workers' interests, such as wages, benefits, production safety, and labor insurance.[156] The emphasis on labor rights is a reflection of the socialist ideology under the rein of CCP. Although labor protection is only an element of corporate social responsibility,[157] it is the core of corporate social accountability standards, such as SA8000. Thus, the concept of corporate social responsibility was partly embodied in the 1994 Company Law, although the term social responsibility was absent. However, this indirect approach was changed by the 2006 Company Law.[158]

In 2005, the Chinese government overhauled the 1994 Company Law. The new version of the Company Law took effect on

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152 1994 Company Law, *supra* note 147, at art. 15. **R**

153 *Id.* at art. 16.

154 *Id.*

155 *Id.*

156 *Id.* at arts. 55, 121.

157 Other aspects of corporate social responsibility may include environmental protection, human rights protection, consumer protection, anti-corruption, etc.

158 Professor Jun-Hai Liu, the first law professor promoting corporate social responsibility in China, argued that two purposes of a company were laid out in the 1993 Company Law: making profits (Article 5) and being socially responsible (mainly Article 14). Article 14 constrained Article 5. Since Article 5 defined the purpose of a company, the 1993 Company Law could be misconstrued as not treating corporate social responsibility as a purpose of a company. For clarification, Professor Jun-Hai Liu suggested that corporate social responsibility should be explicitly stated in Article 1 or in Article 5. At the time of the enactment of the 1993 Law, the importance of corporate social responsibility was downplayed against a background of helping state-owned enterprises shirk debt, the dominance of a laissez-faire point of view, hastiness in legislation, and a lack of well-developed corporate social responsibility research in western countries. *See* Jun-Hai Liu, *supra* note 151. **R**

January 1, 2006.[159] In the 2006 Company Law, Article 5 states, "a company shall comply with the laws and administrative regulations, *social morality and business morality*. It shall act in good faith, accept the supervision of the government and the general public, and bear *social responsibilities*."[160] The term "social responsibilities" is clearly articulated in Article 5.[161] In addition to preserving the labor protections of the 1994 Company Law, the 2006 Company Law strengthens them by obligating companies to enter into formal labor contracts with their employees.[162] The economic purpose of a company stated in Article 5 of the 1994 Company Law was completely removed, but this removal does not mean that making profits is no longer a purpose of a company. Article 1 of the 2006 Company Law preserves and enshrines the economic purpose by protecting the rights and interests of companies and shareholders.[163] In sum, the 2006 Company Law unequivocally makes it clear that companies must maintain corporate social responsibility in the course of pursuing profits.

In addition to the generally applicable 2006 Company Law, the China Securities Regulatory Commission promulgated the Code of Corporate Governance for Listed Companies in China ("the Code") in 2002.[164] The Code essentially requires the listed companies in China to consider stakeholder interests in their corporate decisions. The stakeholder section of the Code[165] states that a listed company shall respect the interests of "banks and other creditors, employees, consumers, suppliers, the community, and other stakeholders."[166] Moreover, "[a] listed company shall actively cooperate with its stakeholders" to advance a sustainable and healthy development of the company.[167] In addition, "[a] company shall provide the necessary means to ensure the legal rights of

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159 Company Law of People's Republic of China (promulgated by Presidential Order of the People's Republic of China, Oct. 27, 2005, effective Jan. 1, 2006) P.R.C. LAWS, *available at* http://www.chinadaily.com.cn/bizchina/2006-04/17/content_569258.htm.

160 *Id.* at art. 5 (emphasis added).

161 *Id.*

162 *Id.* at art. 17.

163 *Id.* at art. 1.

164 Code of Corporate Governance for Listed Companies in China (promulgated by the China Securities Regulatory Commission, State Economic and Trade Commission, Jan. 7, 2001), *available at* http://www.ecgi.org/codes/documents/code_en.pdf [hereinafter the Code].

165 The Code explicitly and unambiguously uses the term "stakeholders." *Id.* at ch. 6.

166 *Id.* at art. 81.

167 *Id.* at art. 82.

the stakeholders."[168] Further, when the rights and interests of the stakeholders are harmed, the stakeholders shall have opportunities and channels for redress.[169] A listed company also shall encourage its employees to express their opinions with regard to important decisions about corporate operations, financial conditions, and employee benefits "through direct communications with the board of directors, the supervisory board and the management."[170] A listed company, while maintaining its sustainable development and maximizing shareholder interests, shall pay attention to "the welfare, environmental protection of public interests of the community in which it resides, and shall pay attention to the company's social responsibilities."[171] The preamble of the Code states that a listed company shall reflect the Code in its articles and bylaws. The Code is the major measure of whether a listed company has a good corporate governance structure. The Securities Regulatory Commission may instruct a listed company with significant problems in its corporate governance to overhaul its governance in accordance with the Code.[172]

The 2006 Company Law and the Code are consistent with the spirit of corporate social accountability standards. Both the Company Law and the Code require companies to consider stakeholders' interests in their operation, particularly employees' interests. The 2006 Company Law has great impact on all companies in China. Typically corporate social accountability standards have been implemented in export-oriented companies only. Domestic-oriented companies have been less exposed to these standards because of a lack of awareness in the domestic market. However, since the 2006 Company Law applies to all companies, whether export- or domestic-oriented, they have to embrace corporate social responsibility in their operations. Thus, corporate social accountability standards now have a statutory basis that has to be incorporated into every business operation in China.

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168 *Id.* at art. 83.

169 *Id.*

170 *Id.* at art. 85.

171 *Id.* at art. 86 (referencing the phrase "company's social responsibilities").

172 *See id.* at Preface.

2. *The Progression of Corporate Social Accountability Standards in China*

There is growing demand in China to develop its own corporate social accountability standards. The demand is driven by recognition of corporate social responsibility and is also a defense against the imposition of western standards.[173] The movement in China towards corporate social accountability standards can be seen in three types of regulations: company law, labor law, and stand-alone corporate social accountability standards.

As mentioned above, the 2006 Company Law explicitly recognizes corporate social responsibility. Besides the Company Law, which provides the broad guidelines for corporate conduct, labor laws specify labor rights and dispute mechanisms. Although the emergence of corporate social accountability standards in the global supply chain is a response to states' failure to effectively control misconduct by multinational companies, it does not belittle the importance of national labor law. Compliance with law is the core content of corporate social accountability standards. The specificity of law can provide clear guidelines for compliance and enforcement and more harmonized standards. Accordingly, how to improve the protections offered by labor laws has always been a focus in discussions about corporate social responsibility in China. In the recent years, the Chinese government has promulgated many laws and rules on labor protection; for example, labor unemployment insurance, prohibition of child labor, minimum wages, and collective employment contracts. However, the effectiveness of these new laws and the enforcement of them by the government need to be examined closely.

Stand-alone corporate social accountability standards are deemed to be a direct countermeasure to Western standards, such as SA8000. The State Council approved a proposal that mandated

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[173] For example, Zhuo-Hui Liu, the Vice Chairman of CNCA, stated that SA8000 is not suitable for the situation in China and that the CNCA currently has no plans to adopt any social accountability standards established by any foreign countries or international organizations. Social accountability certification deserves discussion in China only when China's own social accountability standards are available. *See SA8000 Ren zheng bu sh h zhongguo guo qing [SA8000 Certification Does Not Suit the Situation in China]*, CHINA BUSINESS HERALD (P.R.C.), Jan. 21, 2005. Also, Yu-Ling Ren, Counsellor of the State Council, has said that China has to speed up its research and establish its own corporate social accountability standards in order to prevent that China will be constrained by the standards set up by the western countries. *See* Le-Zhen Huang, *Qiye gongming yundong [Corporate Citizenship Movement]*, CHINA ECON. WEEKLY (P.R.C.), Oct. 24, 2005.

the Ministry of Commerce, in cooperation with seven other ministries, to enact Chinese corporate social accountability standards.[174] Although this general set of corporate social accountability standards is not yet available, corporate social accountability standards still are being realized in government policies. For example, since 2005, the Ministry of Commerce has declared that in order to be eligible for export quota bids of certain minerals a company must provide its employees with labor and other social insurances paid for in full by the company.[175]

Furthermore, the Shenzhen Stock Exchange released the Social Responsibility Guidelines for Listed Companies in September 2006.[176] These Guidelines sets forth basic standards for a listed company on how to interact with its stakeholders, including shareholders, creditors, employees, suppliers, consumers, and the community where it is located. It also suggests that a list company may on a voluntary basis release a social responsibility report periodically. The social responsibility report may address corporate social responsibility measures, systems, implementation conditions, reasons for non- or under- implementation, and corrective measures.

B. *The Attitude of Local Governments*

Since Chinese local governments are eager for local development and also compete with each other, they have shown mixed attitudes toward corporate social accountability standards.[177] The governments in the areas abundant with labor-intensive industries,

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[174] The Chinese corporate social accountability standards were expected to be formally released in 2007. Currently, however, the charged ministries have still not completed the standards. This information was obtained by the author through personal contact with staff members in the Ministry of Commerce).

[175] *See* Ministry of Commerce of the People's Republic of China Department on Foreign Trade, http://big5.mofcom.gov.cn/gate/big5/wms.mofcom.gov.cn/static/column/zcfb/g.html/1 (last visited Apr. 21, 2006).

[176] *See Shenzhen zhengjuan jiaoyisuo shanshi gongsi shehui zeren zhiyin [Social Responsibility Guidelines for Companies Listed on Shenzhen Stock Exchange]*, *available at* http://www.szse.cn/main/rule/jysywgz/fxywgz/200609259300.shtml (last visited Nov.10, 2007).

[177] A survey was conducted by the Contemporary China Research Center of Tsinghua University and the Shenzhen Contemporary Society Observation Center in 2001. The researchers interviewed two hundred local officials in the provinces of Guangdong, Hunan, Anhui, Jiangsu, and Shanghai City. Most of the local officials did not know about the codes of conduct. After research team members informed them of the codes' meanings, however, the local officials, except those in Guangdong, believed the corporate social accountability codes would be beneficial to society. Officials from Guangdong, which is a major locus of processing and assembly industries and accounts for more than one-third of China's export value, were concerned about the likelihood of factories moving away from

such as Guangdong, have traditionally been skeptical about the adoption of corporate social accountability standards and are concerned about the negative impact such standards could have on local industries.[178] However, their skepticism and concern seem to be overcome by the global trend toward corporate social accountability standards and the numerous labor disputes of recent years.[179]

Shenzhen, a city packed with labor-intensive industries in Guangdong, is now considering promulgating corporate social accountability standards in response to external pressure from the global market and the internal pressure created by intense employment disputes.[180]

The Hunan government declared that, on January 2006, it began to conduct a large-scale survey of the situation of corporate social accountability standards implemented in companies and that it would to help companies to obtain SA8000 certifications.[181]

C. *The Private Sector Response*

Currently, companies in China have mixed attitudes toward corporate social accountability standards. There is no mystery behind these mixed views. The decision of whether to implement corporate social accountability standards is based on a benefit-cost calculation. The suppliers that have positive attitudes toward such standards are those who have gained committed buyer relationships.[182] The suppliers that question the standards have not seen the benefits from the implementation of the standards.[183] However, for the time being there seems to be a consensus among the suppliers in China that high production costs and egregious viola-

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Guangdong to other areas with lower labor costs. *See* SOCIAL RESPONSIBILITY OF TRANSNAT. CORPS., *supra* note 8, at 60–63. **R**

178 *See id.*

179 The number of labor disputes accepted by labor and social security agencies nationwide was 47,951 in 1996. The number increased to 226,391 in 2003. *See* Ministry of Labour and Social Security, *P.R.C., Labour Disputes Accepted and Settled*, *available at* http://www.molss.gov.cn/gb/zwxx/2005-12/02/content_95346.htm (last visited Apr. 17, 2007).

180 *See Qiye shehui zheren jiang you Shenzhen biaozhun [Shenzhen Will Establish Corporate Social Responsibility Standards]*, Oct. 31, 2006, http://www.shenzhen.molss.gov.cn/main/Web/Article/2006/10/31/0934550558C20400.aspx (last visited Jan. 06, 2007).

181 *See Hunan qidong SA8000 renzheng chukuo qiye mianlin shehui zheren kauyan [Hunan Initiates SA8000 Certification, Exporting Companies Faced with Corporate Social Responsibility Challenges]*, *available at* http://www.hunan.gov.cn/sy/zwxy/zwdt/200606/t20060624_32372.htm (last visited Nov. 10, 2007).

182 *See* SOCIAL RESPONSIBILITY OF TRANSNAT. CORPS., *supra* note 8, at 43. **R**

183 *See* JØRGENSEN ET AL., supra note 52, at 27–29. **R**

tions of labor rights can put them out of business. When the price is too high, there is no buyer. When the labor standards are too low, there is no buyer either. While the general positive relationship between creating stable buyer relationships and good corporate social responsibility has not been established in China, the probability of losing business and employees due to sub par labor standards is recognized by the suppliers. The suppliers are trying to strike a balance between maximizing profits and providing acceptable labor standards.

VI. RECOMMENDATIONS

In order to implement corporate social accountability standards effectively and efficiently, the external pressure must be transformed into internal values. The attitudes of suppliers, consumers, and workers in China are crucial. The suppliers in China have resisted the standards primarily because increased costs may hurt profits. The Chinese consumers, who should be the impetus for such standards, are absent. The Chinese workers, who are the intended beneficiaries, are ignorant of their rights. Helping these key players to dispel their concerns and recognize their rights is important.

A. *Effective Rewards and Harmonization*

As mentioned above, the corporate social accountability standards in the global supply chain abound with cash standards. This indicates that implementation of corporate social accountability standards requires non-negligible costs. Presently, the multinational companies do not bear the large portion of the implementation costs, though they usually bear the costs of external or internal auditing. Rather, their suppliers in developing countries shoulder the costs of improving working conditions required by the standards. This cost allocation may be explained by multinational companies' strong bargaining power and suppliers' direct control over factories and employees. The burden of costs is the major concern and the cause of resistance by the suppliers in China. The burden may be eased by coordinating procurement policies with social responsibility requirements within a multinational company and harmonizing different standards among multinational companies.

Currently, multinational companies have problems in aligning their low-price purchase policy with socially responsible guidelines.

Procurement decisions are ultimately made by a procurement team with an overriding cost-reduction mission. The screening for socially responsible suppliers is conducted by another team, which operates independently from final purchase decisions. The insufficient coordination causes purchase decisions to favor low-price policies and ignores the costs of implementing corporate social accountability in supplier factories. This pushes many suppliers in China into a dilemma: to close or cheat. This situation may cause multinational companies to consider themselves as winners ? winning low prices and a socially responsible reputation. However, such a view is incorrect. If supplier companies have to close, multinational companies will lose the opportunity to outsource and gain cheap labor without incurring the costs and risks of direct investment. If supplier companies choose to cheat, then multinational companies will incur more costs of supervision and auditing or costs of remedying their reputations when their supplier's sweatshops get exposed to the public. Intensifying supervision is expensive and inefficient.[184] The outsiders (multinational companies and auditing firms) can never know more than the insiders (the suppliers). The costs of remedying reputation are enormous. In addition, socially responsible consumers in developed countries and workers in developing countries lose. The consumers are cheated by the socially responsible appearance of multinational companies and their suppliers. The workers are harmed whether the supplier companies choose to close or cheat. In sum, the root problem is that the uncoordinated policies within a buyer company give suppliers incentives to cheat and create the appearance of social responsibility without incurring the costs to honestly improve labor conditions. To solve this problem, multinational companies should directly include social responsibility experts in their procurement teams, consult their social responsibility departments not only during the screening stage but also at the final stage when the purchase decisions are made, or at least provide more information between procurement departments and corporate social responsibility departments.

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[184] For example, a New York Times article reported that for GAP to "duplicate these intensive [monitoring] efforts at each of the 4,000 independent factories it contracts with would have taken about 4.5 percent of its annual profits of $877 million [in 2000]." Leslie Kaufman & David Gonzalez, *Made in Squalor: Reform Has Limits: Labor Standards Clash With Global Reality*, N.Y. TIMES, Apr. 24, 2001, at A1.

In addition to coordinating procurement policies within a multinational company, harmonization of different corporate social accountability standards may reduce the cost of implementation for suppliers. Currently, there are numerous standards in the global supply chain. A supplier may be subject to conflicting standards and frequent audits by their different buyers. Suppliers usually complain that the contradictory standards and repeated audits disturb their everyday operations.[185] Although most of the corporate social accountability standards are based on the Conventions of ILO or the declarations of the United Nations, the specific details are diverse and sometimes conflicting, particularly with regard to the implementation of cash standards.[186] Moreover, conflicting technical standards may undermine the reasonableness of corporate social accountability standards as perceived by the suppliers and the workers. They may treat the standards as formalities rather than internalized values. Harmonization can be accomplished in two ways: through negotiation among multinational companies and non-governmental organizations on a sector basis or negotiation between a supplier company and its buyers. The SA8000 standard belongs to the former. Individual suppliers in developing countries do not have much say in the process of setting these standards. The latter approach allows supplier companies to play the central role in harmonizing different standards. Of course, these two methods are not mutually exclusive.

B. *Activate Consumer Awareness in China*

Corporate social accountability standards at the moment are primarily implemented in export-oriented companies in China. By and large, companies targeting the Chinese domestic market are not affected by the standards. This is because the standards are the products of the anti-sweatshop movements in the western civil society. Consumers in China have not yet shown a strong demand for products made in a way that honors basic labor rights. Such lack of awareness by Chinese consumers supports the Chinese suppliers'

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185 *See* JØRGENSEN ET AL., *supra* note 52, at 16–18 ("some suppliers report having been subjected to more than 30-50 audits per year," and complain that "audits divert management time and resources, disrupt workflow, and challenge planning processes"); *see also* SOCIAL RESPONSIBILITY OF TRANSNAT. CORPS., *supra* note 8, at 82 (some suppliers complain of frequent and disturbing audits, and some workers in the survey said audits interfered with their rest time). R R

186 For example, the details of implementation usually refer to the number and locations of toilets, the location of fire extinguishers, the capacity of each dorm room, etc.

perception that corporate social accountability standards are an imposition by Western countries rather than a fundamental demand by the populace in China. This perception is an obstacle to improved labor rights.

How to trigger such consumer awareness and then to transform the awareness into consumer movements is a difficult question in China. Many Chinese consumers seem to prefer government intervention by regulation and sanctions over consumer movements.[187] The reasons for this passive attitude by Chinese consumers is likely multifaceted. Passivity may be due to the long-time, tight state control of public interests and issues, resulting in heavy reliance on intervention by the government.[188] Further, consumer movements are a form of speech that may not be freely allowed in China. Nevertheless, the heavy reliance on state regulation to protect labor is inefficient and ineffective given the heterogeneity of the workplaces and the flexibility of employment relationships in rapid and competitive markets.[189] In addition, the heavy reliance on state intervention requires enhanced administration and enforcement by the government. However, the government's lack of enforcement resources is an important reason for the Chinese workers' torment.[190] Complete dependence on state intervention will at best prolong the Chinese workers' misery and at worst never end their difficulty.

Moreover, Chinese consumers tend to favor environmental protection over labor protection.[191] Although this may be because the consumers may have more direct interests in a clean environment, media hype and the government promotion of environmental protection may also be important factors.[192] The government has been reluctant to encourage activism regarding labor rights.

Non-governmental organizations (NGOs) play an important role in anti-sweatshop movements in western societies. However,

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187 *See* SOCIAL RESPONSIBILITY OF TRANSNAT. CORPS., *supra* note 8, at 208 (finding in the survey that consumers prefer government intervention). **R**

188 *See id*. at 203–07 (describing the role of the Chinese government in the consumer movement).

189 *See* Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342, 408 (2004).

190 *See* LI-QING LI & YAN-LING LI, *supra* note 28, at 154. **R**

191 *See* SOCIAL RESPONSIBILITY OF TRANSNAT. CORPS., *supra* note 8, at 202. **R**

192 *See id.*

NGOs are undeveloped in China.[193] The government largely controls awareness and issue formation regarding consumer rights. The consumer rights protection and awareness of such issues presently rely on the efforts of the China Consumer's Association (CCA), established in 1984 with the support of the government.[194] CCA is superficially a non-governmental organization but is essentially a government agency. Although the Law of the People's Republic of China on Protecting Consumers' Rights and Interests recognizes that consumers have the right to form social groups in accordance with the law to safeguard their legitimate rights and interests,[195] it is questionable that an independent organization promoting labor rights would be approved by a government that prohibits independent unions. In the long term, giving the reins of the consumer movement to independent non-governmental organizations would trigger consumer awareness more effectively. However, in the short term, reliance on the efforts of CCA is required given the political reality.

CCA is promoting corporate social responsibility and consumer rights, with a particular focus on product safety and environmental protection.[196] CCA emphasizes the linkage between consumption and environmental protection in order to encourage companies to produce environmentally friendly products.[197] However, CCA, as the leading and the most influential consumer organization in China, should also promote the linkage between consumption and labor rights, another aspect of corporate social

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193 *See* C. David Lee, *Legal Reform in China: A Role for Nongovernmental Organizations*, 25 YALE J. INT'L L. 363, 375–82 (2000) (delineating the role of NGOs in China and stating that "there is 'virtually no such thing' as a completely nongovernmental institution in the PRC"); *see also* PEERENBOOM, *supra* note 109, at 201 (2002) (the CCP has put much effort into controlling social organizations and thus many of the social organizations formed in the last two decades are aligned with the interests of the Party). R

194 CCA is a social organization established by the government. The funding of CCA is provided by the government and social donations. *See* China Consumers' Association, http://eng.cca.org.cn:801/page/aboutcca.htm (last visited Apr. 17, 2007).

195 See Law of the Peoples' Republic of China on the Protection of Consumer Rights and Interests (promulgated by the Standing Comm. Natn'l People's Cong., Oct. 31, 1993, effective Jan. 1, 1994), art. 12.

196 CCA supported "The Summit Forum of Corporate Social Responsibility and Consumption Environment 2006." For detailed information of the Forum, see http://business.sohu.com/s2006/qiyezeren/ (last visited Apr. 21, 2006).

197 CCA announced "consumption and environment" as its theme for 2006 and 2007. *See* China Consumer's Association, *CCA Confirms the Annual Theme for the Year*, *available at* http://eng.cca.org.cn:801/ (navigate through "CCA News") (last visited Oct. 28, 2007).

responsibility. Given that labor rights violations are no less serious than environmental pollution and that the majority of the Chinese consumers are also the victims of labor abuse, the consumers would gain from such a linkage.

C. *Trigger Workers' Awareness of Labor Rights*

Although the Labor Law provides a high level of protection for workers, most workers in China are unaware of their rights.[198] Surprisingly, many workers in the factories that are implementing corporate social accountability standards do not understand the meaning and purpose of the standards.[199] As the intended beneficiaries of the standards, workers are passive, uninformed, non-consulted receivers of the benefits. However, corporate social accountability standards can never achieve success without the workers' active participation. Workers are the most efficient monitors of the standards. If workers would be aware of and understand the rights protected by the law and these standards, improvements in labor standards would likely accelerate and the goal of labor protection might be achieved. Further, triggering the awareness of workers in the export-oriented companies would have a positive spillover effect on workers in domestic-oriented companies because labor flows between companies may transmit the awareness of labor rights to workers who are not covered by the standards. .

Currently, awareness and understanding of corporate social accountability standards is disseminated to workers through employee brochures, posters, and the flow of labor between factories.[200] However, the information is limited and fragmented. More systematic and profound education is needed in order to provide a fuller understanding of corporate social accountability standards among workers.

VII. Conclusion

In response to consumer demand in developed countries, multinational companies have incorporated corporate social accounta-

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198 Actually, ignorance of rights is not a phenomenon limited to poor workers in China, but is common throughout the population. The legal consciousness among citizens was seriously destroyed by the Cultural Revolution and cannot be rebuilt easily. *See* Orts, *supra* note 139, at 61. R

199 *See* Social Responsibility of Transnat. Corps., *supra* note 8, at 46–57. R

200 *See id.* at 50.

bility standards into the global supply chain. However, the impact of the standards is primarily felt by the suppliers in developing countries such as China. By examining the development of corporate social accountability standards in China, as well as the causes of resistance to such standards, this Article argues that the standards are not protectionist and not incongruent with Chinese society. However, effective implementation of corporate social accountability standards requires a refined approach that considers local circumstances in developing countries. Future research should focus more on how to fairly implement the standards in a way that provides the suppliers in developing countries incentives to truly respect labor rights in their production.

THE DYSFUNCTIONAL PROGENY OF EUGENICS: AUTONOMY GONE AWOL

*Matthew D. Martin III**

I would feel more optimistic about a bright future for man if he spent less time proving that he can outwit Nature and more time tasting her sweetness and respecting her seniority.

—E.B. White

I. Introduction

Nearly eighty years ago, the Supreme Court in one of its most controversial decisions placed its rubber-stamp of approval on a policy of compulsory sterilization for the "feeble-minded,"[1] which unbeknownst to the Supreme Court would portend the adoption of comparable measures in much of Western Europe, including Nazi Germany.[2] After the atrocities committed by Nazi Germany prior to and during World War II were revealed, the laws under review and supported by *Buck v. Bell* slowly fell out of favor in the United States and Western Europe. Although the decision itself has never been overturned, and some compulsory sterilization laws remain in effect in some jurisdictions,[3] there has been a growing effort in the United States to make amends for public policies based on the pseudo-science of eugenics that has since been discredited.[4]

Despite the United States and Europe having long since abandoned official policies based on eugenics, the People's Republic of China ("PRC") has embraced policies similar to the antiquated eugenics measures of twentieth century Western nations.[5] In an

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1 Buck v. Bell, 274 U.S. 200, 205-08 (1927).

2 *See* Paul A. Lombardo, Commentary, *"The American Breed": Nazi Eugenics and the Origins of the Pioneer Fund*, 65 Alb. L. Rev. 743, 759-60 (2002).

3 *See* Michael G. Silver, Note, *Eugenics and Compulsory Sterilization Laws: Providing Redress for the Victims of a Shameful Era in United States History*, 72 Geo. Wash. L. Rev. 862, 872 (2004).

4 *Id*. at 886-891.

5 *See* Gail Rodgers, Comment, *Yin and Yang: The Eugenic Policies of the United States and China: Is the Analysis That Black and White?*, 22 Hous. J. Int'l L. 129, 140 (1999).

attempt to limit the growth of the population and eradicate unfavorable characteristics in that population, China continues to adhere to a population control policy contrary to fundamental human rights, drawing the ire of "progressive" Western nations.[6]

Part I of this article chronicles the history of the eugenics movement in the United States and its counterparts in Europe in the 1920s and 1930s, noting the disastrous consequences in Nazi Germany. When the horrors of the Holocaust surfaced following World War II, most of the Western nations abandoned eugenical sterilization procedures. However, in other countries, most recently the People's Republic of China, sterilization policies became the *de facto* means of producing a limited, racially superior population. China does not always give families the same reproductive freedom as they might have in the West; in many cases the reproductive rights of families are beholden to the will of government officials. Part II will address this and other coercive measures taken by the Communist Chinese government to both limit population growth and eliminate the "abnormal" from society. At the turn of the twenty-first century, technological advances created an environment in which genetic abnormalities can be eradicated through the use of prenatal and pre-implantation genetic testing in addition to selective abortion. Part III will address this new form of eugenics made possible by such technological advances.

II. YESTERDAY

[A] page of history is worth a volume of logic.

—Justice Oliver Wendell Holmes, Jr.

A. *Eugenics*

A great many people think they are thinking when they are merely rearranging their prejudices.

—William James

"Eugenics," from the Greek word meaning "well born,"[7] is an "applied science . . . . [w]hich seeks (1) to improve the inherited physical, mental, and temperamental qualities of the human family; (2) to apply human intelligence to man's biological evolution; (3)

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[6] *See* U.S. DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: CHINA (Released by the Bureau of Democracy, Human Rights, and Labor)(2006), http://www.state.gov/g/drl/rls/hrrpt/2005/61605.htm.

[7] Elyce Zenoff Ferster, *Eliminating the Unfit—Is Sterilization the Answer?*, 27 OHIO ST. L.J. 591, 591 (1966).

to guard and improve man's inherited characteristics."[8] Throughout much of the first half of the twentieth century, eugenicists, sociologists, and legislators, under the auspices of a "new conscience,"[9] attempted to rid society of these "mentally deficient" and "socially unfit"[10] individuals. The desire was to construct an American society devoid of persons with a propensity toward criminality or those afflicted with insanity, feeble-mindedness, epilepsy or any number of hereditary diseases.[11]

The goal of eugenicists in the late nineteenth and early twentieth centuries, to purge society of the unfit, was not an original concept. Indeed, the hypothesis underlying eugenics, that society cannot be burdened with the disabled and effectively advance, existed in Ancient Greece and was supported by philosophers such as Plato, Aristotle, and Socrates.[12] In Ancient Greece, approximately ten days after birth a newborn would be subject to *amphidromia* ("'walking around' the hearth"),[13] at which time the family "must look at our offspring from every angle to make sure we are not taken in by a lifeless phantom not worth the rearing."[14] The "exposure" of a physically defective infant was not equated with homicide,[15] but was instead a generally accepted means of abrogating the burden placed on the family and on society of raising a defective child.[16] "Exposure" was not merely for infants either. In ancient Sparta, young men determined to be too weak for warfare were frequently drowned in rivers or left out to die from exposure.[17]

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[8] ELLSWORTH HUNTINGTON, TOMORROW'S CHILDREN: THE GOAL OF EUGENICS 9 (1935).

[9] Jessie Spaulding Smith, *Marriage, Sterilization and Commitment Laws Aimed at Decreasing Mental Deficiency*, 5 J. AM. INST. CRIM. L. & CRIMINOLOGY 364, 364 (1914). Smith's article is an early defense of the passage of then recent eugenical sterilization laws in various states during the "progressive era," in order to eliminate the "drain upon society" these mentally deficient individuals inflict upon the whole of society. *Id.*

[10] *Id*.

[11] *See* J. H. Landman, *The History of Human Sterilization in the United States-Theory, Statute, Adjudication*, 63 U.S. L. REV. 48, 51 (1929).

[12] *See* Cynthia Patterson, *"Not Worth the Rearing:" The Causes of Infant Exposure in Ancient Greece*, 115 TRANSACTIONS AM. PHILOLOGICAL ASS'N 103, 105–06 (1985) (presenting the history of exposure in Ancient Greece).

[13] *Id.* at 105.

[14] *Id*.

[15] *Id.* at 106.

[16] *Id.* at 113.

[17] *See* EDWIN BLACK, WAR AGAINST THE WEAK: EUGENICS AND AMERICA'S CAMPAIGN TO CREATE A MASTER RACE 251 (2003). As Andrew Carnegie, U.S. Steel magnate

Another key feature of eugenics is the supposition that it is acceptable, and indeed necessary, for the "intelligent"[18] persons in a society to disseminate knowledge for the betterment of the general population,[19] even if doing so subordinates individual autonomy for the greater good.[20] This idea of supplanting individual rights with societal interests determined by the elite is a concept as old as civilization itself.[21] The Old Babylonian Code of Hammurabi, one of the earliest sets of laws of human civilization dating from 1760 BCE, cites just such a practice of "group elders" assuming responsibility of society, while concurrently maintaining the façade of a "democratic" form of government.[22]

Nearly 3,800 years later, the eugenics movement swept across Western Europe and the United States, promulgating a policy of advancing the general welfare of society by sterilizing those individuals deemed "socially inadequate."[23] Eugenics emerged in response to the growing adoption of Darwinian evolutionary theories, which displaced the Enlightenment principle of equality and the Judeo-Christian canon of the sanctity of human life,[24] with a theorem giving an animal ancestry to humans.[25] This approach enabled the presupposition that a human hierarchy exists, with morons, imbeciles, the feeble-minded, and the physically disabled at the bottom,[26] an elite core of intellectually and physically superior

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and financial backer of the Eugenics Record Office stated, "However much we deprecate Spartan ideals and her means of advancing them, we must admire her courage in so rigorously applying so practical a system of selection . . . ." *Id.*

18 Smith, *supra* note 9, at 364. **R**

19 *See* THE ENCYCLOPEDIA BRITANNICA: ELEVENTH EDITION, VOLUME IX 885 (1913).

20 *See* Smith, *supra* note 9, at 364. **R**

21 *See* Matthew Martin III & Daniel C. Snell, *Democracy and Freedom, in* A COMPANION TO THE ANCIENT NEAR EAST 397, 398 (Daniel C. Snell ed., 2005).

22 *Id.*

23 *See* Robert J. Cynkar, Buck v. Bell*: "Felt Necessities" v. Fundamental Values?*, 81 COLUM. L. REV. 1418, 1428 (1981).

24 *See* Richard Weikart, *Darwinism and Death: Devaluing Human Life in Germany 1859-1920*, 63 J. HIST. IDEAS 323, 327 (2002); *see also* Michael Dudley & Fran Gale, *Psychiatrists as a Moral Community? Psychiatry Under the Nazis and Its Contemporary Relevance*, 36 AUSTL. & N.Z. J. PSYCHIATRY 585, 590 (2002) (arguing that the Judeo-Christian value of compassion was a weakness and enabled cowardice and self-deception).

25 *See* Weikart, *supra* note 24, at 325. **R**

26 Included in addition to those people deemed mentally deficient and mentally diseased, were: epileptics, manic-depressives, criminals, drunkards, prostitutes, syphilitics, and "chronic paupers." *See* PAUL POPENOE & ROSWELL HILL JOHNSON, APPLIED EUGENICS 123-137 (1933).

individuals at the top,[27] and everyone else falling somewhere in between.

Prior to the rise of eugenics, people in the United States with mental retardation were generally free from state interference when it came to marriage and having children.[28] The legal precept employed to determine whether or not these marriages would be upheld was no different than that used for the rest of society—whether the man and woman were able to understand the basic concept of marriage.[29] With the rise of eugenics, however, people with mental retardation became ostracized in society; they were stripped of their rights because of perceived myths about mental retardation.[30] These myths included the belief that people suffering from mental retardation were overly sexual. This, coupled with their lack of self-control, fomented a disastrous direction for society.[31] To deal with this growing "problem," states created asylums to house these individuals, where they could be segregated from society, and most importantly, from the opposite sex.[32] As these asylums became overcrowded, the living conditions deteriorated. Society needed an efficient means to allow the mentally retarded with the highest potential for productivity to be released, or "normalized,"[33] without exacerbating the perceived problem of a society overrun by mental incompetents.[34]

The eugenics movement in America was supported by the most "progressive" leaders of the early twentieth century. President Theodore Roosevelt, the man credited with ushering in the new American century wrote, "[s]ociety has no business to permit degenerates to reproduce their kind. It is really extraordinary that our people refuse to apply to human beings such elementary knowledge as every successful farmer is obliged to apply to his own stock breeding."[35] During his presidency, Roosevelt signed two immigration laws, one in 1903 and one in 1907, which denied entry

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27 *See* HUNTINGTON, *supra* note 8, at 10. **R**

28 *See* MARTHA A. FIELD & VALERIE A. SANCHEZ, EQUAL TREATMENT FOR PEOPLE WITH MENTAL RETARDATION 9 (1999).

29 *Id.*

30 *Id.* at 10.

31 *Id.*

32 *Id.* at 11.

33 *Id.* at 12.

34 *Id.* at 10.

35 HARRY BRUINIUS, BETTER FOR ALL THE WORLD: THE SECRET HISTORY OF FORCED STERILIZATION AND AMERICA'S QUEST FOR RACIAL PURITY 190 (2006).

to immigrants with any history of epilepsy or insanity,[36] and instituted an arbitrary exclusion of any individual "likely to become a public charge" within two years of entrance to the United States.[37]

Margaret Sanger, the founder of Planned Parenthood of America, also argued for sterilization to lower taxes, among other reasons.[38] She declared that eugenics was "'the great biological interpretation of the human race' that provided 'the most adequate and thorough avenue to the solution of racial, political and social problems.'"[39] Alexander Graham Bell, inventor of the telephone, believed that "[p]ersons . . . who are reported deaf from birth, as a class, exhibit a tendency to transmit the defect, and . . . we cannot decide with absolute certainty that anyone was born deaf."[40]

At the center of the American eugenics movement was the American Breeders Association ("ABA"), co-founded in 1903 by Charles Davenport[41] at the behest of the Assistant Secretary of Agriculture, W. M. Hays.[42] Among the various subdivisions of the ABA was the Eugenics Committee, which was directed "'to investigate and report on heredity in the human race' and 'to emphasize the value of superior blood and the menace to society of inferior blood.'"[43] Eventually, Davenport's obsession with human genetics

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36 *See* Peter Quinn, *Race Cleansing in America*, AM. HERITAGE, Feb.-Mar. 2003, at 34.

37 *See* Rachel Silber, *Eugenics, Family & Immigration Law in the 1920's*, 11 GEO. IMMIGR. L.J. 859, 866-67 (1996).

38 Laura Doyle, *The Long Arm of Eugenics*, 16-3 AM. LITERARY HIST. 520, 520 (2004) (Sanger commented, "[t]he American public is taxed—and heavily taxed—to maintain an increasing race of morons which threatens the very foundations of our civilization."); *See also* Donald K. Pickens, *The Sterilization Movement: The Search for Purity in Mind and State*, 28 PHYLON 78, 88 (1967).

39 Quinn, *supra* note 36, at 34. **R**

40 Pickens, *supra* note 38, at 82. **R**

41 Charles Davenport was racist to the core, exemplified in a fundraising letter he wrote to the Carnegie trustees:

> We have in this country the grave problem of the negro . . . a race whose mental development is, on the average, far below the average of the Caucasian. Is there a prospect that we may through the education of the individual produce an improved race so that we may hope at last that the negro mind shall be as teachable, as elastic, as original, and as fruitful as the Caucasian's? Or must future generations, indefinitely, start from the same low plane and yield the same meager results? We do not know; we have no data. Prevailing 'opinion' says we must face the latter alternative. If this were so, it would be best to export the black race at once.

BLACK, *supra* note 17, at 38. **R**

42 *See* Garland E. Allen, *The Eugenics Record Office at Cold Spring Harbor, 1910-1940: An Essay in Institutional History* 2 OSIRIS 225, 232 (1986).

43 *Id*.

and eugenics overshadowed the ABA's other endeavors. In 1910, he created the Eugenics Record Office at Cold Spring Harbor, Long Island, devoted entirely to eugenics.[44]

As the first superintendent of the Eugenics Record Office, Harry Hamilton Laughlin[45] was devoted to both scientific research on human heredity and to educating the public about the importance of eugenics and its inevitable benefits.[46] Over the next decade Laughlin's dedicated service to the ERO propelled him to the forefront of the eugenics movement, enabling him to secure funding while advancing "eugenical truths."[47] One group that Laughlin targeted was epileptics.[48] To this end, Laughlin distorted his "scientific" findings by likening epileptics to the feeble-minded so as to play on pre-existing concerns that this "menace" was infiltrating American families.[49]

In 1922, Laughlin proposed the Model Eugenical Sterilization Law that provided the foundation for many state sterilization laws enacted over the next ten years.[50] He was also an advocate of strict immigration laws to limit the number of immigrants entering the United States from undesirable nations. Much of Laughlin's most pointed criticism was directed at immigrants from Southern and

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[44] *See id.* at 234. The Eugenics Record Office ("ERO") was responsible for bringing the American eugenics movement into the public consciousness. It was created to equip eugenicists with the data and analysis needed to promote eugenics as the science for the future. *Id.*

[45] *Id.* at 236.

[46] *Id.* at 238.

[47] *Id.* at 245.

[48] *See* BLACK, *supra* note 17, at 54. R

[49] *Id.* at 55. Laughlin and the Eugenics Record Office dismissed certain causes of patients' epileptic seizures that did not align with hereditary theories. *Id.* Even if someone suffered from seizures brought on by a traumatic head injury, the ERO ignored the cause, stating in a bulletin sent out to hospitals, "[t]his defect [epilepsy] may be purely traumatic but, on the other hand, [the patient] has an epileptic brother and a feeble-minded niece so there was probably an innate weakness and the fall is invoked as a convenient 'cause.'" *Id.*

[50] *See* HARRY HAMILTON LAUGHLIN, EUGENICAL STERILIZATION IN THE UNITED STATES 446 (1922). Laughlin proposed a Model Eugenical Sterilization Law that provided for the sterilization of those deemed "socially inadequate." *Id.* Among the "socially inadequate" were:

> (1) Feeble-minded; (2) Insane; (3) Criminalistic (including the delinquent and wayward); (4) Epileptic; (5) Inebriate (including drug-habitués); (6) Diseased (including those with tuberculosis, syphilis, leprosy, and other chronic, infectious and legally segregable diseases); (7) Blind (including those with seriously impaired vision); (8) Deaf (including those with seriously impaired hearing); (9) Deformed (including the crippled); and (10) Dependent (including orphans, ne'er-do wells, the homeless, tramps and paupers).

Id.

Eastern Europe, especially Jews, because Laughlin believed that these groups were responsible for most of the crimes committed in the United States.[51] Laughlin's claims that certain immigrants were biologically inferior had a profound impact on the immigration debate.[52] Congress conferred upon him various honorary titles including "Expert Eugenics Agent" and "Special Immigration Agent," while he conducted a fact-finding mission in Europe.[53]

The Immigration Restriction Act of 1924, otherwise known as the Johnson-Reed Act, severely limited entry into the United States for immigrants whose nationalities Laughlin argued were the racially and genetically inferior.[54] Representative Robert Allen, a Democrat from West Virginia lamented that, "[t]he primary reason for the restriction of the alien stream . . . is the necessity for purifying and keeping pure the blood of America."[55] President Calvin Coolidge enthusiastically signed the bill into law on May 26, 1924,[56] which was not surprising given that as early as 1921 then-Vice President Coolidge espoused his belief that,

> [i]t is a self-evident truth that in a healthy community there is no place for the vicious, the weak of body, the shiftless, or the improvident . . . . It is a duty our country owes itself to require of all those aliens who come here that they have a background not inconsistent with American institutions . . . . Biological laws tell us that certain divergent people will not mix or blend. The Nordics propagate themselves successfully. With other races, the outcome shows deterioration on both sides . . . .[57]

Among various provisions of the Immigration Act of 1924, one section reduced the number of aliens admitted from a certain country from three to two percent, based on the calculation mechanism of a prior Act.[58] Furthermore, the base population determining the number from which the two percent was to be calculated

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51 *See* Allen, *supra* note 42, at 248. **R**

52 *Id.* at 249.

53 *See* BRUINIUS, *supra* note 35, at 267. **R**

54 *See* Allen, *supra* note 42, at 249. **R**

55 BRUINIUS, *supra* note 35, at 269; *see also* Marouf A. Hasian, Jr., *Conserving the Nation's "Germoplasm": Nativist Discourse and the Passage of the 1924 Immigration Restriction Act*, 24 LEGAL STUD. F. 157, 172 (2000). **R**

56 *See* BRUINIUS, *supra* note 35, at 268. **R**

57 Hasian, *supra* note 55, at 161 (quoting Calvin Coolidge, *Whose Country Is This?*, GOOD HOUSEKEEPING, 1921, at 13-14, 106, 107). **R**

58 *See* Silber, *supra* note 37, at 879, 881-82 (citing the Immigration Act of 1924, Pub. L. No. 139 (1924)). **R**

was changed from the 1910 census to the 1890 census.[59] This was done in an effort to minimize the number of immigrants from Southern and Eastern Europe by reverting to the ethnic breakdown of America thirty-four years earlier.[60] As a further impediment to the prospective resident, the burden was shifted to the immigrant to prove that he or she had the potential to be a good citizen before gaining admittance.[61]

B. *United States Pre*-Buck v. Bell

> *If we were to wake up some morning and find that everyone was the same race, creed and color, we would find some other cause for prejudice by noon.*
>
> —George Aiken

Throughout the first quarter of the twentieth century, various state legislatures enacted myriad laws directed at preserving America while removing the "cancer of society," the criminal.[62] The first state to pass a eugenical sterilization law was Indiana in 1907.[63] The state of Washington followed two years later.[64] In succession, California[65] and various states passed sterilization laws so that by the mid-1920s, twenty-three states had passed some form of eugenical sterilization laws.[66] However, these laws were rarely subject to judicial review. It soon became apparent to eugenicists nationwide that uniform, and more importantly, court-approved

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[59] *Id.* at 883–84.

[60] *See* Allen, *supra* note 42, at 249. **R**

[61] *See* Silber, *supra* note 37, at 884. **R**

[62] Landman, *supra* note 11, at 48. **R**

[63] *See* Note, *Eugenic Sterilization in Indiana*, 38 IND. L.J. 275, 276 (1962-63) (citing Ind. Acts 1907, ch. 215). Although this law was later held unconstitutional on procedural due process grounds by the Indiana Supreme Court in Williams v. Smith, 131 N.E. 2 (Ind. 1921), the Indiana Legislature would subsequently pass new statutes conforming to the United States Supreme Court decision of Buck v. Bell, 274 U.S. 200 (1927). *See Eugenic Sterilization in Indiana, supra* note 63, at 275–81 (citing Ind. Acts 1927, ch. 241; Ind. Acts 1931, ch. 50; Ind. Acts 1935, ch. 12). Furthermore, although Indiana was the first state to pass a sterilization law, it was not the first attempt by a state to pass such a law. *See* FIELD & SANCHEZ, *supra* note 28, at 67. Michigan introduced a law in 1897, but it was defeated in committee, and the Pennsylvania Legislature passed a law in 1905, but it was vetoed by the governor. *Id.* **R**

[64] *See* Landman, *supra* note 11, at 60. In 1912, the Washington Supreme Court held this statute to be constitutional. *See* Washington v. Feilen, 126 P. 75 (1912). **R**

[65] *See* Landman, *supra* note 11, at 61. **R**

[66] *Id.* at 59.

language would be needed.[67] The compulsory sterilization law in Virginia, enacted in 1924, became the perfect test case for the eugenics movement.

Paul Popenoe's and Roswell Hill Johnson's *Applied Eugenics*, originally published in 1918, with a revised edition released in 1933, served as the definitive study on eugenics for almost twenty years and was used in universities as a textbook in eugenics courses, educating an entire generation on the fundamentals of the "science."[68] Among their numerous unsubstantiated claims about the "mentally deficient" lies a thirty-page diatribe about the "negroid race,"[69] which can only be characterized as unabashedly racist. Popenoe and Johnson argued that preventing miscegenation of the races was imperative because "the Negro is in America to stay;"[70] and "mating" between the races will create "offspring [who] will usually be inferior to those resulting from a better-assorted mating."[71]

Virginia, like the rest of the United States during the first third of the twentieth century, was enmeshed in the eugenics debate. However, the eugenical laws in Virginia were not drafted simply to prevent the feeble-minded from procreating, but were also designed to preclude any race from reproducing with the superior white bloodline.[72] Whites greatly feared that the inter-mingling of the races would increase the number of blacks passing as whites.[73]

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[67] Sterilization laws were ruled unconstitutional in Indiana (Williams v. Smith, 190 Ind. 526 (1921)), New Jersey (Smith v. Board of Examiners of Feeble-Minded, 88 A. 963 (N.J. 1913)), Iowa (Berry v. Davis, 242 U.S. 468 (1917)), Nevada, (Mickle v. Henrichs, 262 F. 688 (D. Nev. 1918)); New York (In re Thompson, 169 N.Y.S. 638 (N.Y. Spec. Term 1918)), and in Michigan, (Haynes v. Lapeer, 166 N.W. 938 (Mich. 1918)). In Washington, the state Supreme Court upheld its sterilization law (Washington v. Feilen, 126 P. 75 (Wash. 1912)), and in the states of California, Wisconsin, North Dakota, Kansas, South Dakota, Montana, Delaware, Idaho, Minnesota, Utah, and Maine, sterilization laws have been enacted and enforced with no protestation from the courts. *See* Landman, *supra* note 11, at 60–69. Furthermore, the states of Michigan and Iowa passed amended laws after the original laws were held unconstitutional. *Id.* Oregon passed a sterilization law that was ruled unconstitutional in the district court, but while the appeal was pending the legislature passed another law which remained uncontested. *Id.*

[68] *See* BLACK, *supra* note 17, at 137. R

[69] POPENOE & JOHNSON, *supra* note 26, at 280–303. R

[70] *Id.* at 300–301.

[71] *Id.* at 284.

[72] *See* Richard B. Sherman, *"The Last Stand": The Fight for Racial Integrity in Virginia in the 1920s*, 54 J. S. HIST. 69, 69 (1988).

[73] *Id*. at 70. To support these claims, white supremacists pointed to several census reports *Id.* According to the reports, the number of mulattoes in the state had nearly doubled in thirty years from 122,441 in 1890 to 222,910 in 1910. *Id.* However, the number of mulattoes dropped to 164,171 in 1920, prompting fear among the white community that

To allay these fears the state of Virginia began to enact statutes designed to block this miscegenation. In 1910, the Legislature enacted a law containing a new definition for "colored person."[74] Prior to this new statute's passage, the law held that "every person having one-fourth or more of negro blood shall be deemed a colored person . . . ."[75] Under the new statute this threshold was lowered to one-sixteenth "negro blood."[76] Furthermore, the law called for the creation of a Bureau of Vital Statistics to maintain a registry of the race of every Virginian.[77]

By 1924, however, this new law came under fire for not being drastic enough. The Anglo-Saxon Club of America lobbied for an even more stringent standard of race definition.[78] The lobbying paid off and the Racial Integrity Act of 1924 was passed, defining a white person only as someone with "no trace whatsoever of any blood other than Caucasian."[79] Furthermore, if upon presentment for a marriage license the clerk at the Bureau of Vital Statistics questioned the race of one of the applicants, the burden to prove racial purity shifted to the applicant.[80] In 1924, the Virginia Legislature passed another law, which entailed a more proactive method of protecting pure American stock.

C. *Carrie Buck and* Buck v. Bell

> *Laws are often made by fools, and even more often by men who fail in equity because they hate equality: but always by men, vain authorities who can resolve nothing.*
>
> —Michel de Montaigne

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persons of "mixed" heritage were passing as "pure" white. *Id.* This fear was intensified by the drop in the population of people identifying as "Negro." *Id.*

74 *Id*. at 70.

75 *Id*.

76 *Id*.

77 *Id.* at 70–71.

78 *Id.* at 77. The Anglo-Saxon Club of America was created to preserve and maintain Anglo-Saxon ideals in America through "the strengthening of Anglo-Saxon instincts, traditions and principles," the "intelligent selection and exclusion of immigrants," and the implementation of "fundamental and final solutions of our racial problems in general most especially of the Negro problem." *Id.* at 74–75. Paradoxically, however, the Club also stated its goals were to be achieved without racial prejudice or hatred. *Id*. at 79.

79 *Id.* at 77. A caveat to this definition was created for Native Americans. Known as the "Pocahontas Exception," the law allowed a white person to have at most one sixty-forth of the blood of an American Indian. *Id.* This exception was included to protect the descendants of John Rolfe and Pocahontas. *Id*.

80 *Id.* at 78.

In 1927, the future of Carrie Buck was immeasurably altered when a perfect storm of scientific ignorance, faulty logic, and political expediency befell this poor, unfortunate young woman as the three branches of government undertook an undaunted effort to rid America of "slobbering idiots" and "hopeless imbeciles."[81] The Virginia Sterilization Act,[82] which included due process safeguards fashioned to overcome the failings of previously overturned state laws,[83] spurred three men, Harry H. Laughlin, Aubrey Strode and Albert Priddy, to undertake a "test case"[84] to sterilize Carrie Buck, as well as countless other young women who could otherwise be productive members of society but for their "moral delinquencies."[85]

Carrie Buck was the perfect test case. Her mother Emma, a syphilitic[86] and possibly indigent[87] woman with "a lack of moral sense and responsibility,"[88] had been adjudged feeble-minded on April 1, 1920.[89] In 1923, Carrie Buck, seventeen years old and pregnant, was presented to the Colony by her guardians, the Dobbs family, as both feeble-minded and epileptic.[90] Her commit-

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81 W.D. Funkhouser, *Eugenical Sterilization*, 23 KY. L.J. 511, 511 (1934) (authored by the Dean of the Graduate School at the University of Kentucky in an effort to influence the debate in the Kentucky Legislature with regard to passing a compulsory sterilization law.).

82 The preamble to this Act is indicative of its intent:

> Whereas, the Commonwealth has in custodial care and is supporting in various State institutions many defective persons who if now discharged or paroled would likely become by the propagation of their kind a menace to society but who if incapable of procreating might properly and safely be discharged or paroled and become self-supporting with benefit both to themselves and to society, and
>
> Whereas, human experience has demonstrated that heredity plays an important part in the transmission of insanity, idiocy, imbecility, epilepsy and crime . . . .

Cynkar, *supra* note 23, at 1436 (quoting 1924 Va. Acts, ch. 394). **R**

83 *See* Cynkar, *supra* note 23, at 1436.

84 J. DAVID SMITH & K. RAY NELSON, THE STERILIZATION OF CARRIE BUCK 49-50 (1989) (Aubrey Strode's recollections of his "original participation introducing the sterilization law").

85 *Id.* at 57–58.

86 *Id.* at 10.

87 *Id.* at 15. There is some debate as to whether Emma Buck was indigent as she claimed that she had inherited some money from her father and the money was deposited in a bank, although it was never found, and the State Colony for Epileptics and Feeble-Minded made little attempt to ascertain the money's whereabouts. *Id.* at 15-16.

88 *Id.* at 9.

89 *Id.* at 12.

90 *Id.* at 17.

ment was merely perfunctory. Within six months of her commitment, Dr. Albert Priddy, the superintendent of the Virginia Colony, testified to the Colony Board of Directors that Carrie Buck was "feeble-minded of the lowest grade Moron class,"[91] and that sterilization was the only way she could become a productive member of society.[92] Thereafter, Carrie Buck's reproductive organs would be in the hands of the courts.

At Carrie Buck's trial, Aubrey Strode, lawyer for the Virginia Colony, presented evidence and testimony from Dr. Albert Priddy and Harry H. Laughlin that Carrie Buck was illegitimate, feebleminded, of questionable character, and "belong[ed] to the shiftless, ignorant, and worthless class of anti-social whites of the South . . . [about whom] it [was] impossible to get intelligent and satisfactory data . . . ."[93] Carrie Buck's attorney, Irving Whitehead,[94] called no witnesses and presented no evidence to contradict the prosecution's case regarding Carrie's legitimacy,[95] mental proficiency[96] or the truth behind her pregnancy.[97] Whitehead's ineffective lawyering enabled Priddy, Strode, and Laughlin to fast track the issue of the constitutionality of the Virginia Sterilization Law directly to the United States Supreme Court.[98]

The County Court ruling in favor of Carrie Buck's sterilization was affirmed on appeal by the Virginia Supreme Court of Ap-

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91 *Id.* at 44.

92 *Id.*

93 *See* Paul A. Lombardo, *Three Generations, No Imbeciles: New Light on Buck v. Bell*, 60 N.Y.U. L. REV. 30, 51–52 (1985) (internal citation ommitted)

94 Irving Whitehead and Aubrey Strode were lifelong friends. *See* SMITH & NELSON, *supra* note 84, at 84-85. In fact, upon Whitehead's death in 1938, his widow asked Strode to pay Whitehead tribute in the Journal of the Virginia Bar Association. *Id.* R

95 Had Irving Whitehead done even a cursory amount of research he would have discovered that Carrie Buck's mother and father were indeed married and there was no evidence they had ever divorced. *See id.* at 226; *see also* Lombardo, *supra* note 93, at 52. R

96 Buck's school records indicate that she was normal and reached the sixth grade before being removed by the Dobbs family to serve as a worker in their home. *See id.*

97 Carrie Buck reported that she was raped by a nephew of the Dobbs family, but her complaint was ignored. Instead she was quickly whisked away to the Virginia Colony for Epileptics and Feebleminded for "having seizures" and being "morally delinquent." *See* SMITH & NELSON, *supra* note 84, at 5; *see also* Lombardo, *supra* note 93, at 54. R

98 The real conflict of interest arose with the fact that Whitehead was paid by Dr. Albert Priddy and the Virginia Colony for Epileptics and Feeble-Minded, who were, of course, advocating for the sterilization of Carrie Buck. *See* SMITH & NELSON, *supra* note 84, at 86–87. R

peals.[99] Initially, Irving Whitehead contested the judgment of the County Court on three grounds. First, that the Virginia Sterilization Act did not provide due process of law; second, that the Act imposed cruel and unusual punishment; and third, that the Act denied her the equal protection of the law.[100] Notably, Whitehead's final brief focused primarily on the due process violation.[101] Moreover, his final brief was only five pages long and cited only one case as precedent.[102] Meanwhile, Aubrey Strode's brief, a "tour de force,"[103] was forty pages long and compellingly proclaimed that no court should stand in the way of the "path of progress in the light of scientific advancement toward a better day, both for the afflicted and for society whose wards they are."[104]

The Supreme Court of Virginia agreed with Strode. First, the court dispensed with the procedural due process challenge and ignored any substantive due process argument.[105] Second, the Virginia Supreme Court easily discharged the cruel and unusual punishment challenge, finding that the Act's purpose was "not to punish but to protect the class of socially inadequate citizens . . . from themselves, and to promote the welfare of society by mitigating race degeneracy and raising the average standard of intelligence of the people . . . ."[106]

The third argument, that the Act violated the principle of equal protection, was considered the defense's strongest argument, and the one Strode felt left the Act most vulnerable to constitutional challenge.[107] The Virginia Supreme Court cited United States Supreme Court precedent that "a classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality."[108] Additionally, the court concluded that the two classes of individuals (those already com-

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99 *See* Buck v. Bell, 130 S.E. 516, 517 (Va. 1925) (Albert Priddy passed away between the trial and the appeal and he was replaced by Dr. J.H. Bell; *Buck v. Priddy* became *Buck v. Bell*.).

100 *Id.* at 518.

101 *See* SMITH & NELSON, *supra* note 84, at 175. **R**

102 *Id.*

103 *Id.*

104 *Id.*

105 *See* Buck v. Bell, 130 S.E. 516, 517–19 (Va. 1925).

106 *Id.* at 519.

107 *See* Lombardo, *supra* note 93, at 48–49. **R**

108 *See* Buck, 130 S.E. at 520 (citing Lindsley v. National Carbonic Gas Co., 220 U.S. 61 (1912)).

mitted in the Colony and those persons "on the outside") were not distinctly separate, for the simple reason that a citizen on the outside can easily be adjudged insane, committed to the Colony, and sterilized.[109] Upon the Virginia Supreme Court's ruling, upholding the state's Sterilization Law, Whitehead quickly filed a petition for certiorari to the United States Supreme Court.

On appeal to the U.S. Supreme Court, Whitehead adjusted his defense strategy, slightly, focusing on the substantive due process challenge to the Virginia Sterilization Act.[110] Priddy, Strode, and Laughlin played their hand so effectively that the Supreme Court, in a three-page, eight-to-one decision, affirmed the legality of the Sterilization law and thereby provided a ringing endorsement for the eugenical sterilization movement.[111]

By the time Chief Justice William Howard Taft tapped Oliver Wendell Holmes, Jr. to pen the decision in *Buck v. Bell*, Holmes had already long-supported eugenics and sterilization practices.[112] After choosing Holmes to write the opinion, Taft sent him a note asking that the opinion be written with due care because "some of the brethren . . . are troubled about the case, especially Butler."[113] Taft also suggested to Holmes how the opinion should be focused in that, "[t]he strength of the facts in three generations [of imbeciles] of course is the strongest argument for such state action."[114] Thus, the decision in *Buck v. Bell* was written by Holmes, a man who in 1920 wrote,

> I think that the sacredness of human life is a purely municipal idea of no validity outside the jurisdiction. I believe that force, mitigated so far as it may be by good manners, is the *ultima*

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109 *Id.*

110 *See* Lombardo, *supra* note 93, at 56–57. Some would say that Whitehead and Strode colluded to, "orchestrate a judicial charade;" by arguing that the Act violated substantive due process, thus forcing the Court to address the substance of the Virginia Sterilization Act and not simply procedural technicalities. *Id.* . **R**

111 *See generally* Buck v. Bell, 274 U.S. 200, 205 (1927) (Justice Pierce Butler was the lone dissenter).

112 *See* Oliver Wendell Holmes, *Ideals and Doubts*, 10 ILL. L. REV. 1, 3 (1915). ("I believe that the wholesale social regeneration which so many now seem to expect, if it can be helped by conscious, co-ordinated [sic] human effort, cannot be affected appreciably by tinkering with the institution of property, but only by taking in hand life and trying to build a race.").

113 *See* G. EDWARD WHITE, JUSTICE OLIVER WENDELL HOLMES: LAW AND THE INNER SELF 404–05 (1993).

114 *Id.* at 405–06; *See also Buck*, 274 U.S. at 207.

> *ratio*, and between two groups that want to make inconsistent kinds of world I see no remedy except force.[115]

Holmes wrote that the Virginia Sterilization Act not only satisfied procedural and substantive due process requirements, but also provided equal protection guarantees, which Holmes declared to be "the usual last resort of constitutional arguments."[116] Furthermore, he acknowledged the need for compulsory sterilization of the mentally "defective" in this now infamous epigram:

> We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence. It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. Three generations of imbeciles are enough.[117]

Holmes' opinion is a model of omniscient jurisprudence.[118] Holmes was unencumbered by facts and logic, and driven only by what *he* knew to be true. Instead of simply deferring to state legislative action, he crafted an opinion that gave "a shaky eugenics movement a strong stamp of legitimacy."[119]

Although decried by future legal scholars as "a parody of justice," "resting on rhetoric rather than logic or precedent,"[120] Oliver Wendell Holmes, Jr. was quite proud of his opinion.[121] Indeed, Holmes wrote to a friend shortly after the decision stating, "I was getting near the first principle of reform. . . . I have no respect for

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115 BLACK, *supra* note 17, at 120, (quoting Letter from Oliver Wendell Holmes, Jr. to Sir Frederick Pollock (Feb. 1, 1920), *in* HOLMES-POLLOCK LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND SIR FREDERICK POLLOCK 1874-1932, 36 (1942). **R**

116 *See Buck*, 274 U.S. at 207–08.

117 *Buck*, 274 U.S. at 207 (internal citation ommitted). Holmes' reference to the principle sustaining compulsory sterilization marks the only time in the decision where he cites precedent. In the case of Jacobson v. Massachusetts, 197 U.S. 11 (1904), the Supreme Court ruled that state-mandated vaccinations to protect public health and safety were not an illegitimate exercise of the state's police powers.

118 *See* Mary L. Dudziak, *Oliver Wendell Holmes as a Eugenic Reformer: Rhetoric in the Writing of Constitutional Law*, 71 IOWA L. REV. 833, 865–866 (1986).

119 *Id.* at 836.

120 Stephen A. Siegel, *Justice Holmes,* Buck v. Bell*, and the History of Equal Protection*, 90 MINN. L. REV. 106, 106 (2005).

121 *See* BRUINIUS, *supra* note 35, at 72. **R**

the passion of equality, which seems to me merely idealizing envy."[122]

Carrie Buck was sterilized on October 19, 1927 and released from the Virginia Colony within a month.[123] She married William Davis Eagle in 1932, who was thirty-seven years her senior and later married Charles Detamore.[124] Over the years, Carrie worked for many families doing odd jobs, some of which included, ironically, taking care of children and the infirmed.[125] Carrie's daughter, Vivian, died at the age of eight; although she never met her mother nor showed any signs of "feeble-mindedness."[126] Carrie's sister, Doris, was also sterilized, and led to believe that the operation was an appendectomy.[127] In 1979, after thirty-nine years of marriage, Doris finally learned the true reason behind her inability to have children with her husband.[128]

D. *Europe Follows*

> *America is a large, friendly dog in a very small room. Every time it wags its tail, it knocks over a chair.*
>
> —Arnold Toynbee

1. *Great Britain*

The United States was not alone in the drive to sterilize the mentally and physically unfit. Many European nations pushed for eugenical sterilization laws in an effort to eliminate not only the mentally and physically deficient, but also paupers and drunkards who created an internal threat to progress. In Great Britain, for example, Winston Churchill, while serving as Home Secretary, urged the passage of a sterilization bill.[129] He wrote

> The unnatural and increasingly rapid growth of the feeble-minded and insane classes, coupled as it is with a steady restriction among all the thrifty, energetic and superior stocks, constitutes a national and race danger which it is impossible to exaggerate . . . . I feel that the source from which all the streams

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122 *Id.*

123 *See* SMITH & NELSON, *supra* note 84, at 179–80. R

124 *Id.* at 215.

125 *Id.* at 213–14.

126 *Id.* at 171. Vivian attended public schools for the two years prior to her death, making the Honor Roll once. *Id.*

127 *Id.* at 216.

128 *Id.*

129 *See* BRUINIUS, *supra* note 35, at 6.

> of madness is fed should be cut off and sealed up. . . . [A] simple surgical operation would allow these individuals to live in the world without causing much inconvenience to others.[130]

In 1912, two physicians working in British asylums, Dr. Geoffrey Clark and Dr. A.W. Daniel, released a shocking study finding that insanity in England was on the rise.[131] This study reported that in 1859 there were 36,762 cases of insanity in England, equivalent to one in every 536 people.[132] In 1909, however, the total number of cases totaled 128,787, or one in every 278 people, meaning that the proportion of the insane to the general population had doubled.[133] Despite widespread fear in Great Britain that the "national racial stock" was in decline as evidenced by the Clark-Daniel study, compulsory sterilization of the mentally unfit never achieved extensive public support.[134] Furthermore, by the time the Brock Committee, charged with recommending a sterilization policy, eventually released its report, the Nazi sterilization movement was already underway, thereby undermining the ethical basis for sterilization within the British government and the electorate.[135]

Additionally, there had never been a drive in Great Britain to legalize any compulsory sterilization laws. By the time the Brock Committee was charged with determining "'the causation of mental disorder and deficiency' . . . [and] 'the value of sterilization as a preventive measure,'"[136] the debate focused only on whether or not the government should favor *voluntary* sterilization of those included in the "social problem group,"[137] not *mandatory* sterilization upon anyone deemed unfit.

2. *Sweden*

In contrast to the debate surrounding sterilization in Great Britain, Sweden adopted a proactive movement, pushing for

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130 *Id.*

131 *See* J. Miller Kenyon, *Sterilization of the Unfit*, 1 VA. L. REV. 458, 462–63 (1913-1914).

132 *Id.*

133 *Id.*

134 *See* Desmond King & Randall Hansen, *Experts at Work: State Autonomy, Social Learning and Eugenic Sterilization in 1930s Britain*, 29 B. J. POL. SCI. 77, 82 (1999).

135 *Id.* at 104.

136 *Id.* at 89.

137 *Id.* at 91 (included in the "social problem group" were sufferers of idiocy, imbecility, and those born to parents with such characteristics).

eugenics by means of "coercive" sterilization.[138] From the genesis of the eugenics movement, Sweden was at the forefront of the drive to cleanse society of those perceived to be "lesser human beings, flawed by unacceptable mental, social, and socioeconomic characteristics . . . suffer[ing] from 'genetic inferiority.'"[139]

The eugenics movement in Sweden began much like it had in the United States, with laws aimed at preventing the mentally unfit from marrying and procreating.[140] These laws proved popular and set the stage for the sterilization drive that would come to fruition in the 1920s.[141] Although Sweden officially required written consent from those who were to be sterilized,[142] the country adopted coercive tactics as a means to persuade patients to accept sterilization.[143] When Sweden finally adopted a full-scale sterilization law in 1934, the procedural safeguards deemed indispensable in the United States, were swept aside in favor of a system much less deferential to due process controls.[144] Under Swedish law, not only was consent unnecessary, but no governmental agency or oversight board was ever created and no court hearing was required to determine if a person needed sterilization.[145] In effect, there was no system in place to supervise those authorizing sterilization procedures.[146]

In addition to Sweden's unabashed desire to prevent the procreation of the mentally deficient, in 1941 legislators expanded Sweden's sterilization laws to apply to those "whose social behavior might make them an unfit parent."[147] This included individuals suffering from a physical disease or exhibiting any "anti-social way

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138 *See* Stephanie Hyatt, Comment, *A Shared History of Shame: Sweden's Four-Decade Policy of Forced Sterilization and the Eugenics Movement in the United States*, 8 IND. INT'L & COMP. L. REV. 475, 483 (1998).

139 *Id.* at 476–77.

140 *Id.* at 482.

141 *Id.*

142 *See* Torbjorn Tannsjo, *Compulsory Sterilisation in Sweden*, 12 BIOETHICS 236, 237 (1998).

143 *See* Hyatt, *supra* note 139, at 483, 486. Generally, release from a mental institution or hospital was conditioned on the patient's agreement to be sterilized; men and women were "persuaded" into agreeing that sterilization was in their best interest. *Id.* In 1962, a Swedish study revealed that of all the girls leaving Swedish special schools in the twenty-year period between 1937 and 1956, 36% of them were sterilized. *Id.*

144 *Id.* at 483.

145 *Id.*

146 *Id.*

147 *Id.* at 484.

of life."[148] Whereas in the United States the number of sterilizations dramatically decreased after Nazi Germany began implementing sterilization legislation, in Sweden there was no such decline. Throughout the 1940s the number of compulsory sterilizations increased each year.[149] Only recently has the Swedish government made an attempt to remedy the policies under the 1934 Sterilization Act and its amendments that resulted in some 63,000 sterilizations.[150]

3. *Nazi Germany*

> *Insanity in individuals is something rare—but in groups, parties, nations and epochs, it is the rule.*
>
> —Frederich Nietzsche

Irving Whitehead's defense of Carrie Buck in front of the United States Supreme Court included one prescient argument against Acts such as the one passed in Virginia that, unbeknownst to Whitehead and the rest of America, would foreshadow the "race cleansing" of Nazi Germany in the 1930s and 1940s. Whitehead stated to an uninspired Court:

> If this Act be a valid enactment, then the limits of the power of the State (which in the end is nothing more than the faction in control of the government) to rid itself of those citizens deemed undesirable according to its standards, by means of surgical sterilization, have not been set . . . A reign of doctors will be inaugurated and in the name of science new classes will be added, even races may be brought within the scope of such regulation, and the worst forms of tyranny practiced.[151]

Within a generation, the pseudo-science of eugenics, when pushed to its ultimate breaking point by Nazi Germany, would collapse under the weight of its own "success."

Germany entered the eugenics debate with two goals: to reverse its low birth-rate, which by 1932 had reached an international low point,[152] and to promote *Fortpflanzungshygiene* ("procreation

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148 *Id.*

149 *Id.* Sterilizations in the five years after the implementation of the 1934 Sterilization Act averaged 481 each year. *Id.* However, by 1941, the number more than doubled to 1164, and by the end of the 1940s the figure had doubled again to 2351 in 1949. *Id.*

150 The Act was finally repealed in 1976, after some 63,000 sterilizations had been conducted. *Id.* at 487.

151 BRUINIUS, *supra* note 35, at 70–71. **R**

152 *See* Gisela Bock, *Racism and Sexism in Nazi Germany: Motherhood, Compulsory Sterilization, and the State*, 8 SIGNS 400, 405 (1983); *see also,* Henry P. David, Jochen

hygiene")[153] through a system designed to enable desirable births and eradicate *lebensunwertes Leben*, or "lives unworthy of life."[154] In less than a decade and in the name of eugenical divinity, Nazi Germany established a "human hierarchy,"[155] which at first segregated, then sterilized, then euthanized, and then exterminated those "lives unworthy of life" in an effort to purify the righteous German Volk and help solidify "German blooded, Nordic raced beings: right angled in body and soul."[156] The totalitarian regime of Adolf Hitler, coupled with the willful ignorance of the rest of the world, made Nazi Germany fertile ground for these eugenical ideals.

Within the first year of Adolf Hitler's Chancellorship, Nazi Germany instituted a series of laws that on the one hand strictly limited abortion in order to reverse the low birth rate,[157] and on the other hand mandated sterilizations for a wide array of mentally and physically disabled Germans.[158] These laws also stripped the Jewish and Gypsy people of their citizenship rights in order to more easily categorize them as socially inadequate who then systematically could be stripped of their human rights.[159]

Fleischhacker & Charlotte Hohn, *Abortion and Eugenics in Nazi Germany*, 14 POPULATION & DEV. REV. 81, 87–88 (1988). The level of births per thousand of the population dropped precipitously, from 39.2 in 1880, to 31.6 in 1906, 20.7 in 1925 and 14.7 in 1933. *Id.*

153 Bock, *supra* note 152, at 401.

154 *Id.* at 408.

155 Donald J. Dietrich, *Catholic Eugenics in Germany, 1920-1945: Hermann Muckermann, S.J. and Joseph Mayer*, 34 J. CHURCH & ST. 575, 599 (1992).

156 *See* Bock, *supra* note 152, at 405. R

157 *See* David, *supra* note 152, at 89–90. The Nazi government strictly limited sex education, information on contraception, and closed sex and marriage counseling centers in an effort to curtail the use of this information for reproductive reasons. *Id.* The government also reinstated penal codes restricting abortions and increased the penalty for having an abortion, performing an abortion, or for providing information about abortions. *Id.* Incentives were also used to promote higher birth rates. *Id.* Shortly after the reintroduction of the penal codes with regard to abortion, the government instituted regulations providing interest-free loans to newly-married, "biologically sound" couples. *Id.* One-fourth of the loan would be cancelled for each child that the couple produced. *Id.* R

158 *Id.* at 91. The Law for the Prevention of Hereditary Diseases in Future Generations was passed in July of 1933 for the express purpose of blunting the propagation of "lives unworthy of life." *Id. See also* Marie E. Kopp, *Legal and Medical Aspects of Eugenic Sterilization in Germany*, 1 AM. SOC. REV. 761, 763 (1936). The law called for the sterilization of those with (1) hereditary feeble-mindedness; (2) schizophrenia; (3) manic-depressive insanity; (4) hereditary epilepsy; (5) hereditary Huntington's chorea; (6) blindness; (7) deafness; (8) severe physical deformity; and (9) severe habitual drunkenness. *Id.*

159 *See* LENI YAHIL, THE HOLOCAUST: THE FATE OF EUROPEAN JEWRY 71–72 (1991). The Reich Citizenship Law and the Law for the Protection of German Blood and German Honor, collectively known as the Nuremberg Laws, codified a second-class status for Jews.

The German eugenics movement was not ushered in with the rise of Adolf Hitler and the Nazi Party in 1933. It was an already flourishing movement with more broad-based support than in the United States, due in large part to the popularity of Social Darwinism,[160] fueled by Germany's struggle with their loss in World War I and the humiliation of the Treaty of Versailles.[161] The Jews became "the racial germ that corrupts the mixture of the blood,"[162] and were therefore not only inferior to the Aryan race[163] but were *geistig Tote* ("dead souls"), "an alien growth in human society, and of a lower level than animals."[164] In an atmosphere rife with anti-semitism, all it took was the emergence of a charismatic leader and a party willing to confront this "germ"[165] to realize Nazi Germany.

After passage of the various racial hygiene laws from 1933 to 1934, Germany spent the next twelve years pushing eugenics past the brink of mere conjectural debate. Without the burden of a controlling legal or ethical authority, Nazi Germany swiftly eliminated

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Id. at 71. The Reich Citizenship Law officially separated those of pure German blood from everyone else by establishing the difference between a "subject of the state" and a "citizen of the Reich," and only a citizen of the Reich had full political rights. *Id.* The Law for the Protection of German Blood and German Honor essentially relegated Jews to the status of "subjects of the state" and forbade intermarriage and sexual relations between the races. *Id.* at 71-2. Furthermore, Jews were prohibited from employing German female domestics under the age of forty-five. *Id.* at 72. These laws were purely eugenical in nature. As a Gestapo report stated, "the population regards the regulation of the relationships of the Jews as an emancipatory act, which brings clarity and simultaneously greater firmness in the protection of the racial interests of the German people." DANIEL JONAH GOLDHAGEN, HITLER'S WILLING EXECUTIONERS: ORDINARY GERMANS AND THE HOLOCAUST 98 (1996).

160 *See* Weikart, *supra* note 24, at 323; *see also* SHEILA FAITH WEISS, RACE HYGIENE AND NATIONAL EFFICIENCY: THE EUGENICS OF WILHELM SCHALLMAYER 27–37 (1987). R

161 *See* YAHIL, *supra* note 159, at 18. R

162 *Id.* at 44 (quoting Adolf Hitler in, HENRY PICKER, HITLER'S TISCHGESPRACHE IM FUHRERHAUPTQUARTIER, 1941-1942, 321 (1951)).

163 *See* YAHIL, *supra* note 159, at 307 Although used repeatedly, the word "aryan" was never precisely defined by the Third Reich which simply served as a euphemism, and a word used for exclusionary purposes, not one used to include a certain group of people. *Id*. (citing ZVI BACHRACH, RACISM: THE TOOLS OF POLITICS, FROM MARXISM TOWARDS NAZISM 61 (1985)). R

164 YAHIL, *supra* note 159, at 307 (quoting KARL BINDING & ALFRED E. HOCHE, DIE FREIGABE DER VERNICHTUNG LEBENSUNWERTEN LEBENS: IHR MASS UND IHRE FORM 28 (1922)). R

165 A mere seven years before Adolf Hitler would rise to the German Chancellorship, he expressed the following view in his racist rant, MEIN KAMPF, writing, "With satanic joy in his face, the black-haired Jewish youth lurks in wait for the unsuspecting girl whom he defiles with his blood, thus stealing her from her people. With every means he tries to destroy the racial foundations of the people he has set out to subjugate." ADOLF HITLER, MEIN KAMPF 325 (Ralph Manheim trans., Houghton Mifflin Co. 1971) (1925).

not only the reproductive rights of the unfit, but also the unfit themselves. Nazi Germany began by creating Hereditary Health Courts or *Erbgesundheitsgericht*, which were given two tasks: to report anyone who fit into any one of the sterilization categories;[166] and to report any "German-blooded" woman who sought an abortion.[167] Between the creation of the courts in 1934 and the outbreak of World War II in 1939, 320,000 Germans (0.5% of the entire population) had been "legally" sterilized.[168] Unlike those sterilized in the United States, the vast majority of those sterilized in Germany were not institutionalized, but were Germans exhibiting any "deviancy from the norm."[169] In 1939, Nazi Germany adopted a new policy—instead of eliminating Jews and the disabled from future generations, they were simply eliminated from the present generation.[170]

The first stage of exterminating the *Ballastexistenzen* (or "Burdensome Life") was carried out through the use of euthanasia or *Sterbehilfe*, meaning "aid to the dying."[171] This program began with the killing of children with disabilities,[172] and was expanded, by "Fuhrer decree," to include adult mental patients shortly thereafter.[173] Within two years, at least 100,000 institutionalized patients were euthanized for being "useless eaters."[174] The goal was to euthanize another three million "invalids," but the Catholic and Protestant Churches protested and Hitler abandoned the policy on August 24, 1941.[175] The extermination system was then transferred to concentration camps, where gas chambers and gas trucks, dis-

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166 *See* David, *supra* note 152, at 91. R

167 *See* David, *supra* note 152, at 93; Bock, *supra* note 152, at 408, 411. These courts also compiled a centralized registry, indexing the "gene value" of everyone living in Germany. *Id.* at 409. R

168 *Id.* at 413.

169 *Id.* at 414.

170 *See* YAHIL, *supra* note 159, at 308. R

171 *Id.* at 307–08.

172 *See* Dudley & Gale, *supra* note 24, at 587. R

173 *Id.* Not only were these people murdered, but their families received false death notices, were misled to believe that pneumonia was the cause of death, and most appalling, families were charged for the killings. *Id.*

174 Bock, *supra* note 152, at 415. Among those euthanized, 5,000 children were wrested from their mothers by forcing the women into the war industry so as to make home care impossible. *Id.* *See* YAHIL, *supra* note 158, at 309. Often, these children were simply starved to death and their families were informed that they had been transferred to an institution for special treatment. *Id.* R R

175 *See id*; *see also* Bock, *supra* note 152, at 415. R

guised as shower rooms,[176] more efficiently disposed of the "sick, crippled, those unfit for work, and the Jews . . . ."[177] In 1942, a German decree declared "[n]o more applications for sterilization of Jews need to be made;"[178] given that the Final Solution for the Jewish Problem was now in place, and within three years, ten million of these "corruptors of the people"[179] would no longer be able to "sap the strength of the State."[180]

E. *Backtrack—Skinner v. Oklahoma, Relf v. Weinberger (American Sterilization Movement after World War II)*

America is a country that doesn't know where it is going but is determined to set a speed record getting there.

—Laurence J. Peter

The sterilization movement in the United States did not proliferate, as eugenicists had first thought, after the Supreme Court gave the movement its ringing endorsement in *Buck v. Bell*.[181] Various factors contributed to the failure of the eugenics movement in the United States, including changing perceptions of the handicapped,[182] religious influences,[183] new scientific studies,[184] the

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176 *See* Dudley & Gale, *supra* note 24, at 587. R

177 *See* YAHIL, *supra* note 159, at 310. One of the physicians charged with determining the fate of the inmates was Dr. Friedrich Mennecke, who began a letter to his wife on the morning of November 28, 1941 with, "Hurray! We are going out on the merry hunt." *Id.* R

178 Bock, *supra* note 152, at 408–409. R

179 HITLER, *supra* note 165, at 679. R

180 Buck v. Bell, 274 U.S. 200, 207 (1927). In addition to the six to ten million people murdered by the Nazi regime, the Central Association of Sterilized People in West Germany estimated in 1951 that the Nazis had also sterilized 3.5 million people. *See* Silver, *supra* note 3, 870. R

181 *See* Cynkar, *supra* note 23, at 1454. R

182 *See* Philip R. Reilly, *Involuntary Sterilization in the United States: A Surgical Solution*, 62 Q. REV. BIOLOGY 153, 165 (1987). In 1950, the National Association for Retarded Children ("NARC" and now "Citizens") was founded to become a powerful lobby in Washington. In 1962 NARC pressed for a rejection of eugenic sterilization, which the President's Commission on Mental Retardation reaffirmed. *Id.*

183 The Catholic Church had long been an opponent of sterilizations of any kind, and in 1930 Pope Pius XI issued a *Casti Connubii*, condemning not only sterilization but the entire eugenics movement. *See* Pius XI, *Casti Connubii* (Dec. 31, 1930), *available at* http://www.vatican.va/holy_father/pius_xi/encyclicals/documents/hf_p-xi_enc_31121930_casti-connubii_en.html.

184 *See* James B. O'Hara & T. Howland Sanks, *Eugenic Sterilization*, 45 GEO. L. J. 20, 35–36 (1956). The American Neurological Association released a report in 1936 condemning compulsory sterilization laws. *Id.* Although the report did not disapprove of voluntary or even coercive sterilization, the Association took a conservative position by stating, "We do not believe that society needs to hurry into a program based on fear and propaganda." *Id.*; *see also* Cynkar, *supra* note 23, at 1459. The American Medical Association released a R

evolving legal aspects of individual rights,[185] and perhaps most important, the revelation of the monstrous acts the Nazis committed in the name of unburdening the State from the progeny of defectives.[186]

Fifteen years after the decision in *Buck v. Bell*, a new Supreme Court revisited the issue of state-mandated sterilization, this time with regard to the sterilization of criminals exhibiting "moral turpitude."[187] In *Skinner v. Oklahoma,*[188] the Supreme Court was asked to consider whether a criminal statute authorizing sterilization of habitual criminals was constitutional.[189] The petitioner, Jack T. Skinner was convicted and imprisoned in 1926 for stealing chickens and in 1934 for robbery with firearms.[190] Proceedings against Skinner were instituted in 1936 and after a trial, the jury found that sterilization could be performed on Skinner without compromising his health.[191]

On appeal, Skinner made three arguments: lack of due process, cruel and unusual punishment, and violation of the equal protection clause.[192] The Supreme Court, without issuing judgment on the due process and cruel and unusual punishment claims, ruled the statute unconstitutional on equal protection grounds—what Justice Oliver Wendell Holmes, Jr. had fifteen years earlier proclaimed in *Buck v. Bell* to be "the usual last resort of constitutional arguments."[193]

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report in 1937 stating, "Present knowledge regarding human heredity is so limited that there appears to be very little scientific basis to justify limitation of conception for eugenic reasons . . . . There is conflicting evidence regarding the transmissibility of epilepsy and mental disorders." *Id.*

185 *See* Skinner v. Oklahoma, 316 U.S. 535 (1942). The Supreme Court, while not overturning *Buck v. Bell*, did make reproductive freedom a "fundamental" right. *Id.* at 541.

186 *See* BRUINIUS, *supra* note 35, at 243–86. Perhaps the greatest flaw in the American eugenics movement was the admiration notable eugenicists expressed for the Nazi regime. Harry Hamilton Laughlin, for example, received an honorary degree from Heidelberg University in 1936, which he prized for the remainder of his life. *Id.*

187 *See Skinner*, 316 U.S. at 536.

188 Only Harlan Fiske Stone, elevated to the position of Chief Justice of the United States, was on the Court for both the *Bell* and *Skinner* decisions. *See* WILLIAM COHEN & JONATHAN D. VARAT, CONSTITUTIONAL LAW: CASES AND MATERIALS 1684–85 (Robert C. Clark ed., Foundation Press, 11th ed. 2001).

189 OKLA. STAT. tit. 57, § 171 (1935). The Oklahoma Act defined "habitual criminal" as anyone "having been convicted two or more times for crimes 'amounting to felonies involving moral turpitude.'" *Skinner*, 316 U.S. at 536.

190 *See Skinner*, 316 U.S. at 537.

191 *Id.*

192 *Id.* at 538.

193 Buck v. Bell, 274 U.S. 200, 208 (1927).

The Oklahoma statute was ruled unconstitutional by a unanimous Court, reasoning that "[s]terilization of those who have thrice committed grand larceny with immunity for those who are embezzlers is a clear, pointed, unmistakable discrimination."[194] The Supreme Court did not directly overturn the decision of *Buck v. Bell*, though Justice William O. Douglas, in his majority opinion, expressed the same concern that Irving Whitehead had presented to the Supreme Court in his defense of Carrie Buck. Douglas lamented,

> In evil or reckless hands it can cause races or types which are inimical to the dominant group to wither and disappear. There is no redemption for the individual whom the law touches. Any experiment which the State conducts is to his irreparable injury. He is forever deprived of a basic liberty.[195]

Furthermore, in both concurring opinions, Chief Justice Harlan Fiske Stone and Justice Robert H. Jackson argued that science had yet to make definitive assurances that certain conditions were in fact inheritable.[196] These views stood in stark contrast to the extreme deference Oliver Wendell Holmes, Jr. granted eugenical theorists in 1927. In effect, this decision rendered sterilizations for penal purposes unconstitutional. However, involuntary sterilizations for the mentally unfit would continue in the United States for the next thirty years.[197]

Although involuntary sterilizations would continue in the United States until the mid-1970s,[198] over the fifty-year period of eugenical sterilization, only 65,000 people were sterilized.[199] By contrast, Nazi Germany sterilized more people in 1935 alone than the United States sterilized over the past century.[200] Moreover, despite the roughly equal number of persons sterilized in the United States and Sweden during the twentieth century, Sweden's population has never been more than one-twenty-fifth that of the United

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194 Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).

195 *Id.* Justice Douglas also created a new formula for inquiring into the constitutionality of fundamental rights—strict scrutiny analysis. *Id.*

196 *Id.* at 545, 546.

197 *See* Reilly, *supra* note 182, at 167. R

198 In 1978, the Department of Health, Education and Welfare instituted guidelines prohibiting the sterilizations of many, while creating prodigious consent requirements, making both involuntary *and* voluntary sterilizations rare. *See* Reilly, *supra* note 182, at 167. R

199 *See* BRUINIUS, *supra* note 35, at 76. R

200 *See* Cynkar, *supra* note 23, at 1456. R

States population.[201] The number of sterilizations in any given year in the United States never rose above 2,500 whereas the number of women who died during childbirth each year in the United States reached the height of 14,000 in 1933.[202]

When eugenical sterilizations in the United States fell out of vogue after World War II, sterilizations were predominantly performed to serve therapeutic purposes. The legal debate evolved from an initial examination of whether or not the State has the right to sterilize an individual, in order to advance State interests, to whether or not parents or guardians have the right to have their child or ward sterilized for therapeutic purposes.[203]

As the Supreme Court began expanding fundamental rights to include the right to procreate[204] and the right not to procreate,[205] developing law shifted to address the degree of consent required for voluntary sterilizations. The central case dealing with involuntary sterilizations for therapeutic purposes was *Relf v. Weinberger*.[206] Decided by the United States District Court for the District of Columbia, *Relf* would alter the sterilization movement considerably by bringing into question certain coercive measures used by State physicians to procure consent.[207]

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201 *Compare* SWEDEN: POPULATION AND POPULATION CHANGES: 1749-2006 (historical population of Sweden) (http://www.scb.se/templates/tableOrChart___26047.asp) *with* SELECTED HISTORICAL DECENNIAL CENSUS POPULATION AND HOUSING COUNTS, U.S. CENSUS BUREAU (the historical population of the United States) (http://www.census.gov/population/www/censusdata/hiscendata.html).

202 Compare HISTORICAL ABORTION STATISTICS, UNITED STATES (compiled by Wm. Robert Johnston, last updated 20 April 20, 2007) (http://www.johnstonsarchive.net/policy/abortion/ab-unitedstates.html) (citing the number of births per year) *with* Irvine Loudon, *Maternal mortality in the past and its relevance to developing countries today*, 72 AM. J. CLINICAL NUTRITION 241, 244 (2006), *available at* www.ajcn.org (enter "Loudon" in "author" field)(providing maternal mortality rates).

203 *See generally* Relf v. Weinberger 372 F. Supp. 1196 (D. D.C. 1974).

204 *See* Skinner v. Oklahoma, 316 U.S. 535, 536 (1942). Justice Douglas wrote, "Oklahoma deprives certain individuals of a right which is basic to the perpetuation of a race—the right to have offspring." *Id.*

205 *See* Griswold v. Connecticut, 381 U.S. 479 (1965) (overturning a Connecticut statute criminalizing the use of contraceptives by finding a marital right to privacy in the "penumbras" of the Bill of Rights); Eisenstadt v. Baird, 405 U.S. 438 (1972) (overturning a Massachusetts statute criminalizing the use of contraceptives for unmarried people by finding, on the basis of a violation of equal protection, that statutes denying contraceptive use by unmarried people was irrationally discriminatory); Roe v. Wade, 410 U.S. 113 (1973) (holding that most laws restricting access to abortions violate a right of privacy).

206 *See* Relf v. Weinberger, 372 F. Supp. 1196 (D. D.C. 1974).

207 *Id.* at 1203.

The petitioners in *Relf v. Weinberger* were five women coerced into undergoing sterilization based on the threatened withdrawal of federal welfare benefits.[208] The Court concluded that the procedures used were coercive and therefore not "voluntary."[209] The Court held that the Department of Health, Education, and Welfare ("HEW") guidelines must be amended to "require that individuals seeking sterilization be orally informed at the very outset that no federal benefits can be withdrawn because of a failure to accept sterilization." [210] In 1978, HEW adopted the "final rules" which not only prohibited the sterilization of those persons under the age of twenty-one and all mentally incompetent persons, but also effectuated more complex consent requirements.[211]

In a series of cases in the 1980s and 1990s, courts adopted a new test to determine whether sterilizations for people lacking the mental capacity for healthcare decision-making could be sterilized upon the request of a parent or guardian.[212] In *In re Grady*,[213] the Supreme Court of New Jersey adopted a standard whereby the "best interests"[214] of the incompetent person provided the basis for determining whether that person should be sterilized. This standard, in conjunction with the "least-restrictive-means" approach taken in *In re Terwilliger*,[215] comprise the framework courts have used to determine whether sterilization of the mentally incompetent is necessary.[216]

III. TODAY

A. *China and the One-Child Policy*

Do not remove a fly from your friend's forehead with a hatchet.

—Chinese Proverb

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[208] *See* Joseph D. Baker, Comment, *Sexual Sterilization—Constitutional Validity of Involuntary Sterilization and Consent Determinative of Voluntariness*, 40 MO. L. REV. 509, 523 (1975).

[209] Relf, 372 F. Supp. at 1199.

[210] *Id*. at 1203.

[211] *See* Reilly, *supra* note 182, at 167. R

[212] For example, in *In re* Valerie N., the California Supreme Court overturned the state's statute allowing for compulsory sterilization, holding that the mentally retarded have the same procreative rights as everyone else. *See* FIELD & SANCHEZ, *supra* note 28, at 82. R

[213] *In re* Grady, 426 A.2d 467 (N.J. 1981).

[214] *Id.* at 475.

[215] *In re* Terwilliger, 450 A.2d 1376, 1383 (Pa. 1982).

[216] *See* Robert Randal Adler, Note, *Estate of C.W.: A Pragmatic Approach to the Involuntary Sterilization of the Mentally Disabled*, 20 NOVA L. REV. 1323, 1328–30 (1996).

In 1979, the People's Republic of China began implementing family planning policies to combat an exploding Chinese population by limiting the number of children a couple may have to just one.[217] Despite achieving its goal of significantly reducing the birth rate,[218] the policy resulted in disastrous human rights consequences and brought the nation unwanted condemnation; thwarting China's efforts to gain acceptance in the world community. Worldwide attention will be concentrated on China in the coming year due to the nation's hosting of the 2008 Summer Olympic Games in Beijing.[219]

China's One-Child Policy ("OCP") was not the country's first attempt to slow the exploding birth-rate[220] and was a direct about-face from a policy instituted by Mao Ze-Dong who referred to birth control and abortion as a "bourgeois plot to visit 'bloodless genocide' upon the Chinese people."[221] Beginning in 1979, the One-Child Policy was not a national law, but rather a policy espoused by the Communist government and implemented, often inconsistently, through various provincial and municipal laws that lacked provisions for oversight and control.[222] This lack of conformity would lead Ann Noonan, a prominent human rights advocate, to write:

> This has led to the use of local informants to discover unauthorized pregnancies, monitoring women's menses at the work place, and the implementation of draconian measures which in-

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217 *See* Nicole M. Skalla, Note, *China's One-Child Policy: Illegal Children and the Family Planning Law*, 30 BROOK. J. INT'L L. 329, 333 (2004).

218 *Id.* at 341.

219 *See* Philip P. Pan, *China Using Rights Issue to Promote Olympic Bid*, WASH. POST, Feb. 21, 2001, at A18. The mayor of Beijing said in 2001,

> By applying for the Olympics, we want to promote not just the city's development, but the development of society, including democracy and human rights . . . . If people have a target like the Olympics to strive for, it will help us establish a more just and harmonious society, a more democratic society, and help integrate China into the world.

Id.

220 *See* Skalla, *supra* note 217, at 332–333. The first attempt to limit the population came during the population explosion of the 1950s and 1960s when China's population grew from 540 million to 800 million in three decades, an increase of 48%. *Id.* The policy of "wan, xi, shao" or "Later, Longer, Fewer" recommended that couples wait until later in life to marry, wait longer between pregnancies, and limit their number of offspring at two. *Id.* R

221 *Id.* at 332.

222 *See* John Bongaarts & Susan Greenhalgh, *An Alternative to the One-Child Policy in China*, 11 POPULATION & DEV. REV. 585, 587 (1985).

> clude violence against women, forcible late-term abortions, forced IUD insertion, forced sterilization, the detention of pregnant women or their family members, and the destruction of "over-birth" families' homes.[223]

Although this policy was not instituted strictly for eugenical purposes, the means used to implement and conform to this policy, along with the advent of prenatal genetic testing, created a dramatic deficit of female newborns and a high rate of abortion for fetuses deemed "abnormal."

B. *Females in the People's Republic of China*

> *How sad it is to be a woman!*
> *Nothing on earth is held so cheap.*
> *Boys stand leaning at the door*
> *Like gods fallen out of heaven.*
> *Their hearts brave the Four Oceans,*
> *The wind and dust of a thousand miles.*
> *No one is glad when a girl is born:*
> *By her the family sets no store.*
>
> —Fu Xuan

To understand the current family planning policies of China and the potential for human rights abuses stemming from such policies, it is necessary to understand Confucian teachings and other Ancient Chinese traditions, which emphasize a patrilineal family structure with inheritance rights belonging only to the first-born son.[224] Throughout Chinese history, every woman was taught to accept four basic tenets in order to fulfill her role in society.[225] These four "virtues" are:

> [F]irst, a woman should know her place in the universe and behave in compliance with the natural order of things; second, she should guard her words and not chatter too much or bore others; third, she must be clea[n] and adorn herself to please men; and fourth, she should not shirk from her household duties.[226]

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223 Skalla, *supra* note 217, at 337–38 (quoting Ann Noonan, *One-Child Crackdown*, NATIONAL REVIEW, Aug. 16, 2001, *available at* http://www.nationalreview.com/comment/comment-noonan081601.shtml. **R**

224 *See* Mary H. Hansel, Note, *China's One-Child Policy's Effects on Women and the Paradox of Persecution and Trafficking*, 11 S. CAL. REV. L. & WOMEN'S STUD. 369, 378 (2001).

225 *See* Skalla, *supra* note 217, at 343. **R**

226 *Id.*

In addition to being considered second-class citizens, women were bought and sold for their reproductive value. While the family of the bride was paid for their daughter, the bride was forced to submit to her husband's wishes and provide him with children and a ready supply of labor.[227]

Chinese tradition holds that the individual is no more than a "living link in a great chain of being."[228] Because of this, it is believed that the individual has no autonomy with regard to his own body. The body was given by his parents, and held in "trust" for one's sons.[229] Therefore, failing to produce a male heir was regarded as a direct affront to one's ancestors.[230] Importantly, females were "secondary links," only capable of joining the "chain of being" upon death.[231] This tradition of placing the utmost importance on producing a male heir naturally comes into conflict with the policy limiting a couple to just one child because, in theory at least, one-half of all familial chains are cut off.[232]

The Chinese population control measures that are currently in effect are disorganized and contradictory, and oftentimes policies are implemented on an ad hoc basis, at the local level, by local Communist party officials who are conflicted between carrying out the "official" government policy[233] and managing obligations resulting from an antiquated political structure, caught in transition. Despite the extreme measures used to enforce the One-Child Pol-

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227 *See id.*

228 *See* Bongaarts & Greenhalgh, *supra* note 222, at 595. **R**

229 *Id.*

230 *Id.*

231 *Id.* As one woman put it,

> Mothers-in-law love their sons and grandsons, but not their daughters. If a grandson isn't back home on time, the grandmother will worry. If he is sick, she will bring him to the hospital. If it is the granddaughter, no. Our generation treats girls and boys equal. But there is a common sentence in the village: boys are treasure, girls are trouble.

Karen Hardee, Zhenming Xie & Baochang Gu, *Family Planning and Women's Lives in Rural China*, 30 INT'L FAM. PLAN. PERSP. 68, 72 (2004) (citation ommitted)

232 *See* Bongaarts & Greenhalgh, *supra* note 222, at 596. "A one-child limit would imply **R** that fewer than half of all couples will have a surviving son. If this limit were reached, the policy would break over 50 percent of the descent lines, preventing the majority of men from fulfilling their duty to their ancestors . . . ." *Id.*

233 *See* Philip P. Pan, *China Terse About Action on Abuses of One-Child Policy*, WASH. POST, Sept. 20, 2005, at A17. After reports of forced sterilizations by party officials responsible for implementing the One-Child Policy in Linyi province, the Chinese government detained many of these officials to investigate possible abuses of the China policy; no party leaders were detained. *Id.*

icy, numerous exceptions to the law grant couples the right to petition for a second or third child. The most glaring exception is the "daughter-only household exemption."[234] This exemption was first tested in a small rural province of China, but quickly spread to all rural areas of China within a few years.[235] The exemption came about to accommodate the centuries-old belief that failing to provide a male heir dishonors a family's ancestors.[236] However, a permit for this second child is not free, costing at least 4,000 yuan ($500).[237] This creates a substantial burden on rural farming families, who are desperate for a son who can provide both the much-needed labor supply for the farm and support for his parents in their old age.[238] Females cannot provide the latter because they are required to take care of their husbands' parents.[239]

This Chinese tradition of treating females as merely expendable surplus has led to drastic consequences not only for Chinese human rights, but also in terms of the ratio of Chinese males to females. China has dealt for centuries with the adverse affects of male preference, which has resulted in the abandonment or infanticide of countless female children whose only crime was not being born male.[240] China made advances toward a more equal society under Mao Ze-Dong,[241] as evidenced by a decrease in rates of female abandonment and infanticide.[242] However, by the mid-1980s a deficit of one hundred million females resulted from newly acquired technology, giving parents the ability to determine the sex of their child in utero, and the widespread availability of abortion.[243]

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234 *See* Rosemary Santana Cooney & Jiali Li, *Sterilization and Financial Penalties Imposed on Registered Peasant Couples, Hebei Province, China*, 32 STUD. FAM. PLAN. 67, 68 (2001).

235 *Id.*

236 *See* Skalla, *supra* note 217, at 335. **R**

237 *Id.*

238 *See* Hansel, *supra* note 224, at 378. As one author put it, "having a boy child is the best pension a Chinese peasant can get." *Id.* **R**

239 *See* Skalla, *supra* note 217, at 335. **R**

240 *See* Kay Johnson, Huang Banghan & Wang Liyao, *Infant Abandonment and Adoption in China*, 24 POPULATION & DEV. REV. 469, 472 (1998).

241 When the Communists took over China in 1948, they attempted to improve the status of women. *See* Skalla, *supra* note 217, at 344. For example, women were included in the class struggle with the slogan, "women hold up half the sky," signaling an attempt by the Mao Ze-Dong regime to chip away at the traditional patriarchal family. *Id.* **R**

242 *See* Johnson, Banghan & Liyao, *supra* note 240, at 472. **R**

243 *See* Hansel, *supra* note 223, at 376, 379, 383.

Being born is simply the first hurdle Chinese females face. Infanticide and abandonment, on the rise since the mid-1980s, led to the murder of an estimated fifteen million children from the initiation of the One-Child Policy until 1995[244] and one million females are left in orphanages every year.[245] Many of the young girls who are turned over to state-controlled orphanages are destined to die from neglect, starvation, and exposure.[246] In 1991, at the Shanghai Children's Welfare Institute, China's most prestigious orphanage, the death-to-admissions ratio was 77.6%.[247] Additionally, the likelihood that an orphan would survive more than one year was less than fifty percent in 1989, and in some provinces the mortality rate among institutionalized orphans ranged from 59.2% to 72.5%.[248] Females comprise ninety-five percent of the children in orphanages,[249] and unlike many of their male counterparts,[250] these abandoned girls are completely healthy.[251] Nor are these girls always infants.[252] In rural China, girls as old as five have been abandoned after family-planning officials began a "mobilization campaign" to enforce the policy.[253]

According to the Human Rights Watch of Asia, once these girls are admitted to an orphanage they are subjected to deliberately cruel treatment, including starvation, torture, and sexual abuse.[254] Moreover, in a fashion reminiscent of Nazi Germany, children are selected through a process known as "summary resolution" whereby unwanted children are subjected to intentional starvation and dehydration.[255] The Human Rights Watch of Asia has stated,

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244 *Id.* at 380.

245 *Id.* at 381.

246 *See* Skalla, *supra* note 217, at 347. R

247 *See* Hansel, *supra* note 224, at 381. R

248 *See* HUMAN RIGHTS WATCH, DEATH BY DEFAULT: A POLICY OF FATAL NEGLECT IN CHINA'S STATE ORPHANAGES (1996), http://www.hrw.org/summaries/s.china961.html.

249 *See* Skalla, *supra* note 224, at 347. R

250 *See* Kay Johnson, *Chinese Orphanages: Saving China's Abandoned Girls*, 30 AUSTRALIAN J. CHINESE AFF. 61, 62 (1993).

251 *See* Johnson, Banghan & Liyao, *supra* note 240, at 476. R

252 *See* Johnson, *supra* note 250, at 70. R

253 *Id.* The Director of one of the orphanages relayed the particularly tragic story of a five-year old girl who was abandoned by her parents with only the clothes she was wearing and a poem in her pocket. *Id.* The poem, written by her parents, criticized the One-Child Policy, citing it as the reason they were giving up their child. *Id.* The parents expressed hope to one day come back and retrieve their daughter. *Id.*

254 *See* HUMAN RIGHTS WATCH, *supra* note 248. R

255 *See* Hansel, *supra* note 224, at 381. R

> When an orphan chosen in this manner was visibly on the point of death from starvation or medical neglect, orphanage doctors were then asked to perform medical "consultations" which served as a ritual marking the child for subsequent termination of care, nutrition, and other life-saving intervention. Deaths from acute malnutrition were then, in many cases, falsely recorded as having resulted from other causes, often entirely spurious or irrelevant conditions such as "mental deficiency" and "cleft palate."[256]

Additionally, these children are disposed of through the crematorium. This process is run by the Bureau of Civil Affairs, with no oversight, and many times no death certificate has been filled out.[257]

The People's Republic of China appears unwilling to fully abandon its adoption laws in order to effectuate a reversal of these human rights abuses.[258] In order to discourage more unregistered children, China restricts the adoption of these unwanted infants.[259] The only couples permitted to adopt are those who cannot naturally conceive a child,[260] are "free of mental diseases,"[261] and are at least thirty years old.[262] Furthermore, couples who adopt a second child are penalized as if they had given birth to that second child,[263] unless it can be proven that the child was "officially" abandoned and raised in a social welfare institute.[264]

Although infanticide, abandonment, and gender-selective abortion are officially illegal in China,[265] the demographic trends of China's population demonstrate that something besides natural selection is occurring. The accepted standard birth ratio for humans around the world is between 105 and 107 males born per 100 fe-

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256 HUMAN RIGHTS WATCH, *supra* note 248. **R**

257 *Id*.

258 *See* Hansel, *supra* note 224, at 391. **R**

259 *Id.*

260 *Id.*

261 Rachel A. Bouman, Comments, *China's Attempt to Promote Domestic Adoptions: How Does China's One-Child Policy Affect Recent Revisions in China's Adoption Law and Measure up to the Hague Convention?*, 13 TRANSNAT'L LAW. 91, 117 (2000).

262 *Id.*

263 *See* Hansel, *supra* note 224, at 391. **R**

264 *See* Bouman, *supra* note 261, at 118. Prior to this amendment, only special needs children could be adopted by couples who already had one child. *Id.* **R**

265 *See* Skalla, *supra* note 217, at 347. Despite being illegal, prosecutions are few and far between for the practices of infanticide, abandonment, and sex-selective abortion. **R**

males born.[266] This ratio drops to 100 males to 100 females for the "youth population," which are persons between the ages of 15 and 34.[267] China however, has a birth ratio of 116.9 males per 100 females and this number is on the rise.[268] Moreover, one rural province's ratio is 135.6 males per 100 females.[269] Additionally, childhood male to female ratios in China are also very high. Male to female ratios among one- to four- year old children have increased from 107 males per 100 females in 1982, to 109.4 males per 100 females in 1989, to 118.3 males per 100 females in 1995, to the ratio of 120.8 males per 100 females in 2000.[270] These ratios illustrate the nationwide birth-gender gap, with roughly 400,000 to 500,000 more males than females born each year.[271] Despite the widespread view that traditional Asian values lead to this male-preference,[272] there is now a growing preference for females in Japan. One survey found that seventy-five percent of newlyweds are hoping their first child will be a daughter.[273]

The dramatic increase in the gender ratio is even more apparent when birth order is taken into account. The ratio for first births is 107.1 males to 100 females, 151.9 males per 100 females for second births, 160.3 males per 100 females for third births, and 161.4 males per 100 females for fourth births.[274] These trends show that despite the official government policy banning infanticide and gender-selective abortions, these practices continue with impunity.

Such gender imbalances have led to a growing problem in China—the trafficking of tens of thousands of females between the ages of fourteen and twenty-four who are abducted and sold as brides in areas with few females.[275] These young women are lured in with promises of jobs and a better life, but are instead sold like chattel into China's growing prostitution industry[276] or to China's

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266 *See* Andrea den Boer & Valerie M. Hudson, *The Security Threat of Asia's Sex Ratios*, 24 SAIS REV. 27, 28 (2004).

267 *Id.* at 28–29.

268 *Id.* at 33. In 1981 China's birth-sex ratio was 108.5 males per 100 females, and in 1989 it rose to 111.3 males per 100 females. *Id.*

269 *Id.*

270 *Id.*

271 *See* Skalla, *supra* note 217, at 349. **R**

272 *See* Hansel, *supra* note 224, at 387. **R**

273 *Id.*

274 *See* den Boer & Hudson, *supra* note 266, at 33. **R**

275 *See* Hansel, *supra* note 224, at 384. **R**

276 *Id.* at 385.

guang gun-er ("bare branches"), the surplus male bachelors who will never be able to "bear fruit."[277]

Chinese policies have given rise to the massive number of "surplus" males[278] who are unable to marry because there are not enough females, and thus, such men are cast aside by a society that still ties manhood to marriage.[279] This phenomenon has created an environment susceptible to crime, specifically violent crime like rape,[280] which will inevitably lead to dramatic social instability.

C. *Eliminating the 'Abnormal'*

Nature does nothing uselessly.

—Aristotle

Chinese tradition holds societal interests above those of the individual. People who suffer from mental disorders that might disrupt society are heavily stigmatized and isolated.[281] Suicide rates are also very high in China, according to the World Bank's 1990 Global Burden of Disease Study.[282] The study found that China, while making up one-fifth of the world's population, comprised 43.6% of all suicides in the world.[283] Additionally, unlike the rest of the world, suicide in China is committed predominately by females[284]—55.8% of all female suicides in the world, in 1990,

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277 *See* Skalla, *supra* note 217, at 350. **R**

278 *See* Valerie M. Hudson & Andrea den Boer, *A Surplus of Men, A Deficit of Peace: Security and Sex Ratios in Asia's Largest States*, 26 INT'L SECURITY 4, 12 (2002). Hudson and Boer explain that these "surplus males" are,

> [L]iable to come from the lowest socioeconomic class, be un- or underemployed, live a fairly nomadic or transient lifestyle with few ties to the communities in which they are working, and generally live and socialize with other bachelors. In sum, these young surplus males may be considered, relatively speaking, losers in societal competition.

Id.

279 *Id.*

280 *See* den Boer & Hudson, *supra* note 266, at 37. It is a cross-cultural phenomenon that violent crimes are generally perpetrated by young, unmarried, poor males. *Id.* **R**

281 *See* Michael R. Phillips, *The Transformation of China's Mental Health Services*, 39 CHINA J. 1, 10 (1998). In addition, in China, various myths surround the mentally ill given that they are perceived as being "frequently violent or destructive," ill due to "bad 'fate'" or "immoral behavior," and mental illness is thought to be contagious. *Id.*

282 *Id.* at 11.

283 *Id.*

284 *Id.* The total number of official female suicides in the world in 1990 was 330,000—184,000 of these were Chinese women. *Id.* And, although the number of suicides for males is disproportionately higher in China than in the rest of the world (33.9% of all male suicides in 1990 were committed by Chinese men) the rate of suicides for women was 33.5

were carried out by Chinese women.[285] This may be due, in part, to the byzantine administrative system imposed by the Communists, who were unable or unwilling to fully fund medical care, especially mental health care, for decades.[286] This forced people suffering from any mental illness to remain dependent on their families to provide for their well-being.[287] Gradually, the Chinese government is closing community therapy centers and state-funded psychiatric hospitals while promoting privatized health care.[288] The effect of this policy has been a near-complete withdrawal of medical care from China's enormous, rural, and poor population.[289] In addition, psychiatry is held in lower regard than other medical specialties in China,[290] so fewer medical students enter the field, further debilitating an already deficient mental health care community.[291]

China's population controls aim to reduce the number of births while ensuring that children born are only of the highest quality. Centuries of inbreeding in rural communities,[292] a high prevalence of congenital hypothyroidism resulting from lower than normal iodine content in the soil of many rural areas,[293] and hereditary diseases have contributed to higher than normal rates of mental retardation in many rural provinces.[294] In an effort to eliminate this problem, the Chinese government instituted a series of measures including restrictive marriage laws, compulsory (or coercive) sterilizations, and forced abortions.[295]

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per 100,000, while it was 27.2 per 100,000 for males. *Id.* In the rest of the world, the average rates were 12.6 per 100,000 for women and 17.2 per 100,000 for men. *Id.*

285 *Id.*

286 *Id.* at 15.

287 *Id.* at 17.

288 *Id.* at 15–16.

289 *Id.* at 16.

290 *Id.* at 16–17.

291 *Id.* at 16–17. The government has begun forcing students into the field of psychiatry to deal with the paucity of mental health care workers. *Id.*

292 *See* Daniel S. Gewirtz, Note, *Toward a Quality Population: China's Eugenic Sterilization of the Mentally Retarded*, 15 N.Y.L. SCH. J. INT'L & COMP. L. 139, 146 (1994). In many rural villages, potential marriage partners live within a very limited area. *Id.* For generations there was little or no access to the outside world, which led frequently to marriages between close relatives. *Id.*

293 *See id* at 147. Iodine is necessary for proper physical and mental development. *Id.* In some rural areas where the iodine content in the soil is very low, the rate of mental retardation is as high as 17% of the population. *Id.*

294 *See id*. (Approximately 380,000 children are born each year with congenital defects.)

295 *Id.*

China's marriage law, drafted in 1981, forbids the marriage of relatives within three generations.[296] The law also forbids the marriage of those who are mentally retarded, unless both partners agree to sterilization.[297] Furthermore, abortion is strongly recommended for any unborn child found to have a serious genetic defect.[298] Because these laws broadly address a vast array of "abnormalities" and given that such polices are implemented at the local level (like most laws in China), widespread abuse and arbitrary determinations of a person's "defectiveness" have become the norm, rather than the exception.[299]

The Gansu Province in 1988 passed a law mandating the sterilization of certain "intellectually impaired"[300] individuals. The law commanded the sterilization of any person deemed mentally retarded who had already married before the law's passage.[301] Perhaps most horrific is the fact that the law authorized the termination of any pregnancy of a mentally retarded woman, regardless of the stage of fetal development.[302] Anyone who allowed a mentally retarded woman to give birth would be subject to strict economic penalties.[303] Other provinces followed Gansu. Within a few years, one-third of the population of China functioned under laws adopted for these eugenic purposes.[304]

Interest in eugenic principles to promote a mentally and physically fit society is not a new phenomenon in China. For centuries, the Chinese have interwoven holistic folk remedies with various theories about reproductive health in their attempt to promote the welfare of society.[305] This has led to a mindset amongst the Chinese that the interests of society outweigh the rights of the individ-

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296 *Id.*

297 *Id.*

298 *Id.* at 148.

299 *See* Linda Johnson, *Expanding Eugenics or Improving Health Care in China: Commentary on the Provisions of the Standing Committee of the Gansu People's Congress Concerning the Prohibition of Reproduction by Intellectually Impaired Persons*, 24 J. L. & SOC'Y 199, 205 (1997).

300 *Id.* at 207.

301 *See* FRANK DIKÖTTER, IMPERFECT CONCEPTIONS: MEDICAL KNOWLEDGE, BIRTH DEFECTS AND EUGENICS IN CHINA 172–73 (1998).

302 *Id.*

303 *Id.*

304 *See* Gewirtz, *supra* note 292, at 149. **R**

305 *See* DIKÖTTER, *supra* note 301, at 13. **R**

ual.[306] Additionally, women who are incapable of giving birth to healthy children are held responsible because it is believed they have committed some abhorrent wrong.[307]

Health manuals in China promote unsubstantiated claims about the reasons for birth defects, including one, that a child conceived by an intoxicated couple will be inferior[308] and two, that a child conceived by anyone under the legal marriage age will be deficient.[309] A third claim was made that there are three biological clocks responsible for intelligence, physical strength, and mood, and only when these three clocks are at their peak is conception desirable.[310] Moreover, these same health manuals transform "normality" and "abnormality" into medical terms; even the slightest "defect," thought to be caused by a "hereditary disease," will invoke the label of "abnormal" and termination of the pregnancy will be recommended.[311]

Largely as a result of the One-Child Policy and the drive for "superior" births, focus has shifted in China from preventing health defects to simultaneously promoting socially desirable children.[312] To this end, many in China are returning to folk notions of maternal health and maternal influence on the fetus in utero. It is believed that there is a connection between the mother's emotions during pregnancy and the health and physical fitness of the child.[313] To support this theory, numerous "scientific" studies have been conducted, including one that compared the average IQs of children born in a region devastated by an earthquake, to a second unaffected group of children.[314] The first group had a lower aver-

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306 *See* Hansel, *supra* note 224, at 374–75. The 1982 Constitution of the People's Republic of China mandates that families not only practice family planning but that they also use some form of birth control. *Id.* at 371, 374-75. This came on the heels of the 1980 Marriage Law that forbids marriage before the age of twenty-two for males and twenty for females. *Id.* at 371. **R**

307 *See* DIKÖTTER, *supra* note 301, at 130. **R**

308 *Id.* at 131.

309 *Id.* at 131–32.

310 *Id.* at 132–33.

311 *Id.* at 135. Medical textbooks affirm these principles by classifying the following conditions under the umbrella of "defective birth":"'small ears,' 'asymmetrical size of the ears,' 'primitive shape of the ears,' 'low-set ears,' 'aurical tags,' [and] 'preaurical fistulas,' or 'earlobe creases' . . . ." *Id.*

312 *Id.* at 145.

313 *Id.* at 146.

314 *Id.* at 146–47.

age IQ, illustrating that a trauma that causes emotional strain on women can adversely affect the intelligence of the unborn baby.[315]

There is also a growing movement in China supporting euthanasia for newborn infants deemed "defective,"[316] evidenced by an increasing number of academic journal articles by respected scientists, physicians, and demographers propounding this approach. According to such scholars, these defectives have "zero worth," given that they are a financial burden to society, and thus, society has the right to eliminate them in order to preserve the collective good.[317] Euthanasia is seen as the logical solution to defective births that have gone undetected during the pregnancy, precluding abortion as the answer.[318] Over the past twenty years there has also been an increase in the abandonment of infants with minor abnormalities, such as a cleft palate or harelip.[319]

D. *Methods Used to Implement Family Planning*

Violence is the last refuge of the incompetent.

—Isaac Asimov

China's One-Child Policy has created an environment in which discrimination against women and children is allowed to go unchecked. The central feature of China's Family Planning Policy ("FPP") is the One-Child mandate and strict adherence to that policy is obligatory. Officials are penalized severely for allowing FPP violations, including the forging of "illegal" birth certificates, allowing the live birth of a fetus that should have been aborted, and missing state-mandated birth-quotas.[320] By contrast, public officials who violate human rights are subject to no such punitive measures. [321] Moreover, the One-Child Policy is implemented through party directives that are regarded as "superior to legislation and codified laws."[322] This creates an atmosphere in which local party

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315 *Id.*

316 *Id.* at 160.

317 *Id.* at 160–61.

318 *Id.*

319 *Id.* at 181.

320 *See* Xiaorong Li, *License to Coerce: Violence Against Women, State Responsibility, and Legal Failures in China's Family-Planning Program*, 8 YALE J.L. & FEMINISM 145, 163–64 (1995).

321 *Id.* at 164–65.

322 *Id.* at 150.

officials are driven to meet these "top-down," imposed quotas, regardless of the means used.[323]

Local family planning officials, 300,000 full-time workers, and hundreds of thousands of part-time "cadres," are responsible for enforcing these policies.[324] These cadres find women with illegal pregnancies—"illegal" either because they are not registered with the government[325] or because the parents are believed to have "hereditary" defects[326]—and report them to officials who then obtain "voluntary consent" to terminate the pregnancies.[327] As a means of intimidation, and to keep the public vigilant in abstaining from potentially illegal procreation, family-planning workers are known to publish the menstrual cycles of fertile women, along with their preferred choice of birth control.[328] Steven W. Mosher, President of the non-profit Population Research Institute, provides a cogent account of "voluntary compliance" in China:

> There are cases in China where brute force is used to perform abortion and sterilization. But more commonly, the Chinese government abides by its own Orwellian definition of voluntary, which is to say that you can fine the woman; you can lock her up; you can subject her to morning-to-night brainwashing sessions; you can cut off her electricity to her house; you can fire her from her job; you can fire her husband from his job; and you can fire her parents from their jobs. All of this psychological mauling, sleep deprivation, arrest, and grueling mistreatment is inflicted upon these women in order to break their will to resist. But as long as the pregnant women walk the last few steps to the

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323 *See* Skalla, *supra* note 217, at 337. **R**

324 *See* Elina Hemminki, Zhuochun Wu, Guiying Cao, & Kirsi Viisainen, *Illegal Births and Legal Abortions—the Case of China*, 2 REPROD. HEALTH (2005), *available at* http://www.reproductive-health-journal.com/content/2/1/5.

325 *See* Li, *supra* note 320, at 152. For a child to be legally approved of by the government, the mother must have permission from local authorities prior to conception and must also undergo testing to ensure that neither she, nor the child, carries a hereditary defect. *Id.* **R**

326 Having the following abnormalities provided grounds for prohibiting procreation: deafness, muteness, schizophrenia, manic depression, and heart disease. *See* Li, *supra* note 320, at 161. Shanxi province demands sterilization "'if one spouse is insane (*chi*), an idiot (*dai*), or a fool *(sha*), or has any other hereditary disease likely to cause severe defects in descendants . . . .'" *Id.* (citation ommitted). **R**

327 Although the Chinese government claims that its family planning policy "'combines government guidance with the voluntary participation of the people,'" numerous reported accounts indicate that "voluntary" is a malleable term of art. *See* Skalla, *supra* note 217, at 339 (citation ommitted). **R**

328 *See* Hansel, *supra* note 224, at 373. **R**

> local medical clinic under their own power, then the abortions that follow are said to be "voluntary."[329]

If none of these tactics work to gain the woman's "consent" to abort, local government officials may resort to "physical brutality, property destruction, detention, beatings and demolition of residences."[330]

In addition to being subject to overt human rights abuses, women also bear a disproportionate responsibility for contraception.[331] Since use of contraception is mandatory, females with one child are directed to use inter-uterine devices and couples with two or more children are to be sterilized.[332] Women are five times as likely to be sterilized, despite the fact that a vasectomy is far safer than any surgical contraceptive method a woman may choose.[333] Moreover, in accordance with Chinese tradition that the individual should submit himself or herself to the greater good of society,[334] women are treated as objects of "state contraceptive control,"[335] not as the liberated individuals the One-Child-Policy was supposed to beget.[336]

In 1995, the State Birth Planning Commission ("BPC") began pilot projects to improve the "quality of care," or *youzhi fuwu*,[337] and place more emphasis on women's choice.[338] However, the All-China Women's Federation, which is the preeminent promoter of women's issues in China, refuses to cooperate with the BPC.[339] The BPC purportedly "treats population targets as a blind obsession"[340] and is incapable of reversing twenty years of practice by

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329 Skalla, *supra* note 217, at 339–40 (citing Scott Weinberg, *An End to the One-Child Quota?*, Feb. 2000, *available at* http://www.catholic.net/rcc/Periodicals/cwr/Feb2000/Dossier3.html). R

330 *See* Skalla, *supra* note 217, at 340. There are numerous reports that when a woman refuses to submit, her home and the homes of her relatives are torn down so they will not be able to provide her with shelter. *Id.* Furthermore, anyone that does provide her with shelter or any help is subject to the same strict penalties. *Id.* R

331 *See* Susan Greenhalgh, *Fresh Winds in Beijing: Chinese Feminists Speak Out on the One-Child Policy and Women's Lives*, 26 SIGNS 847, 870 (2001).

332 *See* Hardee, Xie & Gu, *supra* note 231, at 70–71. R

333 *See* Greenhalgh, *supra* note 331, at 870. R

334 *Id.*

335 *Id.* at 854.

336 *Id.* at 853.

337 *Id.* at 856.

338 *Id.*

339 *Id.* at 877.

340 *Id.*

switching to a "bottom-up, client-focused service orientation."[341] In 2000 and 2001, the government instituted new directives in an attempt to soften the image of the One-Child Policy.[342] But, notably legislators remain silent on the issue of imposing sanctions and penalties on officials guilty of violating human rights.[343] Essentially, since these new directives are "neither a tightening nor a loosening" of the policy,[344] they simply turn attention toward general reproductive health and "reaffirm the program's historic mission"[345] by providing incentives for couples in compliance,[346] rather than focusing strictly on birth control.[347] Despite this softer side of reproductive subordination to the state, violations of human rights continue relatively unimpeded and unpunished as reformers fall victim to hard-liners who maintain determined in their quest for population control.[348]

In 2001, Huaiji, a Chinese province with a population of roughly one million, became the epicenter of the drive to meet the population quota.[349] Halfway through the year, family planning officials in the province were ordered to conduct 20,000 more abortions by year's end, or face severe penalties.[350] To deal with this "emergency," local county officials withheld parts of the salaries of some 15,000 government employees, including teachers and police and fire personnel, to fund the purchase of ultrasound machines and expedite these abortions—given that more efficient technology enables "doctors to order terminations on the spot."[351] In addition to carrying out forced abortions, physicians were also directed to sterilize every woman as soon as she gave birth.[352]

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341 *Id.* at 874–75.

342 *See* Edwin A. Winckler, *Chinese Reproductive Policy at the Turn of the Millennium: Dynamic Stability*, 28 POP. DEV. REV. 379, 380 (2002).

343 *See* Christie N. Love, *Not in Our Country? A Critique of the United States Welfare System Through the Lens of China's One-Child Policy*, 14 COLUM. J. GENDER & L. 142, 152 (2005).

344 *See* Winckler, *supra* note 342, at 380. **R**

345 *Id.* at 390.

346 *Id.* at 394.

347 *Id.* at 399.

348 *See* Philip P. Pan, *Chinese to Prosecute Peasant Who Resisted One-Child Policy*, WASH. POST, July 8, 2006, at A12.

349 *See* Damien McElroy, *Chinese Region 'Must Conduct 20,000 Abortions': Hated Family Planning 'Police' Crack Down on Rural Area Where Families Average Five Children*, SUNDAY TELEGRAPH (LONDON), Aug. 5, 2001, at 30.

350 *Id.*

351 *Id.*

352 *Id.*

Huaiji has not been the only province forced to undergo such harsh measures. These implementation measures are routinely practiced throughout China's rural provinces, where violations of the One-Child Policy are most prevalent. In 2005, Chen Guangcheng, a blind activist and self-educated lawyer,[353] launched an unprecedented effort to shed light on the abuses perpetrated by the Chinese government through a public campaign to end these atrocities.[354] Guangcheng uncovered widespread abuses including forced sterilizations, forced late-term abortions,[355] and intimidation of families.[356] The Chinese government has repeatedly imprisoned Guangcheng for violating the most fundamental policy of the communist government—speaking to Western newspapers and United States diplomats.[357]

In July 2006, the Chinese government decided to bring criminal charges against Guangcheng for leading a protest against local Linyi officials, among other accusations.[358] Due to the courageous protests of attorneys, scholars, and civic activists from across China and based on the support of diplomats from the United Nations and the United States the Chinese government was finally convinced to allow Guangcheng to meet with his attorney.[359] However, Guangcheng and his attorney were prohibited from discussing his defense. When the attorney traveled to

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353 Since Guangcheng is blind, he was not able to study law in any university. *See Only the 'Medically Fit,' infra* note 365. **R**

354 *See* Philip P. Pan, *Who Controls the Family?—Blind Activist Leads Peasants in Legal Challenge To Abuses of China's Population-Growth Policy*, WASH. POST, Aug. 27, 2005, at A1.

355 *See* Michael Sheridan, *China Shamed by Forced Abortions*, SUNDAY TIMES, Sept. 18, 2005, at 27. Reports abound of women being forced to undergo late-term abortions. *Id.* One woman, Li Juan, in her ninth month of pregnancy, was pinned down so family panning officials could insert a poison-filled syringe in her abdomen. *Id.* "At first I could feel my child kicking a lot. Then after awhile I couldn't feel her kicking anymore," said Juan. *Id.* The next day she gave birth to a dead baby, but just to be sure, officials submerged the baby into cold water for several minutes. *Id.*

356 *Id.*

357 *See* Philip P. Pan, *Rural Activist Seized in Beijing—Legal Campaign Has Targeted Forced Sterilization, Abortion*, WASH. POST, Sept. 7, 2005, at A22. Guangcheng instituted a class-action lawsuit on behalf of the citizens of Linyi Province, China. *Id.* In an effort to bring attention to the suit, he spoke with *Time* magazine, the *Washington Post*, and diplomats at the U.S. Embassy. *Id.* Thereafter, he was arrested, detained, and beaten, but because Guangcheng's story had already reached the Western press, the Chinese government admitted to his being in custody and released him to house arrest. *Id.*

358 *See* Phillip P. Pan, *Trial of Blind Activist Set to Highlight China's Stance on Hard-Liners, One-Child Policy*, WASH. POST, July 7, 2006.

359 *Id.*

Guangcheng's home village to gather evidence for the case, he was assaulted by local thugs, presumably at the direction of local officials.[360]

Guangcheng has been pilloried by Linyi party officials, who describe him as a tool of "foreign anti-Chinese forces."[361] These officials have created such an intense environment of fear that no one is willing to intervene on Guangcheng's behalf.[362] At the behest of local party officials of Linyi, the Foreign Ministry and the Propaganda Department of China have banned all discussion of Guangcheng's case in the state media and on the Internet.[363] Guangcheng's wife, Yuan Weijing stated, "[e]verything that has happened runs counter to Hu Jintao's [President of the People's Republic of China] talk of democracy and governing by law. We live in a nation without law, a nation without morality."[364]

The PRC adopted yet another discriminatory measure by restricting certain individuals from entering universities.[365] Various regulations are imposed on the admittance procedures of universities, including categorical denials of admissions to certain groups deemed inferior and not worthy of an education.[366] For example, applicants "whose legs vary in length by more than two inches" or whose spine is excessively curved, are prohibited from taking courses in geology, law, and civil engineering.[367] Applicants who are color-blind are not allowed in business courses.[368] Anyone with cancer, epilepsy, high blood pressure, or any mental disorder will be prevented from attending universities altogether.[369] These policies were adopted to alleviate the shortage of places in universities for Chinese students.[370] Presently, there are only enough seats available every year for five percent of the student popula-

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360 *Id.*

361 *Id.*

362 *Id.* As one Chinese scholar stated, "In the current political environment, in this political system, no official has any incentive to help him." *Id.* He continued, "The risks to your career are great, and there's little to be gained." *Id.*

363 *Id.*

364 *Id.*

365 *See Only the 'Medically Fit' Can Go to College, China Decrees*, SUNDAY TELEGRAPH (London), June 24, 2001, at 27.

366 *Id.*

367 *Id.*

368 *Id.*

369 *Id.*

370 *Id.*

tion.[371] As one university official stated, the disabled are excluded to prevent the "clogging up" of universities.[372] Allowing one disabled child "only encourages more to apply."[373]

E. *United States vs. China*

> *There is a tendency for the world to say to America, "the big problems of the world are yours; you go and sort them out," and then worry when America wants to sort them out.*
>
> —Tony Blair

China's One-Child Policy and its resulting human rights violations have brought about condemnation from Western nations, particularly the United States. The conflict over human rights between the United States and China arises out of each country's diverging concepts of such rights.[374] Whereas, in the United States, "[w]here human rights are asserted as claims by individuals and against the power of the state"[375] the Chinese believe that it is the duty of the state to provide for the welfare of people. Because of this, human rights in China are tied inextricably to state authority.[376]

With the United States acting as the driving force, the United Nations in 1969 created the United Nations Population Fund ("UNFPA") to assist developing nations in enacting family planning measures.[377] However, in the mid-1980s the United States began withholding funds from the UNFPA when Congress and the Reagan Administration adopted a new policy denying funds to any organization that "supports or participates in the management of a program of coercive abortion or involuntary sterilization."[378] UNFPA funding was reinstated during the Clinton Administration,

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371 *Id.*

372 *Id.*

373 *Id.*

374 *See* Zhou Qi, *Conflicts over Human Rights Between China and the US*, 27 HUM. RTS. Q. 105, 113 (2005).

375 *Id.* (quoting Susan Mendus, *Human Rights in Political Theory*, *in* POLITICS AND HUMAN RIGHTS 12 (David Beetham ed., 1995)).

376 *See* Qi, *supra* note 374, at 113. **R**

377 Barbara B. Crane & Jason L. Finkle, *The United States, China, and the United Nations Population Fund: Dynamics of US Policymaking*, 15 POPULATION & DEV. REV. 23, 23 (1989).

378 *Id.* at 24 (citing the Kemp-Inouye-Helms amendment to the Supplemental Appropriations Act for Fiscal Year 1985, Pub. L. No. 99-88, 99 Stat. 293).

but American funding for the project was again withdrawn immediately after George W. Bush became President in 2001.[379]

For years, the United States has been a vocal critic of human rights violations in China. The 2005 U.S. State Department Report on Human Rights Abuses in China highlighted numerous abuses by Chinese officials.[380] Various human rights violations are outlined in the Report such as: discrimination against women, children and the mentally disabled; trafficking in women; and forced sterilizations and abortions.[381] The U.S. State Department concluded that the central Chinese government was not only silent on the matter of punitive action for officials accused of human rights violations, but in fact, the "rewards or penalties" based on meeting population quotas have created an apparent de facto policy of willful ignorance.[382]

The PRC officially dismisses such claims as meritless[383] by repeatedly pointing to official government policies outlawing gender-selective abortions,[384] or sporadically prosecuting those "conducting family planning work" who have "violated the law."[385] However, numerous reports show that women are brutally coerced into late-term abortions and forced sterilizations.[386] On January of 2006, in complete disregard for Western concerns about these human rights violations, Zhang Weiqing, Minister of the State Commission of Population and Family Planning, stated that the One-Child Policy would remain in effect for the foreseeable future.[387]

IV. TOMORROW

Our children's children will hear a good story.

—Richard Adams

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379 *See* David Rennie, *US Cuts Off UN's Family Planning Aid*, DAILY TELEGRAPH (London), July 23, 2002, at 11.

380 *See* U.S. DEP'T OF STATE, *supra* note 6, § 1-f. **R**

381 *Id.*

382 *Id*.

383 *See US Accusations Over Birth Policy Baseless*, CHINA DAILY (Beijing), June 24, 2005.

384 *See Jail for Those Who Help Sex Selection*, CHINA DAILY (Beijing), Dec. 26, 2005, at 2.

385 *See* Pan, *supra* note 233, at A17. **R**

386 *See* Hannah Beech, *Enemies of the State?*, TIME, Sept. 19, 2005, at 58.

387 *See Minister Says One-Child Rule Will Remain in Coming Years*, CHINA DAILY (Beijing), Jan. 7, 2006, *available at* http://english.peopledaily.com.cn/200601/07/eng20060107_233576.html.

A. *Ethical Considerations*

> *When we are planning for posterity, we ought to remember that virtue is not hereditary.*
>
> —Thomas Paine

Is eugenics, albeit grounded in more than speculative pseudoscience and disregard for human rights, still extant in the United States of America? When Oliver Wendell Holmes, Jr. penned his infamous witticism that "[t]hree generations of imbeciles are enough,"[388] he no doubt envisioned a utopian dreamland, filled with intellectual heavyweights barren of mental misfits.

The line between social and medical "disability" is not only blurry, it is also an arbitrary gap, susceptible to manipulation by callous politicos and social engineers. The "characteristic of disability"[389] lies in the eye of the beholder. People conforming to societal and medical norms serve as judge, jury, and executioner of whomever they deem sick or disabled. Ask someone with Down Syndrome, Spina Bifida, or Achondroplasia (*dwarfism*) if they believe that they are "sick" or "disabled."[390] Should someone with Diabetes, Sickle cell anemia, or Hemophilia be restrained from procreation? If "quality of life" is the basis for determining who should procreate, whose "quality of life" are we to use as the standard: that of Brad Pitt and Angelina Jolie?[391] Keep in mind that to a couple with achondroplasia,[392] bearing a child of "normal" size would be abnormal and perhaps undesirable.[393]

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388 Buck v. Bell, 274 U.S. 200, 207 (1927).

389 Adrienne Asch, *Prenatal Diagnosis and Selective Abortion: A Challenge to Practice and Policy*, 89 AM. J. PUB. HEALTH 1649, 1651 (1999).

390 *Id.*

391 In the summer of 2006, the world awaited the birth of the first child of Brad Pitt and Angelina Jolie. Even before birth, the child was lauded as the "perfect baby." As one gossip columnist lamented, "[t]his week's New York magazine wades knee-deep into the Messiah-level anticipation accompanying the impending birth of Brad Pitt and Angelina Jolie's forthcoming biological offspring, the perfect being expected to emerge from Jolie's womb, cut its own umbilical cord, and toddle off into the world to take care of the business of saving mankind." *Paparazzi Await Birth of Jolie and Pitt's Messiah*, DEFAMER, http://www.defamer.com/hollywood/angelina-jolie/paparazzi-await-birth-of-jolie-and-pitts-messiah-166361.php (last visited Aug. 3, 2006).

392 *See* Ronald M. Green, *Parental Autonomy and the Obligation Not to Harm One's Child Genetically*, 25 J.L. MED. & ETHICS 5, 6 (1997). If two people with dwarfism conceive four children, on average, at least two of them will have dwarfism, and one child will be of normal height. *Id.*

393 *Id.* In yet another example of this mentality, an American lesbian couple, both of whom were deaf, wanted to have a deaf child. *See* A. Holland & I.C.H. Clare, *The Human Genome Project: Considerations for People with Intellectual Disabilities*, 47 J. INTELL. DISA-

In 1990, the United States began funding the Human Genome Project to map the 100,000 human genes so as to write the "book of life."[394] The project aimed to create an index of genes so that parents could "pick, add, or remove" genes to suit their desires.[395] Such an endeavor places the practice of prenatal genetic testing at the forefront of the ethical debate surrounding reproductive rights. Some have argued that the widespread use of prenatal genetic testing in conjunction with on-demand abortion will inevitably lead to social stratification; beholding inferior people to the will of superior people, creating potential exploitation and discrimination.[396] Others take the position that parents have a duty to their offspring "not to inflict genetic harm knowingly or negligently on their children."[397]

These divergent positions have recently been implemented and exemplified by two nations. The Republic of Ireland enacted a policy to protect physicians who refuse to provide genetic counseling if that physician believes such counseling will increase the incidence of abortion.[398] Conversely, in the People's Republic of China, while prenatal genetic testing is proscribed for gender purposes, it remains mandatory for eugenical purposes.[399]

The United Kingdom regulates all assisted reproduction techniques including pre-implantation testing. An embryo may only be implanted if approved by the regulatory agency, the Human Fer-

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BILITY RES. 515, 521 (2003). They used sperm donated by a man who was also deaf. *Id.* The child conceived was mostly deaf, but did have some hearing in one ear. *Id.*

394 Parendi Mehta, *Human Eugenics: Whose Perception of Perfection?*, 33 HIST. TCHR. 222, 226 (2000).

395 *Id.* Parents could choose everything from eye color to intelligence. *Id.*

396 *See* John R. Harding, Jr., *Beyond Abortion: Human Genetics and the New Eugenics*, 18 PEPP. L. REV. 471, 498, 499 (1991).

397 *See* Green, *supra* note 392, at 6. Green argues that instead of comparing a child born with a disabling condition to the child not born at all, focus should shift to a comparison of that disabled child with the "reasonably expected health status of others in the child's birth cohort." *Id.* at 8. **R**

398 *See* Stacy Klein, Note, *Prenatal Genetic Testing and Its Impact on Incidence of Abortion: A Comparative Analysis of China and Ireland*, 7 CARDOZO J. INT'L & COMP. L. 73, 87 (1999). Abortion remains illegal in Ireland and the Irish Medical Organization stated in 1996 that prenatal genetic tests "discriminate against and constitute a threat to the life of the unborn patient." *Id.*

399 The Chinese, unlike many Europeans and Americans, have a "sense of responsibility to society and family which supersedes any perception they may have of their own personal rights." *See id.* at 82–83 (quoting James H. Scheuer, *China's Family Planning and the U.S.*, N.Y. TIMES, Jan. 24, 1987, at 27).

tilisation and Embryology Authority (HFEA).[400] However, the HFEA demands that testing only be done for serious genetic conditions.[401] This policy was questioned in 2001, when a couple aborted a six-month old fetus because it was found to have a harelip.[402] This late-term abortion brought on widespread condemnation because in Great Britain it is illegal to abort a fetus over the gestational age of twenty-four weeks unless "there is a substantial risk that if the child were born it would suffer from such physical or mental abnormalities as to be seriously handicapped."[403] Despite the outrage in Great Britain, the prosecutor did not file charges against the parents or the physician.[404] It has been posited that this inaction "implies that *any* abnormality can qualify as a serious handicap because seriousness is determined not by its impact on the disabled person's life chances but by the parents' reluctance to be inconvenienced by it."[405]

In the United States, while compulsory sterilization is viewed as an antiquated and simplistic approach undertaken on a relatively infrequent basis on institutionalized, aberrant patients, prenatal genetic testing, and more recently, pre-implantation genetic testing enable couples to practice eugenics on their own accord, free of government intervention. For example, in the United States it has been reported that more than eighty percent of babies pre-natally diagnosed with Down syndrome are aborted.[406] As prenatal genetic testing becomes more common and the ability to detect fetal abnormalities improves, the number of "eugenic abortions" in the United States is likely to increase.[407] Others argue that parents have the right to choose their child's schooling, healthcare, and extracurricular activities while generally guiding most of their child's development. It only stands to reason that as parents attempt to make their children "the best that they can be,"[408] they

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400 *See Pre-Implantation Genetic Testing*, 111 BJOG: AN INT'L J. OBSTETRICS & GYNECOLOGY 1165, 1169 (2004).

401 *Id.*

402 *See* Lois Rogers, *Police to Probe Late Abortion of Harelip Baby*, SUNDAY TIMES (London), Oct. 27, 2002, at News 13.

403 Editorial, George F. Will, *Eugenics Abortion: Is Perfection an Entitlement?*, WASH. POST, Apr. 14, 2005, at A27.

404 *Id.*

405 *Id.*

406 *Id.*

407 *See* Klein, *supra* note 398, at 76. **R**

408 Dan W. Brock, *Shaping Future Children: Parental Rights and Societal Interests*, 13 J. POL. PHIL. 377, 381 (2005).

should accordingly be able to choose which embryo to implant or whether to continue a pregnancy.[409]

V. Conclusion

We have come a long way since the sterilization of Carrie Buck. While the practice of sterilization in the United States has fallen out of vogue, the desire to design the perfect human, while shaping the perfect society, remain quintessential goals of the reproductive process. In the eighty years since *Buck v. Bell*, the world has become all too familiar with the disastrous consequences of attempts to create a human hierarchy by segregating, forcibly sterilizing, aborting, and mass murdering those perceived as *unworthy*. Whatever the purpose, when a society declares that a group or groups of individuals are "abnormal," "defective," "disabled," "unfit," "impaired," "inadequate," "retarded" or otherwise designated as *others*,[410] in a vain attempt at social engineering for the "best interests" of the human race by merging science, politics, and sociology, there lies the breeding ground for a society that is no longer advanced and civilized, but has instead reverted to the barbarism and savagery representative of the most primitive of species.

> *The true civilization is where every man gives to every other every right that he claims for himself.*
>
> —Robert Ingersoll

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409 *See id.* at 380–381.

410 *See* Lucinda Vandervort, *Reproductive Choice: Screening Policy and Access to the Means of Reproduction*, 28 Hum. Rts. Q. 438, 439 (2006). Defining *others*, Vandervort states, "[t]he existence of 'others' and social relationships with 'others' constitute essential aspects of what it is to be a person in the social sense, as opposed to what it is to be a human being in a bare biological sense." *Id.*

THE FAILURE OF THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS AND A PROPOSAL FOR A NEW UNIFORM GLOBAL CODE IN INTERNATIONAL SALES LAW

*Christopher Sheaffer**

> Cross-border trade has become the new frontier, where opportunities abound for those able to adapt to the rules of international trade.[1]
>
> The impulse to reduce diversity among the legal systems governing commerce has manifested itself for as long as people have traded across political boundaries.[2]

I. INTRODUCTION

In an age of unprecedented globalization, the world has become an increasingly "small" place to conduct business.[3] The click of a button can now instantaneously create a contract for the transnational sale of goods.[4] As a result, when commercial disputes arise, it is often unclear in what manner international parties should resolve disagreements and, in doing so, what substantive law should apply.

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* I want to thank Professor Curtis Pew for all his help regarding international sales law and international commercial arbitration.

1 V. Susanne Cook, *CISG: From the Perspective of a Practitioner*, 17 J.L. & COM. 343, 343 (1998).

2 Paul Stephan, *The Futility of Unification and Harmonization in International Commercial Law*, 39 VA. J. INT'L L. 743, 744 (1999).

3 John Felemegas, *The United Nations Convention on Contracts for the International Sale of Goods: Article 7 and Uniform Interpretation*, *in* REVIEW OF THE CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 2000-2001 130 (Pace Int'l L. Rev. ed., 2002).

> Today, information technology and Internet services are changing the face not only of consumer practices, but also that of commercial ones. The dynamic growth of business-to-business electronic commerce has opened wide the road to a single, truly global market like never before. Merchants can now buy and sell in a bigger market with greater speed.

Id.

4 Transactions conducted over the Internet, even though not technically cross-border transactions, should still be considered international when involving parties who live in different countries. Michael Joachim Bonell, *Do We Need a Global Commercial Code?*, 106 DICK. L. REV. 87, 93 (2006) [hereinafter Bonell, *Global Commercial Code*].

International trade requires a separate regulatory scheme due to the fact that the contractual parties themselves are international in nature. Consequently, parties may be subject to any number of substantive laws that govern their contractual dealings. It is therefore necessary to harmonize a set of international rules specifically promulgated for international transactions.

Presently, the United Nations Convention on Contracts for the International Sale of Goods ("CISG" or "Convention") is the most globally recognized international commercial code.[5] The CISG is a sales instrument created to govern international commerce and replace applicable domestic law governing transnational contracts.[6] However, disagreements regarding the CISG have undermined the drafters' overall intentions, as the purpose of the Convention was the creation of a uniform law. In particular, disputes have arisen with respect to linguistic inconsistencies between the Convention's multiple drafts, contradictions within provisions of the CISG,[7] and conflicting judicial interpretations.

The most problematic of these issues has been the variant judicial interpretations of Article 7—the result of ambiguous methodology with regard to the provision's application.[8] In order to maintain a relatively flexible code, agreeable to various adopting states, the CISG was purposefully left incomplete in many respects.[9] The drafters included Article 7 to fill these "gaps," stating

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5 United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, S. TREATY DOC. NO. 98-9, 1489 U.N.T.S. 3 U.N. Doc. A/CONF. 97/18 [hereinafter CISG].

6 The goal of uniformity is evidenced in the CISG preamble, which states that the purpose of the Convention is "the adoption of uniform rules which govern contracts for the international sale of goods and take into account the different social, economic and legal systems . . . ." CISG Preamble, *available at* http://cisgw3.law.pace.edu/cisg/text/preamble.html (last visited Mar. 20, 2007).

7 For example, with regard to the inclusion of price, Article 14(1) states that a proposal must be sufficiently definite in that it fixes or provides for a determination of the quality and the price. CISG, *supra* note 5. Article 55 states, however, that where price is not provided by the parties, the price will be that which is generally charged at the time of the contract; acceptable in the trade. *Id.* It is obvious from this conflicting wording that it would be impossible for a court to determine whether a stated price is required for a contract to exist where one part of the code says it must be included but another gives a remedy for a situation where parties fail to agree on that price. *Id.* R

8 *See infra* Part III.A.

9 Anthony J. McMahon, Note, *Differentiating Between Internal and External Gaps in the U.N. Convention on Contracts for the International Sale of Goods: A Proposed Method for Determining "Governed By" in the Context of Article 7(2)*, 44 COLUM. J. TRANSNAT'L L. 992, 999–1001 (2006).

that where the Convention has not addressed a particular issue, the Convention should be interpreted in conformity with the CISG's "international character and to the need to promote uniformity in its application and the observance of good faith in international trade."[10] Unfortunately, the interpretation of domestic law and traditions differs drastically depending on the jurisdiction, especially when good faith is interposed with the formal requirements of an enforceable contract.[11]

Proponents for development of a more stringent global commercial code argue that doing so would provide security and predictability in international litigation.[12] For example, the Uniform Commercial Code ("UCC"),[13] the domestic commercial law in the United States, respects the sovereignty of fifty independent states while preserving a uniform codification of law.[14] Critics, on the other hand, argue that flexible regulations permit the maintenance of international sovereignty,[15] citing the fact that many countries rule solely on the basis of their domestic legal traditions.[16] As such, many jurisdictions, rarely called upon to adjudicate international commercial disputes, will continue to misinterpret international commercial law regardless of any reformation.[17]

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[10] CISG, *supra* note 5, at art. 7 **R**

[11] *See id.* at art. 4 (indicating that the code does not address which formal requirements are necessary to complete an enforceable contract).

[12] Ole Lando, *CISG and Its Followers: A Proposal to Adopt Some International Principles of Contract Law*, 53 AM. J. COMP. L. 379, 384–85 (2005).

[13] Produced by the National Conference of Commissioners for Uniform Sales Laws ("NCCUSL") and American Law Institute ("ALI"), the Uniform Commercial Code is the leading source of commercial law within the United States. It is divided into nine articles, respectively: (One) General Provisions; (Two) Sales; (Three) Negotiable Instruments; (Four) Bank Deposits; (Five) Letters of Credit; (Six) Bulk Transfer and [Revised] – Bulk Sales; (Seven) Warehouse Receipts, Bills of Lading and Other Documents of Title; (Eight) Investment Securities; and (Nine) Secured Transactions. *See* U. C. C. arts. 1-9 (1977), *available at* http://www.law.cornell.edu/ucc/ucc.table.html (last visited Mar. 20, 2007) [hereinafter UCC].

[14] John Murray, *The Neglect of CISG: A Workable Solution*, 17 J.L. & COM. 365, 366 (1998).

[15] "[I]t could be argued that the creation of international commercial law is the vanishing point of sovereignty in that nation states are becoming increasingly less important in the creation of international commercial law with the growth of regional organizations, non-state actors, and international arbitration." Sandeep Gopalan, *The Creation of International Commercial Law: Sovereignty Felled?*, 5 SAN DIEGO INT'L L.J. 267, 268 (2004). *See also* McMahon, *supra* note 9, at 1000. **R**

[16] Lando, s*upra* note 12, at 386. **R**

[17] *See infra* Part III.D.

To date, seventy-one nation states have adopted the CISG as the substantive law governing transnational commerce,[18] clearly demonstrating worldwide eagerness to maintain a system of rules and regulations for the sale of goods in international trade. Nevertheless, problems underlying the CISG have led more than thirty percent of these nations to opt out of certain provisions of the Convention, essentially creating a series of "mini codes" instead of a single applicable uniform rule.[19] Similarly, many attorneys have chosen to contractually opt out of the CISG in favor of more familiar laws, such as the UCC, further diluting the Convention's authority over international trade.[20]

This absence of a consistent and acceptable set of international commercial laws is inimical to international development.[21] Fortunately, there is a "workable solution"[22]—a revolutionary Global Code governing the international sale of goods to harmonize the current state of commercial law. This Global Code would create

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[18] *See* Table of Contracting States, *available at* http://www.cisg.law.pace.edu/cisg/countries/cntries.html (Mar. 20, 2007) ((Argentina: Jan. 1, 1988) (Australia: April 1, 1989) (Austria: Jan. 1, 1989) (Belarus: Nov. 1, 1990) (Belgium: Nov. 1, 1997) (Bosnia- Herzegovina: March 6, 1992) (Bulgaria: Aug. 1, 1991) (Burundi: Oct. 1, 1999) (Canada: May 1, 1992) (Chile: March 1, 1991) (China (PRC): Jan. 1, 1988) (Columbia: Aug. 1, 2002) (Croatia: Oct. 8, 1991) (Cuba: Dec. 1, 1995) (Cyprus: April 1, 2006) (Czech Republic: Jan. 1, 1993) (Denmark: March 1, 1990) (Ecuador: Feb. 1, 1993) (Egypt: Jan. 1, 1988) (El Salvador: Dec. 1, 2007) (Estonia: Oct. 1, 1994) (Finland: Jan. 1, 1989) (France: Jan. 1, 1988) (Gabon: Jan. 1, 2006) (Georgia: Sept. 1, 2005) (Germany: Jan. 1, 1991) (Greece: Feb. 1, 1999) (Guinea: Feb. 1, 1992) (Honduras: Nov. 1, 2003) (Hungary: Jan. 1, 1988) (Iceland: June 1, 2002) (Iraq: April 1, 1991) (Israel: Feb. 1, 2003) (Italy: Jan. 1, 1988) (South Korea: March 1, 2005) (Kyrgystan: June 1, 2000) (Latvia: August 1, 1998) (Lesotho: Jan. 1, 1988) (Liberia: Oct. 1, 2006) (Lithuania: Feb. 1, 1996) (Luxembourg: Feb. 1, 1998) (Macedonia: Dec. 1, 1991) (Mauritania: Sept. 1, 2000) (Mexico: Jan. 1, 1989) (Moldova: Nov. 1, 1995) (Mongolia: Jan. 1, 1999) (Montenegro: June 3, 2006) (Netherlands: Jan. 1, 1992) (New Zealand: Oct. 1, 1995) (Norway: Aug. 1, 1989) (Paraguay: Feb. 1, 2007) (Peru: April 1, 2000) (Poland: June 1, 1996) (Romania: June 1, 1992) (Russian Federation: Sept. 1, 1991) (Saint Vincent & Grenadines: Oct. 1, 2001) (Serbia: April 27, 1992) (Singapore: March 1, 1996) (Slovak Republic: Jan. 1, 1993) (Slovenia: June 25, 1991) (Spain: Aug. 1, 1991) (Sweden: Jan. 1, 1989) (Switzerland: March 1, 1991) (Syria: Jan. 1, 1988) (Uganda: March 1, 1993) (Ukraine: Feb. 1, 1991) (United States: Jan. 1, 1988) (Uruguay: Feb. 1, 2000) (Uzbekistan: Dec. 1, 1997) (Yugoslavia: Jan. 1, 1988) (Zambia: Jan. 1, 1988)).

[19] *Id.*

[20] See infra, Part III.C.

[21] Disa Sim, *The Scope and Application of Good Faith in the Vienna Convention on Contracts for the International Sale of Goods* 19, 21, *in* REVIEW OF THE CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 2002-2003 21 (Pace Int'l L. Rev. ed., 2004).

[22] The term "workable solution" was presented by Professor Murray in the context of reevaluating the interpretation of the CISG. *See generally* Murray, *supra* note 14. **R**

predictability in litigation and provide the unification lacking under the current regime.

The CISG has six official language variations; under the new codification, a single "official version" should be enacted to ensure that the true intention of the drafters is not lost in translation. Second, similar to the committee established for the UCC, creating an international advisory council to govern and interpret the Global Code would ensure that current nation states adopt the changes proposed by this article.[23] This board, with representatives from each adopting nation, would re-evaluate the current Convention to establish an agreeable regulatory scheme for all states while being accountable for amending the Global Code when necessary. Third, just as the Restatements[24] and the comments to the Principles of European Contract Law ("PECL")[25] are, respectively, the leading explanatory annotations for the United States and European Union, a similar form of systematic commentary should be developed to supplement the Global Code and assist with its interpretation.[26] Lastly, an amalgamation of current civil and common law systems should be implemented to enforce the Global Code in ways similar to an international civil law while ensuring judicial consistency by requiring courts to give deference to other jurisdictions and use previous cases as highly persuasive authority.[27] Such an approach would create a regulatory system respectful of national sovereignty, while also helping to ensure uniform application of the law for the international sale of goods.

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23 *See generally* Michael J. Bonell, *A Proposal for the Establishment of a "Permanent Editorial Board" for the Vienna Sales Convention*, *in* INTERNATIONAL UNIFORM LAW IN PRACTICE, ACTS AND PROCEEDINGS OF THE 3RD CONGRESS ON PRIVATE LAW HELD BY THE INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW (UNIDROIT, 1988).

24 Published by the American Law Institute, the Restatements serve to assist in the interpretation of "black letter law." Thus far, the Restatements have been published on twenty-two topic areas, including Agency, Torts and Contracts. *See* RESTATEMENTS, *available at* http://www.law.harvard.edu/library/services/research/guides/united_states/basics/restatements.php (last visited Mar. 20, 2007).

25 The Principles on European Contract Law ("PECL") represent a scholarly restatement, produced by the Commission on European Contract Law, of the principles of contractual law within the European Union. *See* Introduction to the Principles of European Contract Law (PECL), http://frontpage.cbs.dk/law/commission_on_european_contract_law/PECL%20engelsk/engelsk_partI_og_II.htm (last visited Mar. 20, 2007) [hereinafter PECL].

26 *See infra* Part V.C.

27 *See infra* B.

Although academic agree that the CISG is an overall success[28] scholars have continually contradicted themselves by acknowledging that the Convention has not produced the level of uniformity it sought to create.[29] Unlike most scholarly articles, which attempt to reach a uniform interpretation of the CISG, this Note posits that the aspirations of the Convention are an impossible feat under the current system. This article proposes the creation of a uniform Global Code by building upon the current state of the CISG and eliminating the noted flaws of the current Convention.

Part II of this article briefly provides historical background of international sales law and the universal appeal for uniformity. Part III offers an analytical perspective of the failure of the CISG, discussing the shortcomings of the current regulation as an impediment to the Convention's underlying purpose. Part IV establishes guidelines for the creation of a Global Code to regulate international sales law. Finally, Part V recommends various measures to ensure the success of the Global Code where the CISG has failed.

II. HISTORY OF INTERNATIONAL SALES LAW

Uniform international sales law is not a new concept. As Lord Mansfield stated in 1757, "mercantile law . . . is the same all over the world. For the same premises, the sound conclusions of reason and justice must universally be the same."[30] In fact, the unification of sales law governing international commerce dates back to the Middle Ages and the concept of *lex mercatoria*, "a body of truly international customary rules [that governed] the cosmopolitan community of international merchants who traveled [sic] through the civilised world from port to port and fair to fair."[31]

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[28] *See* Monica Kilian, *CISG and the Problem with Common Law Jurisdictions*, 10 FLA. ST. J. TRANSNAT'L L. & POL'Y 217, 217 (2001).

[29] *See generally* Lando, *supra* note 12; Cook, *supra* note 1; Larry DiMatteo et al., *The Interpretive Turn in International Sales Law: An Analysis of Fifteen Years of CISG Jurisprudence*, 24 NW J. INT'L L. & BUS. 299 (2004). R

[30] Pelly v. Royal Exchange Assurance Co., (1757) 97 Eng. Rep. 343, 346 (K.B.). For an extensive discussion of the history of the law merchant and lex mercatoria, see LEON E. TRAKMAN, THE LAW MERCHANT: THE EVOLUTION OF COMMERCIAL LAW (Fred B. Rothman & Co., 1983).

[31] *See generally* Clive M. Schmitthoff, *The Unification of the Law of International Trade, in* CLIVE M. SCHMITTHOFF'S SELECT ESSAYS ON INTERNATIONAL TRADE LAW 206 (Chia-Jui Cheng ed. 1968). There are four characteristics of lex mercatoria that distinguish the "concept" from other kinds of law. Kilian, *supra* note 28 at 220 (citing Gesa Baron, *Do the UNIDROIT Principles of International Commercial Contracts Form a New Lex Mercatoria?* Pace Univ. Website, June 1998, http://www.cisg.law.pace.edu/cisg/biblio/baron. R

The concept of *lex mercatoria* recently re-emerged, gaining acknowledgment not only from legal scholars, but by courts and legislatures as well.[32] In the last fifty years, numerous efforts have been made to create a uniform code to govern international commercial law. Ratified in 1964, the Uniform Law for the International Sale of Goods ("ULIS")[33] and the Uniform Law on the Formation of Contracts for the International Sale of Goods ("ULF")[34] represent early attempts to create a global code for the international sale of goods. However, because these were not widely adopted,[35] the United Nations Commission on International Trade Law ("UNCITRAL")[36] combined the ULIS and ULIFS, adopted several changes and created the CISG.[37]

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html (last visited Mar. 20, 2007)). First, it must be transnational. *Id.* Second, it is based on common mercantile customs. *Id.* Third, it is provided by merchants and not judges or administrative bodies. *Id.* Fourth, it is expedient, informal, and final with an overriding principle of contractual freedom. *Id.*

32 Franco Ferrari, *Uniform Interpretation of the 1980 Uniform Sales Law*, 24 GA. J. INT'L & COMP. L. 183, 187–88 (1994) (citing *Deutsche Schachtbau- und Tiefbohrgesellschaft mbH v. R'as Al Khaimah Nat'l Oil Co.*, [1987] 3 W.L.R. 1023 (Court of Appeal)). *See e.g.*, Rules Applicable to the Substance of the Dispute, 1 Rv. art. 1054, § 3 (Neth.).

33 Convention relating to a Uniform Law on the International Sale of Goods, July 1, 1964, 834 U.N.T.S. 109*, reprinted in* 13 AM. J. COMP. L. 453 (1964), *available at* http://www.unidroit.org/english/conventions/c-ulis.htm (last visited Mar. 20, 2007) [hereinafter ULIS].

34 Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods, July 1, 1964, 834 U.N.T.S. 123, *reprinted in* 13 AM. J. COMP. L. 472 (1964), *available at* http://www.cisg.law.pace.edu/cisg/text/ulf.html [hereinafter ULF].

35 Because these codes were seen to represent continental Western Europe and not the legal traditions of the rest of the world, the ULF and ULS were adopted by only nine countries: Belgium, Great Britain, Federal Republic of Germany, Gambia, Holland, Israel, Italy, Luxembourg, and San Marino. *See* Ferrari, *supra* note 32, at 192; s*ee also* JOHN O. HONNOLD, DOCUMENTARY HISTORY OF THE UNIFORM LAW FOR INTERNATIONAL SALES: THE STUDIES, DELIBERATIONS, AND DECISIONS THAT LED TO THE 1980 UNITED NATIONS CONVENTION WITH INTRODUCTIONS AND EXPLANATIONS (Kluwer 1989) [hereinafter HONNOLD, DOCUMENTARY HISTORY]. **R**

36 Establishment of the United Nations Commission on International Trade Law, G.A. Res. 2205 (XXI), U.N. GAOR, 6th Comm., 21st Sess., 1497th plen. mtg. (Dec. 17, 1966) *reprinted in* 1 Y.B. UNCITRAL 65 (1966). UNCITRAL was established by the United Nations General Assembly in 1966 with the goal of creating international unification in commercial law. It is currently comprised of sixty member States, elected by the General Assembly, which are representative of the various socioeconomic and legal traditions of the world. In its current state, UNCITRAL has worked on various areas of international law, including: International Commercial Arbitration, the International Sale of Goods ("CISG"), Insolvency, International Payments, International Transport of Goods, Electronic Commerce, Procurement and Infrastructure Development, Penalties and Liquidated Damages, and other texts. *See* UNCITRAL, http://www.uncitral.org/uncitral/en/index.html (last visited Mar. 20, 2007).

37 The CISG was adopted on April 11, 1980. *See* CISG, *supra* note 5. **R**

Outside the realm of international sales law, there have been other examples of international codifications validating a general global desire to create a uniform law for transnational commerce. In particular, the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention"),[38] the Brussels Convention for the Unification of Certain Rules Relating to International Transportation by Air ("1929 Warsaw Convention")[39] and the International Chamber of Commerce International Rules for the Interpretation of Trade Terms ("INCOTERMS")[40] are all considered relative successes in the field of international law.[41]

Effective unification of the law is a generally desirable goal.[42] When conducting international transactions, parties should not be concerned with the "vagaries" of another party's legal system.[43] Instead, they ought to be subject to a single set of rules and principles. In addition to creating predictability for lawyers and commercial parties, this approach potentially reduces transactional

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38 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3. The New York Convention was implemented by the United Nations and entered into force on June 7, 1959. Its main purpose is to ensure that courts give effect and enforce arbitral awards issued in other Contracting States. *See* New York Convention, *available at* http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html (last visited Mar. 20, 2007).

39 Convention for the Unification of Certain Rules Relating to International Carriage by Air, Oct. 12, 1929, 49 Stat. 3000, 137 L.N.T.S. 11. The Warsaw Convention regulates liability involving international air transportation of persons, luggage or goods. *See* Warsaw Convention, *available at* http://www.jus.uio.no/lm/air.carriage.warsaw.convention.1929/doc.html (last visited Mar. 20, 2007).

40 International Rules for the Interpretation of Trade Terms 1990 (I.C.C. Publ. No. 560, 1990 ed.). First created in 1936 by the International Chamber of Commerce, the INCOTERMS aid in defining international commercial terms regarding transfer of risk, cost, and the obligations of buyers and sellers. *See* INCOTERMS, *available at* http://www.iccwbo.org/incoterms/id3040/index.html (last visited Mar. 20, 2007).

41 Other notable successes include the: Uniform Customs and Practice for Documentary Credits 1993 (International Chamber of Commerce Uniform Customs for Documentary Credits 1993 (I.C.C. Publ. No. 500, 1993 ed.); The Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Nov. 15, 1965 20 U.S.T. 361, 658 U.N.T.S. 163); The Hague Convention on Taking Evidence Abroad in Civil or Commercial Matters (Convention on Taking Evidence Abroad in Civil and Commercial Matters, Oct. 26, 1968, 23 U.S.T. 2555, 847 U.N.T.S. 231).

42 *Cf.* Stephan, *supra* note 2, at 744 (stating that the benefits of uniform commercial law are minimal). **R**

43 Philip Hackney, *Is the United Nations Convention on the International Sale of Goods Achieving Uniformity?*, 61 LA. L . REV. 473, 475 (2001).

costs and promotes international cooperation among Contracting States.[44]

III. The Failure of the CISG as a Uniform Code

In an attempt to substitute one law for the diverse judicial systems of the world, the CISG represents a momentous attempt to create a system of uniformity in international trade.[45] The CISG represents the culmination of over thirteen years of diplomatic negotiations and drafting by representatives wherein sixty-two states worked toward addressing the shortcomings of the ULIS and ULF.[46] However, "[t]he wide participation in drafting the CISG and its wide adoption rate are not sufficient elements for the achievement of uniformity in sales" law.[47] The CISG is very "thin legislation" and there are numerous "gaps" not addressed by the Convention.[48] More importantly, the CISG provides only minimal theoretical guidance as to how the Convention should be interpreted[49] resulting in inconsistent interpretations among adopting states[50]. Thus, commercial parties are routinely opting out of the CISG due to the uncertainty created by the Convention, as gov-

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[44] Felemegas, *supra* note 3, at 220; Lars Meyer, *Soft Law for Solid Contracts? A Comparative Analysis of the Value of the UNIDROIT Principles of International Commercial Contracts and the Principles of European Contract Law to the Process of Contract Law Harmonization*, 34 Denv. J. Int'l L. & Pol'y 119, 122–23 (2006) (stating that "more compatible or even uniform laws will create more 'legal certainty' among businesses, consumers, lawmakers and legal professionals. This will in turn reduce transaction costs and legal risks, enabling and encouraging more participants to step onto terra incognita and benefit from the economic advantages of global business activity."). R

[45] Felemegas, *supra* note 3, at 167. R

[46] Camilla Baasch Andersen, *The Uniform International Sales Law and the Global Jurisconsultorium*, 24 J.L. & Com. 159, 161 (2005) "'At the United Nations Diplomatic Conference which adopted the CISG, [ ]62 states took part: 22 European and other developed Western states, 11 socialist, 11 South-American, 7 African and 11 Asian countries; in other words, roughly speaking, 22 Western, 11 socialist and 29 third world countries'" (citation omitted).

[47] Felemegas, *supra* note 3, at 221. R

[48] "If national law, for example, requires sales prices to be states [sic] in local currency and a contract covered by the Convention refers only to U.S. dollars, does local law invalidate the agreement or may we consider this an acceptable formulaic price provision under the Convention?" Stephan, *supra* note 2, at 776. R

[49] *See* David Balovich, *Time for an International Code*, Creditworthy News (May 12, 2005), http://www.creditworthy.com/3jm/articles/cw51205.html (last visited Mar. 20, 2007).

[50] "A review of the recent international case law indicates that many tribunals have missed the mark and have contributed to inconsistent results." Phanesh Koneru, *The International Interpretation of the UN Convention on Contracts for the International Sale of Goods: An Approach Based on General Principles*, 6 Minn. J. Global Trade 105, 129 (1997).

erning contractual law.[51] Consequently, questions regarding the effectiveness of the Convention have emerged, prompting some scholars to conclude that the CISG actually increases "legal risk" and harms the unification process.[52]

A. *Article 7 of the CISG as an Impediment to Uniformity*

Article 7 of the CISG is considered the most important provision of the Convention; in fact, some believe that the success of the CISG depends on Article 7.[53] However, because of the provision's ambiguity and the absence of a clear hierarchal methodology of interpretation, Article 7 has been at the center of challenges to the Convention's uniformity.[54]

Article 7(1) of the CISG states that "[i]n the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade."[55] Although the purpose of the inclusion of Article 7(1) was to achieve the most expansive level of uniformity,[56] the provision is continually misinterpreted, especially in terms of the definition of good faith.[57]

Legislative history indicates that the inclusion of the good faith principle was a compromise struck between representatives

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51 Cook, *supra* note 1, at 351; Stephan, *supra* note 241, at 776. *See also* James E. Bailey, *Facing the Truth: Seeing the Convention on Contracts for the International Sale of Goods as an Obstacle to a Uniform Law of International Sales*, 32 CORNELL INT'L L.J. 273, 276 (1999). R

52 *See* Steven Walt, *Novelty and the Risks of Uniform Sales Law*, 39 VA. J. INT'L L. 671 (1999). *See also* Stephan, *supra* note 241, at 779 (calling the CISG a "hollow accomplishment"). R

53 Koneru, *supra* note 50, at 106. R

54 *See* Bailey, *supra* note 51, at 294; *see also* Andersen, *supra* note 46, at 165; *see also* Sim, *supra* note 21, at 25. It is inferred that the structure of interpretation under the CISG proceeds as follows: 1) express language of provision; 2) use of general principles to fill any "gaps;" and 3) resort to domestic law. However, even commentators who consider the CISG an overall success acknowledge that a structure of analogical reasoning is only theoretically mentioned by the code and therefore must be inferred from the structure of the Convention. *See* DiMatteo, *supra* note 29, at 313—14. R R R

55 CISG, *supra* note 5, art. 7(1). R

56 *See* V. Susanne Cook, Note, *The Need for Uniform Interpretation of the 1980 United Nations Convention on Contracts for the International Sale of Goods*, 50 U. PITT. L. REV. 197, 216 (1988). *But see* Larry DiMatteo, INTERNATIONAL SALES LAW: A CRITICAL ANALYSIS OF CISG JURISPRUDENCE 11 (2005). "The fact that Article 7 prefaces its uniformity mandate with 'regard has to be had' implies that a standard below strict uniformity in application was envisioned. The uniformity mandate itself indicates that strict uniformity is not a realizable goal." *Id.*

57 *See* Sim, *supra* note 21, at 21. R

who insisted that parties respect a standard of good faith and fair dealing in contracts and those who argued that such an undefined term would lead to inconsistent interpretations.[58] Because the Convention does not provide an express definition of good faith, the concept is varyingly applied based on the circumstances of a particular contract or, more commonly, the needs of a national legal system.[59] For example, attorneys trained in Canadian or British law rarely comprehend the notion of good faith as a result of being accustomed to detailed legal rules.[60]

Similarly, despite the definition of good faith provided under the UCC,[61] American scholars and courts have struggled to apply the term consistently. For example, Professor Farnsworth postulated that the concept should be used simply as a basis to imply various terms contained within a contract.[62] Professor Summers, on the other hand, argued that good faith should be applied to situations where parties themselves have acted in a manner that would be considered "improper."[63] Finally, Professor Bailey offered a third interpretation, providing that the reference to good faith under Article 7 should serve as a cautionary note to courts to exercise due care before the application of domestic principles when "gap filling" under the CISG.[64]

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58 For a drafting history of Article 7, see HONNOLD, DOCUMENTARY HISTORY, *supra* note 35, at 298–99 (1989). *See also* Legislative History to Article 7, *available at* http://cisgw3.law.pace.edu/cisg/chronology/chrono07.html (last visited Mar. 20, 2007). R

59 Felemegas, *supra* note 3, at 180. R

60 *See* Michael G. Bridge, *Does Anglo-Canadian Law Need a Doctrine of Good Faith?*, 9 CANADIAN BUS. L.J. 385 (1987). *Compare Walford v. Miles*, [1992] 2 A.C. 128 (H.L.), where the House of Lords refused to implement a concept of good faith in contractual dealing, *with* Bürgerliches Gesetzbuch [BGB] [Civil Code] Jan. 1, 1900, as amended § 242 (stating that parties are bound by a duty of good faith in the performance of contracts), *available at* http://bundesrecht.juris.de/englisch_bgb/englisch_bgb.html#Section%20242 (last visited Nov. 25, 2007).

61 The UCC actually defines the principle of good faith in two ways. Under UCC § 1-201(20) "'[g]ood faith'. . . means honesty in fact in the observance of reasonable commercial standards of fair dealing." Under UCC § 2-103(1)(b) "'[g]ood faith' . . . means honesty in fact and the observance of reasonable commercial standards of fair dealing." *See* UCC, *supra* note 13. R

62 *See* E. Allan Farnsworth, *Good Faith Performance and Commercial Reasonableness Under the Uniform Commercial Code*, 30 U. CHI. L. REV. 666, 679 (1963).

63 Robert Summers, *"Good Faith" in General Contract Law and the Sales Provisions of the Uniform Commercial Code*, 54 VA. L. REV. 195, 200 (1968).

64 Bailey, *supra* note 51, at 295–96. The term good faith itself has also "been variously defined as 'fairness,' 'fair conduct,' 'reasonableness,' 'reasonable standards for fair dealing,' 'good faith and fair dealing,' 'community standards of decency, fairness, or reasona- R

Even the plain language of Article 7(1) invites multiple interpretations. If the article is read as, "regard is to be had to . . . the observance of good faith in international trade[,]" it is implied that a court is to impose a standard of good faith directly on the parties.[65] Conversely, if one reads Article 7(1) as "regard is to be had . . . to the need to promote . . . the observance of good faith in international trade[,]" such an interpretation indicates that a court should promote good faith in international trade as a whole, not only under circumstances of the individual case.[66] Although many CISG experts, such as Professors Bonell and Schlechtriem, opine that the principle of good faith is to apply to the conduct of the parties,[67] until an express definition is provided by the Convention and adopted by courts and scholars alike, the term and the CISG will continually be interpreted inconsistently.

In addition, Article 7(2) states,

> Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.[68]

UNCITRAL included this provision so as to avoid the implication of diverse domestic principles that courts were apt to apply alongside the Convention.[69] After several proposals, the current language of Article 7(2) was adopted, over the objections of numerous delegates; they argued that the use of a "general principles" approach would be impossible to apply due to the

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bleness,' 'honesty in fact,' 'decent behavior,' 'a common ethical sense' and as a 'spirit of solidarity.'" Sim, *supra* note 21, at 29 (citations omitted). **R**

65 Koneru, *supra* note 50, at 139 (reading CISG, art. 7(1)). **R**

66 *Id.* at 138 (reading CISG, art. 7(1)). "[T]here are basically four possible roles for the doctrine of good faith in the CISG: as a practice of the parties, as a trade usage, as a substantive general principle or as an interpretive tool." Sim, *supra* note 21, at 51. **R**

67 *See generally* Michael Joachim Bonell, *Article 7*, *in* COMMENTARY ON THE INTERNATIONAL SALES LAW (Cesare Bianca & Michael Bonell, eds., 1987) [hereinafter Bonell, *Article 7*], *available at* http://cisgw3.law.pace.edu/cisg/biblio/bonell-bb7.html; COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS 95 (Peter Schlechtriem & Ingeborg Schwenzer eds. 2d ed. 2005) [hereinafter Schlechtriem, COMMENTARY]. *See also* Carolina Saf, *A Study of the Interplay Between the Conventions Governing International Contracts of Sale: Analysis of the 1955 Hague Convention on the Law Applicable to Contractual Obligations, the 1980 Rome Convention on Contracts for the International Sale of Goods* (1999) (on file with author).

68 CISG, *supra* note 5, art. 7(2). **R**

69 *See* Secretariat Commentary, Article 7, *available at* http://cisgw3.law.pace.edu/cisg/text/secomm/secomm-07.html; Schlechtriem Commentary, *supra* note 67, at 93–94. **R**

impracticality of defining such ideologies.[70] Consequently, whether a particular issue is actually governed by the CISG is intrinsically difficult to determine.

Some general principles are expressly provided by the Convention. For example, parties' freedom to contract[71] and the notion that agreements are not subject to any formal requirements are both clearly established principles.[72] However, most general principles are not explicitly articulated and must be inferred through an analysis of specific provisions or the CISG as a whole.[73] Such examples include a duty to mitigate damages[74] and an inherent standard of reasonableness in commercial transactions.[75]

While civil law systems commonly apply general principles to fill "gaps,"[76] common law jurisdictions typically opt for a more definitive approach, choosing to fill "gaps" with legislative history and legal precedent.[77] Such conflicting ideologies have resulted in discrepancies as to which approach should be used, contributing to further inconsistent judgments as courts refuse to break from domestic tradition.

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[70] *See* Report of the Working Group on the International Sale of Goods, 1st Sess., ¶¶ 56–72, U.N. Doc. A/CN.9/35 (Jan. 1970).

[71] Koneru, *supra* note 50, at 117. The principle of the freedom of contract is analogous to the freedom resulting from the mercantile philosophy of *laissez-faire.* Trakman, *supra* note 30, at 62. R R

[72] CISG, *supra* note 5, arts. 11, 29(1). *See also* Bonell, *Article 7*, *supra* note 67, at 79. R

[73] Commentators have gone so far as to state that Article 7(2) creates the possibility that there are no general principles on which the Convention is based. *See* Amy Kastely, *Unification and Community: A Rhetorical Analysis of the United Nations Sales Convention*, 8 NW. J. INT'L L. & BUS. 574, 606 (1988); DiMatteo, *supra* note 29, at 315–16. R

[74] JOHN O. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION 155 (2d ed. 1991) [hereinafter HONNOLD, UNIFORM LAW].

[75] The standard of reasonableness is a particularly vague term and has been defined differently by courts. *See* Andersen, *supra* note 46, at 162, n.12 (comparing the "noble month" standard of reasonableness used by the German Supreme Court in Bundesgerichtshof 8 March 1995, BGH VIII 159 (German), with the 14 day standard articulated by the Austrian Supreme Court in Oberster Gerichtshof on 15 October 1998, S2 191/98 (Austria)). Despite the fact that the CISG mentions a standard of reasonableness on 38 separate occasions throughout the Code, no definition or guidance is given as to how the term is to be interpreted. *See* DiMatteo, *supra* note 29, at 317–18. R R

[76] HONNOLD UNIFORM LAW, *supra* note70, at 149; Bonell *Article 7*, *supra* note 64, at 75–76 (recognizing that the Civil Codes of Austria, Italy, Spain and Egypt all utilize a general principles approach).

[77] Michael Bonell, *General Provisions*, *in* COMMENTARY ON INTERNATIONAL SALES LAW: THE 1980 VIENNA CONVENTION 3 (Cessare Massimo Bianca & Michael Joachim Bonell eds., 1987) [hereinafter Bonell, *General Provisions*]; Peter Winship, *Commentary on Professor Kastely's Rhetorical Analysis*, 8 NW. J. INT'L L. & BUS. 623, 635 (1988).

Moreover, since these principles are open to interpretation, the only way to ensure uniform application is the utilization of other international decisions. Unfortunately, nothing in Article 7, the legislative history or the language of the CISG as a whole provides any guidance as to how much weight to give such "precedent."[78] Without any regulatory guidance, Article 7 has been applied with extreme flexibility, making it unlikely to contribute to uniform interpretation of the Convention.[79]

B. *Language Problems*

In an effort to ensure maximum adoption of the CISG among nation states, the Convention was published in six official languages: Arabic, Chinese, English, French, Russian and Spanish—each version considered equally authentic.[80] Although publication in multiple languages both strengthened the Convention's political internationality and facilitated the passage of the Convention itself,[81] multiple drafts greatly complicate the goal of uniformity as well.

It is impossible to expect that each version of a multi-language treaty precisely corresponds to others.[82] Replicating terms consistently in two languages, let alone six, is a difficult feat.[83] This is exemplified by the Argentinean version of the CISG, which, at adoption, contained a typographical omission in Article 2, that would have made the CISG applicable to consumer sales and other transactions expressly excluded under the Convention.[84]

These problems are further complicated because many terms have different meanings and levels of significance when translated

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[78] Bailey, *supra* note 51, at 293. **R**

[79] *Id*. at 294.

[80] Conference on Contracts for the International Sale of Goods, Vienna, Austria, Mar. 10 to Apr. 11, 1980, *Final Act of the U.N. Conference on Contracts for the International Sale of Goods,* U.N. Doc. A/CONF.97/18 (Apr. 10, 1980), *reprinted in* 19 I.L.M. 668, 671 (1980). The Pace website provides access to the CISG in both "official" and "unofficial" languages, including Persian and Danish. *See* Pace Law School, Texts of the CISG, *available at* http://www.cisg.law.pace.edu/cisg/text/text.html (last visited Oct. 1, 2007).

[81] Harry M. Flechtner, *The Several Texts of the CISG in a Decentralized System: Observations on Translations, Reservations and other Challenges to the Uniformity Principle in Article 7(1)*, 17 J.L. & COM. 187, 189–90 (1998) [hereinafter Flechtner, *Several Texts of the CISG*].

[82] Felemegas, *supra* note 3, at 213. **R**

[83] *See* Blair Crawford, *Drafting Considerations Under the 1980 United Nations Convention on Contracts for the International Sale of Goods*, 8 J.L. & COM. 187, 189–91 (1988).

[84] Felemegas, *supra* note 3, at 213. **R**

into other languages. Consider, for example, Professor Volken's description of the adoption of the German language translation of the CISG:

> After the international adoption of a new multilateral convention, the German-speaking countries usually meet in order to prepare a common German-language version of the new instrument. Since the French version always serves as the official text in Switzerland, Swiss delegates to the translation meetings must be especially careful to avoid unacceptable discrepancies between the French and the German versions.
>
> With respect to the Vienna Sales Convention, the translation meeting was held in January 1982 in Bonn, and the preparatory draft of the translation was drawn up on the basis of the official English text. At the meeting, three out of four Swiss interventions were raised against deviations from the French version that were considered too far-reaching. The meeting made it clear that in most instances the deficiencies were not due to the basic German draft, but to the fact that the original English and French texts contained discrepancies.[85]

Even Professor Flechtner, an authoritative scholar on the CISG inadvertently misinterpreted Articles 71 and 72 due to linguistic inconsistencies between the French and English texts.[86] If an expert such as Professor Flechtner is capable of such mistakes, it is reasonable to assume that parties less familiar with the intricacies of the CISG will have difficulty interpreting the Convention in a consistent and coherent manner.

C. *"Opting Out" of the CISG*

At the outset, CISG also aimed to provide a substantive international law on the formation of contracts that would appeal to both potential signatories and future commercial parties.[87] As a

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[85] Flechtner, *Several Texts of the* CISG, supra note 81, at 190 (quoting Paul Volken, THE VIENNA CONVENTION: SCOPE, INTERPRETATION, AND GAP-FILLING, IN INTERNATIONAL SALE OF GOODS: DUBROVNIK LECTURES 19, 41 (Petar Sarcevic & Paul Volken eds., 1986)). *See also* Felemegas, *supra* note 3, at 213–14 ("This point is best illustrated when we consider the terms 'offer' and 'acceptance'. These two words are well known legal terms of the common law jurisprudence and carry special weight of legal doctrine in that legal system. . . . When these words are translated in the other official versions, such as Chinese and Arabic, however, their translation only operates on the linguistic level and misses the doctrinal depth of their legal heritage."). R R

[86] Fletchner, *supra* note 77, at 191–92 (addressing the different standards of constituting fundamental breach under the French and English versions of the CISG).

[87] *See* CISG Preamble, *supra* note 5. R

result, the Convention included various provisions authorizing parties and participating states to exclude certain requirements or the CISG as a whole. Such a system makes uniformity impossible when adopting states and contractual parties are given the ability to choose when and how the governing law will be applicable.

For instance, Article 6 of the CISG states that, "parties may exclude the application of this Convention or, subject to Article 12, derogate from or vary the effect of any of its provisions."[88] Obviously, with the goal of creating uniformity in mind, this presents a theoretical conflict with the underlying purpose of the Convention. Similarly, the plain language of Article 6 provides unlimited exclusionary authority under the provision. It is plausible then, that parties could exclude the application of a duty of good faith or even exclude Article 7 in its entirety, which, as previously noted, is considered to be the most important provision in achieving uniformity under the Convention.[89]

Further complications arise in Articles 92 through 96, which permit signatories to make reservations to exclude various portions of the Convention at the time of adoption.[90] Such reservations are especially problematic in reaching uniformity in that over thirty percent of Contracting States have made declarations (some multiple) and Article 92 permits Contracting States to exclude two-

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[88] Article 12 of the CISG states:

> Any provision of article 11, article 29 or Part II of this Convention that allows a contract of sale or its modification or termination by agreement or any offer, acceptance or other indication of intention to be made in any form other than in writing does not apply where any party has his place of business in a Contracting State which has made a declaration under article 96 of this Convention. The parties may not derogate from or vary the effect of this article.

CISG, *supra* note 5, art. 12. **R**

[89] But see UNIDROIT Principle 1.7, which forbids the exclusion of the duty of good faith and fair dealing in international trade and UCC § 1-301 which precludes parties from disclaiming good faith, diligence, reasonableness and care. *See* UNIDROIT, Principles of International Commercial Contracts, *available at* http://www.unidroit.org/english/principles/contracts/main.htm (last visited Mar. 20, 2007); UCC, *supra* note 13 § 1-301. **R**

[90] Countries that have made declarations under Articles 92 through 96 include: Denmark, Estonia, Finland, Norway, and Sweden (Article 92); Australia, Canada and Denmark (Article 93); Denmark, Estonia, Finland, Iceland (remarks made), Norway, and Sweden (Article 94); China, Singapore, Slovak Republic, and the United States (Article 95); Argentina, Belarus, Chile, China, Hungary, Latvia, Lithuania, Paraguay, the Russian Federation, and Ukraine (Article 96). *See* CISG Table of Contracting States, *supra* note 18. **R**

thirds of the Convention.[91] These reservations obscure interpretation to the extent that courts must not only understand the CISG itself, but also, each contracting state's individualized version of the Convention. As a result of these permissible exclusions, a series of "mini codes" have emerged, creating variations in applicable case law for the interpretation of the CISG. Such measures further diminish the authority of the Convention and contradict the underlying uniformity that the drafters clearly so clearly aspired to create.

D. *Misapplication of the CISG by Courts*

Due to the CISG's ambiguity and deficiency in providing for a hierarchical structure of interpretation, many courts refuse to acknowledge the decisions of their international counterparts, opting instead for a "homeward trend" approach, applying familiar domestic law.[92] For example, although the Court, in *Italedcor SAS v. Yiu Industries*,[93] recognized that the CISG governed a dispute between an Italian buyer (Italdecor) and a Chinese Seller (Yiu Industries), the Italian court examined only domestic case law in rendering its decision and improperly interpreted what would have constituted a fundamental breach under the CISG.[94] Similarly, in *Delchi Carrier S.P.A v. Rotorex Corp.*,[95] the U.S. court rejected the application of international case law and instead looked to the UCC and its domestic interpretations for guidance.[96]

Despite the voluminous amount of international trade and early support for the CISG, the United States has been one of the leading countries in misapplications of the Convention's provisions.[97] In particular, problems have emerged from: the U.S.

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91 Under Article 92, Contracting States may "opt out" of either Part II (Articles 14–24) or Part III (Articles 25–88) of the Convention, which mainly govern contract formation and obligations arising from contract. *See* CISG, *supra* note 5, art. 92. R

92 Kilian, *supra* note 28, at 226. R

93 Italdecor SAS v. Yiu's Industries (H.K.) Ltd., Corte app. di Milano [Regional Court of Appeals][CA] Mar. 20, 1998 (It.), *available at* http://cisgw3.law.pace.edu/cisg/wais/db/cases2/980320i3.html#ct (last visited Mar. 20, 2007).

94 For a detailed analysis of the *Italdecor SAS* decision, see Angela Maria Romito & Charles Sant'Elia, *Italian Court and Homeward Trend*, 14 PACE INT'L L. REV. 179 (2002).

95 Delchi Carrier S.P.A v. Rotorex Corp., 71 F.3d 1024 (2d Cir. 1995).

96 *Id*. at 1028 (stating that "[c]aselaw [sic] interpreting analogous provisions of Article 2 of the Uniform Commercial Code . . . may also inform a court where the language of the relevant CISG provisions tracks that of the UCC.").

97 Many European courts have interpreted the CISG in a "correct" manner as most CISG cases originate in central Europe due to the region's prior experience with the ULIS and UFLIS. A study of the United States case law, on the other hand, has shown that in

courts' continued insistence on the application of UCC principles not relevant to the CISG; misuse of the parol evidence rule; and failure to acknowledge that the Convention applies in a specific case.[98] For example, in *Beijing Metals & Minerals v. American Business Center, Inc.*,[99] a Chinese party (Beijing) entered into a contract with an American company (American Business Center) to supply weightlifting equipment. At trial, American Business Center offered that the contract had been orally modified as a defense to its failure to pay. The Court, however, applied the American parol evidence rule without any analysis of the CISG and thereby incorrectly rejected the oral modification, despite the fact that the CISG expressly permits such amendments under Article 29.[100]

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evaluating forty American decisions, thirty-six were incorrectly decided. Ole Lando, Case Comment, *Principles of European Contract Law and UNIDROIT Principles: Moving from Harmonisation to Unification?* 8 UNIF. L. REV. N.S. 123, 125 (2003). *See also* John O. Honnold, *The Sales Convention: From Idea to Practice*, 17 J. L. & COM. 181, 181–86 (1998) [hereinafter Honnold, *From Idea to Practice*]; Felemegas, *supra* note 3, at 340–47; Hackney, *supra* note 43, at 480. **R** **R**

98 The CISG's regulation of U.S. trade is readily apparent when one considers that the United States, Canada, and Mexico have all adopted the CISG, making it the applicable law to international sales under the North American Free Trade Agreement ("NAFTA"). Harry M. Flechtner, Recent Development, *Another CISG Case in the U.S. Courts: The Pitfalls for the Practitioner and the Potential for Regionalized Interpretation*, 15 J.L. & COM. 127, 133 (1995).

99 Beijing Metals & Minerals Imp./Exp. Corp. v. American Bus. Ctr., Inc., 993 F.2d 1178 (5th Cir. 1993).

100 *See id.* at 1182–83. The Court acknowledged in a footnote that the CISG might apply to the dispute but decided that the application of the parol evidence rule would apply regardless of whether the case fell under the Convention. *Id.* at n.9. Other examples of U.S. courts misconstruing or misapplying the CISG include: Zapata Hermanos v. Hearthside Baking Co., 313 F.3d 385 (7th Cir. 2002) (incorrectly interpreting attorneys' fees under CISG, art. 79); Raw Materials Inc. v. Manfred Forberich GmbH, No. 03 C 1154, 2004 U.S. Dist. LEXIS 12510 (E.D. Ill. July 6, 2004) (misinterpreting CISG art. 79 by applying principles of the UCC); Calzaturificio Claudia, S.n.c. v. Olivieri Footwear, Ltd., No. 96 Civ. 8052, 1998 WL 164824 (S.D.N.Y. Apr. 7, 1998) (stating that "Article 2 of the [UCC] may . . . be used to interpret the CISG where the provisions in each statute contain similar language."); Kahn Lucas Lancaster, Inc. v. Lark Int'l Ltd., No. 95 CIV. 10506, 1997 U.S. Dist. LEXIS 11916 *15 n.8 (S.D.N.Y. August 11, 1997) (stating that "[e]ven if the Sale of Goods Convention were applicable, it would very likely lead to the same result reached below, insofar as its provision regarding acceptance by performance is similar to the [UCC] adopted in New York."); GPL Treatment v. Louisiana-Pacific Corp., 894 P.2d 470 (Or. Ct. App. 1995) (applying exceptions applicable to the UCC but not permissive under the CISG). For a non-U.S. example of misinterpretation of the CISG, see Nova Tool & Mold Inc. v. London Industries, Inc., [1998] 84 A.C.W.S. (3d) 1089 (Can.) (applying domestic law for interpretation of fundamental breach).

Furthermore, as a consequence of CISG's ambiguity and resulting misinterpretations, parties and lawyers consistently exclude the CISG as applicable law due to its unpredictability in favor of more definite standards.[101] As one commentator stated:

> Even if counsel with such familiarity finds CISG provisions generally desirable, the unreliability of potential interpretations by courts of his own or other Contracting States may suggest that the safest course is to opt for domestic law. . . . [T]he temptation to insist upon the tried, true and familiar UCC may be irresistible.[102]

As a result, unpredictability and divergent interpretations not only continue to make use of the Convention impractical, undermining uniformity in international sales law, but also make it impossible to achieve the goals of the CISG.[103]

IV. The Creation of a Global Code

In response to increased globalization and foreign investment, reform of the current international sales law is necessary to protect international rights, consistently enforce foreign judgments, and reduce transaction costs in commercial operations.[104] Despite the failure of the CISG in achieving international uniformity in sales law, the Convention provides an invaluable basis for development of a Global Code. However, because the CISG contains no mecha-

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101 "In theory, two identical cases interpreting CISG, one of which is before a U.S. court and the other before a French court, should both reach similar conclusions. There is, however, no mechanism in place that would ensure that they do." Cook, *supra* note 1, at 343. R

102 Murray, supra note 14, at 372. See, e.g., Hackney, supra note 43, at 480; Kilian, supra note 28, at 227. R R

103 Although beyond the scope of this article, some commentators have suggested that the Convention's lack of a formal writing requirement is another major complication in international sales law. *See* Winship, *supra* note 77, at 635. However, a writing requirement must be excluded to ensure maximum adoptability for those Contracting States who have abandoned the statute of frauds. *See generally* Jacob S. Ziegel & Claude Samson, *Report to the Uniform Law Conference of Canada on Convention on Contracts for the International Sale of Goods*, (Difference with Law of Common Law Provinces) (July 1981), http://www.cisg.law.pace.edu/cisg/wais/db/articles/english2.html (last visited Mar. 20, 2007). R R

104 "Globalization of world markets and communication mandates modernization of teaching materials and methodologies particularly in the field of 'Sales.'" Louis F. Del DucA et al., Sales Under the Uniform Commercial Code and the Convention on Contracts for the International Sale of Goods xxi (1993); Jose Angelo Estrella Faria, *The Relationship Between Formulating Agencies in International Legal Harmonization: Competition, Cooperation, or Peaceful Coexistence? A Few Remarks on the Experience of UNCITRAL*, 51 LOY. L. REV. 253, 272 (2005); Bruno Zeller, Damages Under the Convention on Contracts for the International Sale of Goods 9 (2005).

nism for revision or amendment, a new codification is necessary to advance regulatory commercial law in accordance with modern needs.[105]

A. *The Use of the UCC as a Guide in the Creation of the Global Code*

In the United States, fifty independent jurisdictions have enacted the UCC "to simplify, clarify and modernize the law governing commercial transactions . . . [and] to permit the continued expansion of commercial practices through custom, usage and agreement of the parties."[106] The UCC is considered a relative success and its achievements represent encouraging precedent in the formation of an international Global Code.[107]

The purpose of the UCC and a Global Code are similar: both are designed to aid in the interpretation of commercial contracts and to overcome differences in the law—the UCC among the fifty U.S. states and the Global Code among the countries of the world.[108] Thus, the UCC can serve as an effective guide for a new Global Code in three ways. First, although no court is bound by a decision in a separate sovereign state, courts interpreting the UCC often defer to other jurisdictions that have interpreted the Code. As the Alaska Supreme Court stated:

> Although precedent from other jurisdiction is, of course, not binding upon us, we nonetheless are mindful of the fact that a basic objective of the Uniform Commercial Code is to promote national uniformity in the commercial arena and that this objective would be undermined should we decline to follow the stated intent of the Code's drafters and the reasoned decisions of a number of other jurisdictions.[109]

Such respect for persuasive authority not only ensures consistent commercial regulation, it creates predictability in the law, which is one of the main contributing factors to the success of the UCC.

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105 It is necessary for the Global Code to contain language delegating authority as to how the Code can be amended or revised if needed.

106 UCC, *supra* note 13, § 1-102. R

107 Bonell, *Global Commercial Code*, supra note 4, at 88. R

108 *See* Honnold, *From Idea to Practice*, *supra* note 97, at 182; HENRY GABRIEL, PRACTITIONER'S GUIDE TO THE CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (CISG) AND THE UNIFORM COMMERCIAL CODE (UCC) 28 (1994). R

109 Escrow Closing and Consulting ABM, Inc. v. Matanuska Maid, Inc., 659 P.2d 1170, 1172 (Alaska 1983).

Second, in order to avoid any ambiguity in the Code, the UCC contains an official, systematic commentary to aid in its interpretation. A similar approach should be used in the creation of a Global Code, especially considering the relative ease of creating such comments with organizations such as the International Institute for the Unification of Private Law ("UNIDROIT")[110] having already established similar principles in the international context.[111]

Finally, when the UCC was adopted by individual states, each jurisdiction was free to adopt the law as a whole or modify it. Although these reservations impede uniformity,[112] most of the declarations made under the UCC were only slight variations from the overall code and were mostly insignificant.[113] Due to the reality of diverse legal traditions of the world, the Global Code should take the same approach. If countries refuse to adopt the proposed regulatory scheme, there is little hope in achieving uniformity in international commerce. Nevertheless, it is necessary that any variation permitted under the Global Code is minimal and does not rise to the level of reservations acceptable under the CISG.

B. *The Creation of an Internationl Advisory Council*

Without an international legislative body to govern international sales law, questions regarding interpretation, modification and accountability would go unanswered. While it would be impossible to establish a truly "official" legislature similar to that of

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110 International Institute for the Unification of Private, Principles of Commercial Contracts (1994), *available at* http://www.unidroit.org/english/principles/contracts/principles 2004/blackletter2004.pdf. Headquartered in Rome, UNIDROIT is a private organization with the primary purpose of studying and harmonizing international commercial law between States. Since its creation in 1926, UNCITRAL has developed such noteworthy regulations as the Convention on Agency for the International Sale of Goods (1983), the Convention on International Financial Leasing (1988), and the Convention on Stolen or Illegally Exported Cultural Objects (1995). *See* UNIDROIT, *supra* note 89 **R**

111 Although the UNIDROIT Principles are not actually binding law, the Principles have been widely adopted by both the academic and legal community, providing guideline rules for individual countries to adopt into their own laws for the international sale of goods. *See generally* Michael Bonell, *UNIDROIT Principles 2004: The New Edition of the Principles of International Commercial Contracts Adopted by the International Institute for the Unification of Private Law*, 2004 UNIF. L. REV. 5 (2004), *available at* http://www.unidroit.org/english/publications/review/articles/2004-1-bonell.pdf (last visited Mar. 20, 2007) [hereinafter UNIDROIT Principles 2004].

112 *See* discussion *supra* Part III.C

113 Bonell, *Global Commercial Code*, supra note 4, at 92. **R**

the English Parliament or the United States Congress,[114] a private international council should be created with the ability to issue advisory opinions and rectify ambiguities within the Global Code.[115]

Critics of this approach have highlighted three objections. First, they argue that getting approval from each member state of the United Nations, to authorize such a body, would be unlikely. Second, they claim that structural complexities seem insurmountable. Third, they assert that because the council would not be politically accountable, there would be no authoritative body to ensure that representatives advance only the principles of the international code and not the goals of private individuals or nation states.[116] Yet, these criticisms ignore the results yielded from similar institutional bodies such as UNIDROIT and the Hague Conference on Private International Law ("Hague Conference),"[117] both considered to be successful as international regulatory authorities.[118]

More importantly, a limited council for international sales law is already in existence and has been issuing advisory opinions for a number of years under the guidance of UNCITRAL.[119] As the creator of the CISG, UNCITRAL is the predominant authority in the field of international sales law, comprised of members of many

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114 *See* Stephan, *supra* note 2, at 752. One of the benefits of the creation of an "unofficial" council is that it would be "free" from political influence, permitting members to focus on the development of well-reasoned decisions unfettered by outside influence. R

115 This advisory council would not have appellate jurisdiction, per se, but would have the ability to provide opinions to influence future decisions. This is especially important as many adopting states would be reluctant to agree to a system that might jeopardize the state's sovereignty. *See* Sim, *supra* note 21, at 86–87. R

116 Felemegas, *supra* note 3, at 263; Meyer, *supra* note 44, at 134. R

117 The Hague Conference was established in 1893. Like UNCITRAL and UNIDROIT, the purpose of the Hague Conference is to unify the rules of private international law. It is currently comprised of over sixty member States including the United States and all members of the European Union. Recent accomplishments include the Convention of 25 October 1980 on International Access to Justice, the Convention of 22 December 1986 on the Law Applicable to Contracts for the International Sale of Goods, and the Convention of 5 July 2006 on the Law Applicable to Certain Rights in respect of Securities held with an Intermediary. *See* Hague Conference on Private International Law, http://www.hcch.net/index_en.php (last visited Mar. 20, 2007).

118 *See* Stephan, *supra* note 2, at 753–54. Other organizations that have instituted permanent advisory councils into their procedure include the International Monetary Fund and the Commission on Banking Technique and Practice of the International Chamber of Commerce. Sim, *supra* note 21, at 86. R R

119 To date, the CISG Advisory Council has only issued six advisory opinions. *See* Loukas Mistelis, *CISG-AC Publishes First Opinions*, http://cisgw3.law.pace.edu/cisg/CISG-AC.html (last visited Mar. 20, 2007).

contracting nation states. Nevertheless, because UNCITRAL has other duties outside the realm of international sales law, it would be necessary to expand the current council and establish a "Permanent Editorial Board," akin to that established under the UCC.[120] Not only could national authorities petition this board for clarifications of the Global Code, but the board would have the ability to propose amendments at UNCITRAL's yearly meeting to ensure uniform interpretation of the global international sales law.[121]

C. *The Establishment of an International Court*

Although the goal of an international court is rather ambitious, such a possibility should not be abandoned.[122] The axiomatic advantage of establishing a centralized judiciary would be the development of a unified system to add consistency in the interpretation of the Global Code.[123] However, the creation of such an institution is generally dismissed as an impossible goal, due to the diverse legal traditions of Contracting States, recognition of certain geographical impracticalities, and the immense financial resources required in developing such an institution.[124]

Despite such criticism, it should be noted that countries within the European Union have successfully operated in this manner under the jurisdiction of the European Court of Justice ("ECJ"). When petitioned by national courts of member states, the ECJ has the authority to interpret and administer binding decisions regarding treaties and other European Community law.[125] Similarly, the International Court of Justice ("ICJ") operates in adjudicating in-

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[120] Murray, *supra* note 14, at 374 (citing Michael Bonell, *A Proposal for the Establishment of a "Permanent Editorial Board" for the Vienna Sales Convention*, *in* INTERNATIONAL UNIFORM LAW IN PRACTICE, 241 (1988)). However, UNCITRAL has also expressly rejected the creation of a permanent editorial board. *See* UNITED NATIONS, REPORT OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW ON THE WORK OF ITS TWENTY-FIRST SESSION, U.N. Doc. A/43/17 (1988). R

[121] Another possible scenario for an international advisory council would be a compilation of representatives from both adopting Member States and private regulatory bodies such as UNIDROIT, UNCITRAL, and the Hague Convention. Faria, *supra* note 104, at 284. R

[122] *See generally* R. H. Graveson, *The International Unification of Law*, 16 AM. J. COMP. L. 4, 12 (1968).

[123] *See* Zeller, *supra* note 104, at 5–6. R

[124] Felemegas, *supra* note 3, at 262. R

[125] *See* The Court of Justice of the European Communities, http://curia.europa.eu/en/instit/presentationfr/cje.htm (last visited Oct. 2, 2007). *See also* Felemegas, *supra* note 3, at 261 (citing Treaty Establishing the European Community, Nov. 10, 1997, O.J. (C 340) 3 (1997)). R

ternational disputes between Nation States and provides advisory opinions on questions referred by appropriate international agencies.[126] Although the ICJ is not authorized to decide international sales disputes, successes of other international bodies of law support the contention that an International Court could settle commercial law disputes.

D. *One Language*

Due to the nationalistic approach of many countries, it is imperative that Contracting States not feel that they are being treated as inferior to their international counterparts to ensure wide implementation of the Global Code. Nevertheless, as noted in Part III, inconsistencies within the multiple language codifications of the CISG have resulted in conflicting interpretations of the Convention.[127] While it is necessary to publish the Global Code in multiple official languages, in order to rectify the current situation, the Global Code must contain language to the effect of: "Should discrepancies arise between official versions of the Code, the English text shall prevail." It has been noted that English is the best form of expression for the Convention due the fact that that negotiations and drafting are essentially carried out in this form.[128] Therefore, to guarantee that the true intent of the drafters consistently prevails, it is crucial that the English version be used to interpret any ambiguities.

E. *UNIDROIT Principles*

The UNIDROIT Principles of International Commercial Contracts were created by many of the same individuals who were directly involved in the drafting of the CISG and previous international commercial codes.[129] Under the auspices of

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126 *See* International Court of Justice, *available at* http://www.icj-cij.org/court/index.php?p1=1 (last visited Oct. 3, 2007).

127 *See supra* Part III.B.

128 *See* Bundesgericht [BGer] [Federal Supreme Court] Nov. 13, 2003 (Switz.), *available at* http://cisgw3.law.pace.edu/cases/031113s1.html (last visited Mar. 20, 2007). Since the negotiations under the CISG took place in English, the same should be true for drafting under the Global Code.

129 Further, the members of the Working Group who established the UNIDROIT Principles were "chosen with a view to ensuring, on the one side, the widest possible representation of all the major legal systems and regions of the world, and on the other hand, the highest professional qualifications." Bonell, *supra* note 111, at 5. The UNIDROIT principles are available in English, French, German, Italian, Spanish, Chinese, Korean, **R**

UNIDROIT, these scholars constructed principles specifically tailored to international sales law, consistent with the general philosophies of "all legal systems."[130] The success of such an approach was confirmed by the 15th International Congress of Comparative Law of the Académie Internationale de Droit Comparé, which included twenty "National Reporters" from various countries and regions with intrinsically diverse legal traditions and socio-economic structures.[131] After an analytical evaluation of each system and the UNIDROIT Principles as a whole, the council concluded that "relatively few provisions of the UNIDROIT Principles openly conflict with the respective domestic laws, while the remainder are perfectly consistent . . . and in a number of cases represent a useful compliment or clarification."[132]

Similarly, the UNIDROIT principles have been widely designated as the "inspiration" of various legislative codifications and were officially declared by the Estonian government to be one of the "most important and authoritative sources of interpretation in the drafting of new law obligations."[133] Corresponding reliance has occurred within the Civil Code of the Russian Federation of 1995, Hungarian Civil Code, Chinese Contract Law, German Law of Obligations, and the UCC.[134]

Likewise, because of the current, uncertain state of international sales law, commercial parties and courts alike have increasingly chosen the UNIDROIT principles as their governing law for

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Romanian, Russian, Portuguese, Serbian, Turkish and Vietnamese. *See* UNIDROIT, *supra* note 89). R

130 Bonell, *Global Commercial Code*, supra note 4, at 97; Zeller, *supra* note 104, at 23. *Cf.* Meyer, *supra* note 44, at 134 (stating that "the Principles attempt to harmonize international law through the comparison and collection of many legal systems, but . . . can never lead to sufficiently practical provisions."). R R

131 The "National Reporters" included representatives from Australia, Belgium, Canada, People's Republic of China, Denmark, France, Germany, Iran, Israel, Italy, Japan, Mexico, the Netherlands, Romania, Sweden, Switzerland, England, United States, and Vietnam. UNIDROIT Principles 2004, *supra* note 111, at 7. R

132 *Id.*

133 Felemegas, *supra* note 3, at 297–98. R

134 For example Comment 2 of UCC § 1-302 states that "parties may vary the effect of [the UCC's] provisions by stating that their relationship will be governed by recognized bodies of rules or principles applicable to commercial transactions. Such bodies of rules or principles may include, for example, those that are promulgated by intergovernmental authorities such as UNCITRAL or UNIDROIT." UNIDROIT Principles 2004, *supra* note 111, at 8 (citations omitted). R

contractual negotiations.[135] For instance, in 1999, the Center for Transnational Law ("CENTRAL")[136] conducted an evaluation of legal professionals involved in commercial transactions. CENTRAL concluded that two-thirds of those practitioners who responded had used the UNIDROIT Principles during contractual "negotiati[ons] and drafting"[137] Of that group, one third had used the UNIDROIT Principles to overcome linguistic difficulties, another third for guidance in complex legal disputes, and the remaining third as a model for drafting individual contractual provisions.[138]

The UNIDROIT Principles encompass a wide variety of issues currently unaddressed by the current Convention, which are necessary if uniformity is to be achieved. For example, Article 3.1 of the Principles addresses validity requirements for contracts such as incapacity and illegality. Similarly, Articles 3.8 and 3.9 address issues regarding fraud and duress.[139] Without the inclusion of such necessary legal standards, domestic courts are free to institute what they consider appropriate remedies under their own contractual legal traditions. The adoption of such express and internationally accepted rules would preclude courts from resorting to domestic law for interpretation and greatly facilitate fairness within commercial contracts.[140] Nonetheless, even if recourse to the UNIDROIT Principles is not officially adopted as an interpretive measure, the creators of the Global Code should use the Principles for guidance

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135 Michael Bonell, *Creating International Legislation for the Twenty-First Century: Do We Need a Global Commercial Code?*, 106 DICK. L. REV. 87, 98 (2001) (citing The Ministry of Defense and Support for the Armed Forces of the Islamic Republic of Iran v. Cubic Defense Systems, Inc., 29 F. Supp. 2d 1168 (S.D. Cal. 1998)).

136 CENTRAL is the research facility attached to the University of Cologne School of Law, Germany. The organization focuses on transnational law as well as alternative dispute resolution in the international context. CENTRAL also maintains a comprehensive website offering access to various international conventions, principles, and case law. *See* CENTRAL Research Facility Information, http://www.central.uni-koeln.de/content/e13/e7036/index_ger.html.

137 Michael Bonell, *UNIDROIT Principles 2004—The New Edition of the Principles of International Commercial Contracts adopted by the International Institute for the Unification of Private Law,* UNIF. L. REV. 5, 9 (2004).

138 *Id*. The UNIDROIT Principles have also been used frequently in both judicial and arbitration proceedings. *See, e.g.* ICC Award No. 8817 of December, 1997, *in* ICC International Court of Arbitration Bulletin, 10/2 (1999), 75; ICC Award No. 7110 of April, 1998, *in* ICC International Court of Arbitration Bulletin, 10/2 (1999), 54; GEC Marconi Sys. Pty. Ltd. v. BHP Info. Tech. Pty. Ltd. (2003) 128 F.C.R. 1.

139 Currently, under the CISG, there are no articles that address similar defenses. *See generally* CISG, *supra* note 5. R

140 *See* Bonell, *Global Commercial Code*, supra note 4, at 98–99. R

in drafting, to increase consistency within the international legal field.

V. The Interpretation of a Global Code to Ensure Success

One of the leading factors contributing to the failure of the CISG is ambiguity in its methodology of interpretation. Without a strict hierarchical structure of analysis, courts will continue to apply domestic legal principles in their reasoning.[141] Thus, to guarantee the overall success of the Global Code, a more definitive approach for its application must be established.

Like any statutory analysis, the first analytical step requires an examination of the plain language of the provisions. Second, if ambiguities arise, legislative history should be examined to ensure compliance with the true intent of the drafters.[142] Third, to maximize uniform interpretation of international sales law, courts must analyze and defer to relevant decisions from other jurisdictions. Fourth, commentary or something like an official restatement must be consulted to handle any unforeseen difficulties or ambiguities in interpretation. Finally, courts should evaluate academic opinion, not only to further educate themselves in unfamiliar or complex areas of the law, but also to determine which cases were correctly decided in order to give them persuasive effect.

A. *Plain Language and Legislative History*

It is well settled that "[a] benevolent lawmaker's first objective should be predictability and stability in international commercial relations."[143] As such, fundamentally, any assessment of statutory interpretation must begin with the plain language of the provision to be supplemented, when necessary, with the legislative history of the drafters.[144] This approach is widely accepted by courts and aca-

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141 *See, e.g.,* discussion *supra* Part III.A (noting that the use of gap-filling principles is generally accepted in civil law jurisdictions but is not frequently applied under common law systems).

142 Legislative history is known in the international context as travaux prèparatoires. *See* Zeller, *supra* note 104, at 20–21. R

143 Stephan, *supra* note 2, at 746; *see* Cook, *supra* note 1, at 349. R

144 Zeller, *supra* note 104 at 22–23 (citing Fothergill v. Monarch Airlines, 1977 3 All E.R. 616). R

demic commentators alike as a significant resource for ensuring accurate application of the law.[145]

Effective evaluation of the Global Code's express language and legislative history is imperative for two reasons. First, it ensures that the court's interpretation of the Global Code is consistent with the ideals of the drafting council. Second, adopting states have significantly relied on the language articulated by the drafting convention. Without reliance on the express language and legislative history, Contracting States may feel misguided by the existence of conflicting interpretations, undermining confidence in international sales law.

In order to avoid these complications, it is necessary that the drafters take into consideration the failures of the CISG and attempt to clarify any ambiguities. In doing so, a general definition section should be adopted to provide definitive meaning to terms such as "good faith" and "reasonableness."[146] Similarly, the vagaries of Article 7 must be avoided and replaced by the more consistent considerations of interpretation outlined within this section. This would provide significant guidance for courts and commercial parties alike, greatly supporting predictability in litigation and uniformity in international sales law.

B. *Use of Case Law as Highly Persuasive Authority*

As stated by the House of Lords in *Scruttons Ltd. v. Midland Silicones Ltd.,* "it would be deplorable if the nations, after protracted negotiations, reach agreement . . . and that their several courts should then disagree as to the meaning of what they appeared to do."[147] The goal of any international commercial code is

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[145] *See id.* at 20; HONNOLD, UNIFORM LAW, *supra* note 74, at 136; Fothergill v. Monarch Airlines, [1981] A.C. 251 (H.L.); *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842—43 (1984); *Air France v. Saks*, 470 U.S. 392, 396 (1985). **R**

[146] Definitions sections have been utilized by other commercial codes such as the UCC and the PECL. For example, in defining reasonableness, the PECL states that,

> [R]easonableness is to be judged by what persons acting in good faith and in the same situation as the parties would consider to be reasonable. In particular, in assessing what is reasonable the nature and purpose of the contract, the circumstances of the case, and the usages and practices of the trades or professions involved should be taken into account.

PECL, *supra* note 25, §§ 1:301–302, http://www.cisg.law.pace.edu/cisg/text/reason.html. **R**
See UCC, *supra* note 13, § 1-201. The CISG, on the other hand, does not contain such an informational section, thus prompting courts to use domestic legal traditions in interpreting terms under the Convention. *See* Sim, *supra* note 21, at 79. **R** **R**

[147] Scruttons Ltd. v. Midland Silicones Ltd., 1962 App. Cas. 446, 471 (H.L. 1961)

to govern the field of international sales law and replace domestic regulatory authority within the field.[148] Should domestic legal principles be applied to transnational sales disputes, substantive uniformity of the Global Code will be unattainable.[149] Thus, the establishment of a significant body of international case law, reflecting notions of compatible international jurisprudence, is essential for the Global Code's success.[150]

Although some commentators argue that divergent interpretations are inevitable due to geographic and administrative impracticalities,[151] such arguments have become moot due to current technological advancements.[152] UNCITRAL, in its twenty-first working session, instituted a system of "national correspondents" to gather and publish international sales decisions from each adopting state in the Case Law Under UNCITRAL Texts (CLOUT) standardized reporting system.[153] Similarly, The Centre

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148 *See* Bonell, *General Provisions*, *supra* note 77, at 3; Bailey, *supra* note 51, at 286; DiMatteo, *supra* note 29, at 308. R R

149 "Where, for instance, there are three equally plausible autonomous interpretations, and two interpreters who construe the same provision independently, the chance that there will be a uniform result only amounts to 33%, or, in other words, the probability of diverging interpretations is 67%." Ferrari, *supra* note 32, at 204. R

150 When courts give deference to other international decisions, they are more likely to interpret international sales law correctly. *See, e.g.,* MCC-Marble Ceramic Center, Inc. v. Ceramica Nuova D'Agostino SPA, 144 F.3d 1384 (11th Cir. 1998); Shuttle Packaging Systems v. Jacob Tsonakis, No. 1:01-CV-691, 2001 US Dist. LEXIS 21630, at *22 (W.D. Mich. Dec. 17, 2001); Medical Mktg. Int'l, Inc. v. Internazionale Medico Scientifica, *SRL*, No. 93-0380, 1999 U.S. Dist. LEXIS 7380 (E.D. La. May 17, 1999); Claudia v. Olivieri Footwear Ltd., No. 96 Civ. 8052 (HB) (THK), 1998 US Dist. LEXIS 4586, at *18 (S.D.N.Y. Apr. 6, 1998); Usinor Industeel v. Leeco Steel Prod., 209 F. Supp. 2d 880, 886 (N.D. Ill. 2002); Sport d'Hiver di Genevieve Culet v. Ets. Louys et Fils, Trib. Civile of Cuneo [District Court], Sez. 45/96, Jan. 31, 1996 (It.), *available at* http://cisgw3.law.pace.edu/cases/960131i3.html (last visited Mar. 21, 2007); Gaec des Beauches B. Bruno v. Societe Teso Ten Elsen GmbH & Co KG, CA Grenoble [Appeals Court] [CA], 94/3859, Oct. 23, 1996 (Fr.), *available at* http://cisgw3.law.pace.edu/cases/961023f1.html (last visited Mar. 21, 2007).

151 *See* Murray, *supra* note 14, at 373 (stating "[e]xpecting courts to develop an international perspective by analyzing CISG applications around the world borders on the absurd."). *See also* Michael F. Sturley, *International Uniform Laws in National Courts: The Influence of Domestic Law in Conflicts of Interpretation*, 27 VA. J. INT'L L. 729, 738 (1986). R

152 *Cf.* Sim, *supra* note 21, at 89–90 (stating that the "homeward trend" approach will not be eliminated simply by providing greater access to case law using CLOUT and UNILEX.). R

153 REPORT OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW ON THE WORK OF ITS TWENTY-FIRST SESSION 98 (1988). *See* U.N. Comm. on Int'l Trade Law ("UNCITRAL"), Case Law on UNCITRAL TEXTS (CLOUT), A/CN.9/SER.C/GUIDE/1/Rev. 1 (Feb. 4, 2000). The purpose of CLOUT is to,

> [P]romote international awareness of such legal texts elaborated or adopted by the Commission, to enable judges, arbitrators, lawyers, parties to commercial

for Comparative and Foreign Law Studies in Rome maintains UNILEX, providing access to both case law and an international bibliography concerning international commercial law.[154] Finally, Pace University Law School provides noteworthy access to voluminous research and academic publications regarding the CISG.[155]

This accessibility to international case law would impose a duty on courts to utilize such information in judicial application of the Global Code. Furthermore, courts may access the analytical reasoning behind rendered decisions so that the interpretive methodology of previous courts can be evaluated. The emerging difficult questions are: to which decisions and to what extent should courts give deference in terms of international rulings?

While some scholars have extended the principle so far as to argue for a system of binding precedent under the scheme of a "supernatural stare decisis,"[156] such an approach would more likely

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> transactions and other interested persons to take decisions and awards relating to those texts into account in dealing with matters within their responsibilities and to promote the uniform interpretation and application of those texts.

Id. at 2. Currently, CLOUT contains information covering the Convention on the Limitation Period in the International Sale of Goods (1974), the United Nations Convention on Contracts for the International Sale of Goods (1980), the UNCITRAL Model Law on International Commercial Arbitration (1985), the United Nations Convention on the Carriage of Goods by Sea (1978), the United Nations Convention on Independent Guarantees and Stand-by Letters of Credit (1995), the UNCITRAL Model Law on Procurement of Goods, Construction and Services (1994), the UNCITRAL Model Law on Electronic Commerce (1996), the UNCITRAL Model Law on Cross-Border Insolvency (1997), the United Nations Convention on International Bills of Exchange and International Promissory Notes (1988), the United Nations Convention on the Liability of Operators of Transport Terminals in International Trade (1991), and the UNCITRAL Model Law on International Credit Transfers (1992). *Id.*

154 UNILEX provides a detailed collection of international case law covering both the CISG as well as the UNIDROIT Principles. *See* UNILEX, *available at* http://www.unilex.info (last visited Mar.21, 2007).

155 Of all the available online resources, Pace Law School offers the most comprehensive information regarding international sales law, including scholarly articles, advisory opinions, the drafting history of the Convention and interpretive guides for parties. *See* Pace Law School, CISG Database, http://www.cisg.law.pace.edu (last visited Mar. 21, 2007).

156 *See* Larry A. DiMatteo, *The CISG and the Presumption of Enforceability: Unintended Contractual Liability in International Business Dealings*, 22 YALE J. INT'L L. 111, 133 (1997). In creating a code for maximum adoptability by nation states, it should be taken into account that some civil jurisdictions expressly forbid notions of binding precedent. For example, Dutch law expressly forbids binding authority and there has been little, if any, reliance by courts on previously rendered decisions. Felemegas, *supra* note 3, at 254. **R**

undermine than advance the unification effort.[157] Without a hierarchical international court system, it is difficult to determine which courts shall have binding authority.[158] Further, a system of stare decisis would bind other courts to both properly as well as improperly reasoned opinions.[159]

Instead, under the Global Code, courts should analyze a variety of international decisions, determine which were accurately decided, and accord them high deference.[160] Such an approach concurrently maintains respect for international sovereignty while encouraging international comity among adopting nations.[161] This not only furthers the goal of uniformity within commercial sales law, but also potentially creates a "landslide" of international decisions, currently lacking under the CISG.[162]

C. *Supplemental Commentary*

Supplemental commentary can offer one of the "most useful aids to interpretation and construction"[163] of statutes. Unfortu-

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157 *See* Schlechtriem, COMMENTARY, *supra* note 67, at 98–99; Zeller, *supra* note 104, at 10. R

158 Certainly, it would not make sense for the Supreme Court of France to be bound by a state court decision in the United States. *See* Franco Ferrari, *Ten Years of the U.N. Convention: CISG Case Law—A New Challenge for Interpreters?*, 17 J. L. & COM. 245, 259 (1998).

159 It would also create considerable problems where two, equally authoritative, court opinions contradict each other. Such a situation would force a court interpreting international sales law to choose the reasoning of one jurisdiction over another. Not only does this obviate a lack of uniformity, the political ramifications may undermine notions of international comity.

160 Due to linguistic obstacles and quantitative difficulties in determining which cases should be addressed, it would be impossible for courts to evaluate each case and opinion. Instead, courts must simply conduct comparative analysis sufficient to support their judicial interpretation.

161 "[H]armonious international trade is doubtlessly an asset to harmonious relations between states . . . ." Kilian, *supra* note 28, at 242. For an extensive discussion regarding international judicial cooperation, see Anne-Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT'L L.J. 191 (2003). R

162 "[W]hen CISG was first enacted, many observers immediately expected to see a landslide of decisions under CISG. The landslide never occurred since most practitioners and merchants routinely opt out of CISG. To most practitioners and merchants, CISG continues to evoke the general sense of discomfort that stems from the unknown." Cook, *supra* note 1, at 351. R

163 Murray, *supra* note 14, at 375 (quoting James J. White & Robert S. Summers, UNIFORM COMMERCIAL CODE 12 (3d ed. 1988). *See also* Bailey, *supra* note 51, at 300 (stating that "[i]ncluding this commentary would pro vide [sic] needed guidance for U.S. courts and lawyers when attempting to understand a legislative scheme with so many civil law elements."). R R

nately, there is currently no form of consistent, *official*, systematic commentary within the field of international sales law.[164] However, "experience has shown that courts defer, and . . . *ought* to defer to the guidance [that] [c]omments offer as to the proper application of Code provisions."[165]

Commentary provides an invaluable resource for interpreting and understanding the underlying policy considerations of the provision so that the rule can be appropriately applied.[166] This understanding is extremely important for regulations, such as the Global Code, which are created to foster uniformity while remaining malleable. In such codifications, official commentary provides the necessary component to achieve consistency in interpretation—to "bridge" complex statutory language and fact-specific circumstances.[167]

Such an approach is exemplified by various international conventions in their methodology of interpretation, including the 1964 Hague Conventions (ULF and ULIS)[168] and the 1974 Convention on the Limitation Period in the International Sale of Goods ("Limitations Convention").[169] Similarly, under the PECL, the first tier of interpretation of the regulation is an analysis of the provision itself. The language of the provision is then supplemented with "comments explaining the rule's purpose and systematic context."[170] Finally, the comments provide reference to the authority on which the law is based and a comparative analysis of the provision to other legal systems.[171]

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164 Although the Secretariat Commentary to the CISG exists, it was created a year before the 1980 Vienna Convention and, therefore, is not based on the final text of the Code. As such, the Secretariat Commentary was not officially adopted by the drafters. *See Commentary on the Draft Convention on Contracts for the International Sale of Goods, prepared by the Secretariat,* U.N. Doc. A/CONF.97/5, *reprinted in* UNITED NATIONS CONFERENCE ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS, U.N. Doc. No. A/CONF. 97/19 (E.81.IV.3) (1980).

165 Sean Michael Hannaway, *The Jurisprudence and Judicial Treatment of the Comments to the Uniform Commercial Code*, 75 CORNELL L. REV. 962, 962 (1990) (discussing the application of the UCC Comments in the interpretation of the Code).

166 *Id.* at 966.

167 *Id.* at 967.

168 *See supra* Part II.

169 *See* Convention on the Limitation Period in the International Sale of Goods, *available at* http://cisgw3.law.pace.edu/cisg/text/limitation-text.html (last visited Mar. 21, 2007).

170 Meyer, *supra* note 44, at 133. **R**

171 *Id*.

Despite an emphasis on the need for development of an official commentary to supplement the current Convention, it is unclear why this approach has not been more widely adopted.[172] Yet, because the Global Code would contain concepts of interpretation somewhat "unfamiliar" to certain jurisdictions, the development of a certified commentary promises necessary guidance and the tools for uniform application.[173]

D. *Use of Scholarly Articles*

Among civil law jurisdictions, reliance on scholarly articles has long been utilized in interpretation of the law.[174] Conversely, under common law, courts have been reluctant to confer the same weight to academic opinion when resolving disputes.[175] Despite this reservation, there is evidence that common law courts are beginning to shift their approach, especially when faced with legal complexities involving international disputes.[176] Reliance on scholarly opinion is especially useful considering that many authors, such as Professor Bonell, served as active delegates in the drafting of the CISG and can provide useful insight in understanding the principles on which global law is based.

Finally, scholarly opinion is an invaluable asset for providing critical analysis of international sales case law. Should a court misapply the statutory analysis or come to an improper decision, scholars will be quick to flag these rulings. This will serve as a "policing" function to alert future courts that these decisions should be considered less persuasive. Such an approach would not only assist the courts in providing consistent interpretation, but would also concurrently provide the necessary support for practitioners and students eager to understand the intricacies of international sales law.

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172 Some commentators believe that the decision to forgo adoption of the official commentary is based on the fact that the drafters feared that the textual provisions would be ignored in favor of a more easily read commentary. Winship, *supra* note 77, at 637; Sim, *supra* note 21, at 83 (citing U.N. Doc. A/CONF.97/8 (Jan. 11, 1980)). R R

173 Sim, *supra* note 21, at 83. R

174 Ferrari, *supra* note 32, at 208. R

175 Felemegas, *supra* note 3, at 259. R

176 *See, e.g*, Usinor Industeel v. Leeco Steel Products, Inc., 209 F.Supp.2d 880 (N.D. Ill. 2002) (citing Richard Speidel, *The Revision of UCC Article 2, Sales in Light of the United Nations Convention on Contracts for the International Sale of Goods,* 16 Nw. J. INT'L L. & BUS. 165, 166 (1995) and HONNOLD, UNIFORM LAW, *supra* note 74. *See also* Ferrari, *supra* note 32, at 209–10. R R

VI. Conclusion

In the increasingly global and technologically advanced society in which we live, commercial dealings can cross international borders instantaneously. Regrettably, due to unfamiliarity with international sales law, most commercial parties remain unaware that the CISG is the substantive law governing their transaction. Those who are familiar often opt out of the Convention in favor of a more consistent commercial law such as the UCC or other familiar domestic law.

The CISG has been unsuccessful in reaching its goal of uniformity. This failure can be directly attributed to the ambiguous nature of the Convention, textual inconsistencies within the Convention, and the resulting misapplication by courts.

Thus, it is necessary that a Global Code be promulgated to harmonize the international community. In creating this Global Code, the "general principles" approach must be abandoned in favor of a stricter hierarchical structure of interpretation. If courts continue to utilize domestic legal principles, the Global Code will be short lived.

Many of the necessary components for the creation of a Global Code already exist. The CISG is a perfect starting point for an international commercial code; it simply must be reformed. With UNCITRAL in a position to act as a regulatory council, it can easily issue advisory opinions and provide guidance for interpretation. UNIDROIT has already drafted what could be the official commentary to accompany the new statutory text. Finally, websites such as CLOUT and UNILEX make international decisions easily accessible to both courts and scholars, permitting the evaluation of prior decisions to render well-reasoned, uniform judgments with highly persuasive authority.

For the harmonization of international law to have any effect, courts and practitioners must look beyond the scope of their own domestic traditions and approach law with an international perspective.[177] Fortunately, the academic trend has begun to educate prospective lawyers in legal principles that transcend national bor-

[177] "It has long been suggested that the common preference of judges for the law of their own country . . . might be explained by a sincere recognition of their not having been trained to cope with foreign law." Felemegas, *supra* note 3, at 257. **R**

ders.[178] It is time that the regulatory authority did the same, and a Global Code is the most efficient and effective way to achieve critical uniformity in international commercial law.

[178] For example, Harvard Law School has recently changed its first-year Juris Doctor curriculum to include classes targeting global legal systems, public international law, international economic law, and comparative law. *See HLS Faculty Unanimously Approves First-Year Curricular Reform*, Oct. 6, 2006, http://www.law.harvard.edu/news/2006/10/06_curriculum.php; *cf.* Trakman, *supra* note 30, at 101 (stating that "[n]ational adjudicators are trained primarily in domestic law; they are not necessarily equipped to appreciate the usages of the international community of merchants"). R

NOTES

CAN THE AUSTRALIAN MODEL BE APPLIED TO U.S. MORAL RIGHTS LEGISLATION?

*Joan Pattarozzi**

I. INTRODUCTION

Authors'[1] rights, which are the core of copyright, are protected on either a fundamentally moral or economic basis; the emphasis in the protection of these rights depends upon a society's value and perception of creative works.[2] In common law Anglo-American countries, these rights have developed since the eighteenth century[3] in line with principles of traditional property, wherein creative works are treated as tangible objects of ownership whose value is based on their social utility and dictated by the marketplace.[4]

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1 As used in this Note, the terms "author," "creator," and "artist" refer, interchangeably, to creators of literary, dramatic, musical, artistic, and film works—the authors covered by Article 6bis of the 1928 Rome Convention of the Berne Convention. Berne Convention for the Protection of Literary and Artistic Works, art. 6bis, July 24, 1971, 25 U.S.T. 1341, 828 U.N.T.S. 221. [hereinafter Berne Convention].

2 As used herein, "work," refers to works as defined by Berne:

> The expression "literary and artistic works" shall include every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression, such as books, pamphlets and other writings; lectures, addresses, sermons and other works of the same nature; dramatic or dramatico-musical works; choreographic works and entertainments in dumb show; musical compositions with or without words; cinematographic works to which are assimilated works expressed by a process analogous to cinematography; works of drawing, painting, architecture, sculpture, engraving and lithography; photographic works to which are assimilated works expressed by a process analogous to photography; works of applied art; illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, architecture or science.

Id. art. 2(1).

3 *See* Statute of Anne, 1710, 8 Ann., c. 19 (Eng.), *available at* http://www.yale.edu/lawweb/avalon/eurodocs/anne_1710.htm ("An act for the encouragement of learning, by vesting the copies of printed books in the authors or purchasers of such copies . . . . [F]or the encouragement of learned men to compose and write useful books . . . .").

4 *See, e.g.,* Neil Netanel, *Alienability Restrictions and the Enhancement of Author Autonomy in United States and Continental Copyright Law*, 12 CARDOZO ARTS & ENT. L.J. 1 (1994).

This utilitarian, public interest approach appears to sharply contrast the artists' interest approach of civil law nations of continental Europe, where creative works are viewed as "inseverable" extensions of their authors' personalities and which, thus, must be regarded in terms of certain moral rights and human dignity.[5] Common law countries, including the United States, however, have gradually incorporated a certain amount of moral rights protection into their copyright systems,[6] and some, most notably Australia, have significantly and expressly expanded the protection of moral rights.[7] Regardless of whether the current level of U.S. protection of authors' moral rights complies with governing international standards, more explicit statutory protection of these rights would not necessarily supplant the United States' public interest basis for protecting creative works.[8]

Following its accession to the Berne Convention ("Berne Convention" or "Berne") in 1988, the United States enacted the Visual Artists' Recording Act (VARA) in 1990, which grants a moral rights cause of action to *visual* artists, aiming to protect these artists' personal interests while promoting the public interest in creative works.[9] The federal codification of moral rights as to all *authors* would ensure U.S. compliance with Berne, and, in a world where most nations expressly protect authors' moral rights, such codification would promote continued efficient and effective global trade.

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[5] *Id.* at 6; Michael B. Gunlicks, *A Balance of Interests: The Concordance of Copyright Law and Moral Rights in the Worldwide Economy*, 11 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 601, 602 (2001). *See also* MAREE SAINSBURY, MORAL RIGHTS AND THEIR APPLICATION IN AUSTRALIA 12–14 (2003) (citing the Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 12, 1948) [hereinafter UDHR], which describes the nature of moral rights as fundamental human rights, wherein "everyone" has the right to freely participate in the community culture, and the protection of "moral and material interests" stemming from one's production as author).

[6] *See, e.g.,* Melville Nimmer & Monroe E. Price, *Moral Rights and Beyond: Considerations for the College Art Association*, *in* 3V OCCASIONAL PAPERS IN INTELLECTUAL PROPERTY FROM BENJAMIN N. CARDOZO SCHOOL OF LAW 9, 9–11 (1999); Gerald Dworkin, *The Moral Right of the Author: Moral Rights and the Common Law Countries*, 19 COLUM.-VLA J.L. & ARTS 229 (1995); Gunlicks, *supra* note 5, at 618; Netanel, *supra* note 4, at 23–26. **R**

[7] Jane Ginsburg, *The Right to Claim Authorship*, 41 HOUS. L. REV. 263, 294 (2004) [hereinafter Ginsburg, *Authorship*] (Australia's law, as compared to the laws of the United Kingdom, New Zealand, and Canada, "appears to be both the most highly elaborated and the most balanced in its approach to the interest of creators and exploiters.").

[8] Gunlicks, *supra* note 5, at 605. **R**

[9] Netanel, *supra* note 4, at 45. *See* discussion *infra* Part VIII.C. **R**

Berne and the Agreement on Trade Related Aspects of Intellectual Property Rights ("TRIPS") are the foundation of the international convergence of copyright laws.[10] Berne's moral rights provision, however, is considered "minimalist," as it only recognizes two specific moral rights, the right of attribution and the right of integrity,[11] and was adopted as a compromise which did not require express moral rights provisions to be included in national copyright laws.[12] In 1988, sixty years after Berne adopted its moral rights provision, the United States finally acceded to Berne.[13] Like most other common law nations, the United States had various laws and established causes of action outside the Copyright Act which at least indirectly protected artists' moral rights to attribution of authorship and integrity.[14] Thus, the United States determined that, in order for it to guarantee authors the degree of protection Berne required, further statutory recognition of moral rights was unnecessary.[15] Shortly after its accession to Berne and prior to TRIPS negotiations, the United States, apparently in an effort to bring itself into compliance with Berne, enacted VARA, but it has not shown any intent of exploring further statutory protection for authors' moral rights.[16]

This note will discuss the United States' current international obligations to protect authors' moral rights, and it will trace recent developments in the United States' treatment of moral rights as these indicate, perhaps, a shift in U.S. attitude, or, at least, the

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[10] SAINSBURY, *supra* note 5, at 31; Adolf Dietz, *ALAI Congress: Antwerp 1993, the Moral Right of the Author: Moral Rights and the Civil Law Countries*, 19 COLUM.-VLA J.L. & ARTS 199, 200 (1995). R

[11] Dietz, *supra* note 10, at 200. R

[12] Dworkin, *supra* note 6, at 232 (citing Sam Ricketson, *Moral Rights and the Droit de Suite: International Conditions and Australian Obligations*, 1 ENT. L. REV. 78, 79 (1990)). R

[13] The United States joined Berne to gain credibility in the global marketplace, in international trade negotiations, especially with nations where piracy is not uncommon, and in the development of international trade policy, to assure a high level of protection for U.S. copyright holders. *See* S. REP. NO. 100-352 (1988), *as reprinted in* 1988 U.S.C.C.A.N. 3706, 3707–11.

[14] S. REP. NO. 100-352, *as reprinted in* 1988 U.S.C.C.A.N. 3706, 3707–11.

[15] *See, e.g.,* Dworkin, *supra* note 6, at 232–36; Gunlicks, *supra* note 5. *See also* Berne Convention Implementation Act of 1988, Pub. L. No. 100–568, §§ 2(2)–2(3), 3(b), (102 Stat. 2853) 2853 (1988); S. REP. NO. 100-352, *as reprinted in* 1988 U.S.C.C.A.N. 3706, 3714–15. R

[16] Edward J. Damich, *Moral Rights Protection and Resale Royalties for Visual Art in the United States: Development and Current Status*, 12 CARDOZO ARTS & ENT. L.J. 387, 388–89 (1994) [hereinafter Damich, *Moral Rights Protection*]. *See also*, *e.g*., Cyrill P. Rigamonti, *Deconstructing Moral Rights*, 47 HARV. INT'L L.J. 353, 404–11 (2006).

weakening of U.S. resistance to the recognition of moral rights. In the current international environment, where recognition of moral rights is the norm,[17] the United States must codify its currently scattered, analogue protection of moral rights, in order to continue to participate in global trade. Part II distinguishes authors' moral and economic rights. Part III discusses the evolution of authors' rights in common law nations. Part IV explores the relationship between moral rights and the common law tradition. Part V examines the current international level of moral rights recognition, vis-à-vis the prevailing international agreements, Berne and TRIPS, and Part VI discusses the state of moral rights protection in the United States, in light of its international obligations. Part VII looks at the reasons the United States is suspicious of implementing stronger moral rights protection, and Part VIII highlights various analogue protections of moral rights in the United States and Australia. Part IX describes why these measures are not sufficient and moves toward the proposal, via analysis of recent moral rights legislation in Australia (Part X), that similar legislation in the United States could reconcile U.S. concerns about stronger moral rights protection with its international obligations to protect moral rights. On a practical level, this sort of protection of authors' rights would give American artists an avenue to show violation of their rights, without necessarily disrupting our balance of public and private interests.[18] It is not clear, however, whether such protection for artists would comport with the traditionally American cultural and economic concepts of an "author" and his relationship to his work.[19]

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17 Moral rights recognition in international copyright law is widespread and global; the global status of moral rights is evidenced by two key international documents. The U.D.H.R. carries considerable international authority as forty-eight United Nations Member States voted in its favor in 1948, none voted against it, and eight abstained. SAINSBURY, *supra* note 5, at 12–13. The Berne Convention, the internationally recognized source of international copyright law, also recognizes moral rights. Berne, *supra* note 1, art. 6bis. *See* discussion *infra* Part V. **R** **R**

18 *See* SAINSBURY, *supra* note 5, at 16. **R**

19 *See* Lawrence Adam Beyer, *Intentionalism, Art, and the Suppression of Innovation: Film Colorization and the Philosophy of Moral Rights,* 82 NW. U. L. REV. 1011, 1021–22, 1025–28 (1988) (suggesting that the limited monopoly granted to protect the economic interests of U.S. authors only provides economic incentives for innovation, which facilitates cultural development and serves a greater public interest, rather than acknowledging an inherent link between authors and their works); Thomas J. Davis, Jr., *Fine Art and Moral Rights: The Immoral Triumph of Emotionalism*, 17 HOFSTRA L. REV. 317, 361–62 (1989) (suggesting that, since the framing of the Constitution, art in the United States has been

II. Distinguishing Moral and Economic Rights

Authors' rights, as they emerged in civil law nations following the French Revolution, include a moral component, which recognizes authors' property rights in their artistic, musical, or literary creations.[20] Based on moral rights theory, these sorts of creations, unlike more utilitarian forms of property, are representative of their creators' unique personalities and thus are deserving of special protection.[21] In this context, authors' rights may be considered human rights, and the moral rights component of authors' rights allows an author to prevent mutilation of his work and claim authorship in his work, where reasonable.[22] It also protects an author's distinct personal interests in his work, which are separate from his copyright interests.[23] As with human rights, moral rights are of the economic and social variety; as such, they ensure that individuals can fully enjoy their civil and political human rights.[24] The Universal Declaration on Human Rights ("UDHR"), a strong

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property— the exploitability of which has driven our cultural development—and that greater rights to artists could supplant competition in favor of artists, but not art).

20 Daniel Gervais, The TRIPS Agreement: Drafting History and Analysis 49 (1998).

21 *Id.*; Sainsbury, *supra* note 5, at 14. *See* Parliament of Australia, Parliamentary Library, 1996–97 Bills Digest 160: Copyright Amendment Bill 1997, *available at* http://www.aph.gov.au/library/pubs/bd/1996-97/97bd160.htm [hereinafter Bills Digest 160]. In the Proceedings of the 101st U.S. Congress surrounding the passage of the Copyright Amendments Act of 1990, whose Title III incorporated VARA, Representative Markey distinguished the nature of useful and creative works and stated that such distinction justified additional protection of the latter. 136 Cong. Rec. H8266-02, H8271 (1990) (statement of Rep. Markey). **R**

> There is an unfortunate problem, however, in that too often a work is treated simply as a physical piece of property, rather than as an intellectual work, like a novel. But artworks are intellectual expression, not just physical property. . . . A work of art is not a utilitarian object like a toaster. It is an intellectual work like a song, a novel or a poem. We must not permit the connection between the artist and his or her work to be severed the first time the work is sold.

Id.

22 Gervais, *supra* note 20, at 49. *See also* Sainsbury, *supra* note 5, at 12–13. **R**

23 Henry Hansmann & Marina Santilli, *Authors' and Artists' Moral Rights: A Comparative Legal and Economic Analysis*, 26 J. Legal Stud. 95, 95. *See also* Gervais, *supra* note 20, at 49; Copyright Amendment (Moral Rights) Bill, 1999 (Austl.) (Revised Explanatory Memorandum at 1); Copyright Law Review Committee, Report on Moral Rights, pt. III, paras. 59–60 (Jan. 1988) [hereinafter CLRC 1988 Report] (citing A. Stromholm, *Droit Moral—The International and Comparative Scene from a Scandinavian Viewpoint*, 14 Int'l Rev. of Indus. Prop. & Copyright L. 1, 14 (1983) (Stromholm suggests that one basis for moral rights is linked to respect for the inviolability of individuals and respect for intellectual creativity.)). **R**

24 Sainsbury, *supra* note 5, at 12–13. **R**

international moral, albeit not legally binding, authority[25] which aims to outline a "standard of Achievement for all peoples and nations . . . to promote respect for these rights . . . and to secure their universal and effective recognition"[26] establishes moral rights as fundamental human rights.[27] By stating that authors are entitled to the recognition of moral, as well as material, interests in their works, the UDHR recognizes both the economic and moral components of creative works and brings them under the umbrella of fundamental human rights.[28]

The economic, or material, component of authors' rights, on the other hand, is limited to the author's pecuniary interests in the work and enables him to allow others to use his work; protection of this is available to authors in civil as well as common law countries.[29] In common law countries, copyright emerged as essentially an economic concept, as an equitable protection of authors' and publishers' interests, recognizing the value of authorship in statutorily protected works.[30] Thus, a copyright system which focuses on economic rights would consider a mutilation of a creative work only in terms of how much such alteration would reduce the monetary value of the work of art, rather than how it might reduce the artist's reputation.[31]

As moral rights are so closely connected to one's personality, countries that recognize moral rights usually make them inalienable;[32] they remain with the author, allowing him to retain some control over the work, even when pecuniary rights are transferred.[33] An author, though he holds moral rights in a work, does not necessarily own the copyright in that work.[34] In this way, and

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[25] *See generally supra* note 15. **R**

[26] SAINSBURY, *supra* note 5, at 13 n.65 (quoting UDHR, *supra* note 5). **R**

[27] GERVAIS, *supra* note 20, at 49; SAINSBURY, *supra* note 5, at 13. **R**

[28] "'Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.'" SAINSBURY, *supra* note 5, at 13 (quoting UDHR., *supra* note 5). **R**

[29] PAUL GOLDSTEIN, INTERNATIONAL INTELLECTUAL PROPERTY LAW 275 (2001) [hereinafter GOLDSTEIN, INTELLECTUAL PROPERTY LAW]. BILLS DIGEST 160, *supra* note 21 ("An interchangeable term in copyright discussions for economic rights is material rights."); GERVAIS, *supra* note 20, at 49. **R**

[30] GERVAIS, *supra* note 20, at 49. **R**

[31] BILLS DIGEST 160, *supra* note 21. **R**

[32] Hansmann & Santilli, *supra* note 23, at 96. **R**

[33] SAINSBURY, *supra* note 5, at 24; Netanel, *supra* note 4, at 24–25. **R**

[34] *See* AUSTRALIAN COPYRIGHT COUNCIL, INFORMATION SHEET, MORAL RIGHTS, G043 (June 2006), *available at* http://www.copyright.org.au/G043.pdf [hereinafter ACC INFOSHEET G043].

under a theory of absolute property ownership, the concept of moral rights would seem to conflict with the rights of owners and users of property which is protected by moral rights.[35] It is possible for an author's moral rights to continue to exist, however, even alongside the legitimate economic interests of owners and users of the creative property.[36]

For example, even as notions of essential natural rights to absolute, comprehensive control over one's property swept France at the end of the nineteenth century, moral rights emerged alongside such extreme theories of property.[37] Now, modern conceptions of property ownership, as a set of negative rights which prevent others from using property in specific ways, widely recognize the rights to own and enjoy one's property.[38] Modern property theory, however, as indicated by laws governing, e.g., nuisance, negligence, and trespass, acknowledges that these rights are subject to limitations which ensure that one's enjoyment of his property does not cause harm to others.[39] Likewise, moral rights, which ensure that copyright owners' use of creative property does not violate the integrity and reputation of a work's author, can coexist with modern property rights and economic property interests.[40]

III. The Evolution of Copyright & Protection of Authors' Rights in Common Law Countries

The principles underlying both civil and common law copyright regimes were aimed at promoting public interest and were grounded in the Lockean natural rights theory that a property right automatically arises out of one's labors.[41] By the end of the nine-

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[35] Sainsbury, *supra* note 5, at 24–26. R

[36] *Id.*; Dworkin, *supra* note 6, at 263. R

[37] Sainsbury, *supra* note 5, at 25–26. R

[38] *Id.* at 26–27.

[39] *Id.* at 26.

[40] *Id.* at 26–27.

[41] Locke's natural rights theory of property awards one's mental and/or physical labor in producing an object simply because the creator exerted the effort to create the object. Natural rights theory conceptualizes products of the mind as, necessarily, subjects with a perpetual property right in their creator, independent of statutory grants. These natural rights exist only by virtue of an author's efforts. The artistic works—the original expressions of an author's ideas—are products of his mental labor; therefore, the author has the right to hold these objects as his property. Since these creative works are property, they must be alienable, as are other forms of property. In an Anglo-American, utilitarian system of copyright, however, the declining emphasis on natural rights theory is related to the point, in the transfer of a creative work, at which an author's natural rights are realized,

teenth century, however, jurists in the civil law nations on the European continent became disillusioned with the characterization of literary and artistic property as analogous to any other form of property, and many of them rejected the tempering of the authors' rights by the public interest.[42] As the distinction between inalienable personality and alienable property affected their theories, copyright, as a property right, emerged in these countries as an extension of personality right; as such, it encompasses both economic/alienable and personal/inalienable components.[43] Thus, under the civil law approach of continental Europe, authors and their personal or moral rights are never separated, even if economic rights have been transferred.[44]

In Anglo-American doctrine, on the other hand, Locke's theory ultimately has had limited impact on copyright law, which developed around the utilitarian purposes of the public welfare and the creation of balanced incentives to venture into new markets.[45]

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and how the realization of these rights is balanced against public interest. *See* Netanel, *supra* note 4, at 814. **R**

[42] *Id.* at 14–16.

[43] In the late nineteenth century, this distinction, which is based on authors' personal connection to their works, developed in Continental legal discourse from the writings of, among other legal scholars, Kant, Kohler, and Hegel. Kant, reflecting the notion which emerged from the Romantic Movement of an author as not a mere artisan, but as superior within society and as one who wrote only for himself, characterized a creative work as an extension of an author's inner self, not as a separate, external object. Thus, an author's right in his work is inherent in his personhood; he can only grant others the right to use his work. Under Kant's theory, the title to the work itself and the corresponding rights cannot be transferred. SAINSBURY, *supra* note 5, at 4–5; Edward J. Damich, *The Right of Personality: A Common-Law Basis for the Protection of the Moral Rights of Authors*, 23 GA. L. REV. 1, 26–27 (1988) [hereinafter Damich, *Right of Personality*]; Netanel, *supra* note 4, at 16–19. Kohler and Hegel, on the other hand, recognized that works of art were external formulations of expression that transformed inalienable mental ability into alienable property. In effect, this "dualist" theory of authors' rights viewed an author's economic interests as parallel to, but legally and conceptually separate from, the author's personal interests (e.g., in having his work attributed to him and in controlling how it is publicly presented). The aspects of the work that related to the work as an expression of the author's personality were perceived as superior to the property/economic aspects of the work. *See* Damich, *Right of Personality* supra note 43, at 27–8; Netanel, *supra* note 4, at 19–22. The combination of these theories profoundly shaped the Continental copyright law definition of the inalienable and alienable elements of creative works. Netanel, *supra* note 4, at 16–17, 20. **R** **R** **R** **R**

[44] Peter Burger, *The Berne Convention: Its History and Its Key Role in the Future*, 3 J.L. & TECH. 1, 6 (1988).

[45] PAUL GOLDSTEIN, COPYRIGHT'S HIGHWAY: FROM GUTENBERG TO THE CELESTIAL JUKEBOX 141 (2003).

> United States copyright law has been molded principally by classical utilitarianism and, to a lesser extent, by Lockean natural right theory. . . . Recent Su-

Since the first copyright statute, the Statute of Anne, the common law Anglo-American tradition has emphasized the public welfare purpose of the copyright.[46] Indeed, the public welfare interest is clearly articulated in the Copyright Clause of the U.S. Constitution.[47] Moreover, in an 1834 decision, the United States Supreme Court expressly severed natural law, or any independent strain of natural law based in copyright, from copyright and recognized that copyright exists only insofar as federal statutory law provides.[48] Underscoring the scope of copyright protection in common law nations, statutes, since the Statute of Anne, have wholly replaced common law copyright and its supporting natural property right principles.[49] U.S. copyright owners' only rights, from the point at

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> preme Court opinions have reiterated that rewarding the author is a secondary consideration of copyright law and that the author has no natural right to such a reward.

Netanel, *supra* note 4, at 8–10. **R**

46 *See* Statute of Anne, 1710, 8 Ann., c. 19 (Eng.), *available at* www.yale.edu/lawweb/avalon/eurodocs/anne_1710.htm.

47 U.S. CONST. art. I, § 8, cl. 8 ("[*t*]*o promote the Progress of Science and useful Arts*, by securing for limited times to authors and inventors the exclusive right to their respective Writings and discoveries") (emphasis added). *See also* Jane Ginsburg, *A Tale of Two Copyrights: Literary Property in Revolutionary France and America*, 64 TUL. L. REV. 991, 992, 999–1000 (1990) [hereinafter, Ginsburg, *Literary Property*].

48 Wheaton v. Peters, 33 U.S. (8 Pet.) 591, 657 (1834) (holding that an author's natural rights to the product of his work were realized at the time of the transfer/sale and publication of his work, at which point any natural rights were assigned or extinguished; thus, the author's natural rights in his work were limited to the scope of the federal copyright statute. *See also* Netanel, *supra* note 4, at 13; Benjamin Davidson, Note, *Lost in Translation: Distinguishing Between French and Anglo American Natural Rights in Literary Property, and How* Dastar *Proves that the Difference Still Matters*, 38 CORNELL INT'L L.J. 583, 600, 610 (2005). **R**

49 Burger, *supra* note 44, at 5–6; Davidson, *supra* note 48, at 596. The notion that an author's rights in his creative work are limited by statute is further emphasized, in the United States, by 17 U.S.C. § 301, which expressly restricts the protection of all "fixed" (thus, published as well as unpublished) works to the "equivalent" statutory rights. Section 301 states: **R**

> (a) On and after January 1, 1978, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103, whether created before or after that date and whether published or unpublished, are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State.

17 U.S.C. § 301 (2000). *See* Damich, *Right of Personality*, supra note 43, at 49–50. *See also* 17 U.S.C. § 102(a) (2000) (In order to be protected, a work must be "fixed in any tangible medium of expression."). **R**

which a work is "fixed," are statutory.[50] Furthermore, the Statute of Anne, in clearly distinguishing authors' rights from those of proprietors or publishers (to whom an author's rights are *completely* transferable), laid the groundwork for the persistent Anglo-American copyright distinction between authors and copyright owners.[51] Thus, compared to a natural rights based system of copyright, which places authors at the center, the Anglo-American system focuses on the owner of the copyright and his statutory rights.[52]

IV. Common Law Conflicts with Moral Rights

Under the utilitarian, common law notion of creative works as commodities that advance public welfare, the Anglo-American tradition of copyright values the alienability of authors' rights.[53] The alienability of these rights affects the flow of creative works in the marketplace, and as the balance of interests in the United States tipped toward the public interest, and away from artists' moral interests, a conflict between copyright holders' proprietary interests and authors' personal rights emerged.[54] Consequently, the United States became wary of moral rights as a form of "continuing author sovereignty"[55] over their works, which authors could assert on a whim, tipping the balance in the production of creative works from

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[50] *See* 17 U.S.C. § 102 (2000).

[51] Burger, *supra* note 44, at 6. *See* Statute of Anne, 1710, 8 Ann., c. 19 (Eng.). In the United States, for example, copyright is completely statutory, and statutes explicitly provide for the protection of copyright "owners," not "authors." *See* 17 U.S.C. §§ 106–106A (2000) (exclusive rights are granted to the "owner of copyright" and rights to attribution and integrity only to "certain authors."). **R**

[52] Burger, *supra* note 44, at 7. **R**

[53] Netanel, *supra* note 4, at 8–11. **R**

[54] Undoubtedly, contributing to the limited moral rights protection under U.S. law (and perhaps to the view that American protections of authors' non-economic rights are sufficient) is the view by some that moral rights are simply not desirable in the American legal system. Professor Robert Gorman declares:

> [C]omprehensive [moral rights] legislation is likely to be ill-advised. It is likely to be impracticable in its application, to be unsettling in its impact upon long-standing contractual and business arrangements, to threaten investment in and public dissemination of the arts, to sharply conflict with fundamental United States legal principles of copyright, contract, property and even constitutional law, and ultimately to stifle much artistic creativity while resulting in only the most speculative incentives to such creativity.

Ilhyung Lee, *Toward an American Moral Rights in Copyright*, 58 Wash. & Lee L. Rev. 795, 805, 811–14 (2001) *(*quoting Robert A. Gorman, *Federal Moral Rights Legislation: The Need for Caution*, 14 Nova L. Rev. 421, 422 (1990)). *See* Gunlicks, *supra* note 5, at 604–05. **R**

[55] Netanel, *supra* note 4, at 7. **R**

social to artists' welfare.[56] Arguably, however, the public, as well as the artist, has an interest in seeing artists' moral rights protected. The public has an interest in seeing the work in its authentic form, in accordance with the artists' intent.[57] Regardless, the United States fears that moral rights protection would turn creative works into liabilities by giving authors a means to unreasonably burden free trade and restrict the free market flow of socially beneficial material. This perspective has affected American compliance with its obligations under Berne.[58]

V. THE CURRENT STATE OF INTERNATIONAL MORAL RIGHTS RECOGNITION UNDER BERNE AND TRIPS

Berne, originally drafted in 1886, is now considered the "premier multilateral copyright agreement."[59] Though its approach to moral rights protection is "minimalist,"[60] it affords authors greater protection than any other international copyright convention.[61] Indeed, Berne's Article 6bis provision on moral rights, adopted in 1928, which protects the moral rights to attribution and integrity, is the most internationally recognized expression of authors' moral interests in creative works.[62] Further, because Berne members are

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[56] *Id.*; Julie Levy, Note, *Creative Works as Negotiable Instruments: A Compromise Between Moral Rights Protection and the Need for Transferability in the United States*, 5 VAND. J. ENT. L. & PRAC. 27, 29 (2003).

[57] Nimmer & Price, *supra* note 6, at 11. *See supra* note 54; *See also infra* note 79 and accompanying text. R

[58] *Id.*

[59] Davidson, *supra* note 48, at 587. *See also*, *e.g.,* S. REP. NO. 100-352 (1988), *as reprinted in* 1988 U.S.C.C.A.N. 3706, 3707; 132 CONG. REC. H3079-02 (1988) (statement of Rep. Kastemeier). R

[60] SAINSBURY, *supra* note 5, at 18 (Berne Article 6bis represents a compromise between civil law and common law nations whose concepts of moral rights were diverse.). R

[61] "The Berne Convention . . . is the highest internationally recognized standard for the protection of works of authorship of all kinds." S. REP. NO. 100-352, *as reprinted in* 1988 U.S.C.C.A.N. 3706, 3707. *See* Berne Convention, *supra* note 1, art. 1 ("The countries to which this Convention applies constitute a Union for the protection of the rights of authors in their literary and artistic works."); Dietz, *supra* note 10, at 200. *See also* AUSTRALIAN GOVERNMENT DEPARTMENT OF COMMUNICATIONS, INFORMATION TECHNOLOGY, AND THE ARTS, GUIDE TO THE COPYRIGHT AMENDMENT (MORAL RIGHTS) ACT 2000—FACT SHEET [hereinafter DCITA FACT SHEET] (on file with author). R R

[62] *See* SAINSBURY, *supra* note 5, at 16–18 ("The enactment of the moral right signified the first time that the Berne Union recognized a personal element in copyright, an important element which already existed in laws of most continental European . . . countries."); Dietz, *supra* note 10, at 200. These rights, enacted at Rome in 1928, were strengthened at the Brussels Revision Conference in 1948 and at Stockholm in 1967. Burger, *supra* note 44, at 28, 32, 46. Further, according to Berne: R R R

obligated to grant national treatment to other members, each member nation must protect literary and artistic works originating in other member nations on the same substantive minimum terms it applies to the works of its own nationals.[63]

Under Berne, not every modification to an author's work is an actionable violation of the right of integrity; this right is only violated if a work is modified in a way that prejudices the author's honor or reputation.[64] Berne does not expressly restrict the transfer of moral rights, though it implies that these rights are transferable separately from economic rights.[65] Although they need not be perpetual, under Berne, moral rights must belong to the author for at least the duration of the copyright.[66] Parties to Berne must enforce the minimum moral rights to attribution and integrity, but Berne grants nations flexibility in creating legislation to safeguard these rights.[67] Many Berne nations prohibit waivers of moral rights, some nations allow the rights to be waived entirely or in part, and some nations do not address the waiver issue.[68] Waivers are not explicitly addressed by Berne.[69] Furthermore, Berne does not prohibit the work-made-for-hire doctrine, which in the United States acts as an automatic waiver of all an author's rights.[70] Fi-

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> [I]ndependently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right [e.g., of attribution] to claim authorship of the work and [e.g., of integrity] to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation. The rights granted to the author in accordance with the preceding paragraph shall, after his death, be maintained, at least until the expiry of the economic rights . . . .

Berne Convention, *supra* note 1, art 6bis. **R**

63 S. REP. NO. 100-352, *as reprinted in* 1988 U.S.C.C.A.N. 3706, 3707. *See* GOLDSTEIN, INTELLECTUAL PROPERTY LAW, *supra* note 29, at 20–21. **R**

64 Berne Convention, *supra* note 1, art. 6bis(1); SAINSBURY, *supra* note 5, at 55–56; Gunlicks, *supra* note 5, at 630–31. **R** **R**

65 Berne Convention, *supra* note 1, art. 6bis (The author retains his moral rights "independently . . . and even after the transfer of the [economic] rights."). GERVAIS, *supra* note 20, at 73; Gunlicks, *supra* note 5, at 652–53. **R** **R**

66 Berne Convention, *supra* note 1, art. 6bis. GERVAIS, *supra* note 20, at 73; Burger, *supra* note 44, at 46. **R** **R**

67 Berne Convention, *supra* note 1, art. 6bis(3) ("Means of redress for safeguarding the rights granted by this article shall be governed by the legislation of the country where protection is claimed."). **R**

68 Gunlicks, *supra* note 5, at 651. **R**

69 Berne Convention, *supra* note 1, art. 6bis; Dworkin, *supra* note 6, at 261; Gunlicks, *supra* note 5, at 652. **R** **R**

70 17 U.S.C. §§ 101, 201(b) (2000) ("work for hire" definition); Gunlicks, *supra* note 5, at 652. **R**

nally, Berne does not impinge upon member states' copyright priorities by prescribing that signatories, when interpreting their own laws, grant supremacy to authors' moral rights over their economic rights.[71]

The Uruguay Round of Multilateral Trade Negotiations, which launched in 1986, resulted in TRIPS, the sole means of enforcing the Berne Convention[72]. Prior to TRIPS, Berne's efficacy was limited due to the lack of any enforcement mechanism and effective international dispute resolution processes.[73] TRIPS establishes specific minimum standards pertaining to intellectual property rights and obligates all World Trade Organization ("WTO") member nations to provide a certain degree of protection of these rights, including procedures related to the administration of rights and a dispute resolution process, under their respective domestic laws.[74] The TRIPS Council, comprised of representatives of each WTO member nation, reviews TRIPS members' legislation and monitors their compliance with their TRIPS obligations.[75]

Article 9 of TRIPS subjects the Berne Convention to the WTO dispute settlement mechanism.[76] Except for Article 6bis and "rights derived from" 6bis, every element of Berne was incorporated into TRIPS Article 9 and thus became enforceable under the WTO.[77] Thus, WTO enforcement does not apply to any moral rights provided by Berne under Article 6bis. The United States pushed for this omission of moral rights from TRIPS, allegedly based initially on the lack of relation of moral rights to trade.[78] That proved to be a false distinction; eventually, the United States admitted its desire to prevent the possibility of the strengthening of

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71 Berne Convention, *supra* note 1, art. 6bis; Gunlicks, *supra* note 5, at 655–56. R

72 Gunlicks, *supra* note 5, at 655–56; Davidson, *supra* note 48, at 613. R

73 GOLDSTEIN, INTELLECTUAL PROPERTY LAW, *supra* note 29, at 111. Without these, and because many nations including the United States objected to specific Berne standards and thus refused to join the convention, Berne did not truly establish universal international minimum standards of intellectual property protection until TRIPS emerged. *See id.* at 96. R

74 *Id.* at 97.

75 *Id*. at 103–04.

76 GERVAIS, *supra* note 20, at 72. *See* Agreement on Trade-Related Aspects of Intellectual Property Rights, art. 9, Apr. 15, 1999, 33 I.L.M. 1197 [hereinafter TRIPS]. R

77 "Members shall comply with Articles 1 through 21 of the Berne Convention (1971) and the Appendix thereto. However, Members shall not have rights or obligations under this Agreement in respect of the rights conferred under Article 6bis of that Convention or of the rights derived therefrom." TRIPS, *supra* note 76, art. 9(1).

78 GERVAIS, *supra* note 20, at 72. R

moral rights.[79] As a result of the absence of Berne Article 6bis from TRIPS, Berne signatories, including the United States, are obligated to protect moral rights, but a claim for violation of these rights may not be enforced before a WTO dispute settlement panel.[80]

VI. THE STATE OF U.S. INTERNATIONAL MORAL RIGHTS OBLIGATIONS

When the United States signed onto Berne in 1988, it did so through the Berne Convention Implementation Act ("BCIA"), which states that Berne's provisions are not self-executing, may not be enforced in an action pursuant to the provisions themselves, and "do not expand or reduce" the rights of authors in the United States.[81] Presently, the United States is the last common law copy-

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79 *Id.* The legislative history surrounding the United States' implementation of Berne clearly shows that the United States' concerns in joining Berne were related to moral rights and to the effect of these rights upon trade. The United States feared that incorporating moral rights into U.S. law might affect the "balance of rights between American authors and proprietors," and, when the Berne Convention Implementation Act ("BCIA") was introduced to the Senate, it was with the desire to "prevent disruptive moral rights concepts from creeping into U.S. law. . . . U.S. implementing legislation should be neutral on the issue of moral rights." 134 CONG. REC. S14549-01 (1988) (statement of Sen. Hatch). *See* S. REP. NO. 100–352, *as reprinted in* 1988 U.S.C.C.A.N. 3706, 3715.

80 TRIPS members shall not have "rights or obligations under this Agreement in respect of the rights conferred under Article 6bis of the Convention or of the rights derived therefrom." GERVAIS, *supra* note 20, at 71. **R**

81 According to the BCIA,

> [t]he Convention for the Protection of Literary and Artistic Works, signed at Berne, Switzerland, on September 9, 1886, and all acts, protocols, and revisions thereto . . . are not self-executing under the Constitution and laws of the United States. (2) The obligations of the United States under the Berne Convention may be performed only pursuant to appropriate domestic law. (3) The amendments made by this Act, together with the law as it exists on the date of the enactment of this Act, satisfy the obligations of the United States in adhering to the Berne Convention and no further rights or interests shall be recognized or created for that purpose. . . . The provisions of the Berne Convention, the adherence of the U.S. thereto, and satisfaction of the U.S. obligations thereunder, do not expand or reduce any right of an author of a work, whether claimed under Federal, State, or the common law—(1) to claim authorship of the work; or (2) to object to any distortion, mutilation, or other modification of, or other derogatory action in relation to, the work, that would prejudice the author's honor or reputation.

Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, §§ 2–3, (102 Stat. 2853) 2853–54 (1988). Further, because Berne's provisions are not self-executing, these provisions are not directly enforceable in U.S. courts. The rights they provide exist only to the extent provided by U.S. law, which means that foreign authors cannot, in the United

right system without specific moral rights legislation.[82] With the minor exception of VARA, which applies to a very specific group of authors, neither the U.S. Copyright Act nor the common law recognizes authors' express rights of attribution or integrity.[83] While moral rights and the interests of the author are the foundation of civil nations' copyright law[84], common law nations, most notably Canada, the United Kingdom, and, most recently, Australia, have also incorporated specific statutory moral rights provisions into their copyright systems.[85] In all these TRIPS-member nations which have established statutory moral rights protections, authors' moral rights would be protected regardless of the exclusion of Berne Article 6bis from TRIPS Article 9. Because TRIPS is the sole means of enforcing Berne, however, the United States, without statutory moral rights (except VARA), can continue to avoid protecting moral rights and implementing legislation without risk of liability.[86] This does not change the fact that the United States is not in compliance with its Berne obligations to protect authors' moral rights in its domestic laws.[87] Moreover, the United States' refusal to adopt moral rights protection denies American

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States, assert broader rights than U.S. authors can assert under U.S. law. 134 CONG. REC. S14549-01 (1988) (statement of Sen. Deconcini).

[82] Gunlicks, *supra* note 5, at 667. R

[83] 17 U.S.C. § 106A; Gunlicks, *supra* note 5, at 617. *See* 3 PAUL GOLDSTEIN, GOLDSTEIN ON COPYRIGHT § 17:201 (3d ed. 2005) [hereinafter GOLDSTEIN, COPYRIGHT]. R

[84] Gunlicks, *supra* note 5, at 604. R

[85] In 1931, Canada enacted moral rights legislation which closely followed the language of Article 6bis. Dworkin, *supra* note 6, at 243. The United Kingdom in 1988, and Australia in 2000 and 2004, have implemented moral rights provisions. Gunlicks, *supra* note 5, at 666–67. *See also* GOLDSTEIN, INTELLECTUAL PROPERTY LAW, *supra* note 29, at 295; Ginsburg, *Authorship*, *supra* note 7, at 287–96. *See generally* Australian Copyright Act, 1968 (Moral Rights) Amendment 2000 (Austl.). R R R

[86] Davidson, *supra* note 48, at 613. *See also* Ginsburg, *Authorship*, *supra* note 7, at 281; Gunlicks, *supra* note 5, at 667–68. R R

[87] GERVAIS, *supra* note 20, at 72 n. 69; Ginsburg, *Authorship*, *supra* note 7, at 281; Gunlicks, *supra* note 5, at 605, 608–09. *See* Berne Convention, *supra* note 1, art. 6bis. In fact, during Senate Proceedings on October 5, 1988, Senator Hatch further revealed U.S. priorities in adhering to Berne. Citing the United States' strong financial interests in protecting its works from piracy as a reason for joining Berne, the Senator then explained that existing U.S. law satisfies the United States' Article 6bis obligations, even as he acknowledged, relying upon substantial case law, that our judicial system consistently reinforces that moral rights are outside U.S. law. 134 CONG. REC. S14549-01 (1988) (statement of Sen. Hatch). U.S. interests, in signing onto Berne, focused upon enhancing U.S. credibility in the global marketplace, combating piracy of U.S. works, and increasing U.S. leverage in global trade policy formulation. These articulations of U.S. reasons for joining Berne shed light on the United States' treatment of its moral rights obligations under Berne. The United States' cursory dealing with Berne's requisite moral rights reflects that moral rights R R R

authors the highest international standard of copyright protection.[88]

VII. WHY IS THE UNITED STATES SO CONCERNED ABOUT ADOPTING MORAL RIGHTS LEGISLATION?

A natural outgrowth of the common law emphasis on alienability of creative works,[89] the maintenance of the "delicate balance" of interests and rights between authors and copyright owners/proprietors, was a chief legislative concern surrounding the BCIA in 1988.[90] The resulting implementation, with its neutral effect on the status of moral rights in U.S. copyright law,[91] reflected the successful lobbying efforts of publishers, motion picture distributors, and other commercial exploiters of authors' works.[92] These

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were more or less an obstacle to the U.S.'s securing the primary benefits of Berne. *See also* S. REP. NO. 100-352 (1988), *as reprinted in* 1988 U.S.C.C.A.N. 3706, 3707-10.

88 Gunlicks, *supra* note 5, at 663. As acknowledged by Congress at the time of Berne's implementation, Berne affords authors the highest internationally recognized standard of moral rights protection. By failing to effectively adhere to its obligations under Berne, the United States continues to deny its own authors the high level of protection other Berne members afford their authors. *See*, *e.g.*, S. REP. NO. 100-352, *as reprinted in* 1988 U.S.C.C.A.N. 3706, 3707–10. **R**

89 *See* discussion *supra* Part IV.

90 During congressional debates surrounding the BCIA, Senator Leahy stated that when he introduced the bill to his colleagues, he opted for a "minimalist approach" to moral rights, not wanting "to disrupt the assumptions now governing relations among creators, publishers, distributors, and consumers of copyrighted works." 134 CONG. REC. S14549-01 (1988) (statement of Sen. Leahy). Also during these proceedings, Senator Hatch said that these moral rights, if enforced, would have a major effect on existing "copyright relationships" in the United States. 134 CONG. REC. S14549-01 (1988) (statement of Sen. Hatch). *See also* S. REP. NO. 100-352, *as reprinted in* 1988 U.S.C.C.A.N. 3706, 3715. The House Proceedings reflected a similar focus on the preservation of the balance of statutory rights and public interest. 134 CONG. REC. H3079-02 (1988) (statement of Rep. Kastemeier).

91 *See* 134 CONG. REC. H3079-02 (1988) (statement of Rep. Kastemeier).

92 Lee, *supra* note 54, at 805. The Magazine Publishers' Association, which originally opposed Berne due to moral rights concerns, helped craft the legislative compromise which resulted in the BCIA. 134 CONG. REC. S14549-01 (1988) (statement of Sen. Hatch). Echoing the sentiments of Senator Hatch, the publishers approved of the broadening of copyright protection abroad, but they feared the vesting of rights of attribution and integrity in news writers would bring a "bonanza" of "aggrieved reporters' lawsuits." With this in mind, *Time* assembled a coalition of "publishing heavyweights", including the Magazine Publishers' Association, McGraw-Hill, Inc., and Dow Jones & Co. to lobby against Berne. **R**

> Even beyond the world of magazines and newspapers, the coalition says signing Berne could unleash legal tornadoes wherever works are copyrighted. It sees the moral-rights concept as a giant wild-card that will let contentious artists press all sorts of unprecedented grievances. Lyricists could sue radio stations for not crediting them when their songs go on the air. Film makers could sue

groups stood to suffer great economic devastation as a result of anything that might burden their abilities to edit, reproduce and distribute creative product (in the form of films, articles, magazines, etc.), and they had the power and resources to make their needs heard.[93] Also, industries which deal largely with the creation of derivative works, such as the motion picture industry, fear that the recognition of moral rights could subject, e.g., filmmakers, to an onslaught of legislation where screenwriters, authors, or novelists claim that alterations to a work exceed those which are necessary to transfer the underlying work from, e.g., book to cinema.[94]

The United States' fears of adopting moral rights legislation seem to reflect a U.S. notion that it would have to adopt a system just like that of the French,[95] the most expansive system of recognition of moral rights in the world today.[96] The French system protects moral rights in a "personalistic" way, where the right of respect for an author's name, authorship and work, and his subjec-

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> TV stations if they object to the commercials that run with their movies. A professor who writes a textbook chapter could sue the publisher over the way the entire book turns out.

133 CONG. REC. E4622-01 (1987) (statement of Sen. Morrison, citing Michael W. Miller, *Pressing Issue: Publishers Mobilize to Foil Revision of Copyright Law*, WALL ST. J., Nov. 3, 1987, at 25.).

93 133 CONG. REC. E4622-01 (1987) (statement of Sen. Morrison). Representative Berman, speaking at the House Proceedings on the BCIA, expressed concern for screenwriters and directors who lack bargaining power to resist film studios' coercions to contractually waive protections of their films from material alterations. Thus, as contracts do not adequately and universally protect these rights, he saw a need for a statutory approach, but he was concerned about not "kill[ing] the goose that lays the golden egg." He implied that moral rights legislation is possible, as long as it strikes a proper balance. Moral rights could restrict the distribution and production of films, and filmmakers, having taken the financial risk in getting films made, should be able to exploit the films in every market. Furthermore, the entire creative community and global "filmviewing public" benefits from the production of American films. 134 CONG. REC. H3079-02 (1988) (statement of Rep. Berman).

94 Even when a filmmaker wants to be faithful to the underlying work, some changes are required in the transferring of mediums (e.g., from print to film); determining which changes are technically required and which ones are made at the filmmakers' discretion requires great subjectivity. Thus, filmmakers (and other creators of derivative works) are uncomfortable with the idea of moral rights legislation, as it could allow authors to make claims even as to alterations demanded by a change of medium. Nimmer & Price, *supra* note 6, at 11. **R**

95 Gunlicks, *supra* note 5, at 609. *See also* Lee, *supra* note 54, at 805 (citing Orrin G. Hatch, *Better Late Than Never: Implementation of the 1886 Berne Convention*, 22 CORNELL INT'L L.J. 171, 175 (1989)). **R**

96 Dietz, *supra* note 10, at 222. **R**

tivity as to any alterations to his work, are nearly absolute and not subject to any condition.[97] The Berne convention is silent as to the issue of alienability of moral rights and it certainly does not require the level of protection recognized in France.[98] Some common law nations, such as Australia, as discussed *infra*, that have adopted legislation to protect moral rights, have adopted the more moderate approach condoned by Berne. For example, in France, there is a presumption that an author's integrity rights are violated by *any* modification, not just mutilation or distortion, to his work.[99] Berne and other common law countries, including Australia, however, require that an author claiming an integrity violation show prejudice to his honor or reputation before he may object to an act done to his work.[100]

Moreover, even in France and Germany, the "birthplace of moral rights", moral rights, though they burden a transferee's free use of a work and create an unbreakable link between the author and work, are limited in their "absoluteness" by good faith and the interests of transferees, publishers, and the public.[101] Indeed, even French courts have acknowledged that the inalienability of moral rights must yield to commercial practicality and particular situations.[102]

As will be discussed in the following parts, moral rights "analogues" in the United States and Australia provide extremely weak

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97 *Id.*; Ginsburg, *Literary Property*, *supra* note 47, at 996 (indicating that French and American—thus civil and common law—systems of copyright had similar underpinnings until personalistic concepts arose in the French system). R

98 *See* Berne Convention, *supra* note 1, art. 6bis; CLRC 1988 REPORT, *supra* note 23, pt. III, at paras. 37–42. R

99 SAINSBURY, *supra* note 5, at 55–56; Damich, *Right of Personality*, *supra* note 43, at 40. Berne Convention, *supra* note 1, art. 6bis. R R

100 SAINSBURY, *supra* note 5, at 55–56; Damich, *Right of Personality*, *supra* note 43, at 40. Berne Convention, *supra* note 1, art. 6bis. R R

101 Gunlicks, *supra* note 5, at 608. Members of the public in France and Germany have the absolute right to use the work as they wish in private. In addition, French law affords users various exceptions, e.g., criticism and academic uses, to the right of integrity. Also, French and German laws allow a few exceptions to authors'/employees' moral rights as to works made for hire. *See id*. at 649–53; Netanel, *supra* note 4, at 24. R R

102 *See* CLRC 1988 REPORT, *supra* note 23, pt. III, at paras. 39–42. R

> The shifting standards by which the right of integrity is applied to adaptations or collaborative works may, for example, be explained on the basis of implied waivers. One seminal example is the case of *Bernstein v. Matador et Pathe Cinema* where a covenant allowing all changes necessary for adapting a play to a movie was held valid, notwithstanding the author's inalienable moral right.

Id.

protections of authors' moral rights compared to the specific statutory causes of action granted to authors in continental nations,[103] but continental moral rights seem to be, indeed, a much greater burden on alienability than the current U.S. protections.[104] It is possible, however, for a common law nation to adopt legislation which protects authors' rights and honors Berne, without restricting the alienability of goods; as such, extreme, French-style protections are not necessary.[105]

VIII. Moral Rights "Analogues" in the United States and Australia

As a signatory to Berne, the United States is obligated to statutorily protect authors' moral rights of integrity and attribution.[106] Title 17 of the U.S. Copyright Act grants authors economic incentives to produce creative works by granting them a bundle of copyrights that protect their creativity, but only as far as the works, treated as profit-making tools, have economic value.[107] Rather than legislate to protect moral rights, however, the United States still claims (as Australia did prior to enacting 2000 and 2004 legislation which incorporated moral rights into the Australian Copyright Act[108]) that its scattered common law and legislative provisions adequately protect authors' moral rights as set out in Berne.[109] (The

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103 *See* discussion of moral rights analogues *infra* Part VIII *et. seq*. *See* Netanel, *supra* note 4, at 25. R

104 *See* Netanel, *supra* note 4, at 26. R

105 *See* CLRC 1988 Report, *supra* note 23, pt. III, at para. 42. R

106 Berne Convention, *supra* note 1, art. 6bis. R

107 Levy, *supra* note 56, at 27. R

108 *See* discussion *infra* Parts IX, X.A–B. In addition, the Australian Copyright Act granted to creators of certain types of creative works limited negative rights to control the manner in which copyright owners use the works, thus providing some degree of protection of the integrity in the work. Copyright Amendment (Moral Rights) Act 2000 (Austl.).

109 In 1988, Congress saw no need to modify U.S. law in order to comply with Berne. Even while acknowledging that Article 6bis moral rights were not provided in U.S. statutes and that claims for relief under moral rights doctrine had been rejected by state and federal courts, Congress stated:

> However, protection is provided under existing U.S. law for the rights of authors listed in Article 6bis . . . . This existing U.S. law includes various provisions of the Copyright Act and Lanham Act, various state statutes, and common law principles such as libel, defamation, misrepresentation, and unfair competition, which have been applied by courts to redress authors' invocation of the right to claim authorship or the right to object to distortion.

S. Rep. No. 100-352 (1988), *as reprinted in* 1988 U.S.C.C.A.N. 3706, 3714–15. Even the Director General of the World International Property Organization, Dr. Arpad Bogsch, stated in 1987 that it was unnecessary for the United States to enact moral rights legislation

analogue protections of moral rights in the forthcoming discussion continue to exist in Australia, even as moral rights are now statutorily protected there.) Indeed, an examination of U.S. law reveals that the moral rights of attribution and integrity are "well-recognized within the fabric of U.S. law."[110] In addition, since joining Berne, the United States seems to be moving from a purely economic approach to copyright towards an approach that at least tacitly acknowledges moral rights, but the U.S. patchwork of moral rights protections does not fully satisfy Berne obligations.[111]

At the core of moral rights are the rights of integrity and attribution.[112] The former preserves the elements of the author's per-

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in order to comply with Art. 6bis. 134 CONG. REC. H3079-02 (1988) (statement of Rep. Moorhead). To date, the United States insists that its patchwork of federal and state causes of actions and common law doctrines combine to provide the minimum moral rights safeguards required by Berne. Monica E. Antezana, Note, *The European Union Internet Copyright Directive as Even More Than it Envisions: Toward a Supra EU Harmonization of Copyright Policy and Theory* , 26 B.C. INT'L & COMP. L. REV. 415, 427 (2003). *See* Davidson, *supra* note 48, at 614; Dworkin, *supra* note 6, at 232–33. R

110 Gunlicks, *supra* note 5, at 618. *See* 134 CONG. REC. H3079-02 (1988) (statement of Rep. Coble) ("As the House report points out, the committee recognizes that protection of the rights of paternity and integrity in this country have gradually been increasing."). Furthermore, Professor Damich, examining the recognition of a general right of "creative personality" (which is closely linked to moral rights in that both recognize creative works as extensions of the author's personality) in American case law, vis-à-vis courts' reliance on the Copyright Act of 1976, rights of privacy and publicity, unfair competition, the Lanham Act, defamation, and contract, finds that the ad hoc results of American law could lay the groundwork for systemic protection of personality rights in the United States. *See* Damich, *Right of Personality*, supra note 43, at 3–5, 35–71. R R

> It can be said that American law recognizes (1) the principle of the right of personality; (2) the principle that the personality can extend to objects external to the human body, and (3) the principle that the unique configuration of the economic rights of copyright is based in part on the personal aspect of artistic creativity.

Id. at 86.

111 Antezana, *supra* note 109, at 427, 434. R

112 Nimmer & Price, *supra* note 6, at 10; Gunlicks, *supra* note 5, at 608 (In addition to the moral rights of integrity and paternity/attribution, France and Germany, the "birthplace of moral rights," protect the right of disclosure/publication, and withdrawal/retraction.). *See* Davidson, *supra* note 48, at 605. Although Berne does not specifically protect the moral rights to publish and retract, these are, effectively, protected in U.S. law. The right to publish, or to control when and how the work is first made public, has been protected under copyright statutes since 1790; and it has been explicitly incorporated into the 1976 Copyright Act, which protects a work from the point at which it is fixed in a tangible medium of expression. Also under the Copyright Act, an author can exercise a limited right to retract, or to halt public dissemination of a work pre- or post-publication by voiding a contract without cause after thirty-five years. The author can also exercise a right of retraction prior to publication, under contract law, if she chooses not to transfer a work. R R

sonality as they are manifested in his work.[113] The denigration or alteration of the work in a manner which affects the author's honor and reputation[114] thus affects his professional integrity and marketability.[115] An author's right of attribution also protects his reputation, in that it enables him to control his recognition as the author of his works—he can choose to be accredited, to remain anonymous or use a pseudonym, and to prevent false attributions of authorship.[116]

A. *Moral Rights Analogues: Contract*

American and Australian authors who wish to protect their moral rights can do so through express contractual terms[117]. If these rights are expressly preserved in a contract at the point of transfer of a copyright, American authors can make a claim of infringement based on a contractual breach.[118] Where a contract is silent as to alterations to the works, courts will look to industry trade and custom, and they may also imply the transferee's obligation not to make substantial alterations.[119] Similarly, where an author does not preserve his right to claim authorship in a contract, courts may also look to industry custom.[120] If he does preserve the right to claim authorship, he has an actionable breach of contract claim where a substantially altered work is sold with his name on it, as this will harm his reputation.[121]

See GOLDSTEIN, COPYRIGHT, *supra* note 83, § 17:201; Gunlicks, *supra* note 5, at 608, 611–12, 648. *See also* 17 U.S.C. §§ 102, 106. R

113 Gunlicks, *supra* note 5, at 630–31. R

114 Berne Convention, *supra* note 1, art. 6bis; Gunlicks, *supra* note 5, at 608. R

115 Gunlicks, *supra* note 5, at 630. R

116 *Id.* at 620; Berne Convention, *supra* note 1, art. 6bis. "Reputation is critical to a person who follows a vocation dependent on commissions from a variety of clients. Success breeds success, but only if the first success is known to potential clients." Ginsburg, *Authorship*, supra note 7, at 265 (citing Prior v. Sheldon (2000) 48 I.P.R. 301 ¶ 87 (Austl.)). R

117 SAINSBURY, *supra* note 5, at 70. R

118 GOLDSTEIN, COPYRIGHT, *supra* note 83, §§ 17:205–06; Dworkin, *supra* note 6, at 233; Gunlicks, *supra* note 5, at 620. R R

119 GOLDSTEIN, COPYRIGHT, *supra* note 83, § 17:206; Gunlicks, *supra* note 5, at 638 (noting that "'even if the contract with the artist expressly authorizes reasonable modifications . . . it is an actionable wrong to hold out the artist as author of a version which substantially departs from the original.'" (citing Granz v. Harris, 198 F.2d 585, 588 (2d Cir. 1952)). R

120 GOLDSTEIN, COPYRIGHT, *supra* note 83, § 17:214; Gunlicks, *supra* note 5, at 621. R

121 Gunlicks, *supra* note 5, at 637–38. Furthermore, because the right to claim authorship is not expressly protected under the U.S. Copyright Act, it is not a right the author can transfer; even if he transfers a work in its entirety and does not expressly preserve his right to claim authorship, the transfer of this right may not be implied. Finally, a contemporary trend of implying a covenant of fair dealing into publication contracts may signal courts' R

Relying on contractual implications may not always serve an author's moral rights interests, however. Where the right to alter is expressed in the contract, courts may be extremely deferential to the agreement and will give great latitude to the party to whom the alteration rights were granted, at the expense of the author's reputation.[122] Even if an author contractually reserves his integrity rights, however, certain changes required in the transferring of the work to another, approved medium may be reasonable without the author's consent.[123] Or, a court may imply that a defendant was authorized to make necessary alterations as per industry standards related to a particular type of contract (for example, for a contract regarding the transfer of a work from one medium to another), regardless of how these alterations prejudice the author.[124]

B. *Moral Rights Analogues: The U.S. Copyright Act*

Beyond contractual remedies, American copyright owners may look to the Copyright Act to prevent, albeit indirectly, violations of their integrity and attribution right, but only insofar as the Copyright Act "recognizes" these rights. As these statutory rights are transferable, however, they belong to the *copyright owner*, who is authorized to make use of the work, and who is *not necessarily the author*.[125] Thus, to the extent that the Copyright Act even protects an author's integrity rights, when a copyright is transferred in its entirety, the author can no longer enforce these rights against the transferee/owner, e.g. publisher; all violations of copyright, once it has been transferred, infringe upon the rights of the transferee/owner, not the author.[126] The American distinction between *copyright owners and authors*, and the limited protection the Copy-

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willingness to imply a covenant to attribute authorship. Unless an American author expressly contracts to publish his work anonymously or under a pseudonym, however, the true attribution of the work will probably only incur liability if the use of the author's true name is unreasonable. GOLDSTEIN, COPYRIGHT, *supra* note 83, § 17:214; Gunlicks, *supra* note 5, at 627. R R

122 SAINSBURY, *supra* note 5, at 74–75. R

123 Gunlicks, *supra* note 5, at 635. R

124 *Id.*

125 *See* 17 U.S.C. § 106 (2000); Jill R. Applebaum, *The Visual Artists Rights Act of 1990: An Analysis Based on the French Droit Moral*, 8 AM. U. J. INT'L L. & POL'Y 191, 197 (1992).

126 *See* 17 U.S.C. § 106.

right Act grants to authors vis-à-vis publishers is highlighted by the works-for-hire provision.[127]

The only provisions of the Copyright Act which indirectly protect an author's right to attribution, albeit only for as long as the author remains the copyright owner as to these rights, are those granting him the exclusive right to reproduce his work and to create derivative works.[128] The exclusive right to create a derivative work, however, effectively protects the copyright owner, who may or may not be the work's author, against distortion and violation of the integrity of the work.[129] Even if a copyright owner grants the right to make a derivative work, the owner may have an infringement claim if the derivative does not appropriately express the substance of the original[130] or if it exceeds the permission he granted in transferring this right.[131] The Fair Use doctrine, contained in section 107, also protects the integrity of a work, albeit not through a positive cause of action granted to the copyright owner, but by allowing the copyright owner to negate a fair use *defense* to an infringement claim.[132] Furthermore, the right of integrity in non-dramatic musical works is protected under section 115, which denies a compulsory license to make and distribute phonorecords where the licensee's arrangement of the underlying work changes its fundamental character.[133]

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127 This provision gives the employer status of author and copyright owner as to a work made by an employee within the scope of employment. It underscores the fact that, in some situations, where there is no express contractual provision, an author may not have any right at all to attribution of authorship in his work. 17 U.S.C. § 101 ("work for hire" definition). *See* GOLDSTEIN, COPYRIGHT, *supra* note 83, § 17:213. R

128 Derivative works are original works of authorship that recast or transform a preexisting work. *See* 17 U.S.C. §§ 101, 106(1)–(2) ("derivative work" definition). These rights are protected, however, only while the author retains these exclusive section 106 rights in his work; as soon as he transfers these rights, they belong to the copyright owner, not the author. §§ 101, 106(1)–(2); GOLDSTEIN, COPYRIGHT, *supra* note 83, § 17:212. R

129 17 U.S.C. §§ 101, 106(2); GOLDSTEIN COPYRIGHT, *supra* note 83, § 17:207; Gunlicks, *supra* note 5, at 631, 633. R R

130 Gunlicks, *supra* note 5, at 633. *See* 17 U.S.C. § 101; Applebaum, *supra* note 125, at 197. R

131 Gunlicks, *supra* note 5, at 633. R

132 *See* 17 U.S.C. § 107 (2000). The remedial measure granted to the copyright owner here is only a rebuttal to an infringer's defense, and if the unauthorized use of the copyrighted work falls within the fair use exception, the copyright owner will not prevail on an infringement claim. *See* Gunlicks, *supra* note 5, at 632–34. R

133 17 U.S.C. § 115(a)(2) (2000).

C. *Moral Rights Analogues: VARA, the Only Statutory Moral Rights Protection in the United States*

Although Congress, according to the legislative history surrounding the BCIA,[134] believed U.S. law adequately protected moral rights in accordance with Berne obligations, it enacted VARA, the first and only federal regulation which expressly incorporates moral rights, albeit as to a specific group of authors, into the U.S. Copyright Act.[135] The enactment of VARA could be viewed as an indication that parallel protection for all authors' personal interests can fit into U.S. law and culture.[136]

Enacted in 1990, possibly as a good faith effort by the United States to comply with its Berne obligations,[137] VARA grants authors of works of fine art in single or limited editions[138] statutory rights of attribution and integrity.[139] One of the most significant elements of VARA is that the right of attribution is enforceable without the author having to assert his right.[140] Because VARA rights are not transferable and are only waivable by a specific, advertent waiver, which must be obtained by the buyer, VARA was a

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134 *See supra* notes 81, 109 and accompanying text. **R**

135 17 U.S.C. § 106A; Dworkin, *supra* note 6, at 259; Lee, *supra* note 54, at 805. A few states, including California and New York, have enacted fine art statutes that protect, in varying scope and degree, artists' rights of integrity in works of fine art. GOLDSTEIN, COPYRIGHT, *supra* note 83, §§ 17:211–12. **R**

136 *See generally* Applebaum, *supra* note 125. **R**

137 Dworkin, *supra* note 6, at 259. **R**

138 17 U.S.C. § 101 (A "work of visual art" is a painting, drawing, print or sculpture or a still photographic image produced for exhibition purposes only, where there is at least one original and no more than 200 signed and numbered copies.).

139 According to Title 17:

> (a) Rights of Attribution and Integrity.—Subject to section 107 and independent of the exclusive rights provided in section 106, the author of a work of visual art— (1) shall have the right—(A) to claim authorship of that work, and (B) to prevent the use of his or her name as the author of any work of visual art which he or she did not create; (2) shall have the right to prevent the use of his or her name as the author of the work of visual art in the event of a distortion, mutilation, or other modification of the work which would be prejudicial to his or her honor or reputation; and (3) subject to the limitations set forth in section 113(d), shall have the right—(A) to prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation, and any intentional distortion, mutilation, or modification of that work is a violation of that right, and (B) to prevent any destruction of a work of recognized stature, and any intentional or grossly negligent destruction of that work is a violation of that right.

17 U.S.C. § 106A.

140 Ginsburg, *Authorship*, *supra* note 7, at 300. **R**

pioneering piece of U.S. legislation.[141] It demonstrates a sincere effort to honor Berne obligations and shows a clear intent for VARA rights to remain vested in the author regardless of who owns the work itself.[142]

Furthermore, it is precisely some of the limits of VARA's application that allow it to protect artists' moral rights in a manner that fits comfortably within the U.S. landscape of authors'/private and copyright owners'/public interests, suggesting that some form of statutory moral rights protection can exist in the United States. For example, by limiting protected works of art to visual works, more specifically, to what is generally perceived as "art" (VARA excludes items of mass production—films, literary and musical works, television shows, crafts, reproductions in excess of 200 limited edition copies, and works made for hire), VARA effectively safeguards large exploiters from artists' moral rights claims.[143] This means, however, that while the public interest in alienability of creative works is not overwhelmed by a sweeping grant of artists' rights, such distinctions, especially combined with some of VARA's other restrictions (limiting protection to works "of recognized stature" or to cases of prejudice to an author's reputation) may elicit discriminatory treatment of artists or disincentivize certain types of creation.[144] In addition, as VARA's protections are not available to reproductions, artists may only exert moral rights when their original works (or one of a limited edition of 200 works) are actually affected.[145] Thus, arguably, creativity and cultural development are encouraged by VARA's limitation.[146] A balance is struck wherein original creators can maintain rights in their original works and other creators may improve upon these without fear of challenge by the original artists; the subsequent creators may, in turn, protect their rights of attribution and integrity in their newly-created works.[147] Finally, a case may be made that the "life of the

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141 *See id.*; Applebaum, *supra* note 125, at 208–09; Dietz, *supra* note 10, at 224; Dworkin, *supra* note 6, at 261; Gunlicks, *supra* note 5, at 645. R R

142 17 U.S.C. § 106A(b) ("Only the author of a work of visual art has the rights conferred by subsection (a) in that work, whether or not the author is the copyright owner . . . ."). *See* Dworkin, *supra* note 6, at 261–62; Gunlicks, *supra* note 5, at 644–45. R

143 *See* 17 U.S.C. § 101 (definition of "work of visual art"); Applebaum, *supra* note 125, at 202–04, 211. Of course, by the same token, VARA thus limits the extent of moral rights protection conferred upon an author. R

144 *See* Applebaum, *supra* note 125, at 204–11. R

145 *See* 17 U.S.C.§ 106A; Applebaum, *supra* note 125, at 214–16. R

146 *See* Applebaum, *supra* note 125, at 215–16. R

147 *Id.*

author" term of VARA's moral rights encourages the general public interest because it does not unduly impede cultural development by restricting future derivative works.[148] The balance between the public interest in the promotion of ideas and culture, on the one hand, and art preservation and the protection of original works and their artists' integrity, on the other, tips slightly in favor of the public interest, however—as soon as the artist dies, the owners of his work may do with it anything they wish.[149] A term of protection of moral rights which outlasts the artist but does not last in perpetuity, e.g., for a term consistent with the period of copyright, might strike a more reasonable balance between the general welfare and artists' and the original works' integrity.[150]

Unfortunately, and aside from the limited group of authors whose moral rights it protects, VARA, in practice, has not actually produced the kind of moral rights protection prescribed by Article 6bis.[151]

D. *Moral Rights Analogues: Consumer-Oriented & Common Law Causes of Action*

If an American author's moral rights are not protected by contract, VARA, or the other provisions of the Copyright Act discussed above, he must try to fit his claim into a recognizable cause of action within U.S. common law or other statutes.[152] These causes of action are available even if the author has transferred the copyright in its entirety.[153] In order to bring a federal cause of action for unfair competition under section 43(a) of the Lanham Act,

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148 *See id.* at 219–20; 17 U.S.C. §106A(d).

149 Applebaum, *supra* note 125, at 219–20. R

150 *Id.* at 222.

151 VARA fails to grant artists the duration of moral rights protection granted by Berne Art 6bis(2), which grants moral rights protection for at least the duration of copyright protection. VARA only grants lifetime rights to artists. Edward J. Damich, *A Comparison of State and Federal Moral Rights Protection: Are Artists Better Off After VARA?*, 15 HASTINGS COMM. & ENT. L.J. 953, 965 (1993) [hereinafter Damich, *State and Federal Moral Rights*]. *See* 17 U.S.C. §106A(d). *See generally* Susan P. Liemer, *How We Lost Our Moral Right and the Door Closed on Non-Economic Values in Copyright*, 5 J. MARSHALL REV. INTELL. PROP. L. 1 (2005).

152 *See* Lee, *supra* note 54, at 810–11. There is no common law *copyright*, however. *See* R *infra* notes 48–49 and accompanying text. *See generally* Dworkin, *supra* note 6; Gunlicks, R *supra* note 5. R

153 *See* GOLDSTEIN, COPYRIGHT, *supra* note 83, § 17:203; Gunlicks, *supra* note 5, at R 637–38.

a plaintiff must be protecting a reasonable commercial interest[154] that might be damaged by a false or misleading representation of origin or fact.[155] Thus, by protecting the author against injury to his reputation due to public presentations of mutilated versions of the work, the Lanham Act allows an author to protect his interest in the integrity of his work. Likewise, Australian authors may rely on common law and federal statutes that protect consumers and aim at unfair competition.[156]

These consumer-oriented causes of action, however, are limited in how they can protect an author's moral rights.[157] For one thing, these claims ultimately turn on how the defendants' actions affect the consumer and the public, not the author.[158] Second, the questionable conduct must be of a commercial character, and it must be misleading or deceptive.[159] Finally, in order to succeed on these claims and prove that his commercial interest suffered as a

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154 In bringing a section 43(a) claim, an author's name and reputation almost always qualify as a "reasonable commercial interest." Lanham Act § 43(a), 15 U.S.C.A. § 1125(a) (1946), Gunlicks, *supra* note 5, at 623–24. R

155 *See* Lanham Act § 43(a); GOLDSTEIN, COPYRIGHT, *supra* note 83, § 209. *See* Gunlicks, *supra* note 5, at 635–37. R R

156 *See* Trade Practices Act, 1974, pt. V (Austl.).

157 Until the landmark 2003 *Dastar Corp.* decision, which held that "origin of goods" in section 43(a)(1)(A) of the Lanham Act does not refer to the "author of any idea, concept, or communication embodied in those goods," section 43(a) provided a great opportunity for relief against a failure to attribute authorship and misattribution of authorship (to someone other than the author). GOLDSTEIN, COPYRIGHT, *supra* note 83, § 17:215–17. *See* Dastar v. Twentieth Century Fox Film Corp., 539 U.S. 23, 66 U.S.P.Q.2d 1641 (2003). Section 43(a)(1)(B) of the Lanham Act, which deals with the quality or characteristics of goods, however, is still available to authors whose works have not been attributed to them. Lanham Act § 43(a)(1)(A)–(B); GOLDSTEIN, COPYRIGHT, *supra* note 83, § 17:216–17. Where a work has been falsely attributed to an author, *Dastar* does not apply, and an author so affected still has a strong claim of actionable misrepresentation under section 43 of the Lanham Act as well as under state and federal unfair competition laws. The unfair competition passing-off doctrine consists of representing that another's works/goods are one's own. Gunlicks, *supra* note 5, at 622. R R R

158 Lanham Act § 43(a); SAINSBURY, *supra* note 5, at 75–78. Intended beneficiaries of these causes of action are consumers, not authors. Ginsburg, *Authorship*, supra note 7, at 283. Part V of the Australian Trade Practices Act encompasses unfair practices and is titled "*Consumer* Protection" (emphasis added). Trade Practices Act, 1974, pt. V (Austl.). R R

159 Even if the action happens in a commercial context, American courts tend to prefer parties to be in competition. Ginsburg, *Authorship*, *supra* note 7, at 278. Under the Australian Trade Practices Act 1974 as well as in a passing-off action, a plaintiff must show that defendants' conduct was misleading and deceptive; a passing-off action requires the author to show misrepresentation. Thus, an author may have difficulty establishing a claim based on a failure to attribute; where there has been no attribution at all, the public has merely been uninformed, not misinformed. Similarly, if a defendant alters the work and makes it clear to the public that his use is unauthorized, there cannot be misrepresentation. Thus, R

result of defendants' misleading the public, an author must also establish that he had a reputation—his commercial interest which was affected by defendants' actions—in the marketplace.[160] This limits these causes of action to a specific group of authors who have established reputations.[161] Furthermore, if the distortion is removed, an author's Lanham claim is diminished.[162]

State common law provides American authors with several causes of action for reputation-affecting distortions of their works. Besides common law unfair competition claims[163], defamation and invasion of rights of privacy and publicity are available to protect the author's reputation and thus, his integrity.[164] Similarly, an Australian author whose public reputation has been negatively affected due to a statement, vis-à-vis a false attribution or alteration to his work, may establish a claim under the laws of defamation.[165] The integrity of an author's own work or reputation may be affected if he is associated with another's work or if another's work is falsely attributed to him. Such common law claims, however, depend largely on the reputation and public perception of the author, and on the public perception of the producer of the work in question.[166]

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an author's claim fails. SAINSBURY, *supra* note 5, at 75–80 (citing Trade Practices Act, 1974, pt. V, § 52 (Austl.)). **R**

160 Lanham Act § 43(a); SAINSBURY, *supra* note 5, at 79–80. *See* Trade Practices Act, 1974, pt. V (Austl.). **R**

161 SAINSBURY, *supra* note 5, at 79. **R**

162 Damich, *Moral Rights Protection*, *supra* note 16, at 398. **R**

163 Lanham Act § 43(a); Gunlicks, *supra* note 5, at 622. **R**

164 GOLDSTEIN, COPYRIGHT, *supra* note 83, § 17:210–11; Gunlicks, *supra* note 5, at 637–38. **R**

165 Where there has been a failure to attribute, however, no statement has been made; an author will therefore have difficulty establishing that his or her reputation was detrimentally affected and will be unable to protect his or her moral rights by way of a defamation claim. In establishing that a non-attribution or attribution of his or her work to another was defamatory, an author bears the burden of proving that the public reached conclusions about the non or mis-attribution which damaged his or her reputation. *See* SAINSBURY, *supra* note 5, at 80–82. **R**

166 An author's best chance of protecting his moral right of attribution on a defamatory claim might be where the author is wrongly attributed to another author's work and that work is inferior to the works upon which the complaining author has built his reputation. *See* SAINSBURY, *supra* note 5, at 82. An author may protect his moral right of integrity on a defamation claim if he can establish that the alterations to the work are likely to make the public think less of him, and thus damage his reputation. In order for such a claim to succeed, the public must understand, through the defendant's improper publication, that the altered work is that of the plaintiff. For the alterations to be defamatory, the public must be unaware that the alterations are not the author's or authorized by the author, otherwise, the damage to the author's reputation is less likely, and the author's possibility of protecting his right to integrity on a defamation claim is limited. Id. at 85. If the altera- **R**

IX. The Need for Change in the United States and Australia

The above analogue protections of moral rights represent the extent of the United States' protection of authors' personal interests in their works, and clearly fall short of specific, statutory causes of action for moral rights violations. The current patchwork of moral rights protections in the United States is similar to the protection Australia granted or continues to grant to its authors, *independent of* the recent Australian legislation. Prior to 2000 and 2004 copyright amendments in Australia, as is the present case in the United States, the rights of attribution and integrity were specific and limited in federal statutory copyright (which, in Australia, is entirely contained in the federal Copyright Act 1968).[167] Australia's copyright legislation affords authors similar *economic* rights to those granted in the United States.[168] Because the United States

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tions could detrimentally affect an author's reputation, and the copyright owner presents the work as the plaintiff's own, then the author may make a successful claim of defamation. *Id.* at 83.

[167] In the United States, express moral rights protection is limited to VARA. *See supra* notes 134–151 and accompanying text; 17 U.S.C. § 106A. Prior to 2000, the only moral rights provision in Australian copyright law was section 190's prohibition against false attribution of authorship, which provided that "(a) person (in this subsection referred to as 'the offender') is by virtue of this section, under a duty to the author of a work not to: insert or affix another person's name in or on the work, in such a way as to imply that the other person is the author of the work." CITE. Other paragraphs deal with the publishing, sale, hire, offer for sale, exhibition, distribution and reproduction of works carrying an unauthorized attribution. Under the Act, section 194 conferred a right of action for damages and injunction, in respect of an unauthorized attribution. Beyond these provisions, there was no enactment in Australia of moral rights. Michael Blakeney & Fiona MacMillan, *Bringing Copyright into the Digital Age*, 5 E-LAW/Murdoch U. Electronic J.L., 1 (1998), http://www.murdoch.edu.au/elaw/issues/v5n1/blake51.html (last visited Feb. 22, 2007). R

[168] Australian copyright owners are granted a bundle of exclusive statutory, economic rights that closely parallel those granted to American authors in section 106 of the U.S. Copyright Act. Australian Copyright Council, Information Sheet, An Introduction to Copyright in Australia, G10 (July 2005), *available at* http://www.copyright.org.au/G010.pdf [hereinafter ACC Infosheet G10]. Depending on whether a work is a literary, dramatic, artistic or musical work or a sound recording, film or broadcast, the creator has the right to reproduce, publish, and distribute the works, as well as, to certain types of works, to perform or display the work publicly and make adaptations, rebroadcast, and to transmit the work via any form of technology. *See id. See also* 17 U.S.C. § 106 (2000). Any combination of these rights may be assigned or licensed in writing; thus the copyright owner of a work is not necessarily its author. ACC infosheet G10, *supra* note 167. These copyrights subsist in works from the moment of the works' creation in a recorded medium; they need not be formally registered in order to be enforced by a court. *Id. See also* 17 U.S.C. § 102. Performers have part ownership of copyright in audio recordings of their live performances, as well as rights, separate from the copyright and moral rights in the material being performed, to control the recording and communication of their performances.

must incorporate moral rights into its copyright statutes in order to comply with Berne and the international trade landscape, and because of the similar common law legal and copyright traditions in the United States and Australia, it is worthwhile to examine the recent Australian legislation which exemplifies the incorporation of moral rights into a common law statutory framework.[169]

X. THE PATH TO MORAL RIGHTS LEGISLATION IN AUSTRALIA—COULD THE UNITED STATES WALK THE SAME PATH?

When the issue of legislative protection of authors' moral rights was first officially addressed in the 1988 Australian Copyright Law Review Committee ("CLRC") Report, the controversial finding of the five to four majority, after five years' consideration, stated that Australia need not enact specific moral rights legislation in order to comply with Berne Article 6bis.[170] Although the report acknowledged that certain alterations to works are inappropriate and may be morally unjust,[171] the majority was especially con-

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AUSTRALIAN COPYRIGHT COUNCIL, INFORMATION SHEET, PERFORMERS' RIGHTS, G22 (Feb. 2005), *available at* http://www.copyright.org.au/G022.pdf [hereinafter ACC INFOSHEET G22]. For specific purposes, certain parties, namely academics and the media, can use copyright material without permission. Fair dealing provides enumerated defenses against a claim of infringement of copyright holders' exclusive rights. Copyright Act, 1968, §§ 176–78A, 182A (Austl.). *See also* 17 U.S.C. § 107 (2000). Although the general rule of the Australian Copyright Act is that the person responsible for creating the work is the first owner of copyright, in certain situations, there are exceptions. Like the work-for-hire doctrine of the United States, an employer in Australia is the first owner of copyright when an employee, within the scope of his employment, creates a work for the employer. ACC INFOSHEET G10, *supra* note 168. Generally, as mentioned above, copyrighted material is protected for seventy years from the end of the creator's life or the end of the year in which the material was first published. AUSTRALIAN COPYRIGHT COUNCIL, INFORMATION SHEET, DURATION OF COPYRIGHT, G23 (Sept. 2005), *available at* http://www.copyright.org.au/G023.pdf [hereinafter ACC INFOSHEET G23].

169 *See* Ginsburg, *Authorship*, *supra* note 7, at 287–88. **R**

170 The report was produced upon the suggestion of the Australian Attorney General. "The Copyright Law Review Committee was established in 1983 to consider and report to the Attorney-General on specific copyright matters referred to it from time to time." CLRC 1988 REPORT, *supra* note 23 (Preface); Dworkin, *supra* note 6, at 238–39. *See also* **R**
CLRC 1988 REPORT, *supra* note 23, pt. II, paras. 10–11 (majority cites support for its rec- **R**
ommendation); Copyright Amendment (Moral Rights) Bill, 1999, BILLS DIGEST NO. 99 (Parliament of the Commonwealth of Australia, House of Representatives, introduced Dec. 7, 1999) (on file with author) [hereinafter BILLS DIGEST NO. 99]; Blakeney & MacMillan, *supra* note 167. **R**

171 CLRC 1988 REPORT, *supra* note 23, pt. I, paras. 29–30. The United States' recogni- **R**
tion of moral rights analogues shows that this sense of moral inappropriateness underlies our legal/copyright culture as well. *See also supra* note 110. **R**

cerned with the practical problems of implementing moral rights legislation, especially with regard to potentially frivolous claims, as well as the reasonableness standard by which alterations would be judged in an author's claim of an integrity violation.[172] Overall, however, they believed that only a small section of the community was interested in and might be affected by the legislation, potentially causing industrial and social disruption disproportionate to its potential public benefit.[173] These concerns echo the United States' fears that moral rights legislation would upset the "delicate balance of interests" between copyright owners and authors.[174]

In Australia, the responses to these concerns on moral rights legislation ultimately supported the groundbreaking Copyright Amendment (Moral Rights) Act 2000.[175] Why did Australia finally decide to implement moral rights legislation? In 1988, the CLRC minority recognized the international trends in favor of moral rights, the demands of a significant portion of the copyright community, the fairness and equity of protecting moral rights, technological trends, Australia's Berne obligations, as well as developments in the United Kingdom and Canada, which demonstrate that the copyright of authors is incomplete where economic rights are without their "necessary complement"—rights which preserve the author's personality.[176] Nearly twenty years after the CLRC minority outlined these bases in favor of moral rights legislation in Australia, in direct response to that nation's concerns regarding such legislation (as expressed by the CLRC majority), it is impressive to note that these bases also address points of U.S. hesitation regarding moral rights legislation.[177] Does Australia's legis-

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172 CLRC 1988 REPORT, *supra* note 23, pt. I, paras. 14–16. *See id.*, pt. I, at paras. 22–23. R

173 *Id.* pt. II, at paras. 16, 26–28.

174 *See supra* notes 89–94 and accompanying discussion. R

175 *See* Copyright Amendment Bill, 1997, BILLS DIGEST, EXPLANATORY MEMORANDUM (Parliament of the Commonwealth of Australia, House of Representatives, June 18, 1997), *available at* http://parlinfoweb.aph.gov.au/piweb/view_document.aspx?ID=107&TABLE=OLDEMS&TARGET=; Blakeney and MacMillan, *supra* note 167.

176 *See* CLRC 1988 REPORT, *supra* note 23, pt. III, paras. 2, 45–46. Professors Blakeney and MacMillan echoed the concerns of the 1988 CLRC minority that the urgent need for modification of Australian law in 1997 arose from the need to respond to technological change, shifts in the international copyright regime, inadequacies in protection, and the longstanding, underlying pressure for Australian copyright law, as it is based on English principles, to harmonize its copyright principles with those of continental Europe. The 1997 Copyright Amendment Bill laid the groundwork for the 2000 amendment. Blakeney & MacMillan, *supra* note 167. R R

177 *See supra* notes 171–76 and accompanying discussion. Of course, there is an "overwhelming international trend towards providing direct moral rights protection in legisla-

lative solution suggest the possibility that the balance of copyright owners' and authors' interests that has caused the United States so much hesitation regarding statutory moral rights might not be disrupted by moral rights legislation?[178]

Following wrangling of various stakeholders' interests, a broad compromise emerged in Australia through proposed Copyright Amendment Bills.[179] Copyright authorities clearly recognized that Australia's piecemeal protection of moral rights, as provided by ar-

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tion specifically designed for the purpose, rather than relying on indirect protection to protect the rights of integrity and attribution." SAINSBURY, *supra* note 5, at 16. The United States acknowledges, perhaps tacitly, to the extent of VARA and the various analogues through which the United States sometimes protects personal elements of creative works, the fairness and equity connected to the protection of moral rights. *See supra* discussion, Part VIII and accompanying notes. Of course, the United States and Australia have the same obligations under Berne. *See* discussion *supra* Part VI and accompanying notes. R

178 *See supra* note 174. In 1994, an Australian working group established by the federal government to explore effective moral rights legislation advocated Australian moral rights legislation in its Discussion Paper, PROPOSED MORAL RIGHTS LEGISLATION FOR COPYRIGHT CREATORS. SAINSBURY, *supra* note 5, at 33. This paper presumed to represent the common consensus as to the need for strong legal protection for creators' moral rights. Press Release, Parliament of Australia Minister for Justice, Duncan Kerr, MP & Michael Lee, MP, Moral Rights for Copyright Creators (June 21, 1994), http://parlinfoweb.aph.gov.au/piweb//view_document.aspx?TABLE=PRESSREL&ID=1176 (last visited Feb. 22, 2007). R R

> The Ministers [Duncan Kerr, Minister for Justice, and Michael Lee, Minister for Communications and the Arts] emphasized that the [legislative] scheme [outlined in the 1994 Discussion Paper] is intended to provide a workable balance between the needs of copyright creators . . . industries which invest in copyright, and . . . the community in having ready access to and use of copyright materials.

Id. Investors and broadcasters were concerned that proposed legislative provisions would not preserve rights of literary criticism, journalism and parody. CASLON ANALYTICS, INTELLECTUAL PROPERTY GUIDE: MORAL RIGHTS, http://www.caslon.com.au/ipguide17.htm (last visited Feb. 22, 2007).

179 CASLON ANALYTICS, *supra* note 178. The Copyright Amendment Bill 1997 introduced to Parliament was largely based on the 1994 Discussion Paper, PROPOSED MORAL RIGHTS LEGISLATION FOR COPYRIGHT CREATORS. *See* SAINSBURY, *supra* note 5; Blakeney & MacMillan, *supra* note 167. After this Bill was passed by the House of Representatives and reviewed by a Senate committee, however, the Federal Government withdrew for further consideration the moral rights provisions, particularly those relating to waiver of rights, from the 1997 Bill. SAINSBURY, *supra* note 5, at 33. Finally, following the withdrawal of moral rights from the Copyright Amendment Bill 1997, the Australian Parliament reviewed the Copyright Amendment (Moral Rights) Bill 1999 and passed the Copyright Amendment (Moral Rights) Act 2000. DCITA FACT SHEET, *supra* note 61. The Copyright Amendment Bill 1999 differed from the 1997 bill, most significantly, in that the 1999 bill included screenwriters as authors of films and provided for co-authorship agreements, which allow screenwriters, directors and producers to jointly exercise integrity rights. *See* BILLS DIGEST NO. 99, *supra* note 170. R R R R R

eas of law other than copyright, did not adequately enable authors to assert their moral rights or provide the protection required by Berne.[180] They saw the need for specific legislation.[181] The Copyright Amendment (Moral Rights) Act 2000 reflected extensive consultation with industry interest groups and enacted such specific moral rights legislation as to creators of literary, artistic and dramatic works, computer programs, and films, largely with the purpose of complying with Berne Article 6bis.[182]

A. *The Current State of Statutory Moral Rights in Australia*

The 2000 and 2004 Australian amendments grew out of a legal and copyright landscape very similar to that of the United States, as well as out of a set of concerns regarding the implementation of moral rights legislation which mirrored those of the United States. The end result, legislation which finally grants to creators the express statutory right to attribution, the right not to be falsely attributed, and the right of integrity,[183] gives Australian authors the protection to which they are entitled as citizens of a Berne member nation, without causing a shift in a balance of cultural or legal interests.[184] There may be hope for the United States, and an examination of the specific provisions of the Australian legislation is valuable in this assessment.

As part of the U.S. Free Trade Agreement Implementation Act of 2004 ("USFTAIA"), the statutory Australian copyright term was extended from fifty to seventy years from the author's death or from the year in which the material was first published.[185] Moral

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[180] BILLS DIGEST NO. 99, *supra* note 170; BILLS DIGEST 160, supra note 21 (regarding "copyright authorities"); Blakeney & MacMillan, *supra* note 167. R R

[181] Copyright Amendment (Moral Rights) Bill, 1999 (Austl.); BILLS DIGEST NO. 99, *supra* note 170; Blakeney & MacMillan, *supra* note 167. R

[182] Copyright Amendment (Moral Rights) Bill, 1999 (Austl.) (Revised Explanatory Memorandum) *supra* note 23; Dean Ellinson & Eliezer Symonds, *Australian Legislative Protection of Copyright Authors' Honour*, 25 MELB. U. L. REV. 623, 652 (2001). *See also* BILLS DIGEST NO. 99, *supra* note 170. R

[183] ACC INFOSHEET G043, *supra* note 34. R

[184] As part of the U.S. Free Trade Agreement Implementation Act (2004), the same moral rights were granted to performers whose performances of musical, dramatic or literary works were live or captured on sound recordings. U.S. Free Trade Agreement Implementation Act, 2004, No. 120, 100–112 (Austl.), *available at* http://scaleplus.law.gov.au/html/comact/browse/TOCN.htm (last visited Jan. 30, 2006) [hereinafter USFTAIA].

[185] *See generally id*. The substantive amendments that effectuate the Australia-United States Free Trade Agreement ("AUSFTA"), many of which involve changes to the Australia Copyright Act 1968, are found in USFTAIA. The Australian government had actually committed itself to accede to the WIPO Performances and Phonograms Treaty ("WPPT"),

rights granted in 2000 and 2004 to performers and creators of creative works and films generally last for the same duration as copyright protection, thus, moral rights are protected for seventy years beyond the creator's or performer's life.[186]

Now, authors in Australia have the benefit of a statutory scheme that protects their moral rights in their creations separately from their economic rights, but the question is, how does this affect an author's relationship to his work? Like the economic rights of the copyright owner described above, moral rights arise automatically when a copyright work is created and they do not need to be asserted for a creator to reap their benefits.[187] Unlike the economic rights of copyright, moral rights cannot be assigned, transferred or sold.[188] An Australian author can, however, consent in writing to acts or omissions in relation to false or non-attribution or an otherwise "derogatory" treatment of specified works.[189] At the time the consent is given, the relevant work may exist, be of a par-

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prior to negotiating AUSFTA. Although the United States is also a signatory to WPPT, it has not enacted any legislation protecting performers' rights; U.S. law is still similar to Australian law, pre-USFTAIA. AUSTRALIAN COPYRIGHT COUNCIL, INFORMATION SHEET, FREE TRADE AGREEMENT AMENDMENTS, G85 (Feb. 2005), *available at* http://www.copyright.org.au/G085.pdf [hereinafter ACC INFOSHEET G85].

186 Under § 195AM of the Copyright Amendment (Moral Rights) Act, 2000, authors' moral rights except "[a]n author's right of integrity of authorship in respect of a cinematograph film," continue for the duration of copyright protection, which was fifty years beyond the life of the creator, under the 2000 Act. Copyright Amendment (Moral Rights) Act, 2000, § 195AM (Austl.). In 2004, the USFTAIA made amendments, related to the copyright term extension, to the Copyright Act 1968, extending the period of copyright, and thus moral rights, another twenty years beyond the creator's life. USFTAIA, *supra* note 184.

187 Moral rights apply to literary material, artistic works (including paintings, drawings, architecture, sculpture, maps, photographs), musical works, dramatic works, computer programs, films, and sound recordings. ACC INFOSHEET G043, *supra* note 34, at 2. Copyright Amendment (Moral Rights) Act, 2000, §195AZE (Austl). R

188 ACC INFOSHEET G043, *supra* note 34, at 1, 3. R

189 *Id.* at 3–4 (Unless an author has consented in writing not to be identified or it is reasonable in all the circumstances not to identify the author, he must be attributed in the manner that would make anyone receiving, seeing or hearing the work aware of his name when the work is reproduced, published, publicly exhibited (artistic works or film), communicated (via internet, digital transmission, or fax), or adapted (translated, adapted from a literary to dramatic work or arranged).); Copyright Amendment (Moral Rights) Act, 2000, Div. 2, §§ 194, 195, 195AA, 195AB, 195AS, 195AW, 195AWA (Austl.). "Derogatory" treatment, as protected against by the right of integrity, includes mutilating, distorting or materially altering the work, or destroying or exhibiting the work in public. To infringe on the creator's moral rights, the alteration must go beyond making him upset; it must objectively prejudice his honor or reputation. Copyright Amendment (Moral Rights) Act, 2000, Div. 4, §§ 195AI, AJ, AK, AL (Austl.).

ticular description and not yet in existence, or it may be in progress.[190]

An employee may grant blanket consent to his employer in relation to any or all acts or omissions which might otherwise constitute an infringement of moral rights, and as to all works created or to be created in the course of employment.[191] With moral rights, though, Australian creators of works made in the scope of employment now have the possibility of retaining stronger rights in those works than they would have had under a copyright-only regime, wherein the employer was deemed the creator and copyright-holder of the works and there were no moral rights for the employee-creator to retain.[192]

Furthermore, an alleged moral rights infringer may establish a reasonableness defense for the failure to attribute or for derogatory treatment of the work, but not for a false attribution.[193] In considering whether derogatory treatment or a failure to attribute was reasonable in the circumstances, courts look to various factors, based on the facts of each case.[194] In addition, certain treatments of moveable artistic works, buildings, and architectural drawings, including good faith efforts to restore or preserve a work, will not infringe the creator's moral rights of integrity in the work.[195]

B. *The Net Australian Result*

The current Australian system of moral rights protection brings Australia into compliance with its international obligations under Berne and acknowledges creators' personal rights in their works while allowing reasonable restriction of these rights dependent upon the use of the works. While continental European

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[190] Copyright Amendment (Moral Rights) Act, 2000, Div. 6, §§ 195AW(3), 195AWA(3)(b) (Austl.).

[191] Copyright Amendment (Moral Rights) Act, 2000, Div. 6, §§ 195AW(3), 195AWA(3)(b) (Austl.). *See also* DCITA FACT SHEET, *supra* note 61. R

[192] The Copyright Act, in contrast to the consent provisions of the Copyright Amendment (Moral Rights) 2000, made the employer the creator of a work produced in the course of employment, unless otherwise agreed upon. DCITA FACT SHEET, *supra* note 61. R

[193] Copyright Amendment (Moral Rights) Act, 2000, §§ 195AP, 195AR, 195AS (Austl.)

[194] In a reasonableness test of moral rights infringement, courts generally consider the nature of the work, the purpose, manner and context for which the work is used, industry custom and practice, whether the work was created in the course of employment or under a service contract, whether the treatment was required by law, and the views of the authors, if there were two or more. For specific criteria of the reasonableness test, see Copyright Amendment (Moral Rights) Act, 2000, §§ 195AR, AS (Austl).

[195] Copyright Amendment (Moral Rights) Act, 2000, Div. 6, §195AT (Austl).

moral rights are inalienable and cannot be sold or waived, the United States strongly resists that inalienability, and Australia has struck a compromise with an "equivocal position" with regard to alienability and a balancing of interests.[196] Effectively, while arguing that existing causes of action protect rights of attribution and integrity guaranteed by Berne, Australia statutorily created these rights and made them more or less alienable, thus extending existing protection while bringing Australia into compliance with its international obligations.[197]

XI. Conclusion: The Status of "Authors" in the United States is Not Inconsistent with Stronger, Berne-Compliant Moral Rights Protection, and the United States Can and Should Adopt the Australian Model of Systematic Moral Rights Protection Immediately

Moral rights, on the one hand, emphasize an author's unique attachment to his creative work and endeavor to protect his personality and personal expression, as these are manifested in his creation.[198] Copyright, on the other hand, focuses on the property rights of the party who seeks to use the creative work, whether or not this is the original author.[199] As intellectual property rights and the protection of creative works emerged in the United States, in statutes and from the Constitution, the greater public or cultural benefits derived from progress and innovation have always taken priority over the enrichment and protection of creative individuals.[200] Thus, in the United States, as between the *users* of creative works (copyright owners) and the *creators* of these works (artists), the bulk of authority to determine the use of creative works has always been placed in the hands of the users—who are viewed as the parties who will facilitate progress and cultural development—in line with the Framers' intent.[201] From the United States' perspective, giving creators too much power, in the form of greater moral rights, will hamstring growth and the greater good.

In order to reasonably incorporate moral rights into its statutory scheme and cultural landscape, the United States, however,

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196 Caslon Analytics, *supra* note 178. **R**
197 *Id.*
198 *See, e.g., supra* Part II.
199 *Id.*
200 Davis, *supra* note 19, at 322–23. **R**
201 Beyer, *supra* note 19, at 1015–16. **R**

need not embrace the civil law world's romantic notion of the artist as heroic creator, whose moral rights are founded in natural rights theory.[202] It follows that as long as the proper balance is struck between the creators and the users of creative works, the American emphasis on cultural progress may coexist with artists' rights. Where the benefit of cultural innovation (on which side copyright owners'/users' interests lie) does not outweigh the cultural cost of such development (on which side authors' interests lie), the United States should feel comfortable protecting authors' moral rights in the integrity and preservation of their work, and allow the balance to tip against the public interest in progress.[203] Thus, a system which simultaneously contemplates creators' rights and the greater cultural good could comport with the U.S. balance of artists' moral rights as to the integrity of their works and the use of creative works to improve public welfare.

On a practical level, in common law Anglo-American copyright systems such as the United States and Australia, where non-economic moral rights are secondary to economic rights, public welfare, and the free flow of copyright commodities, there is justifiable concern that granting creators extensive rights over the personal character of their works would frustrate these primary goals.[204] Indeed, the power that moral rights laws grant to authors is not disproportionate to the potential loss of reputation caused by violations of integrity/attribution to work. Furthermore, the restraint on property rights is consistent with modern conceptions of property ownership; this notion is not uniquely related to moral rights. Finally, the foundations of moral rights, the recognition of the importance of a creator's integrity, reputation, and credit for his work, are not foreign concepts in the U.S. cultural, legal, or copyright landscape. The international consensus and U.S. treaty obligations under Berne demand protection of these.

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202 *See supra* notes 41–43 and accompanying discussion. *See also* Beyer, *supra* note 19, at 1023. R

203 For example, in order to evaluate the merit of alterations to creative works in terms of the public good, rather than categorically deferring to artists' expectations to not have their works altered, Beyer suggests consideration of the following: (1) Does the work which might be altered already occupy a venerated position in the culture?; (2) Would the alteration fundamentally transform the work and destroy its essence?; (3) Would the alteration be permanent and irreversible? Beyer, *supra* note 19, at 1036. R

204 *See, e.g.*, GERVAIS, *supra* note 20, at 9; Nimmer & Price, *supra* note 6, at 11. *See generally* Netanel, *supra* note 4. R R

By enacting moral rights legislation, based on that of Australia, to protect the rights of integrity and attribution the United States could accommodate the above concerns, while maintaining its prized status quo balance of copyright owners' and authors' interests. The protections of the proposed moral rights legislation would have to apply to the original, individual authors of works, even as to works-made-for-hire, not to "copyright owners," who are the sole beneficiaries of current U.S. copyright legislation. These protections would last for the duration of copyright, and, as they recognize the author's personal rights to his work, they would not be transferable. But, in order to maintain a balance of interests, such protections could be waived, where a specific written waiver reflected the exact circumstances of the waiver. Safety valves such as statutory allowances for consent, the specific constraints of a reasonableness defense, and other exceptions found in the Australian moral rights legislation, function as checks on the extent of authors' sovereignty over their works and acknowledge that there are circumstances which require the alteration of a work or the omission of attribution. Thus, a balance between moral and economic rights suitable for the U.S. legal and social framework is conceivable. This balance would not only facilitate the flow of goods, but would also ensure that creative commodities are being put to their most efficient uses and would, at last, afford U.S. authors the high degree of copyright protection they deserve under Berne.

A FINAL PLEA FOR "DEATH WITH DIGNITY": A PROPOSAL FOR THE MODIFICATION AND APPROVAL OF THE ASSISTED DYING FOR THE TERMINALLY ILL BILL IN THE UNITED KINGDOM

Lindsay Pfeffer

ABSTRACT

Increasing respect for personal autonomy in health-related decision-making, major alterations in the assisted suicide laws of other European countries (especially Switzerland and the Netherlands), and the rising popularity of Swiss suicide clinics have introduced the need for the British legislature to reevaluate the United Kingdom's stance on assisted suicide and to adjust medical practices to contemporary social needs. The introduction and obstruction of a bill in the House of Lords for the legalization of physician-assisted suicide for terminally ill individuals has provoked opposition from the British medical community and serious concern on behalf of members of the government regarding the future of the nation's end-of-life law. In contrast, general public opinion appears to grow in favor the bill's passage.

The Swiss and Dutch legal regimes provide settings against which the potential change in British medical law can be compared. This Note proposes the implementation of further alterations of the bill to ease concerns about a "slippery slope" and encourages the bill's approval in the House of Lords in a future parliamentary session.

I. INTRODUCTION

The British government faces an ongoing controversy over its end-of-life law, which now reaches beyond its nation's borders. Proponents for change in the country's assisted suicide law assert that the rising trend toward autonomous heath care decisions,[1] the example of liberalized neighboring nations,[2] and the growth of the

[1] Hazel M. Biggs, *The Assisted Dying for the Terminally Ill Bill 2004: Will English Law Soon Allow Patients the Choice to Die?*, 12 EUR. J. HEALTH L. 43, 44-47 (2005).

[2] Georg Bosshard, Susanne Fischer & Walter Bär, *Open Regulation and Practice in Assisted Dying: How Switzerland Compares with the Netherlands and Oregon,* 132 SWISS

suicide clinic phenomenon[3] necessitate the introduction of legalized, physician-assisted suicide to respect the wishes of terminally ill patients who desire to end their unbearable pain in a dignified and peaceful manner. The criminal penalty in the United Kingdom for assisting an individual to end his or her life through suicide remains one of the most severe in Europe.[4] While the Suicide Act 1961 made suicide permissible, a provision of the act simultaneously created a new statutory offense defined as "aid[ing], abet[ting], counsel[ing] or procur[ing]" the act of suicide by another, to which a punishment of up to fourteen years imprisonment was attached.[5] Although the British Parliament has held steadfast to this harsh criminal penalty, members of the House of Lords have voiced their determination to overcome this long-standing barrier. This Note encourages the initiation of a major change within Great Britain through the House of Lords' approval of proposed legislation known as the Assisted Dying for the Terminally Ill Bill.[6] The second version of the bill brought before the House of Lords[7] authorizes the establishment of assisted suicide as a legally viable option for an individual suffering from the physical pain and loss of personal autonomy associated with a debilitating terminal illness.[8] Although rejected by the British Parliament for the second time in May 2006 and delayed for six months, there is no foreseeable end to its controversy.

The bill was not a revolutionary proposition bound to startle and offend, but rather the inevitable result of tensions among the medical community, legislators, and the general public that have

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MED. WKLY. 527, 527 (2002) (explaining the legalization of assisted suicide in both Switzerland and the Netherlands).

[3] Antonio Ligi, *Suicide Tourism a Grisly Problem for the Swiss,* N.Z. HERALD, Aug. 12, 2006, *available at* http://www.nzherald.co.nz/section/story.cfm?c_id=2&objectid=10395906.

[4] Biggs, *supra* note 1, at 45.

[5] Suicide Act 1961, 1961, 9 & 10 Eliz. 2, c. 60 (Eng.).

[6] Assisted Dying for the Terminally Ill Bill, 2005, H.L. Bill [36] (Gr. Brit.).

[7] The first bill was brought before the House of Lords in 2004, but time ran out before the House could further deliberate on it. Assisted Dying for the Terminally Ill Bill, 2004, H.L. Bill [17] (Gr. Brit.). The main difference between the 2004 and 2005 versions and the likely reason for the 2004 bill's failure is that the 2004 bill preceded the extensive research done in connection with the bill, which provided the House of Lords with more of a background against which they could accurately assess its proposal. The 2004 bill also lacked certain safeguards that the 2005 bill contains. The possibility of success for the bill in a future parliamentary session likely increases with the number of safeguards included in the bill.

[8] Assisted Dying for the Terminally Ill Bill, 2005, H.L. Bill [36] (Gr. Brit.).

accumulated over time. National polls have indicated notable changes in public opinion. One such opinion poll administered in 1976 reported that 69% of Britons were in favor of legislation to allow assisted dying, while the same opinion poll administered in 2004 reported that 82% of Britons were in favor.[9] According to Lord Joel Joffe, the bill's author, the debate surrounding the bill should be primarily characterized as a balancing of two competing and conflicting interests, namely the potential social injuries that result from allowing assisted suicide with the personal and individual right to request assistance to die.[10] The bill addresses this conflict by including an extensive list of safeguards and a highly regulated decision-making process to prevent the creation of a slippery slope.[11] Its provisions do not compel assisted suicide but only create the option;[12] the bill's ultimate goal is to empower those individuals of sound mind who feel that ending their lives is in their own best interest.

The goal of this Note is to encourage acceptance of the legalization of assisted suicide in Great Britain by evaluating the need for change from the perspectives of legislators, physicians, and the British people. It also proposes changes to the current version of the bill to improve the likelihood that the bill will be approved upon further review. The liberalized assisted suicide laws and stable medical practices of nearby Switzerland and the Netherlands provide an important context for assessing the likely success of this legal change in Great Britain, particularly because they form the background against which Lord Joffe reviewed his own bill.

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9 M.A. Branthwaite, *Taking the Final Step: Changing the Law on Euthanasia and Physician Assisted Suicide*, 331 BRIT. MED. J. 681, 682 (2005). These surveys have been remarked as too basic due to the "form of simple Yes/No questions posed without an exploration of the surrounding context—for example, the availability and effectiveness of palliative care," but the increase in the proportion of positive respondents is a significant indication of a change in public opinion. SELECT COMMITTEE ON THE ASSISTED DYING FOR THE TERMINALLY ILL BILL, VOL. I: REPORT, 2005, H.L. 86-I, at 6, *available at* http://www.publications.parliament.uk/pa/ld200405/ldselect/ldasdy/86/86i.pdf [hereinafter SELECT COMMITTEE REPORT].

10 Lord Joel Joffe, Letter to the Editor, *The Proposed Assisted Dying Bill in the UK*, 20 PALLIATIVE MED. 47, 47 (2006); *see also* Part III of this Note (explaining fears, such as abuse of vulnerable and elderly patients and the undermining of the medical profession, and describing the rise in respect for autonomous decision-making).

11 Assisted Dying for the Terminally Ill Bill, 2005, H.L. Bill [36] (Gr. Brit.); *see also* Joffe, *supra* note 10.

12 Assisted Dying for the Terminally Ill Bill, 2005, H.L. Bill [36] (Gr. Brit.); *see also* Joffe, *supra* note 10.

Part II.A of this Note provides the history of Great Britain's end-of-life law and the state of its medical treatment methods in order to assess the desirability and potential consequences of implementing a change. Part II.B discusses assisted suicide laws in both Switzerland and the Netherlands and their influence on the British controversy. Swiss suicide organizations have sprouted since the legalization of assisted suicide, the most controversial of which offers assisted suicide services to individuals not only within the country's borders but throughout Europe, having drawn at least 54 British individuals to its clinics.[13] One side of the ongoing debate in Great Britain believes that this growing number must be heeded as a signal that British law must conform to the changing needs of these strong-minded people in order to assure them a safe and manageable way of ending their lives. This section next focuses on the Netherlands, which is the most liberal of all the European countries in terms of its end-of-life practices.[14] Assessing the country's cultural circumstances and legal changes allows one to better comprehend the spectrum of end-of-life decision-making and, in turn, more ably to scrutinize the potential successes and downfalls inherent in a system permitting physician-assisted suicide.

Part III analyzes the most current Assisted Dying for the Terminally Ill Bill and assesses criticisms of the bill, which include slippery slope arguments, fears about damage to the state of palliative care and the medical profession, and other concerns.

In conclusion, this analysis demonstrates the urgency to amend the time-weary Suicide Act 1961[15] in view of the current state of affairs in Great Britain and the changing face of international end-of-life law.

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13 *Depressed 'Could Get Help to Die*,' BBC NEWS, Sept. 20, 2006, http://news.bbc.co.uk/nolpda/ukfs_news/hi/newsid_5364000/5364400.stm.

14 Mason L. Allen, Note, *Crossing the Rubicon: The Netherlands' Steady March Towards Involuntary Euthanasia*, 31 BROOK. J. INT'L L. 535, 535-575 (2006).

15 Assisted Dying for the Terminally Ill Bill, 2005, H.L. Bill [36] (Gr. Brit.) (amending Section 2 of the Suicide Act 1961 by inserting a subsection which states that "Subsection (1) does not apply where a person assists another person to die, or where a person helps another person to assist a third person to die, or where a person is present when another person ends his own life or attempts to do so, in accordance with sections 1 and 8 of the Assisted Dying for the Terminally Ill Act 2005."); *see* Suicide Act 1961, 1961, 9 & 10 Eliz. 2, c. 60 (Eng.).

II. BACKGROUND

A. *British Law*

The Suicide Act 1961 simultaneously eliminated suicide as a crime in Great Britain and made to "aid, abet, counsel or procure such an act by another"[16] a statutory offense with a possible penalty of up to fourteen years imprisonment.[17] Many exceptions and exclusions to the Suicide Act 1961 have been born as a result of British medical procedure, creating uncertainty in an area that should otherwise be unambiguous. These procedures include terminal sedation and refusal of treatment despite certain death (the purpose of which is difficult to distinguish from that of assisted suicide). Terminal sedation is frequently referred to under the "double effect"[18] doctrine, in which reasonable measures to reduce the pain experienced by a terminally ill patient may be legally taken even in the event that they accelerate death in the process.[19] *Airedale NHS Trust v. Bland* discusses refusal of treatment, in the context that physicians "responsible for [a patient's] care must give effect to his wishes, even though they do not consider it to be in his best interests to do so . . . ."[20]

One of the most widely publicized cases was *Pretty v. United Kingdom,* in which a woman with motor neurone disease challenged assisted suicide law by requesting that her husband not be

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16 *Id*.

17 *Id*. Assisted suicide is commonly defined (and is so defined in Great Britain) as "any action taken to encourage or help somebody to kill oneself. It may consist of providing a lethal substance or any other means to the person planning to commit suicide. The final gesture (e.g. taking and swallowing the pills) must be made freely by the person committing suicide." Olivier Guillod & Aline Schmidt, *Assisted Suicide Under Swiss Law*, 12 EUR. J. HEALTH L. 25, 26 (2005).

18 The double effect doctrine is described in *Cruzan v. Director, Missouri Dep't of Health*, where the Court made the distinction between allowing a patient to die and making him die. The case shows that in some cases, where death is imminent, a patient's autonomy interest may outweigh the state interest in preserving life. 497 U.S. 261, 273 (1990). For an overview of the double effect doctrine, see Alison McIntyre, *Doctrine of Double Effect*, *in* STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., 2006), *available at* http://plato.stanford.edu/entries/double-effect/.

19 In *R. v. Adams*, the jury received the instruction that "[i]f the first purpose of medicine, the restoration of health, can no longer be achieved there is still much for a doctor to do, and he is entitled to do all that is proper and necessary to relieve pain and suffering, even if the measures he takes may incidentally shorten life." [1957] CRIM. L. REV. 365.

20 [1993] AC 789, 864 (Civ.).

subject to prosecution for assisting in her death.[21] She knew that her disease would ultimately paralyze her, rendering her physically unable to end her life on her own or communicate with her family.[22] The House of Lords explained that they could not interpret Section 2 of the Suicide Act 1961 to mean that there is a right to die or a right to gain assistance in dying.[23] Rather, it relied on a ruling by the European Convention on Human Rights, which "enunciated the principle of the sanctity of human life and provided that no individual shall be deprived of life by means of intentional human intervention, [and] did not imply the right of an individual to choose whether to live or die."[24] The case continued for two years until the European Court of Human Rights heard it in 2002.[25] Ms. Pretty was ultimately denied relief and later died of suffocation, as she had dreaded.[26]

A more recent case, from the United Kingdom High Court, is *Re Z; Local Authority v. Z,* which involved a woman who, like Ms. Pretty, suffered from an incurable disease that would ultimately destroy her motor function.[27] After first attempting her own suicide, she later expressed interest in assisted suicide to her husband and family.[28] While disagreeable at first, her husband and family came to support her desire and the woman arranged to go to Switzerland to follow through with her decision.[29] However, since she needed the assistance of her husband to do so and he informed the local authorities about the plan, the husband was barred by an injunction, on the basis of potential criminal liability under the Suicide Act 1961, from assisting his wife in her suicide by removing

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21 Pretty v. United Kingdom, 41 Eur. Ct. H.R. 155 (2002). Individuals diagnosed with motor neurone disease do not necessarily have palliative care as an available remedy. One fervent speaker revealed during a House of Commons debate that "[h]alf of all patients diagnosed with motor neurone disease die within 14 months of diagnosis, yet a survey carried out in 2005 found that only 39 percent of such patients were referred to specialist palliative care services. Is it any wonder that people take fright when diagnosed with MND?" 441 PARL. DEB., H.C. (6th ser.) (2006) 1443.

22 Pretty, 41 Eur. Ct. H.R. 155, ¶14.

23 *Id.*; *see* Suicide Act 1961, 9 & 10 Eliz. 2, c. 60 (Eng.); *see also United Kingdom: The Physician-Patient Relationship, in* INTERNATIONAL ENCYCLOPAEDIA FOR MEDICAL LAW 204 (Herman Nys, ed. 2002) (discussing *Pretty v. UK*).

24 SELECT COMMITTEE REPORT, *supra* note 9, at 25; *see* Pretty, 41 Eur. Ct. H.R. 155.

25 Pretty, 41 Eur. Ct. H.R. 155.

26 GAIL TULLOCH, EUTHANASIA—CHOICE AND DEATH 90 (2005).

27 *Re Z; Local Authority v. Z*, [2004] EWHC (Fam) 212, 2004 All E.R. (D) 71 (Eng.).

28 *Id.*

29 *Id.*

her to Switzerland.[30] The Court determined that the woman had legal decision-making capacity and had made the decision solely on her own behalf.[31] Although the Court found that the local authorities had the power to further enforce the injunction, it lifted the injunction and allowed Mrs. Z to proceed with her plan.[32] The Court explained that the primary duty of the local authorities was to determine Mrs. Z's decisional capacity, and the Court could not interfere with her right to autonomy and self-determination, especially if it were to do so largely because of her disability.[33]

Lord Joffe first introduced the Patient (Assisted Dying) Bill as a Private Members Bill in 2003.[34] The bill was representative of the increasing attention paid to the importance of personal autonomy.[35] It was changed following an intense Parliamentary debate and reintroduced as the Assisted Dying for the Terminally Ill Bill in 2004, modeled on the effective Oregon assisted suicide law.[36] It

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30 *Id*; *see* Suicide Act 1961, 1961, 9 & 10 Eliz. 2, c. 60 (Eng.).

31 *Re Z*, [2004] EWHC (Fam) 212, 2004 All ER (D) 71 (Eng.) ("[I]n the context of a person of full capacity, whilst the right to life is engaged, it does not assume primacy (at the hands of another especially) over rights of autonomy and self-determination.")

32 *Id.*

33 *Id*.

34 Biggs, *supra* note 1, at 43 (Private Members Bills "have traditionally been the vehicle for controversial socially reforming legislation where party political support is difficult to muster despite growing public encouragement hence it is significant that it takes this form.").

35 SELECT COMMITTEE REPORT, *supra* note 9, at 20-29 (in the chapter titled "Underlying Ethical Principles"); *see also* Branthwaite, *supra* note 9, at 681.

36 Clare Dyer, *UK House of Lords Rejects Physician Assisted Suicide*, 332 BRIT. MED. J. 1169, 1169 (2006). The Death with Dignity Act, which allowed for a physician to assist in a person's death through prescribing lethal drugs, passed in Oregon in November 1994 with a vote of 51% to 49%. Roger S. Magnusson, *Book Review—Dying Right: The Death with Dignity Movement*, 11 MED. L. REV. 408 (2003)(reviewing DANIEL HILLYARD & JOHN DOMBRINK, DYING RIGHT: THE DEATH WITH DIGNITY MOVEMENT (2001)). The Oregon statute places the following requirements on the patient and the primary physician. The patient must: [1] be capable (able to make and communicate decisions about his/her health care); [2] have a terminal disease (incurable and irreversible disease that is expected to lead to death within six months); and [3] have made one written and two oral requests to die to his/her primary physician. The primary physician, on the other hand, is required to: [1] confirm the above conditions together with a consultant; [2] refer the patient for counseling if either he or the consultant believes that the patient's judgment is impaired by depression or some other psychiatric or psychological disorder; and [3] inform the patient of all feasible alternatives, such as comfort care, hospice care, and pain-control options. OR. REV. STAT. § 127.800 – 127.890; 127.895; 127.897 (1994) (numerals added); *see infra* Appendix (showing the characteristics shared by both the Oregon and British models). Certain factors that may have contributed to the successful passage of the Death with Dignity Act include the "pre-existing legal framework (which already included provisions for living wills and advance directives), the presence of a detailed protocol seeking to secure

was presented to the House of Lords but did not advance further.[37] The Select Committee on the Assisted Dying for the Terminally Ill Bill was then formed for the purpose of scrutinizing the issues and determining whether proceeding with the bill was the best course of action.[38]

The majority of the Lords praised Chairman of the Select Committee Lord Mackay for his thorough report, published in April 2004, that presented the ethical principles and practical issues surrounding the bill, as well as studies on public opinion and comparisons of the legislation to that of other regions where assisted suicide had already been legalized, including Switzerland, the Netherlands, Belgium, and the state of Oregon.[39] It also made suggestions for future legislation.[40] The report focused on five points. First, it revealed that "the demand for assisted suicide or voluntary euthanasia is particularly strong among determined individuals whose suffering derives more from the fact of their terminal illness than from its symptoms and who are unlikely to be deflected from their wish to end their lives by more or better palliative care."[41] While some may view this as an unacceptable reason to request assisted suicide, one must keep in mind that suffering is not only physical but strongly emotional as well. Some patients are so overcome with dread about their anticipated demise that they cannot be sufficiently consoled by palliative care. Who is to decide which state is more painful than terminally ill patients themselves? Second, the bill must be clear in distinguishing assisted suicide from euthanasia, as statistics reveal that assisted suicide is more prevalent in jurisdictions where euthanasia is lawful. Third, the directions a doctor must follow in arranging an assisted suicide after a patient is eligible for the procedure must be more precisely defined. Fourth, the terms "terminal illness," "mental incompetence" and "unbearable suffering" must be more thoroughly defined.[42]

'voluntariness' within the initiative itself, and crucially, the limitation of the initiative to physician-assisted suicide (excluding voluntary euthanasia)." Magnusson, *supra*.

37 681 PARL. DEB., H.L. (5th ser.) (2006) 1183. Because any member of the House of Lords can verbally object upon the reading of the title of a bill and consequently adjourn its second reading, only uncontroversial bills pass through without debate. HOUSE OF COMMONS INFORMATION OFFICE, FACT SHEET: PRIVATE MEMBERS' BILLS PROCEDURE 4 (2006), *available at* http://www.parliament.uk/documents/upload/l02.pdf.

38 Biggs, *supra* note 1, at 43-44.

39 *See* SELECT COMMITTEE REPORT, *supra* note 9, at 2-7.

40 SELECT COMMITTEE REPORT, *supra* note 9, at 7.

41 Joffe, *supra* note 10.

42 Branthwaite, *supra* note 9, at 683.

The report also recommended changing the phrase "unbearable suffering" to "unrelievable suffering,"[43] making clear that the pain cannot be mitigated. And fifth, the report suggested that patients actually experience palliative care rather than merely being informed of the possibility as an option.[44]

An extensive debate in October 2005 in the House of Lords followed the report's publication.[45] The primary concerns expressed by members of the House of Lords included lack of protection of vulnerable parties, harm to the quality of palliative care, and potential undermining and obstruction of the medical profession.[46] Lord Joffe responded to the Select Committee's concerns by making the relevant changes to the bill, but rejected the recommendations that the patient experience palliative care and that "unbearable suffering" be changed to "unrelievable suffering."[47] In spite of (perhaps surprising) acclaim from the House of Lords for the report, the newly altered bill was rejected in November 2005.[48] Lord Joffe was persistent in his efforts and read the bill for the second time in the House of Lords in May 2006, but it was rejected for yet a second time by a margin of 148 votes to 100.[49] A number of particular adjustments were made during the time between the rejection of the 2004 version of the Assisted Dying for the Terminally Ill Bill and the introduction of the 2005 version, many of which accommodated concerns expressed by the House of Lords in the October 2005 debate.[50]

The current bill's stated purpose is to "[e]nable an adult who has capacity and who is suffering unbearably as a result of a terminal illness to receive medical assistance to die at his own considered and persistent request; and for connected purposes."[51] More specifically, in order to make a valid assisted suicide request, a pa-

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43 Branthwaite, *supra* note 9, at 683.

44 Branthwaite, *supra* note 9, at 683.

45 674 PARL. DEB., H.L. (5th ser.) (2005) 46.

46 *Id.*

47 681 PARL. DEB., H.L. (5th ser.) (2006) 1187. Allowing this change in language would limit assisted suicide to only those whose pain could not be alleviated by palliative care. Yet, some might argue that terminal sedation could always be employed, despite that it would essentially strip a patient of any control over his own body.

48 *Id*. at 1183.

49 Will Woodward, *Lords Vote to Block Assisted Suicide Bill for Terminally Ill: Peers Delay Second Reading for Six Months; Sponsor Pledges to Reintroduce Measure*, GUARDIAN (London), May 13, 2006, at 11.

50 Assisted Dying for the Terminally Ill Bill, 2005, H.L. Bill [36] (Gr. Brit.).

51 *Id.*

tient is required to have mental decision-making capacity and must be suffering unbearably due to a terminal illness from which she is certain to die within six months.[52] This time restriction is more limiting than it may seem, as cancer is one of the few illnesses of which physicians are able to make reasonable prognoses.[53] The bill contains an amendment to the Suicide Act 1961and authorizes assisted dying only with the aid of a physician.[54]

The current bill better defines the proposed law's permissions and prohibitions, includes extensive safeguards for vulnerable patients, and emphasizes the continuation of quality palliative care and protection for the medical community and others wary of related legal responsibilities.[55] Lord Joffe intends that the bill firmly eradicate fears about involuntary euthanasia of unconsenting patients through more than twenty safeguards.[56] Self-administration of the lethal drug is essential to protect doctors from criminal liability.[57] Only if a patient is physically unable to administer the drug herself, estimated to be a rare circumstance,[58] will assistance be provided.[59] The 2005 version of the bill included a new provision on determination of lack of capacity for further assurance that physicians would only grant a request for assisted suicide after a finding that the patient was of sound mind.[60] It includes more safe-

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52 *Id*.

53 Irene J. Higginson, *Conclusions from the Meeting*, 94 J. ROYAL SOC'Y OF MED. 496, 496-97 (2001). In Britain, "only about 5% of patients entering hospice or palliative care services have a diagnosis other than cancer." *Id*. In January 2006, Jim Dobbin sought permission in the House of Commons to present a bill to provide palliative care to a broader number of terminally ill people, disclosing that the National Council for Palliative Care "estimates that, while 95 per cent of patients using hospice or palliative care have cancer, 300,000 people with other terminal diseases are excluded. It is a fact that cancer patients have access to the most and the best palliative care." 441 PARL. DEB., H.C. (6th ser.) (2006) 1443.

54 Suicide Act 1961, 1961, 9 & 10 Eliz. 2, c. 60 (Eng.); Assisted Dying for the Terminally Ill Bill, 2005, H.L. Bill [36] (Gr. Brit.).

55 Assisted Dying for the Terminally Ill Bill, 2005, H.L. Bill [36] (Gr. Brit.). The greatest difference between the two bills is the increase in the revised bill's safeguards, particularly with regard to physician involvement. *Compare* Assisted Dying for the Terminally Ill Bill, 2004, H.L. Bill [17] (Gr. Brit.), *and* Assisted Dying for the Terminally Ill Bill, 2005, H.L. Bill [36] (Gr. Brit.).

56 681 PARL. DEB., H.L (5th ser.) (2006) 1186.

57 *Id*. at 1183.

58 *Id*. at 1188. It is estimated that approximately 5 percent of patients will be physically incapable of swallowing the drug; in this circumstance, the drug may be added to the patient's feeding tube. *Id*. at 1188-1189.

59 *Id*. at 1188.

60 Assisted Dying for the Terminally Ill Bill, 2005, H.L. Bill [36] (Gr. Brit.).

guards for physicians involved with dying patients, such as the option for attending physicians to work with a member of a health care team and permitting a consulting physician to carry out the patient's request.[61]

The medical community has been largely unyielding to legal change in the current end-of-life care system due to reservations about the potential abuse of vulnerable patients and fears about neglect of palliative care and medical research.[62] All the while, opinions among medical professionals have also become more diverse.[63] While most physicians are content with the current legal landscape, a portion report feeling inhibited in their ability to provide patient care.[64] British physician organizations have expressed ambivalence about a change in the law, stating their vehement opposition toward some points and tolerant neutrality toward others. In a survey taken of British medical practitioners of the Royal College of Physicians, 73% of the physicians were not in favor of a change in the law, and those involved in palliative care were most opposed.[65] A survey of 1,202 general practitioners (GPs) in Wales demonstrated that the opinions of GPs against assisted suicide have become more rigid since an earlier survey in 1994, as currently only one in five GPs would agree to prescribe lethal medication, and only one in eight GPs would administer the medication themselves.[66] The British Medical Association (BMA), which is the United Kingdom's largest voluntary professional organization for doctors, was a long-time opponent of doctor-assisted suicide,

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61 *Id*. Lord Joffe also stated at the meeting of the House of Lords in May 2006 that he wished to narrow Section 1(a)(ii) of the bill by removing "or appropriate" after "impossible" and that he intended to add a provision explicitly proscribing acts of active euthanasia. He also emphasized Clause 14(2)(d) of the act, which would allow the Secretary of State to set out a code of practice that would instruct doctors in prescribing, dispensing and controlling the medication, as well as the steps of self-administration. *Id*.

62 I.G. Finlay et al., *The House of Lords Select Committee on the Assisted Dying for the Terminally Ill Bill: Implications for Specialist Palliative Care,* 19 PALLIATIVE MED. 44 – 53 (2005).

63 At an annual representatives meeting in 2005, the British Medical Association acknowledged diverse opinions among British doctors with regard to assisted dying. BRITISH MEDICAL ASSOCIATION, END OF LIFE DECISIONS: VIEWS OF THE BMA 3 (July 2006).

64 Clive Seale, *National Survey of End-of-Life Decisions Made by UK Medical Practioners,* 20 PALLIATIVE MED. 3, 8 (2006).

65 James Chapman, *Three Out of Four Doctors Are Against the Euthanasia Bill*, DAILY MAIL (London), May 10, 2006, at 2.

66 *GP Views Harden Over Assisted Dying*, PULSE, June 1, 2006, at 3.

but assumed a neutral position on the matter in 2005.[67] The organization overturned this position, however, in June 2006, when delegates to the annual conference of the British Medical Association voted against the legalization of doctor-assisted suicide and voluntary euthanasia.[68] Public opinion seems to be in direct contrast to these physicians' opinions, as a YouGov survey conducted by the Dignity in Dying group in 2006 found that 76% of people supported assisted dying under the condition that safeguards were utilized.[69]

A possible explanation for the physician organizations' changes in stance may be a combination of unwarranted fears and misinterpretation of the likely consequences of the law itself.[70] One of these fears is the potential for abuse of vulnerable patients, such as disabled individuals, and the likelihood that older patients will feel obliged to die to prevent undue emotional or financial burden on their families.[71] Another fear is that palliative medicine would be neglected and medical research would be stunted because assisted suicide will become too much of a trouble-free substitute for treatment.[72] Advocates of physician-assisted suicide blame religious group interference for the escalation of these concerns.[73] Surveys also strongly suggest that most of the public would trust their doctors to the same degree, or even a higher degree, if assisted suicide were legalized.[74] A social attitudes survey taken in 1996 showed that 82% of the British public was in favor of assisted

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67 Jane Merrick, *Doctors' Revolt Over Assisted Suicide Law*, DAILY MAIL (London), June 24, 2006, at 53.

68 *Doctors in Britain Give Thumbs-Down to Euthanasia*, AGENCE FRANCE PRESSE, June 29, 2006.

69 Rosa Prince, *Killed Off: Lords Block Law for Assisted Suicide Should We Get the Right to Have Ourselves Killed*?, Mirror (London), May 13, 2006, at 23.

70 *See infra* Part III (Subsection titled *Misinterpretation of the Bill*).

71 R.J.D. George, I.G. Finlay & David Jeffrey, *Legalised Euthanasia Will Violate the Rights of Vulnerable Patients*, 331 Brit. Med. J. 684, 684 (2005); Shawn Pogatchnik, *British Doctors Vote to Oppose Assisted Suicide, Overturn Policy of Neutrality*, ASSOCIATED PRESS (Belfast), June 30, 2006.

72 One Lord is cited as exclaiming, "Why waste money on care for the terminally ill?" 681 PARL. DEB., H.L (5th ser.) (2006) 1225.

73 "Advocates of medically assisted suicide accused religious pressure groups of exerting undue influence over the [BMA] vote." Pogatchnik, *supra* note 71.

74 COMPASSION IN DYING ALL PARTY PARLIAMENTARY GROUP, BRIEFING FOR THE DEBATE ON THE REPORT OF THE SELECT COMMITTEE ON THE ASSISTED DYING FOR THE TERMINALLY ILL BILL 7 (2005), *available at* http://www.politics.co.uk/campaignsite/compassion-in-dying-all-party-parliamentary-group-$366359$2.htm [hereinafter COMPASSION IN DYING BRIEFING].

dying in the situations described in the proposed bill, and, most interestingly, disabled people were more agreeable toward the bill's proposal than people who were not disabled.[75]

In contrast to the confusion surrounding the medical community's position on the matter, general public support for the bill has remained stable. Public opinion polls spanning the past twenty-five years have demonstrated that public support for assisted dying has always been above 70%.[76] A January 2007 study in which forty-one terminally ill patients were interviewed revealed that most of the patients supported the legal change in Britain, and those who opposed it appeared to have based their decision on their misunderstanding that involuntary euthanasia would be permitted.[77] The Select Committee has previously reported that, although polling results cannot be deemed completely accurate, "the apparent groundswell in public agreement with the concept of euthanasia cannot be dismissed."[78]

B. *The Swiss and Dutch End-of-Life Legal Regimes*

As Lord Joffe has said, "As there is no available experience of assisted dying in the UK, it is natural to turn to the experience of other countries with similar health provision and similar standards of living which have actually implemented similar legislation."[79] The legal regimes of both Switzerland and the Netherlands offer insight into the effectiveness of certain legal systems, or aspects of those legal systems, over others. Additionally, proposed legislation in these countries is relevant because critics of the Assisted Dying for the Terminally Ill Bill utilize these extremely liberal legal propositions to enhance their "slippery slope" arguments.

Switzerland is known for its extremely liberal end-of-life law.[80] A patient need not receive a second medical opinion, as required

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[75] *Id.* at 9.

[76] 681 PARL. DEB., H.L. (5th ser.) (2006) 1185.

[77] *Shortcuts from BMJPG Journals: Dying Patients Wish to Control Their Lives*, 334 BRIT. MED. J. 68, Jan. 13, 2007. The results of this study are a sound example of the weight that misinterpretation and misunderstanding have in preventing the successful implementation of legal change.

[78] COMPASSION IN DYING BRIEFING, *supra* note 74, at 5.

[79] Memorandum from Lord Joffe on Patient (Assisted Dying) Bill to Select Committee on Liaison (Oct. 22, 2003).

[80] Bosshard et al., *supra* note 2, at 527. The Netherlands, Belgium and Oregon have legalized assisted suicide, as well. *Id.; Belgium Legalises Euthanasia*, BBC NEWS, May 16, 2002, *available at* http://news.bbc.co.uk/2/hi/europe/1992018.stm; *see also* Graeme Laurie,

in the Netherlands and the state of Oregon, nor be dying of a terminal illness to request assisted suicide.[81] The subject of greatest controversy is Switzerland's Article 115, a law established in 1942 that criminalizes inciting and assisting someone to commit suicide.[82] It reads, "[a] person who, for selfish reasons, incites someone to commit suicide or who assists that person in doing so will, if the suicide was carried out or attempted, be sentenced to a term of imprisonment (*Zuchthaus*) of up to 5 years or a term of imprisonment (*Gefängnis*)."[83] The four required elements are: "[1] a suicide was committed or attempted; [2] a third party encouraged or helped in the suicide; [3] the third party acted on selfish grounds; [4] the third party acted deliberately (intent)."[84] However, some restrictions do apply. Article 114 of the Swiss penal law states that killing a person at his or her request "for decent reasons, especially compassion," is still an illegal act.[85] While its language may seem contradictory, Article 114 is viewed as punishing direct active euthanasia, which may be defined as follows:

> Direct active euthanasia is commonly defined as the deliberate killing of another person in order to shorten his or her suffering. For instance, a doctor or any third party deliberately injects a lethal substance into the veins of the suffering person, thus directly causing his or her death. The death-causing act is not made by the suffering person but by the mercy-killer.[86]

Like the Assisted Dying for the Terminally Ill Bill, Article 115 is claimed to permit assisted suicide only if the person has the mental capacity to appreciate the "meaning and importance of his or her act."[87]

Editorial, *Physician Assisted Suicide in Europe: Some Lessons and Trends*, 12 EUR. J. HEALTH L. 5, 5 (2005) (including discussion about Belgian assisted suicide law).

81 *See infra* Appendix; *see also* Bosshard et al., *supra* note 2, at 527.

82 Guillod & Schmidt, *supra* note 17, at 29.

83 *Criminal Law and Assisted Suicide in Switzerland: Hearing with the Select Committee on the Assisted Dying for the Terminally Ill Bill*, H.L., 3 (2005) [hereinafter *Switzerland Hearing*] (statements of Prof. Dr. Christian Schwerzenegger & Sarah Summers). "Zuchthaus" means a maximum of five years imprisonment, while "Gefängnis" means a minimum punishment of three days of imprisonment. *Id.* at 3 n.5 (2005).

84 Guillod & Schmidt, *supra* note 17, at 29 (numerals added).

85 *Switzerland Hearing*, *supra* note 83, at 3; Guillod & Schmidt, *supra* note 17, at 26. **R**

86 Guillod & Schmidt, *supra* note 17, at 26.

87 Guillod & Schmidt, *supra* note 17, at 30. The statute is codified as a criminal law, meaning that it does not imply a right to assisted suicide, which weakens the autonomy right argument. *Id.* at 31. The law also leaves uncertain the issue of whether an institution or health care facility has the responsibility of allowing assisted suicide on its premises. *Id.* However, as of January 1, 2006, at least one Swiss hospital has allowed patients who are

Significantly, assisted suicide in Switzerland was not intended to be closely associated with the practice of medicine,[88] which may be logically linked to the popularity of suicide clinics. Major assisted suicide organizations EXIT, which has offered its services since 1990,[89] and Dignitas, which has offered its services since 1998,[90] avoid legal punishment by asserting their lack of selfish motive in aiding people to end their lives in what they claim to be a quick, painless and dignified manner.[91] The Dignitas motto is "[l]ive with dignity, die with dignity,"[92] promising that, after a person ingests the lethal drug, he or she will fall into a deep coma after five minutes and ultimately die after twenty or thirty minutes.[93] The clinics prepare lethal doses of barbiturates and provide them to individuals who must ingest the drugs themselves, unless they are physically unable to do so.[94]

Dignitas founder Ludwig Minelli has urged changes in Switzerland's assisted suicide law[95], arguing against the threat of a

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too incapacitated to go home to receive assistance in their hospital beds from the suicide organization EXIT. Luke Harding, *Swiss Hospital the First to Allow Assisted Suicide: Medical Chiefs Decide After Two-Year Ethical Debate: Euthanasia Still Not Allowed at Lausanne Site*, GUARDIAN (London), Dec. 19, 2005, at 12. The legal and ethical director of the hospital explained, "The mission of our hospital is to cure patients, not help them die," but admitted, "[w]e cannot deprive them of a right they would have at home, simply because they are in a hospital." Colin Nickerson, *Suicide Groups Make Switzerland a Final Destination*, BOSTON GLOBE, Feb. 26, 2006, at A12.

88 Guillod & Schmidt, *supra* note 17, at 29. Rather, the concept of assisted suicide was derived from romanticized ideas about loyalty, family honor, and unrequited love. *Id.*

89 Bosshard et al., *supra* note 2, at 529.

90 While the agencies must offer not-for-profit services, they are allowed to charge basic fees. Nickerson, *supra* note 87. Dignitas members pay 100 Swiss francs (80 U.S. dollars) to join and an annual fee of 50 francs. Ligi, *supra* note 3.

91 Guillod & Schmidt, *supra* note 17, at 25.

92 Sarah Boseley & Clare Dyer, *'I Believe I Must End My Life While I Am Still Able': Terminally-Ill UK Doctor Kills Herself at Swiss Clinic: Campaigners Urge Britain to Permit Assisted Suicide*, GUARDIAN (London), Jan. 25, 2006, at 8.

93 *Suicide-Clinic Entrepreneur: Depressed? 'We Never Say No' Insists Mentally Ill Have Same Rights as Able-Minded to Choose How to Die*, WORLD NET DAILY, Apr. 16, 2006.

94 *See* Bosshard et al., *supra* note 2, at 530.

95 Dignitas is at the forefront of the controversy over possible changes in Swiss law. Minelli has been spotlighted for his particularly liberal viewpoints, having stated that assisted suicide should be available to people without terminal illnesses and people with chronic, untreatable depression. Jane Kirby, *Britons 'Should Be Free to End Their Lives,'* PRESS ASSOCIATION, Sept. 20, 2006. His rationale is, "[i]f you accept the idea of personal autonomy, you can't make conditions that only terminally ill people should have this right." *Id*. He has been quoted as saying that his organization's services offer "a marvelous possibility" for people who want to gain some control over the manner of their deaths. *Suicide Helper Claims He Is Saving Lives*, CHINA DAILY, July 5, 2006. Minelli has also gained entrance to the courts in a variety of cases involving mentally ill patients. A

"slippery slope."[96] He claims that, in his experience, it is clear that many individuals wish merely to have the option of assisted suicide rather than actually to take advantage of it.[97] Only Dignitas extends its services to people beyond the country's borders. This practice has led to concern in the Swiss government about the spread of "death tourism,"[98] in which individuals travel from countries where assisted suicide remains illegal to end their lives at the organization's clinics.[99] The organization has assisted at least 493 people in ending their lives, with more than half of them coming from Germany and Great Britain.[100]

Swiss assisted suicide law is liberal to the point that it "has no centralized notification system for assisted suicide" and "there is strong reliance on figures from the right-to-die organisations themselves."[101] The investigative authorities examine reported deaths

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Dignitas member with manic depression requested that Ludwig Minelli aid him in his suicide without first meeting the medical requirements under law; he fought his case to the Swiss Supreme Court and won. Lewis Wolpert, *Depression Is Not a Good Reason to Die*, TELEGRAPH (London), Sept. 22, 2006, *available at* http://www.telegraph.co.uk/health/main.jhtml?xml=/health/2006/09/22/hsuicide22.xml; Michael Sung, *Swiss Court Extends Physician-Assisted Suicide to Incurable Mental Patients*, JURIST (Pittsburgh), Feb. 3, 2007, *available at* http://jurist.law.pitt.edu/paperchase/2007/02/swiss-court-extends-physician-assisted.php. The Court also heard a case of a patient with bipolar disorder requesting the same. Ben Russell & Maxine Frith, *Swiss Clinic Wants to Offer Assisted Suicide to the Mentally Ill*, INDEPENDENT (London), Sept. 21, 2006, at 27. It recently concluded that mentally ill people do have the right to assisted suicide. Hilary White, *Mentally Ill Have a Right to Assisted Suicide*, LIFESITENEWS, Feb. 2, 2007. Some critics view Minelli's challenges in court as "proof at last of the falsehood of the claim that the push to legalize euthanasia is about caring for people in distress," labeling the push for euthanasia and assisted suicide as symbolic of a movement for a "death on demand culture." Hilary White, *Swiss Euthanasia Group Demands Assisted Suicide for the Depressed*: *Proves Euthanasia/Assisted Suicide Movement is Essentially a "Death in Demand Culture,"* LIFESITENEWS, Sept. 22, 2006.

96 Kirby, *supra* note 95.

97 Kirby, *supra* note 95. It is likely that Britons would also take comfort in the fact that the choice of assisted suicide exists, rather than opt for it immediately upon its legalization.

98 *See* Hilary White, *Switzerland Refuses to Alter Assisted Suicide Law to Nix Death Tourism*, LIFESITENEWS, June 2, 2006, *available at* http://www.lifesite.net/ldn/2006/jun/06060210.html.

99 *Id*. In addition to its Zurich clinic, Dignitas has formed clinics in Germany. Annette Tuffs, *Assisted Suicide Organisation Opens Branch in Germany*, 331 BRIT. MED. J. 984, Oct. 19, 2005.

100 Nickerson, *supra* note 87. Yet, several suicides with which the clinic has assisted have been the subject of legal investigations, leading Minelli to begin videotaping the deaths of patients to prove that they administered the medications themselves. EXIT has displayed comparatively more precaution, as a spokesman for the organization noted that it does not take clients from abroad "because the distance makes it difficult to assess their judgment and motivation." *Id.*

101 Bosshard et al., *supra* note 2, at 531.

from unnatural causes in the same way as unassisted suicides.[102] The number of assisted suicides in Switzerland has averaged from 300 to 350 per year, but suicide tourism has caused this number to rise.[103] This circumstance has alarmed politicians; Beatrice Wertli of the Swiss Christian democrats, for example, has said, "We feel the organisations are too pushy in helping people to commit suicide."[104] She was likely referring to the widely published grandiose expressions uttered by the Dignitas organization's Ludwig Minelli, including "[w]e never say no"[105] and his describing assisted suicide as a "marvelous possibility."[106] Yet, despite fervent political debate on implementing more restrictive laws on assisted suicide, the Swiss government has rejected proposals for change.[107]

The Netherlands' end-of-life law may be characterized as one of strict regulation and careful review, but also as the most radical.[108] The attention directed to the subject can be seen from the country's continuous revisions of its formal procedure for review-

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[102] Bosshard et al., *supra* note 2, at 531. This practice is distinct from that of the Netherlands, where an "elaborate control system involving a special review committee" seems to provide more safeguards against abuse of patients. *Id.*

[103] Noelle Knox, *An Agonizing Debate About Euthanasia; European Nations Torn Not Only Over Whether to Legalize Assisted Suicide, but Also Over Where to Set Boundaries*, USA TODAY, Nov. 23, 2005, at A15. Given the lenient reporting procedures in Switzerland, an exact number cannot be determined.

[104] *Dignitas: Swiss Suicide Helpers*, BBC NEWS, Jan. 24, 2006, *available at* http://news.bbc.co.uk/2/hi/health/4643196.stm.

[105] *Suicide-Clinic Entrepreneur: Depressed?*, *supra*, note 93.

[106] *Suicide Helper Claims He is Saving Lives*, *supra* note 95.

[107] Dorle Vallender and Alexander Baumann brought two motions to the National Council regarding "suicide tourism" that were denied. The Vallender motion proposed that suicide tourism and the assisted suicide of mentally incompetent victims be legally regulated. It requested that the regulation state that:

> (1) [o]nly people who are residents of Switzerland should be allowed to ask for assisted suicide within the country; (2) [o]rganisations [sic] providing suicide assistance should be registered and licensed, in order to prevent abuses; (3) [t]wo physicians should separately certify the victim's persistent desire to die and his or her mental capacity; (4) [a]dvertising for organizations offering assisted suicide should be prohibited. The Baumann motion proposed to cancel the expression 'selfish motive' in the present text of article 115 of the Penal Code and, therefore, asked for a total criminalization of assisted suicide.

Guillod & Schmidt, *supra* note 17, at 34; *see also* White, *supra* note 98 (discussing the Swiss Cabinet's statement that it sees no need to tighten restrictions on assisted suicide).

[108] "In 2001, the proportion of assisted deaths (as reported to the authorities) in all deaths was almost ten times higher in the Netherlands (1.5% of all deaths) than in Oregon (<0.1% of all deaths) or Switzerland (0.2% of all deaths)." Bosshard et al., *supra* note 2, at 527. It also has been suggested that the cultural atmosphere in the Netherlands is distinct from that of Great Britain and likely contributes to the country's very liberal end-of-life law. Three key characteristics of Dutch society include its liberal nature, long-term rela-

ing cases of euthanasia[109] and physician assisted suicide,[110] which have both been legal since 1991.[111] This system of review is meant to encourage accurate reporting of cases and fulfillment of the requirements involved in prudent practice.[112]

The requirements for prudent practice in euthanasia and physician assisted suicide are both substantive and procedural. The substantive requirements are: "[t]he patient's request must be voluntary and well considered; [t]he patient's condition must be unbearable and hopeless;[113] [n]o acceptable alternatives for treatment are available; [and] [t]he method is medically and technically appropriate."[114] The procedural requirements are that a second doctor be consulted before going forward and that the case be reported as an unnatural death.[115] The most recent procedure, revised in April 2002, requires that a review committee still evaluate all reported cases, but the Assembly of Prosecutors General only reviews cases that do not meet the requirements for prudent practice.[116]

One difficulty with the Dutch system is the underlying tension between the physician's duty to preserve life and his or her duty to alleviate suffering and respect the patient's wishes.[117] The "Termination of Life on Request and Assisted Suicide (Review Procedures) Act,"[118] which was enacted in April 2002, specifically

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tionships with doctors (which likely influences patients' willingness to trust them), and free nursing home care. TULLOCH, *supra* note 26, at 109.

109 Euthanasia is defined by Dutch law as "purposely ending the life of someone at his or her explicit request." Bregje D. Onwuteaka-Philipsen et. al., *Dutch Experience of Monitoring Euthanasia*, 331 BRIT. MED. J. 691, 691 (2005).

110 Physician assisted suicide is defined by Dutch law as "the prescription or supply of drugs with the explicit intention to enable the patient to end his or her own life." *Id.*

111 *Id.*

112 *Id.*

113 The Dutch legal system has dealt with the formerly controversial issue of how to define "unbearable" through its court system. Two cases pressed the Dutch Supreme Court to conclude that unbearable suffering could be defined as "'increasing loss of personal dignity' and 'the prospect of an undignified death,'" and one not necessarily linked to a terminal illness. *The Netherlands: The Physician-Patient Relationship in Specific Terms, in* INTERNATIONAL ENCYCLOPAEDIA OF MEDICAL LAW 79, 87-88 (Herman Nys, ed. 2006). More thorough discussion amongst legislators may foster the creation of more objective criteria that may aid doctors in determining the degree of a patient's suffering.

114 Onwuteaka-Philipsen et al., *supra* note 109, at 691. R

115 Onwuteaka-Philipsen et al., *supra* note 109, at 691. R

116 Onwuteaka-Philipsen et al., *supra* note 109, at 691. R

117 Nys, *supra* note 113, at 85-86 (the Dutch Supreme Court discussed this issue in a 1984 case). R

118 Stb. 2002, 194.

articulates a legal exemption for physicians who perform euthanasia or physician-assisted suicide and comply with certain requirements from being held criminally liable for the deaths of their patients.[119] The Dutch conflict, however, differs from the conflict discussed in Britain and Switzerland. One scholar explained that the "success of the review procedure depends largely on the extent to which doctors report euthanasia and physician assisted suicide."[120] The results of the Dutch review procedure are somewhat contradictory; while doctors have been reported as expressing positive attitudes about the use of a committee as a cushion between a doctor and a public prosecutor, the rates of doctors reporting cases have not risen significantly.[121] However, there is hope for improvement. One reason for the lack of full disclosure is that the law permits a review committee to contact the reporting or consulting doctor if desired,[122] physicians may feel uneasy about reporting if they are uncertain about the law itself.[123] An important step has been the establishment of a special training program for consulting physicians, organized by the Royal Dutch Medical Association.[124] The use of a training program in the British system is advisable and should be written into the Assisted Dying for the Terminally Ill bill.

The Netherlands has become the first country to legalize the euthanasia of infants, with the formation of a regulatory committee to follow.[125] Minors between sixteen and seventeen years old are already capable of making a request for physician-assisted suicide

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119 Nys, *supra* note 113, at 87.

120 Onwuteaka-Philipsen et al., *supra* note 109, at 691.

121 The Dutch government's third nation-wide study on the incidence of euthanasia and other end-of-life medical decisions revealed that doctors may choose not to report cases because of "the belief that not all criteria of due care have been met; the belief that euthanasia is a matter between the physician and his patient; the desire to avoid the stress and the administrative upset of a review procedure or a judicial inquiry; [and] uncertainty about the consequences of a report." Nys 2006, *supra* note 113, at 95; s*ee also* Onwuteaka-Philipsen et al., *supra* note 109. According to a recent 2001 survey, almost half of all cases of euthanasia and physician assisted suicide remain unreported. *See id*., at 692.

122 Onwuteaka-Philipsen et al., *supra* note 109, at 693.

123 The suggested instrument for change in this area is greater education for doctors in order to "increase doctors' awareness of whether and when they have to report a case, how to meet the requirements for prudent care, and help them to realise that the chances of prosecution are close to zero if they comply with the requirements." Onwuteaka-Philipsen et al., *supra* note 109, at 691.

124 Nys, *supra* note 113, at 92.

125 *See* Matthew Campbell, *Holland to Allow "Baby Euthanasia,"* TIMES ONLINE (London), March 5, 2006, *available at* http://www.timesonline.co.uk/tol/news/world/article737519.ece (describing case of infant with spina bifida whose feeding tube was withdrawn). Before the law was passed, at least 15 unreported infant deaths were facilitated by doctors

under the condition that their parents be consulted before proceeding.[126] But the fact that babies are incapable of expressing consent has sparked fervent debate about a potential "slippery slope" that could ultimately allow doctors to lawfully perform euthanasia on non-consenting adults, as well. Statistics reveal that many active euthanasia cases, in which a doctor kills a patient without his or her explicit consent, go unreported in the Netherlands.[127] While unreported cases are often discussed as evidence of abuse in the Dutch system, legitimate reasons such as the "double effect" doctrine may explain the prevalence of these reported instances.[128] The effectiveness of Dutch assisted suicide law is apparent—an official government study revealed that 85 percent of Dutch doctors found their assistance in helping their patients to die strongly improved the quality of their dying.[129]

III. ANALYSIS

A. *The Assisted Dying for the Terminally Ill Bill: Addressing Criticisms*

The criticisms of the Assisted Dying for the Terminally Ill Bill are primarily grounded in fears of abuse of its proposed system. It is essential to begin with what are commonly characterized as the "slippery slope" arguments. While the current bill includes more safeguards than the previous version, many critics have failed to acknowledge them, particularly those who attempt to use fear and unease to win over people who are uncertain about its risks.[130]

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with parental consent per year, mostly involving infants with spina bifida or other chromosomal abnormalities. *Id*.

126 *Netherlands First Nation to Approve Physician-Assisted Suicide*, 36 PSYCHIATRIC NEWS 12, 12 (2001).

127 COMPASSION IN DYING BRIEFING, *supra* note 74, at 13 (providing in-depth summary of the October 2005 debate).

128 *Id.* at 9.

129 674 PARL. DEB., H.L. (5th ser.) (2005) 46.

130 This notion was well-illustrated by the Earl of Glasgow, who explained:

> [O]nce [assisted suicide] becomes legal, it could be abused for selfish or even criminal ends. Old, infirmed grandmothers are often cited as the likely victims: still with a desire to go on living but encouraged, pressurised or bullied into believing that they have become an intolerable burden on the rest of the family, and eventually agreeing to have themselves be put down.

Id. Surely, inducing people to picture their own elderly, frail relatives being "put down" like animals is quite the crude attempt to persuade the ill-informed. Another poorly drawn argument is that of a "death in demand culture." *See* White, *Swiss Euthanasia Group Demands Assisted Suicide for the Depressed*: *Proves Euthanasia/Assisted Suicide Movement Is Essentially a "Death in Demand Culture," supra*, note 95. This argument frequently

However, the numerous safeguards included in the bill, as well as its provision regarding the use of a strict monitoring system,[131] effectively counter broad conjectures about the fate of the British medical practice. Law Professor Graeme Laurie[132] succinctly summarized the importance of a regulatory framework:

> [L]egality is a threshold issue, while regulation ensures continued control of the practice being regulated, protection of both the instant patient and others, a means to monitor activities, and a mechanism to respond more effectively to abuses, should they occur. These are issues which reach far beyond the particular needs of any one individual; they point to the need in all of this debate to resist over-zealous reliance on autonomy-driven arguments to support PAS [physician-assisted suicide] or other euthanistic practices.[133]

A major question has been, "while we might sympathise with each individual who is suffering and requests to die, can we be sure of establishing a regulatory framework that will respect their wishes while protecting the interests of those who have not, and cannot, express any such wish?"[134] This argument is linked to the concern about the potential for abuse of vulnerable patients and the likelihood that older patients will feel pressure to end their lives early to preclude undue emotional or financial burden on their families. In other words, ending life prematurely will become "such an accepted medical procedure that people who don't choose to die this way may be seen as selfishly using medical resources that could better help curable patients."[135]

An effective response to this concern lies in the language[136] of the Assisted Suicide for the Terminally Ill Bill, which is limited to

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arises with regard to the goal of Ludwig Minelli to extend his organization's services to individuals who are not terminally ill. But, in reality, the British bill's safeguards are so extensive that the process entailed in granting an individual's request cannot be deemed as "on demand." An individual's ability to have his life ended is contingent upon the medical opinions of multiple doctors and a required waiting period, to say the very least. *See* Assisted Dying for the Terminally Ill Bill, 2005, H.L. Bill [36] (Gr. Brit.).

131 The monitoring system is very similar to that used in the Netherlands. *See* Nys, *supra* note 113, at 87-88.

132 Professor of law at Edinburgh Law School in Edinburgh, Scotland.

133 Laurie, *supra* note 80, at 6.

134 Laurie, *supra* note 80, at 7.

135 Nickerson, *supra* note 87. Some allege that the desire to save medical resources will result in the decline of palliative care. *See supra*, subsection titled "Misinterpretation of the Bill" of this Note.

136 Guillod and Schmidt note that "the 'cultural sensitivity' of a nation is reflected in the language of its law." Laurie, *supra* note 80, at 8.

only those individuals who can voluntarily express their wish to die. Examination of the Oregon and Dutch legal models also point to a lack of a "slippery slope." The number of patients receiving assistance to die in the Netherlands has become stable in recent years,[137] suggesting that legalization of assisted suicide does not necessarily lead to an excessive number of deaths. Also, the number of individuals requesting euthanasia has declined, while palliative care has allegedly improved over the past five years.[138] According to one doctor's study, 84% of individuals asking for euthanasia did so only on the basis of unbearable pain.[139] Similarly, the director of the Oregon Hospice Association reported that the number of state citizens dying under hospice care increased following the introduction of the state legislation.[140] The Select Committee held ten sessions in Oregon to discuss the existence of abuses, and concluded in nine out of the ten sessions that there was no evidence of abuse.[141] As mentioned later in this Note, the experience from other countries that allow assisted suicide indicates that only a small, distinct category of people would even consider ending their lives in such a manner.[142]

The "slippery slope" argument misconstrues the legislation as a mandate rather than a mere option. The current version of the bill provides more safeguards in response to concerns about abuse of vulnerable parties. One new provision regards the making of a determination of lack of capacity.[143] The other safeguards include: a necessary written request on behalf of the patient; the requirement that the patient have a terminal illness and be in unbearable suffering due to that terminal illness; the doctor's obligation to provide instruction about palliative care and notification to family members; and the requirements that the doctor obtain informed and voluntary consent to refer the patient to a consulting physi-

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137 Joffe, *supra* note 10, at 47.

138 SELECT COMMITTEE REPORT, *supra* note 9, at 66.

139 SELECT COMMITTEE REPORT, *supra* note 9, at 66.

140 681 PARL. DEB., H.L. (5th ser.) (2006) 1188.

141 674 PARL. DEB., H.L. (5th ser.) (2005) 46. These results add fuel to the argument that the legalization of assisted suicide should be seen as no more than giving people the autonomy to decide their own threshold for pain and suffering, which others have no right to dispute.

142 Joffe, *supra* note 10.

143 Assisted Dying for the Terminally Ill Bill, 2005, H.L. Bill [36] (Gr. Brit.).

cian.[144] These steps are the same as those taken when a patient wishes to refuse treatment. According to M.A. Branthwaite:

> Some people would argue that because assisted dying introduces new intervention—the drug used with specific intent to procure death—it is different from allowing death by withholding or withdrawing life sustaining treatment. But if life sustaining treatment such as mechanical ventilation is withdrawn, whether at the patient's request or because it is deemed futile, death is a virtually certain consequence and doctors are aware of this when they act. In other words, their action fulfills the legal criteria for indirect intent. The motive may be benevolent but the intention is to kill or to permit a preventable death.[145]

That these steps are already accepted by the medical community concerning a decision that will result in potentially premature death lends credence to their use in decisions about assisted suicide. While the practices differ in a technical sense, the purpose of lessening unnecessary suffering is the same. This point should not be muddled by the formalities involved. More importantly, research studies reveal that, to some extent, British doctors are already employing physician-assisted suicide.[146]

Some have criticized the bill's provision allowing physicians to provide assistance to patients physically unable to administer the lethal drug themselves, arguing that it straddles the boundary between physician assisted suicide and active euthanasia.[147] However, the solution may be a set of stricter safeguards surrounding this procedure, such as a required number of witnesses, a longer waiting period to provide more time for the possibility of revocation, and additional psychological examinations close to the patient's selected date. While these circumstances might incur extra costs, the situations would likely be rare. It must also be expected that some patients may lose physical capacity during the process of gaining approval and should not instantly lose their opportunity to make this important end-of-life decision because of it.

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144 *Id*. at §2 (2) (First of two qualifying conditions for grant of an assisted suicide request: the first condition states the procedures required by the attending physician, while the second condition states the procedures required by the consulting physician).

145 Branthwaite, *supra* note 9, at 681.

146 Steven Ertelt, *British Doctors Use Euthanasia to Kill Nearly 3,000 Patients*, LIFENEWS.COM, Jan. 17, 2006, *available at* http://www.freerepublic.com/focus/f-news/1560289/posts.

147 Laurie, *supra* note 80, at 7.

The question of whether a patient's pain and suffering is of an unbearable quality has also been criticized for being too discretionary and under the scrutiny of a few physicians who may be unintentionally biased in their perspectives on pain.[148] Yet, such is the long-time difficulty involved in making bioethical decisions that do not have concrete answers. If a person can be lawfully found to have decision-making capacity with regard to withholding or withdrawing treatment after having been examined for related difficulties, such as depression, the determination of capacity in this situation should not be held to a higher standard. The ultimate result (the premature termination of a life) is the same.[149]

Many critics have yet to comment on the extensive safeguards included in this comparatively[150] conservative bill. The bill requires that the patient first acquire the professional opinion of both her attending physician and a second physician with regard to the extent of her suffering and competence, the autonomy of her decision, and the accuracy of her diagnosis. Following the patient's initial request, a "cooling off" period of fourteen days is also required for the purpose of giving the patient the opportunity to revoke her declaration. These regulations are necessary to make assisted suicide a viable alternative. They make certain that the practice will be continually monitored and also provide a way of efficiently countering abuses if they do arise.[151]

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148 Celia Milne, *Brits Delay Latest Push to Legalize Physician-Assisted Suicide*, 42 MED. POST 51, June 2, 2006.

149 Also, the doctrine of "double effect" has been used as an ethical defense. This practice of administering increased amounts of sedatives to dying patients and consequently accelerating their deaths is an accepted medical practice. While alleviation of pain is the primary purpose, and accelerating death is not, the point is that early death is, in effect, justified by the doctors' intent to lessen patient suffering. It is not difficult to see how assisting a patient to commit suicide can be similarly justified. Nigel Sykes & Andrew Thorns, *Sedative Use in the Last Week of Life and the Implications for End-of-Life Decision Making*, 163 ARCHIVES INTERNAL MED. 341 (2003); *see also* National Legal Center for Medically Dependent & Disabled, Inc., 18 Issues L. & Med. 293, 294 (2003) (discussing the previously cited source).

150 The Assisted Dying for the Terminally Ill Bill contains far greater safeguards than the Dutch and Swiss models and it encourages the use of a closely monitored system such as that used in Oregon. *See* SELECT COMMITTEE REPORT, *supra* note 9, at 69-73, 83. For a comparative analysis of the Oregon, Swiss and Dutch systems, see *id.* at 54-74.

151 Laurie, *supra* note 80, at 6.

B. *Misinterpretation of the Bill*

In spite of Lord Joffe's reassurances, the Select Committee's thorough report, and the careful additions made to the 2005 bill, the bill has continuously been rejected. Further work must be done to increase the probability of the bill's survival in a future parliamentary session; much of this work appears to involve supplying legislators and doctors with more information and a clear explanation of the bill. The primary concerns expressed by members of the House of Lords during the debate held in October of 2005 included the lack of protection of vulnerable parties, harm to the quality of palliative care, and the undermining and obstruction of the medical profession.[152] While much of the debate about the bill involves moral objections, the greater part of the debate concerns the likelihood of the aforementioned "slippery slope" and detrimental effects to medical practitioners who would be involved in assisted suicide procedure. This may be largely attributed to widespread misinterpretation of the bill and its parameters.

Two major misinterpretations of the bill involve its purpose and intended beneficiaries. An archbishop's comment on the bill reveals this confusion, as he stated that "the government could better help the dying by providing more money for hospices and institutions offering palliative care."[153] Similarly, the verdict from BMA physicians in their June 2006 vote was that better palliative care for the terminally ill will provide the dignity in dying so fervently discussed.[154] This conclusion misses the objective of the bill, which is primarily to provide the option of assisted suicide to individuals whose pain cannot be helped by palliative care[155] or who wish to die because of their terminal illnesses.

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152 674 PARL. DEB., H.L (5th ser.) (2005) 46.

153 Nickerson, *supra* note 87.

154 Press Release, Care NOT Killing, Latest on BMA Vote (June 29, 2006), *available at* http://www.carenotkilling.org/uk/?show=368. Care NOT Killing is a UK-based alliance whose objective is to join human rights groups, healthcare groups, palliative care groups, faith groups, and concerned individuals to promote improvements in palliative care, protect laws against euthanasia and assisted suicide, and to support continued reliance upon these laws.

155 Lord Joffe asserted before the second House of Lords vote, "We must find a solution to the unbearable suffering of patients whose needs cannot be met by palliative care. This bill provides that solution in the absence of any other." Woodward, *supra* note 49. Wishing to die because of a terminal illness cannot simply be equated to depression; this concern is dealt with in the determination of capacity provision included in the Assisted Dying for the Terminally Ill bill, which mandates that the patient be of sound mind before proceeding with his or her assisted suicide request. The possibility of the patient's thought

Those individuals who wish to die on the premise of their terminal illnesses may be better described as "suffering from their suffering." This argument is primarily rooted in autonomy and one's ability to define one's own humanity. It may also be construed to mean emotional suffering, which cannot be alleviated by palliative care and may theoretically be more painful than the physical effects of a terminal illness. The reality that palliative care cannot help every suffering individual (whether physically or mentally) cannot reasonably be taken as an insult to its general use.[156] More importantly, waiting for improvements in palliative care currently leaves terminally ill patients who cannot respond to care without the opportunity for relief. The bill's provision titled "Offer of Palliative Care" should be reworded to assure that a patient would not merely receive a rushed reminder about palliative care, but a thorough education about its advantages. While it may be argued that time restraints would be problematic, the required waiting period could allow for this procedure. Although it was suggested during the October 2005 debate that the legislation require patients to first try palliative care before making a decision, Lord Joffe justly rejected this recommendation because it would strip patients of autonomous decision-making.[157] Requiring that a patient undergo palliative treatment before making a decision cannot be rationally characterized as a mere condition of the decision-making procedure, just as holistic treatment could not logically be made a prerequisite to deciding upon whether to undergo chemotherapy.

Another misunderstanding discussed in the October 2005 debate is also one of great concern to British physicians—the unwarranted fear that palliative medicine would be neglected and medical research would be inhibited.[158] The bill is narrowly tailored to apply only to individuals who are in intolerable pain and

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processes being distorted by depression is a factor taken into account during a psychological examination.

156 *See* Ann Sommerville, *Changes in BMA Policy on Assisted Dying*, 331 BRIT. MED. J. 686, 688 (Sept. 24, 2005).

157 Jacqueline Herremans, head of Belgium's Association for the Right to Die with Dignity, explained the rising respect for autonomous decision-making, stating, "Any pluralistic society must allow every citizen to live this last act of their life, that of choosing their own death," noting that the "feeling of the right to choose one's destiny is certainly growing in the [European] population." Nickerson, *supra* note 87. Graeme Laurie identifies the right to "choose the mode, manner and timing of one's own death" as one of the most vital manifestations of autonomy. Laurie, *supra* note 80, at 6.

158 A recent national survey of end-of-life decisions made by medical practitioners in the UK, which reported a lower frequency of physician-assisted dying and a high frequency of

estimated to die within a few months. Additionally, the bill requires that a patient as a first step be fully informed about the option of palliative care. Perhaps surprising to some, Lord Joffe has explained that improvements in palliative care are crucial to the credibility of the bill itself.[159] An appropriate alternative choice for patients is important to establish assisted suicide as a plausible preference.[160] While one may argue that the desire to keep hospital costs down would result in reduction of the quality of palliative care, this consequence seems highly unlikely given the mass acclaim for the advancement of palliative care in the United Kingdom.[161] One might conjecture that cutting down on palliative care would actually harm hospitals, as well as the reputation of doctors, rather than benefit them. The medical research feared to be neglected should be outweighed by the suffering of terminally ill patients, many of whom would not live to benefit from their participation in studies.

Lord Joffe responded to complaints about the 2004 bill's procedure by creating more flexibility for physicians involved with dying patients. The bill now provides that a physician may work in conjunction with a member of a health care team in handling assisted suicides.[162] While the 2004 bill explained that the attending physician would have the responsibility of assisting the patient, the 2005 bill permits that the newly-coined "assisting physician," who may be either the attending or consulting physician, may play this role.[163]

The fine lines between end-of-life care methods, including assisted suicide, euthanasia, and the withholding and withdrawing of treatment must also be defined more precisely in order to accurately express the bill's scope. Such analysis will not only respond to the fears of individuals who are not fully informed about the

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non-treatment decisions (withholding or withdrawing treatment), indicated a "culture of medical decision making informed by a palliative care philosophy." Seale, *supra* note 64.

159 Sommerville, *supra* note 156. ("As part of the bigger picture, safeguards for patients must also include the availability of alternatives, especially good palliative care. Calls for legalisation of assisted dying lack credibility if patients have no proper alternative, and Lord Joffe has repeatedly emphasised how unsatisfactory are the current gaps in availability of palliative care.").

160 Sommerville, *supra* note 156, at 688.

161 441 PARL. DEB., H.C. (6th ser.) (2006) 1443 (Jim Dobbin admitted, "I am proud of the fact that the UK leads the world in palliative care.").

162 Assisted Dying for the Terminally Ill Bill, 2005, H.L. Bill [36] §5 (Gr. Brit.).

163 Assisted Dying for the Terminally Ill Bill, 2005, H.L. Bill [36] (Gr. Brit.).

potential for a "slippery slope" but also speak to the reality of British medical practices. Studies of British medical practice reveal that the physician-assisted suicide that the bill proposes already is being employed.[164]

C. *Switzerland and the Netherlands: Comparative Legal Paradigms*

The strengths and weaknesses of Swiss and Dutch law have been examined by the Select Committee on the Assisted Dying for the Terminally Ill Bill, and the resulting bill reflects the committee's acquired knowledge. The bill incorporates the review procedures (including a monitoring commission) and important physician involvement refined by the Dutch system.[165] The bill also outlines specific threshold requirements for patient eligibility.[166]

The dangers inherent in a law lacking strict restraints are seen in the prevalent use of unregulated suicide clinics. The fact that almost 90% of individuals who visit the Dignitas clinic are foreigners lends support to the notion that assisted suicide procedures in Switzerland should be subject to greater constraint.[167] Further, this statistic shows that the issue of public desire to legalize assisted suicide should gain more recognition as an international issue. At least fifty-four Britons have traveled to Switzerland to evade British law and rid themselves of their suffering.[168] One example was a British doctor with progressive supranuclear palsy, a brain disease, who had a seven-year life expectancy but chose to travel to Zurich before she would be incapable of swallowing a barbiturate solution.[169] Parliament's neglect of these people's wishes has led to the addition of Britons to the ever-increasing flow of suicide tourists. Critics explain that people feel forced to die in a country that is not

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164 *See* Ertelt, *supra* note 146.

165 Assisted Dying for the Terminally Ill Bill, 2005, H.L. Bill [36] (Gr. Brit.).

166 *See* Allen, *supra* note 14, at 555.

167 *Suicide Helper Claims He is Saving Lives*, *supra* note 95. Dignitas is most recently the subject of intense criticism due to a German woman's painful death at its Zurich clinic after ingesting the usual lethal dose of drugs. She experienced pain for four minutes, screaming "I'm burning. I'm burning," before falling into a coma and dying almost forty minutes later. Minelli refused to comment on the incident. This sort of unfortunate instance seems as though it was likely foreseeable, however, given the lack of strict regulation surrounding assisted suicides in Switzerland. *"Assisted Suicide" in Spotlight After Report of Painful Death*, HEALTH, Jan. 9, 2007.

168 Kirby, *supra* note 95.

169 Boseley & Dyer, *supra* note 92.

their own, sometimes prematurely,[170] and are unprotected by any legislative safeguards in doing so.[171] The cost of travel limits those who cannot afford it. There are also, of course, individuals who attempt suicide on their own, but fail, only to end up in the lingering state they had originally feared.

Contrary to the Swiss legal system, the Assisted Dying for the Terminally Ill Bill provides extensive safeguards so that assisted suicides are open only to individuals with terminal illnesses and unbearable suffering and are conducted in closer association with doctors who can most accurately assess each patient's condition. While possible conflicts brought about through physician involvement in assisted suicide have been hotly debated in the United Kingdom, the benefits and safeguards that exist in Lord Joffe's proposed procedure should be juxtaposed with Swiss procedure, where physicians play only a minor role by prescribing the barbiturates.[172] Swiss physician organizations have not actively approved of this practice, but merely tolerate its use.[173] The weakness in excusing physician involvement is most apparent in the rise of suicide clinics, which are conducted by individuals who presumably lack the education and medical knowledge of physicians. Recent criminal investigations of Dignitas suicide clinics should provide incentive to prioritize doctor-regulated assisted suicide. While some Swiss physicians admit relief from feeling morally burdened by working alongside right-to-die societies,[174] a more restrictive sys-

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170 Kirby, *supra* note 95. Minelli has said, "These people have to make a decision to travel to Switzerland. So, sometimes they come prematurely when they could live on, if we had the possibility to come to them where they live, to help them there." *Id.*

171 Madeleine Brindley, *Why Welsh Man Chose Death in a Swiss Clinic*, WESTERN MAIL, June 3, 2006, at 1. The *Re Z* case is demonstrative of this safety issue; by lifting the injunction upon Mr. Z, the local authorities appeared to have merely looked the other way without considering Mrs. Z's welfare or the welfare of the many Britons who seek relief in Swiss suicide clinics. *Re Z; Local Authority v. Z,* [2004] EWHC (Fam) 212, 2004 All ER (D) 71 (Eng.).

172 Bosshard et al., *supra* note 2, at 530.

173 Harding, *supra* note 87, at 12 (reporting that the Swiss Medical Association and the National Committee on Ethics both state that "to respect the wishes and independence of patients, assisted suicide should be permitted in exceptional cases, but it should never become a routine procedure").

174 Bosshard et al., *supra* note 2, at 532. For example, one family doctor recently concluded in his report on his work with a right-to-die organization in the assisted suicide of a terminally ill patient that "'to respect the freedom of the patient, to help him over obstacles, to guide him through the twilight and confront death with him; this [was] all part of [his] work as a doctor. But these tasks (respecting another person's freedom, giving someone support, confronting death) are by no means specific medical tasks but much rather general humanitarian requirements. Therefore, why not suggest to others – people from

tem of review appears to be a method more favorable to government monitoring and protection of vulnerable parties. Some individuals travel alone to the Dignitas clinic.[175] Allowing assisted suicide in Great Britain might better allow for them to be surrounded by family (which might ultimately affect individuals' revocations of their assisted suicide requests and, perhaps, encourage stricter monitoring of procedural violations). The Swiss medical procedure serves as a useful example of what the British system must avoid, especially in light of the dominating concerns about abuse of vulnerable parties and the undermining of British physicians.

D. *Challenging Tradition*

As with any legal proposal that challenges traditional and deeply held moral convictions, such as those surrounding abortion,[176] mere textual changes to a bill will not eliminate entrenched, somewhat philosophical concerns—some of which were expressed during the October 2005 debate.[177] One such objection is that doctors intend to save lives rather than terminate them. Yet, doctors in contemporary times are certainly cognizant of the extensive advancements in medicine and technology the last few decades have yielded. People have largely praised these advancements for allowing humans to live longer; yet, it is though many do not take responsibility for, or merely acknowledge, the difficulties that have arisen from them. Many may assert that the pain people experience in old age is inevitable and natural, neglecting the fact that the older an individual becomes, the more likely he or she is to suffer

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the church, lawyers, and everyone who feels motivated – that they assist those close to them in committing suicide?'" *Id*.

175 Linda MacDonald, *Founder of Swiss Suicide Clinic Explains How He Helps People Take Their Lives*, GUARDIAN (London), Dec. 3, 2004, *available at* http://www.buzzle.com/editorials/12-3-2004-62473.asp (Ludwig Minelli explaining that some clinic visitors travel alone).

176 *See* Allen, *supra* note 14, at 535-75. Allen comments on a systematic perspective of the controversies surrounding end-of-life medical practice and abortion: "First, each religious, philosophical, or legal argument constitutes a self-defining belief system that may or may not be compatible with competing belief systems. Second, the degree to which an individual adheres to a particular belief system, aside from environmental or sociological pressures, depends upon an individual's intuition. Third, all modern legal systems, as well as the vast majority of modern belief systems, recognize that the intentional killing of another individual is usually wrong and therefore the practice of euthanasia must be justified as an exception to the general rule." *Id.* at 567-68.

177 *See* 674 PARL. DEB., H.L. (5th ser.) (2005) 46.

from multiple health problems. Such problems can collectively cause more pain than would have been suffered without the aid of modern medicine.[178] More people would have actually died without these medical improvements, as well.

Broad tolerance of this perspective may be a nearly impossible task, but it may be possible to diminish certain hesitations. Constituents might be better assured of the fact that palliative care and assisted suicide will not be treated as an "either/or" situation. It is possible to support improvements in palliative care while also supporting, or merely accepting, the practice of assisted suicide.[179] Since pain and suffering are subjective matters, a patient with a higher tolerance for pain may be a better candidate for palliative care, while another patient might find the same pain unbearable and determine assisted suicide to be his best option. Fears about sending the message that "certain kinds of life are not worth living"[180] undermine the intention of the bill to provide individuals with the liberty of making this decision for themselves, given that they must personally endure the pain and suffering related to their terminal illnesses.

Another theory is that physicians will be faced with the unjust burden of overseeing or engaging in a medical practice that they likely had not contemplated before entering the medical profession. The tension between patient autonomy and medical paternalism is ingrained in the fabric of contemporary medical practice, and the practice of assisted suicide should not be treated as a more radical topic than it actually warrants. Regardless, the focus should be on the suffering patients, rather than on the exaggerated notion of overturning the medical profession itself, as was the situation concerning withdrawal cases.

Lastly, religious assumptions have also been an impediment to acceptance of the bill. It has been assumed that if a person is strongly religious, he or she cannot tolerate assisted suicide.[181] Yet, even a Bishop explained during a House of Lords debate that the

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[178] Ludwig Minelli of Dignitas agrees, as he has been quoted, "'because of the long life expectancies, and if you look at the results of statistics on suicide, you will find every second suicide is of somebody aged over 60.'" Kirby, *supra* note 95.

[179] *See* Sommerville, *supra* note 156, at 688.

[180] Woodward, *supra* note 49 (citing Roman Williams, the Archbishop of Canterbury).

[181] According to a survey spoken of by the chief executive of the Dignity in Dying organization, "most doctors want neutrality, and resent a religious minority dictating policy across their profession." *Doctors in Britain Give Thumbs-Down to Euthanasia*, *supra* note 68.

bill should be evaluated on a rational basis, rather on than its religious implications.[182] The Select Committee's report reveals that religious Dutch doctors do not perceive the existence of a dilemma between their assisted suicides and their religious convictions.[183]

E. *Facing Reality*

Ultimately, the protection of citizens' welfare should reign supreme in this legal debate. Some House of Lords members argue that the small number of "determined"[184] people that would actually utilize the option of assisted suicide cannot justify the implementation of a new law,[185] drawing upon the "utilitarian" perspective of the greater good. House of Lords members estimate that about 650 assisted suicides a year might be expected in Great Britain, based on a comparison to the number of individuals who have requested assisted suicide in Oregon.[186] Yet, it certainly would not be more appealing if the number of people who actually requested assisted suicide were far greater than anticipated. Additionally, individuals requesting assisted suicide in Oregon are "younger, more highly educated, and accustomed to being in control of their lives,"[187] which "detracts from the contention that permissive legislation will pressurize elderly or vulnerable patients into seeking death for the perceived benefit of others."[188] The Select Committee also explained that the number of people who would take comfort in knowing that the option is merely available to them, consequently preserving their feeling of control over their own condition, is substantial.[189] While the proportion of people who would use assisted suicide may be small, this number should not serve as a measure for the humanity and respect such individuals deserve.

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182 674 PARL. DEB., H.L. (5th ser.) (2005) 46.

183 *Id.*

184 681 PARL. DEB., H.L. (5thser.) (2006) 1185; *see also* Joffe, *supra* note 10, at 47 ("It is clear to us that the demand for assisted suicide or voluntary euthanasia is particularly strong among determined individuals whose suffering derives more from the fact of their terminal illness than from its symptoms and who are unlikely to be deflected from their wish to end their lives by more or better palliative care.").

185 681 PARL. DEB., H.L. (5th ser.) (2006) 1185.

186 Branthwaite, *supra* note 9, at 682.

187 Branthwaite, *supra* note 9, at 682.

188 Branthwaite, *supra* note 9, at 682-83.

189 674 PARL. DEB., H.L. (5th ser.) 17 (2005) (Lord Joffe stated, "[i]t is only for these patients that assisted suicide was proposed as an option, which they may wish to exercise").

The reason for the small number of anticipated assisted suicides may be due to the general effectiveness of palliative care. One must be aware that palliative care is not effective for all individuals and that receiving such treatment is always a matter of personal choice, just as is refusing or withdrawing treatment (both legally authorized). Terminally ill patients who only *anticipate* greater pain and suffering and believe it is in their best interest to end their lives prematurely do not have a remedy under the law.[190] These people are forced to either act alone or flee the country earlier than they might have otherwise to end their lives peacefully in Swiss suicide clinics. This demonstrates that "illegality . . . can be a singularly ineffective approach."[191]

Great Britain is directing more attention to patient autonomy.[192] A British court recently struggled to balance the tension between patient autonomy and medical paternalism in *W Healthcare NHS Trust v H*.[193] While concluding that it could not legally grant the family's wishes to not have the patient's gastronomy tube that had fallen out be re-inserted, the court closed the case with an undoubtedly sympathetic voice for the family of the patient, expressing discomfort with its inability to relieve the patient of her pain.[194] The intent to respect patient wishes is present in British

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190 *See* Branthwaite, *supra* note 9, at 682. These people may not accept terminal sedation or may not have the opportunity to pursue that option; for example, patients with motor-neuron disease may suffer sudden and frightening suffocation as a result of terminal sedation. *Id.*

191 Laurie, *supra* note 80, at 8.

192 The British Medical Association's Patient Liaison Group reported in a memorandum of evidence compiled in January 2007 that "[h]ealthcare policy decisions, at whatever level they are made, ultimately affect patients' lives. Therefore it can be argued that patients have a moral and ethical right to play a meaningful role in developing healthcare policies." Memorandum from British Medical Association's Patient Liaison Group, Health Select Committee—Public and Patient Involvement in the NHS (Jan. 12, 2007). A related matter rooted in autonomy and fundamental rights is the practice of abortions. It is interesting to note the United Kingdom's liberal treatment of this practice in comparison to that of assisted suicide—after legalizing abortion in 1967, it was the second country (after France) to approve the use of RU-486, the abortion pill, in 1991. *See* U.N. DEP'T OF ECON & SOC. AFFAIRS, POPULATION DIV., ABORTION POLICIES: A GLOBAL REVIEW (2002), *available at* http://www.un.org/esa/population/publications/abortion/pop830.pdf (study of national policies concerning induced abortion); *see also* Abortion Act 1967, c. 87, § 1 (Eng.)(1967).

193 W Healthcare NHS Trust v. H, [2004] EWCA (Civ) 1324 (Eng.).

194 *Id*. The Court felt compelled to order the continuance of treatment because the patient no longer had the mental capacity to make such decisions, had not made an advanced directive based on her specific circumstances, and was technically not in a vegetative state. This was, however, in spite of oral testimony from the patient's daughter that she would not have wanted to be kept alive by machines. Perhaps, there is a hint of irony

law, but its structure unjustly excludes some suffering individuals over others. The law allows people physically capable of ending their own lives and people currently under hospital care to end their lives as they wish (allowing patients to refuse treatment, accept terminal sedation, or commit suicide on their own), but leaving others floundering. Patients who can withhold or withdraw consent to life support measures should not have greater personal autonomy to control the time and manner of their death on this basis.[195]

IV. Conclusion

The question to ask, then, might be how these deep-seated notions and questionable assumptions can be shaken from their foundations. Perhaps some cannot be. The potential for change in attitudes toward physician-assisted suicide has been questioned.[196] Reliance upon religious creed and ancient ideals, however, should not and cannot play a role in the administration of justice for suffering patients in contemporary times. The pain that British terminally ill patients experience is real and remains unalleviated under the law. Education about the realities of current medical care and the anticipated impact of permitting physician-assisted suicide for the terminally ill may be the most effective instrument. As one House of Lords member explained, assisted suicide will ultimately join the ranks of other equally controversial subjects that have been addressed by the law in spite of strong disagreement.[197] It is therefore only rational to tackle the issue when it is in its early stages and open to future complication.

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in the fact that current legal mechanisms, such as advanced directives, are meant to further patient autonomy, yet shut out those who do not exactly meet the official formalities. *Id*.

195 *See generally* Branthwaite, *supra* note 9, at 683.

196 Graeme Laurie asked, "What, then, are we to make of a plethora of (failed) reforms? Do we focus on their sheer number as a mark of where we are going, or do we take their failure as an indication of continued resistance to the very idea of physician assisted suicide? Only time will tell." Laurie, *supra* note 80, at 8.

197 674 Parl. Deb., H.L. (5th ser.) (2005) 46 (the Earl of Arran expressed this view). For more on a comparison of end-of-life law to abortion, see *Suicide Helper Claims He is Saving Lives*, *supra* note 95 ("Drawing parallels with abortion, once restricted to back alleys and now part of mainstream medical care in most Western countries, [Ludwig Minnelli] said it was critical that suicide be openly acknowledged, discussed and regulated.").

APPENDIX: COMPARISON OF ASSISTED SUICIDE LEGAL PROCEDURES

	Oregon	United Kingdom (Procedure proposed in Assisted Dying for the Terminally Ill Bill)	The Netherlands	Switzerland
ELIGIBILITY:				
Terminal Illness Required	Yes	Yes	Yes	No
"Unbearable" Suffering	Yes	Yes	Yes	No
Children Eligible (with restrictions)	No	No	Yes	No
PROCEDURE:				
Required Physician Involvement	Yes	Yes	Yes	Yes*
Reporting/ Monitoring System	Yes	Yes	Yes	No
Physician Training Program	No	No	No	No

* Doctors are *only* involved in prescribing the lethal drug.

CURRENT EVENT

THE ECONOMIC INCENTIVE BEHIND THE UNLAWFUL INTERNET GAMBLING ENFORCEMENT ACT

Dana Gale

ABSTRACT

This piece examines the difference between the stated and underlying purposes of the Unlawful Internet Gambling Enforcement Act of 2006. While the Act's proponents cite the protection of family values and the prevention of money laundering and terrorism as the motivation for the legislation, the underlying purpose of the Act appears to be economic in nature. The number of Internet gamblers has grown in recent years to over twenty million, with as many as 80 percent of players residing in the United States. Further, because of federal laws prohibiting domestic, remote gambling, most, if not all, Internet gambling companies operate outside of the United States. Consequently, American money is constantly leaving the United States to be deposited at offshore sites, and the government misses out on tax and other revenue from this lucrative phenomenon. While supporters claim that the Act preserves family values, legislators promoting the Act recognize the profit that can be made from Internet gambling, outside of the United States, by keeping that money in the country, to stimulate the domestic economy. If the Act were solely about protecting the morals of society, it would have banned all gambling; instead, the Act carves out exceptions for State lotteries, horseracing, gambling on Tribal land, and fantasy sports. This Act has several stated intentions, yet one unstated purpose: to exclude foreign gambling entities while allowing domestic gambling to continue. Although the Act does not make Internet gambling illegal, it effectively does just that by preventing Americans from funding their online accounts.

I. INTRODUCTION

Internet gambling is a global economic phenomenon creating revenue which has increased exponentially over the past decade,

today earning more than any other Internet-based business.[1] Not surprisingly, Americans have jumped at the chance to "make a buck" from the comfort of their own homes.[2] They have embraced this phenomenon to such an extent that "as much as 80 percent of [Internet gaming] traffic—and profit—comes from the U.S."[3] In 2006 alone, "Internet gambling revenues from the U.S. [are expected to] reach about $7.2 billion, nearly half of the world-wide total of $15 billion."[4] What astounds many Americans is that, due to the fact that Internet gaming companies are based outside of the United States, American money leaves the country every time an American gambles on one of these websites.[5] As a result, in September of 2006, Congress passed the Unlawful Internet Gambling Enforcement Act ("the Act"), which prohibits financial institutions from allowing Americans to transact with Internet gaming companies.[6] Hoping to ban Internet gambling by attacking payment methods Americans use to fund online accounts, legislators promoting the Act cited Internet gambling's "ill effects on society" as the incentive for the creation of this law.[7] This comment argues that, in actuality, the underlying purpose of this Act is economic in nature, serving only to exclude foreign gambling entities, thereby keeping American money in the United States and further segregating Americans from the rest of the world.

Part II of this piece gives a brief history of Internet gambling as an international phenomenon. Part III details the status of U.S.

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[1] John D. Andrle, *A Winning Hand: A Proposal for an International Regulatory Schema with Respect to the Growing Online Gambling Dilemma in the United States*, 37 VAND. J. TRANSNAT'L L. 1389, 1390 (2004).

[2] *See* Joel Weinberg, Comment, *Everyone's a Winner: Regulating, Not Prohibiting, Internet Gambling*, 35 SW. U. L. REV. 293, 295-96 (2006) ("The United States has been transformed from a nation in which legalized gambling was a limited and a relatively rare phenomenon into one in which such activity is common and growing.") (citations omitted).

[3] *60 Minutes: I-Gaming: Illegal and Thriving*, (CBS television broadcast Sept. 17, 2006), http://cbsnews.com/stories/2005/11/17/60minutes/printable1052420.shtml. *See also* Bill Britt, *Barred in US; Set to Blossom in UK*, MARKETING, Oct. 11, 2006, at 21 ("The world's leading online gambling companies may be based in the UK and Gibraltar, but until now, the bulk of their revenues have come from the US."); Jason Gross, *Internet Gambling & the Law—Prohibition vs. Regulation*, 14.8 METROPOLITAN CORP. COUNS., Aug. 2006, at 11, *available at* http://www.metrocorpcounsel.com/current.php?artType=view&artMonth¶November&artYear=2006&EntryNo=5431 ("Despite the international locales of Internet gaming firms, they derive most of their income from Americans.").

[4] Gross, *supra* note 3. R

[5] *60 Minutes*, *supra* note 3. R

[6] SAFE Port Act, Pub. L. No. 109-347, §§ 801–03, 120 Stat. 1884, 1952–62 (2006).

[7] Frank Ahrens, *New Law Cripples Internet Gambling*, WASH. POST, Oct. 14, 2006, at A1.

laws before the new legislation and the effect of each of these laws on Internet gambling. Part IV analyzes the Act itself, including the legal underpinnings and legislative intent behind its passage. Part V argues that the legislators' expressed intent in creating such legislation is misleading because the underlying purpose of the Act is economic in nature. This Part will evaluate the existence of carve-outs in the Act, the economic standpoint that the Act encompasses, and the ongoing World Trade Organization ("WTO") dispute between the United States and Antigua and Barbuda, which the Act has intensified. Finally, this Part will explain how the Act further segregates the United States from the rest of the world.

II. Brief History of Internet Gambling

Internet gambling establishments began operating in the late 1990s, with the first opening on August 18, 1995.[8] By 2000, "250 to 300 companies operated more than 1800 Internet gambling websites."[9] Due to U.S. laws that potentially prohibit Internet gambling, discussed in Part III, many, if not all Internet gambling companies operate overseas.[10] Currently, "[t]here are more than 80 countries outside the United States that have legalized Internet gambling,"[11] and these jurisdictions license some 500 companies operating approximately 2300 sites.[12]

These websites have been lucrative from the beginning. For example, "[i]n 2003, Internet gambling revenue was estimated at $5.905 billion globally, and is projected to reach $20.659 billion in 2008."[13] By 2010, Internet gambling revenue is expected to reach more than $24 billion.[14] Accordingly, "[i]t was estimated in 2003

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[8] Jonathon Schwartz, Essay: *Click the Mouse and Bet the House: The United States' Internet Gambling Restrictions Before the World Trade Organization*, 2005 U. Ill. J.L. Tech. & Pol'y 125, 125 (2005).

[9] Weinberg, *supra* note 2, at 296. R

[10] Joseph J. McBurney, Comment, *To Regulate or to Prohibit: An Analysis of the Internet Gambling Industry and the Need for a Decision on the Industry's Future in the United States*, 21 Conn. J. Int'l L. 337, 357 (2006).

[11] Gross, *supra* note 3. R

[12] Michael McCarthy & Jon Swartz, *New Legislation May Pull the Plug on Online Gambling*, USA Today, Oct. 2, 2006, http://www.usatoday.com/news/washington/2006-10-02-internet-gambling-usat_x.htm.

[13] Weinberg, *supra* note 2, at 296 (citations omitted). *See also* McBurney, *supra* note 10, at 338 ("[A]bout $12 billion in revenue was collected over the Internet in 2005, or close to 5% of the world's total gross gambling yield."). R R

[14] Gross, *supra* note 3. It should be noted that these projected calculations were determined before the passing of the Unlawful Internet Gambling Enforcement Act. R

that nearly 50 to 70 percent of Internet gamblers were wagering from within the United States,"[15] and with that number growing over the next few years, Americans show no intention of slowing their Internet gambling activities.[16]

To combat what they consider to be "bad" behavior,[17] legislators have consistently attempted to prohibit American participation in Internet gambling.[18] However, due to the international character of Internet gambling, lawmakers have encountered numerous problems in obtaining jurisdiction over online gaming companies.[19] In fact, the only significant setback for the industry occurred in 2001 when Visa, MasterCard, and various banks began refusing to transact directly with Internet gambling sites.[20] Nonetheless, this did not unsettle the industry; U.S. customers turned to non-U.S., third party "e-wallets," which process payments and transfer money to gambling sites.[21] "E-wallets" are based off-shore much like Internet gambling operators, and thus, "[t]he U.S. government has no authority [to regulate third party] processors . . . that are operating legally" outside of the United States.[22]

At the most basic level, "[t]he primary problem with enforcing any sort of ban on Internet gambling is in exercising jurisdiction and in enforcing any civil or criminal judgments."[23] While many legislators and government officials feel that current federal laws reach international gambling entities in terms of jurisdiction, ambiguity surrounding the scope of these laws has prevented courts from applying the laws to many Internet gaming activities.[24]

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15 Weinberg, *supra* note 2, at 296. **R**

16 Weinberg, *supra* note 2, at 296. **R**

17 McBurney, *supra* note 10, at 342. **R**

18 Weinberg, *supra* note 2, at 296. **R**

19 McBurney, *supra* note 10, at 342. *See also* Weinberg, *supra* note 2, at 307. **R**

> Since all Internet gambling websites have located themselves outside the United States, any judgment would go unenforced unless the nation in which the Internet gambling operator was located gave full faith and credit to the American court's judgment. Foreign governments which license and draw revenue from Internet gambling would most likely not enforce an American judgment against an Internet gambling operator, as enforcement would have a negative effect on profits.

*Id. (*internal citations ommitted)

20 Adam Goldman, *Experts: Ban Won't Stop Online Gambling*, ASSOC. PRESS, Oct. 24, 2006, http://www.usatoday.com/tech/news/techpolicy/2006-10-24-web-gambling_x.htm.

21 *Id.*

22 *Id.*

23 Weinberg, *supra* note 2, at 306–07. **R**

24 *Id.* at 303.

III. Current U.S. Laws Pertaining to Internet Gambling

Three federal laws are purported to regulate Internet gambling: the Wire Act of 1961,[25] the Travel Act,[26] and the Illegal Gambling Business Act.[27] The Wire Act of 1961[28] "prohibits the knowing use of any 'wire communication facility' to transmit bets or wagers, use of information assisting betting or wagering on a sports event or contest, or any communication which entitles the recipient to receive money or credit resulting from betting or wagering."[29] While many legislators believe that the Wire Act prohibits Internet gambling, some critics say "the law, created in 1961 to combat illegal bookmaking by the Mafia, is outdated and does not readily apply to (a) the Internet, which did not exist as a form of communication in the 1960s, or (b) traditional casino-style games, such as blackjack and poker that are played online."[30] Furthermore, ambiguity in the construction of the law has kept courts from enforcing the Wire Act against Internet gambling; instead, courts use it to prohibit sports betting.[31] As a result, for Internet gambling to be included in the scope of the law, Congress would have to amend the Wire Act to specifically prohibit foreign and domestic Internet gambling.[32]

Additionally, legislators claim that two additional federal statutes ban Internet gambling.[33] First, the Travel Act[34] "outlaws distribution of proceeds from an unlawful activity across state lines or

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25 18 U.S.C. § 1084 (2006).

26 18 U.S.C. § 1952 (2006).

27 18 U.S.C. § 1953 (2006).

28 18 U.S.C. § 1084.

29 Marc S. Friedman & Athena Cheng, *From Poker to the Pokey: The Laws Governing Online Gambling*, Law.com, July 14, 2006 (on file with author).

30 Gross, *supra* note 3. R

31 Ahrens, *supra* note 7 ("Courts have disagreed [with legislators], saying that betting on sports teams over the Internet is illegal, but wagering on casino games, such as poker, is not."); Friedman & Cheng, *supra* note 29. *See, e.g.,* Weinberg, *supra* note 2, at 303–04. R R

> For example, in *In re MasterCard Int'l, Inc.*, the Fifth Circuit Court of Appeals interpreted the Wire Act to cover only sporting events, which excludes Internet gambling casinos from the Wire Act. Furthermore, the Wire Act's language, "transmission of a wire communication," is ambiguous because it could be construed to include both receiving and sending information, or only sending information.

Id.

32 Weinberg, *supra* note 2, at 304. R

33 Gross, *supra* note 3. R

34 18 U.S.C. § 1952 (2006).

international borders."[35] In particular, the Travel Act would punish gambling operations explicitly prohibited by the states in which they operate. Second, the Illegal Gambling Business Act[36] makes it a crime to conduct a gambling enterprise that is "prohibited in the state where the activity occurs, with five or more persons who conduct, finance, manage, supervise, direct or own all or part of such business, and is in continuous operation for more than 30 days or [has] gross revenues of $2,000 in any single day."[37] Because it is unclear whether Internet gambling is illegal in the states, both the Travel Act and Illegal Gambling Business Act have been unsuccessful in prohibiting it. Most simply, the Acts fail to cover the relevant "process by which electronic gambling fundamentally occurs."[38]

Moreover, even if the ambiguity of these Acts was resolved, the question of jurisdictional reach of each would still be controversial. Because Internet gambling operators conduct their business solely through Internet communication, they never have to physically enter the United States to complete a business transaction. Furthermore, it is unclear whether the United States has the authority to prosecute gambling operators located offshore who reach into the United States via the Internet to conduct business. Consequently, (and with the exception of sports betting, which is clearly covered by the Wire Act,)[39] until Congress' recent legislation, Internet gambling has flourished, remaining unregulated and largely free from prosecution.[40]

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35 Gross, *supra* note 3. *See also* Friedman & Cheng, *supra* note 29 ("The Travel Act regulates Interstate and foreign commerce related to any unlawful activity, including illegal gambling in a state prohibiting the activity. When online gambling crosses state lines via the Internet with the intent to participate in illegal gambling, then the Travel Act is violated."). **R**

36 18 U.S.C. § 1953 (2006).

37 Friedman & Cheng, *supra* note 29. **R**

38 Andrle, *supra* note 1, at 1397. **R**

39 18 U.S.C. § 1084 (2006).

40 Because it is explicitly stated in the Wire Act that sports betting is illegal, government officials have begun to prosecute large Internet sports books. *See* Goldman, *supra* note 20. **R**

> British BetOnSports PLC folded after its chief executive was arrested in July by U.S. authorities. David Carruthers faces 22 counts of fraud and racketeering charges and remains under house arrest in the St. Louis area. London-based Sportingbet's chairman was detained last month in New York on a state fugitive warrant charging him with illegal online gambling. He was eventually freed.

Id.

IV. UNLAWFUL INTERNET GAMBLING ENFORCEMENT ACT OF 2006

A. *What the Act Does*

To combat the jurisdictional issues discussed above, legislators turned to payment methods used to fund Internet gambling to fulfill their goal of keeping Americans from gambling online. On September 30, 2006, just before Congress was to recess, legislators opposing Internet gambling passed the Unlawful Internet Gambling Enforcement Act of 2006[41] by a vote of 409 to 2.[42] Signed by President Bush on October 13, 2006[43] and tacked on to the SAFE Port Act,[44] an unrelated bill that enhances port security, the Act prohibits the "acceptance of any financial instrument for unlawful Internet gambling."[45]

Specifically, the Act amends 31 U.S.C. § 53, Monetary Transactions,[46] by adding section 802, subchapter IV, entitled "Prohibition on Funding of Unlawful Internet Gambling."[47] Section 5363, the "[p]rohibition on acceptance of any financial instrument for unlawful Internet gambling," reads:

> No person engaged in the business of betting or wagering may knowingly accept, in connection with the participation of another person in unlawful Internet gambling—
>
> (1) credit . . . extended to or on behalf of such other person . . .

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41 SAFE Port Act, Pub. L. No. 109-347, §§ 801–03, 120 Stat. 1884, 1952–62 (2006).

42 Security and Accountability for Every Port (SAFE) Act, *available at* http://www.congress.org/congressorg/issues/votes/?votenum=516&chamber=H&congress=1092 (last visited Nov. 2, 2006). Because the Act was attached to the SAFE Port Act, legislators voted for the Act as a whole, meaning that the number of votes is not necessarily a reflection of how legislators felt about online gambling.

43 President's Statement on H.R. 4954, the Security and Accountability For Every Port Act of 2006, 42 Weekly Comp. Pres. Doc. 42 (Oct. 13, 2006), *available at* http://www.whitehouse.gov/news/releases/2006/10/20061013-12.html (last visited Oct. . 21, 2007).

44 Legislators were smart to attach a relatively controversial bill to one destined to ensure national security. *See* Matt Scuffham, *ROUNDUP Online Gaming Stocks Plummet After Anti-gaming Legislation Passed*, AFX NEWS, Oct. 2, 2006, *available at* http://www.forbes.com/business/feeds/afx/2006/10/02/afx3059915.html.

> It's pretty clear how this piece of legislation got through. . . . "[Legislators] couldn't vote down a piece of national security legislation and their hands were forced," . . . . [T]he Safe Port Act had been seen by most U.S. politicians as essential to the country's security amid heightened concerns over global terrorism.

Id.

45 SAFE Port Act § 802.

46 31 U.S.C. § 5301–67 (2005).

47 SAFE Port Act § 802.

> (2) an electronic fund transfer . . . from or on behalf of such other person;
>
> (3) any check, draft, or similar instrument which is drawn by or on behalf of such other person and is drawn on or payable at or through any financial institution; or
>
> (4) the proceeds of any other form of financial transaction . . . which involves a financial institution as a payor or financial intermediary on behalf of or for the benefit of such other person.[48]

Although the Act fails to specify the exact procedures that financial institutions must follow to be in compliance with the Act, section 5364(a) states:

> Before the end of the 270-day period beginning on the date of the enactment of this subchapter, the Secretary and the Board of Governors of the Federal Reserve System, in consultation with the Attorney General, shall prescribe regulations . . . requiring each designated payment system, and all participants therein, to identify and block or otherwise prevent or prohibit restricted transactions through the establishment of policies and procedures reasonably designed to identify and block or otherwise prevent or prohibit the acceptance of restricted transactions . . . .[49]

Section 5362 defines key terms for interpreting the Act:

> (1) BET OR WAGER—The term 'bet or wager'—
>
> (A) means the staking or risking by any person of something of value upon the outcome of a contest of others, a sporting event, or a game subject to chance, upon an agreement or understanding that the person or another person will receive something of value in the event of a certain outcome;
>
> . . . .
>
> (4) FINANCIAL TRANSACTION PROVIDER—The term "financial transaction provider" means a creditor, credit card issuer, financial institution, operator of a terminal at which an electronic fund transfer may be initiated, money transmitting business, or international, national, regional, or local payment network utilized to effect a credit transaction, electronic fund transfer, stored value product transaction, or money transmitting service, or a participant in such network, or other participant in a designated payment system.

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[48] SAFE Port Act § 802, subch. IV, § 5363(1–4).

[49] SAFE Port Act § 802, subch. IV, § 5364(a).

> . . . .
>
> (10) UNLAWFUL INTERNET GAMBLING—
>
> (A) IN GENERAL—The term 'unlawful Internet gambling' means to place, receive, or otherwise knowingly transmit a bet or wager by any means which involves the use, at least in part, of the Internet where such bet or wager is unlawful under any applicable Federal or State law in the State or Tribal lands in which the bet or wager is initiated, received, or otherwise made.[50]

Finally, the Act carves out exceptions for securities transactions,[51] fantasy sports,[52] State lotteries,[53] gambling on Tribal lands,[54] and horseracing.[55]

Instead of explicitly making Internet gambling illegal, which would raise the same jurisdictional issues as earlier discussed, this Act "merely speaks to the *mechanism* by which an online account is funded."[56] Additionally, section 5361 plainly states that "[n]o provision of this [Act] shall be construed as altering, limiting, or extending any Federal or State law or Tribal-State compact prohibiting, permitting, or regulating gambling within the United States."[57] Basically, by controlling the mechanisms linked to funding Internet gambling, Congress is attempting to "enforce laws that already exist."[58]

B. *Congressional Findings and Purpose*

The Act is based on House Bill 4411,[59] the Internet Gambling Prohibition and Enforcement Act, passed by the House of Repre-

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[50] SAFE Port Act § 802, subch. IV, § 5362(1–10).

[51] SAFE Port Act § 802, subch. IV, § 5362(1)(E)(i).

[52] SAFE Port Act § 802, subch. IV, § 5362(1)(E)(ix).

[53] SAFE Port Act § 802, subch. IV, § 5362(10)(B).

[54] SAFE Port Act § 802, subch. IV, § 5362(10)(C).

[55] SAFE Port Act § 802, subch. IV, § 5362(10)(D)(1).

[56] Allyn Jaffrey Shulman, *Legal Landscape of Online Gaming Has Not Changed*, CARDPLAYER, Oct. 5, 2006, http://www.cardplayer.com/poker_law/article/1446.

[57] SAFE Port Act § 802, subch. IV, § 5361(b).

[58] Shulman, *supra* note 56. Although legislators who support the Act already believe internet gambling is illegal under the Wire Act, they still feel that preventing U.S. customers from funding their online accounts will stop these customers from gambling, even though the jurisdictional reach of the Wire Act formerly prevented them from doing so. "This new law applies, if and only if, the gambling is already illegal under current law. . . . In a nutshell, sports betting is made illegal by the 1961 Wire Act, but poker is not." *Id.* While many believe online poker is not illegal, the Attorney General believes poker is prohibited by the Wire Act. *Id.* **R**

[59] Unlawful Internet Gambling Enforcement Act of 2005, H.R. 4411, 109th Cong. (2005).

sentatives on July 11, 2006 by a vote of 317 to 93.[60] "The Internet Gambling Prohibition and Enforcement Act, which [was] part of the Republican's American Values Agenda, combine[d] H.R. 4411 introduced by Representative Jim Leach (R-Iowa) and H.R. 4777 introduced by Representative Bob Goodlatte (R-Va.)." Like the Senate's version of the Act passed by Congress, House Bill 4411 attacked payment methods used to fund online gambling.[61]

Proponents of both the Act and House Bill 4411 believe that Internet gambling harms the United States as a whole. In creating House Bill 4777, Representative Goodlatte "said he opposes all gambling, citing its 'ill effects on society,' but particularly Internet gambling."[62]

> "All the problems that manifest themselves with gambling, even in heavily regulated states, are even worse on the Internet," Goodlatte said . . . . "There are family problems, bankruptcy problems, gambling addiction, gambling by minors, using gambling to launder money for criminal and terrorist organizations and organized crime. It does not help our society."[63]

Moreover, former Representative Leach has said that "[i]t is extraordinary how many American families have been touched by large losses from Internet gambling."[64] Further, he echoed the opinion of one business professor at the University of Illinois who explained that "the Internet is 'crack cocaine' for gamblers. 'There are no needle marks . . . . There is no alcohol on the breath. You just click the mouse and lose your house.'"[65] Representative Leach also sees Internet gambling as a danger to national security, claiming "it can be used to launder money, evade taxes and finance criminal and terrorist activities."[66] Lastly, he believes that passage of the Act is a major victory for the country at large.

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60 Sarah Polson, *House Approves Bill to Stem Online Gambling*, POKERLISTINGS.COM, July 11, 2006, http://www.pokerlistings.com/house-approves-bill-to-stem-online-gambling-7354.

61 *Id.* However, unlike the Senate's version, House Bill 4411 would have amended the Wire Act to specifically prohibit Internet gambling, enabling Internet service providers to block access to gambling websites. *Id.*

62 Ahrens, *supra* note 7. **R**

63 *Id.*

64 Press Release, Rep. Jim Leach, Leach Wins Ban on Internet Gambling; Bill Caps Years-Long Drive to Protect Families (Sept. 30, 2006) (on file with author) [hereinafter Leach Wins Ban].

65 *Id.*

66 *Id.*

> Internet gambling's characteristics are unique. Never has it been so easy to lose so much money so quickly at such a young age. The casino is in effect brought to the home, office and college dorm. Children may play without verification, and betting with a credit card can undercut a player's perception of the value of cash, which too easily leads to bankruptcy and crime.[67]

In terms of the expressed legislative intent behind the Act, section 5361 of Public Law 109-347 outlines the congressional findings and purpose in enacting it:

> (a)(1) Internet gambling is primarily funded through personal use of payment system instruments, credit cards, and wire transfers.
>
> (a)(2) The National Gambling Impact Study Commission in 1999 recommended the passage of legislation to prohibit wire transfers to Internet gambling sites or the banks which represent such sites.
>
> (a)(3) Internet gambling is a growing cause of debt collection problems for insured depository institutions and the consumer credit industry.
>
> (a)(4) New mechanisms for enforcing gambling laws on the Internet are necessary because traditional law enforcement mechanisms are often inadequate for enforcing gambling prohibitions or regulations on the Internet, especially where such gambling crosses State or national borders.[68]

Arizona Republican Senator Jon Kyl,[69] the Act's author[70] and chief sponsor in the Senate, pushed to prohibit Internet gambling because he considers it a "moral threat."[71] Also comparing the use of Internet gambling to that of crack cocaine, Kyl believes the Act is designed to strictly control a "social pathology," when the big-

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67 *Id.* "Unlike brick-and-mortar casinos in the United States, where legal protections for bettors exist and where there are some compensatory social benefit[s] in jobs and tax revenues, Internet gambling sites principally yield only liabilities to America and to Americans." *Id.*

68 SAFE Port Act, Pub. L. No. 109-347, § 802, subch. IV, § 5361(a)(1–4), 120 Stat. 1884, 1952–53 (2006).

69 *60 Minutes*, *supra* note 3. **R**

70 Stephen Foley, *How Protectionism and Puritanism Put Paid to Online Gaming Industry*, INDEPENDENT (LONDON), Oct. 3, 2006, at 36.

71 *Bush to Sign Bill to Prevent Internet Gambling*, AGENCE FRANCE PRESSE (ENGLISH WIRE), Oct. 2, 2006, *available at* http://www.turkishpress.com/news.asp?id=144678 [hereinafter *Bush*].

gest dangers posed by gambling are its addictive nature and effect on children.[72]

Finally, former Senate majority leader Bill Frist, the Tennessee Republican who is credited with attaching the bill to the SAFE Port Act,[73] believes that,

> [g]ambling is a serious addiction that undermines the family, dashes dreams, and frays the fabric of society. Congress has grappled with this issue for 10 years, and during that time we've watched this shadow industry explode. . . . Although we can't monitor every online gambler or regulate offshore gambling, we can police the financial institutions that disregard our laws.[74]

In a statement made on the floor of Congress before it was to vote on the Act, Senator Frist explained: "The bottom line is that [Internet gambling is] illegal. But most Americans don't know that. It's our responsibility to remind them that it is. The only way we can do that is to put teeth in the laws already on the books through effective enforcement."[75]

To legislators supporting prohibition, Internet gambling has become as important an issue as the country's other leading social problems.

> Once a small, tight-knit group of hard-core sports bettors, Internet gamblers, attracted by celebrity players and incessant television coverage of poker tournaments, have grown into a largely mainstream group of amateur bettors. But in the eyes of the U.S., they have joined the ranks of people who transport illegal drugs or sell unregistered firearms.[76]

Additionally, the Act's proponents are concerned that Internet gambling provides an avenue for money laundering and tax evasion.[77] Furthermore, congressional members supporting the Act "framed it as a sensible response to a 'mushrooming epidemic' of

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[72] *60 Minutes*, *supra* note 3. **R**

[73] SAFE Port Act; Chris Reiter, *Gamblers Adapt to Loss of U.S. Online Sites*, REUTERS, Oct. 4, 2006.

[74] Press Release, Sen. Bill Frist, Frist Statement on Passage of Internet Gambling Legislation, (Sept. 29, 2006) (on file with author), [hereinafter Frist Statement].

[75] Press Release, Sen. Bill Frist, Frist Touts Internet Gambling Legislation, (Sept. 29, 2006) (on file with author) [hereinafter Frist Touts].

[76] Liz Benston, *Congress Deals Poker Fans a Hand They Can't Bet*, LAS VEGAS SUN, Oct. 3, 2006, *available at* http://www.lasvegassun.com/sunbin/stories/text/2006/oct/03/566611199.html.

[77] Weinberg, *supra* note 2, at 313 ("They believe that Internet gambling is 'vulnerable to money laundering . . . [and] tax evasion . . . [because] the gambling sites are frequently located in areas with weak or nonexistent supervisory regimes.'"). **R**

underage gambling and a burgeoning 'national-security problem' (since some Internet bookies are allegedly terrorist fronts)."[78] Essentially, critics believe that Internet gambling "is the equivalent of putting a slot machine in every home, providing an easy chance to lose money with a few mouse clicks, all without the social controls at a bricks-and-mortar casino."[79]

For a number of other reasons, various groups have supported the Act from its outset: "(1) casinos, racetracks, and other gaming industries [that] wanted to avoid competition; (2) religious and social conservatives [that] worried about the moral decay of the communities; and (3) professional sports leagues [that] saw Internet gaming as a serious threat since the leagues ostensibly opposed betting on games."[80] Commenting on their allegiance, Representative Leach opined:

> The reason the NCAA, NFL, NBA, MBA and NHL support this legislation is that they are concerned with the integrity of the games. The reason the religious community—from Baptists and Methodists to Muslims—has rallied to this cause is because it is concerned for the unity of the American family. Internet gambling is not a subject touched upon in the Old or New Testament or the Koran. But the pastoral function is one of dealing with families in difficulty and religious leaders of all denominations and faiths are seeing gambling problems erode family values.[81]

Considering the stated purpose of the Act is to protect the general welfare of society, it is not surprising that legislators and societal groups alike offered their support for its passage.

V. The Unstated, Yet Underlying Purpose of the Act is Economic in Nature

Several factors have contributed to the author's conclusion that the underlying purpose of this Act is not the stated concern for the general welfare of society. These factors range from exceptions

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[78] James Surowiecki, *Wagers of Sin*, New Yorker, Sept. 25, 2006, *available at* http://www.newyorker.com/printables/talk/060925ta_talk_surowiecki.

[79] Matt Richtel & Heather Timmons, *U.S. May Push Its Crackdown, But Internet Casinos Won't Die Easily*, N.Y. Times, July 25, 2006, at C1.

[80] McBurney, *supra* note 10, at 347; McBurney, *supra* note 10, at 348 (Today, many casinos support Internet gambling. "[B]rick and mortar casinos saw how Internet gambling had exploded, and realized they were missing out on a potentially lucrative revenue stream."). R

[81] Leach Wins Ban, *supra* note 64. R

within the Act to the fundamental economic nature of Internet gambling itself.

A. *The Act Carves Out Exceptions*

Contrary to legislative statements, this Act is not entirely about Internet gambling's alleged "ill effects on society."[82] In reality, the Act is simply economic in nature. The underlying purpose of the legislation is to keep foreign Internet gambling companies from accessing U.S.-based customers, thereby ensuring that money formerly used to gamble outside of the United States will stay in the U.S. economy. If the stated intent reflected the true motivations of legislators, the Act would not have carved out exceptions for specific American gambling entities. These carve-outs, when combined with the absence of any articulated means for treating gambling problems, indicate that the Act "looks to be more focused on keeping gaming revenue within U.S. borders . . . ."[83]

As previously discussed in Part III, the Act seems inconsistent with its stated purpose because it carves out exceptions for fantasy sport leagues, State lotteries, gambling on Indian Tribal lands, and bets placed on inter-state horseracing.[84] The Poker Players Alliance, a group opposing the legislation, believes that the Act "picks and chooses between types of gambling" it seeks to prohibit.[85] The Alliance argues that Internet gambling and domestic gambling share many of the same attributes that legislators claim are harmful to society, but they are only choosing to attack Internet gambling. Thus, it follows that exemptions are permitted for purely economic reasons since they provide both state and federal governments with an exceptional amount of revenue each year.[86] For example,

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[82] Ahrens, *supra* note 7. **R**

[83] Reiter, *supra* note 73. **R**

[84] Dominic Walsh & Tom Bawden, *Bankers and Players in America Hedge Their Bets on Internet Law*, TIMES (LONDON), Oct. 3, 2006, at 44. *See also* Gross, *supra* note 3 ("Internet gambling companies criticize the glaring inconsistencies in the [Act], which provides exemptions for buying lottery tickets and placing 'authorized' bets on horse races over the Internet"); Eric Pfanner, *Online-Gambling Shares Plunge on Passage of U.S. Crackdown Law*, N.Y. TIMES, Oct. 3, 2006, at C3 ("Online operators based in Britain complain that Washington has been inconsistent in its opposition to online gambling, allowing horse racing operators and state lottery systems to run Internet operations, for instance."). **R**

[85] Polson, *supra* note 60. **R**

[86] Alicia Hansen, *Lotteries are Another State Tax—But With Better Marketing*, CRAIN'S CHI. BUS., Jan. 3, 2005, *available at* http://www.taxfoundation.org/research/show/234.html. *See* Michael Bolcerek, *I'm Just a Bill, I'm Only a Bill . . . Sittin' Up Here on Capitol Hill . . .*, BLUFF, Oct. 2006, at 56 ("[Lotteries] are allowed because they provide valuable tax reve-

"[s]tate governments nationwide kept almost $14 billion of the nearly $45 billion spent on lotteries in fiscal 2003."[87] Consequently, "the recent moves [are] little more than an elaborate cat-and-mouse game serving only to benefit Las Vegas and Atlantic City casinos, along with Indian gambling operations, rather than seriously protecting Americans from falling prey to excessive gambling."[88]

B. *The Key Motivation: Money*

If the Act is not wholly about protecting the morals of society, what is it about? Money. Simply stated, "'Internet gambling diverts revenue—and taxes—from lawfully authorized gaming within the United States . . . .' [m]erely illustrat[ing] the reason for prohibition: federal and state governments are not currently receiving any revenues from Internet gambling."[89] Moreover, Internet gambling "sucks billion[s] of dollars per year out of the U.S. economy."[90] The money is not going into the U.S. economy because Internet gambling operators are prohibited from operating within U.S. borders. As a result, Internet gambling profits reside in for-

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nues for state governments."). If this Act were entirely about protecting morality, domestic gambling would be prohibited as well. *See, e.g.,* McBurney, *supra* note 10, at 346–47 (discussing how U.S. domestic casinos pose the same problems that legislators claim to be preventing by enacting legislation to prohibit the funding of online gambling accounts). **R**

87 Hansen, *supra* note 86. **R**

88 Richtel & Timmons, *supra* note 79. *See* Shulman, *supra* note 56 (discussing H.R. 4777, Representative Goodlatte's bill which also included similar exclusions). **R**

> In one breath, Rep. Goodlatte says that gambling destroys the moral fiber of our society. In the next breath, his bill contains carve-outs for such things as lotteries, horse racing, and the stock market. It is offensive to hear a legislator preach about morality and then condone things like lotteries, which have long been held to be the most insidious form of gambling.

Allyn Jaffrey Shulman*, A Comprehensive Analysis of the Internet Gambling Prohibition Act*, CARDPLAYER.COM, May 2, 2006, http://www.cardplayer.com/magazine/article/15416. Because of the economic benefits derived from domestic gambling, Republican legislators did not want to ban it altogether. Instead, to appear as if they believe that gambling is immoral, they decided only to ban Internet gambling. *See* Benston, *supra* note 76 ("But with Republican lawmakers nervous about the Nov[ember] 7 elections and eager to find issues that will please conservative religious groups, former Senate Majority Leader Bill Frist and other Republican leaders saw an opportunity to adopt the ban."). **R**

89 Weinberg, *supra* note 2, at 312 (internal citation ommitted). *See also* McBurney, *supra* note 10, at 341–42 ("In the United States, state governments compete with Internet gaming sites for gaming revenue, leading them to adopt 'the position that the entire system of wagering over the Internet was inherently fraudulent.'" (internal citation ommitted). **R** **R**

90 Shulman, *supra* note 88. **R**

eign economies where the companies operate legally, even though "the bulk of their revenues have come from the U.S."[91]

Legislators supportive of the Act have even commented on the economic takeoff of Internet gambling. Representative Leach has said that "[t]here is nothing in Internet gambling that adds to the G.D.P. or makes America more competitive in the world . . . . Everyone loses if this industry continues its remarkable growth trends."[92] Additionally, many of the world's largest Internet gaming companies are listed on the London Stock Exchange or the Alternative Investment Market.[93]

> Billions of dollars of these stocks are traded each year. While the majority of the players on these sites of the large publicly traded companies are Americans, it is foreign brokers and traders that are earning this revenue. Furthermore, many investors in these stocks are Americans, who are choosing to invest in foreign, rather than domestic stock exchanges.[94]

After the news that Congress had passed the Act in the United States, most of these stocks plummeted.[95] For example, "[P]artygaming PLC, the world's biggest online gaming firm, was the most dramatic loser, declining by over half its market value."[96] This is significant; in the last year alone, PartyGaming derived 84

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91 Britt, *supra* note 3, at 21. *See also* Bolcerek, *supra* note 86 (In terms of the Internet poker industry, "[i]t seems blatantly absurd for lawmakers to decry that $12B (the value of the iGaming market) is going overseas, when they penalize U.S. companies from competing for the business of poker players."). R

92 Pfanner, *supra* note 84. R

93 Bolcerek, *supra* note 86. *See* Pfanner, *supra* note 84 ("Over the last few years, Internet gambling operators, many of them based outside Britain, rushed to list their shares on the London Stock Exchange, taking advantage of a change in British law that legalized and regulated the business."). R

94 Bolcerek, *supra* note 86. *See also* Richtel & Timmons, *supra* note 79 ("The investors in the companies have included some of America's largest investment houses, among them Goldman Sachs and the FMR Corporation, parent of Fidelity Investments, which bought shares of some for its mutual funds."). R

95 Scuffham, *supra* note 44. *See* Goldman, *supra* note 19 ("'The time has been one of rapid growth,' said Sebastian Sinclair, president of Christiansen Capital Advisors, a gambling consultant. 'This industry was well on its way to becoming mainstream in a great part of the world. Capital was tripping over itself to fund these companies.'"). R

96 Scuffham, *supra* note 44. On Monday, October 2, 2006, the first business day after the Act passed, "PartyGaming's shares fell 59 percent by 0725 GMT, while Sportingbet lost 64 percent, 888 was down 45 percent and gaming software provider Playtech fell 55 percent. Austria's bwin.com Interactive Entertainment fell as much as 22 percent in the first few minutes of trading." Pete Harrison, *Online Gaming in Crisis after U.S. Ban is Passed*, REUTERS, Oct. 2, 2006. R

percent of its revenue, $977.7 million, from U.S.-based customers.[97] American legislators hope that after the passage of the Act, $977.7 million dollars will be placed in the U.S. economy, either through domestic gambling channels or through any other legal, non-gambling means desirable to citizens.

C. *The WTO Dispute*

Internet gambling was the subject of the World Trade Organization dispute between the United States and Antigua and Barbuda, conciliated by the Dispute Settlement Body (DSB) of the WTO in 2005.

> Antigua and Barbuda (Antigua) challenged several U.S. state and federal laws that, Antigua argued, imposed a "total prohibition" on cross-border delivery of gambling services. In considering those laws, the panel found that all three of the federal laws and four of the eight state laws resulted in U.S. violations of its commitments under Article XVI, which prohibits certain quantitative restrictions on market access. Further, the panel found that the United States had failed to make out a defense under Article XIV of GATS that the U.S. measures were necessary to protect public morals.[98]

The decision allowed the United States eleven months and two weeks to "implement the recommendations and rulings of the DSB."[99] To date, and despite the persistence of Antigua and Barbuda, the United States has not complied with the WTO ruling.[100] Instead of fulfilling its obligations, the United States passed this Act, which seems to further violate the WTO ruling.[101]

In making its decision, the DSB panel focused on the carve-outs included in existing federal laws.[102] "The WTO held that the

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[97] Britt, *supra* note 3 ("Similarly, in the six months to 30 June, 52% of 888.com's dollars 163.5m (pounds 86.6m) net gaming revenue came from US punters. And according to Sportingbet, whose brands include Paradise Poker, 54% of its revenue in its latest quarter came from the Americas."). **R**

[98] Daniel Bodansky, *International Decision: United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, 99 AM. J. INT'L L. 861, 862 (2005).

[99] World Trade Organization, Dispute Settlement Body, Dispute *United States*—Measures Affecting the Cross-Border Supply of Gambling and Betting Services, WT/DS285 (Apr. 20, 2005), http://www.wto.org/English/tratop_e/dispu_e/cases_e/ds285_e.htm.

[100] *Id.*

[101] Stephanie Kirchgaessner & Daniel Pimlott, *US Could Face WTO Pressure Over Online Protectionism*, FIN. TIMES, Oct. 7, 2006, at 19. "Antigua and Barbuda's lawyer in the case said the new bill made the U.S. more clearly in breach of the WTO's rules." *Id*.

[102] *See generally* McBurney, *supra* note <*CITE* _Ref163739786">.

United States failed to show that it applied its prohibition on remote wagering on horse races in a nondiscriminatory manner."[103] As with the current Internet Gambling Act, exemptions proved to be a turning point in the international community. "The exemptions targeted at the internal U.S. gambling industry help to back claims by the Caribbean islands of Antigua and Barbuda that the U.S. unfairly discriminates against foreign internet gambling companies."[104] If the United States outlawed all remote gambling, foreign and domestic, the international community could not have supported a claim of discrimination. But the Act does discriminate in order to benefit the U.S. economy, excluding only foreign entities that provide remote gambling services.

D. *Exclusion of Foreign Entities Segregates the United States from the Rest of the World*

Although the Act does not explicitly make Internet gambling illegal, prohibiting Americans from funding their gambling accounts accomplishes just that. Furthermore, by enacting legislation that excludes foreign gambling entities while permitting domestic gambling, the United States is ultimately segregating itself from the international economic community. In particular, because of the indictments brought against two foreign CEOs of online sports books, the Internet gambling community feels uncomfortable transacting with the United States. Calvin Ayre, CEO of a top Internet gaming company, Bodog.com, stated, "'the U.S. government has made it clear that anybody that's involved in Internet online gambling is not welcome in the U.S.'"[105]

Moreover, the international community is upset over what they consider to be another discriminatory law.[106] After the passage of the Act, the Caribbean Community, known as Caricom, "thr[ew] its support behind Antigua and Barbuda in its dispute with the U.S. over Internet gambling, saying the issue touched the entire region."[107] A statement issued by Antigua and Barbuda said

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[103] *Id.* at 361. . *See* Kirchgaessner & Pimlott, *supra* note 100 ("The island republics, which license offshore internet gambling operations that make money from the US, won a ruling last year that US laws on online betting broke international trade rules and were protectionist.").

[104] *Id.*

[105] Gross, *supra* note 3. **R**

[106] *Caricom Backs Antigua in On-line Gambling Dispute with USA*, BBC MONITORING LATIN AM., Oct. 15, 2006.

[107] *Id.*

that Caricom officials told the United States that the region "'views with concern the U.S.' response to date to the WTO rulings and recommendations in the Internet gaming case,' and the issue 'should not be regarded as bilateral but as a regional one.'"[108] As a result, Caricom vowed to initiate further WTO proceedings regarding the Internet gambling dispute, "pointing out that America's new legislation is in contravention of global free trade rules."[109] Likewise, the European Union has identified itself as an "interested party" in the WTO dispute, believing that the passage of the Act "confirms the existing legislation, which was already found to be discriminatory."[110]

Above all, passage of the Act caused some leading Internet gambling operators to halt all business with customers based in the United States, significantly affecting the operators' revenue opportunities.[111] For example, it was recently reported that since the passage of the Act, "[s]everal London-based Internet gambling companies and a handful in Europe and Australia subsequently sold off or shut down their U.S. operations, losing around 80 percent of their combined business in the process."[112] For smaller gaming companies, the situation could be even worse.

> Roughly half [of] the estimated 500 companies operating 2,300 gambling websites across the Caribbean, Central America and Europe could be wiped out . . . . The survivors will have to make do on sharply reduced revenue, while seeking ways around the U.S. ban and building up their business in Asia.[113]

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108 *Id.*

109 *Id.*

110 Kirchgaessner & Pimlott, *supra* note 100.

111 Jane Wardell, *Britain Criticizes U.S. Online Bet Ban*, ASSOCIATED PRESS, Oct. 27, 2006. *See, e.g.*, McCarthy & Swartz, *supra* note 12 ("PartyGaming generated 80% of its $1 billion in 2005 revenue from the U.S. market. During the first half of 2006, American bettors accounted for 78% of $662 million in revenue . . . ."). *See also* Pfanner, *supra* note 84 ("As a result [of the recent legislation], several online-gambling companies said . . . that they planned to stop doing business with customers in the United States—by far the largest market for Internet gambling."). R R

112 Wardell, *supra* note 111. *See* McCarthy & Swartz, *supra* note 12 ("PartyGaming, the world's largest online-gambling company, said it will stop taking bets from 920,000 active U.S. customers . . . ."). *Cf.* Marianela Jimenez, *Online Gambling Flourishes in Costa Rica*, ASSOCIATED PRESS, Oct. 16, 2006, ("'VegasPoker247 is pleased to announce that it's business as usual . . . .'"). R

113 McCarthy & Swartz, *supra* note 12. *Cf.* Britt, *supra* note 3 ("The situation in the U.S. will not affect every firm equally; while it has been a lucrative territory, several operators were already experiencing their fastest growth in new players elsewhere."); Pfanner, *supra* note 84. R R

Basically, "[i]f you lop off 80% of somebody's revenues, it's going to hurt,"[114] and when companies begin to go under as a result, the U.S. government will be blamed.

VI. REGULATION WILL ACHIEVE BOTH THE STATED AND UNSTATED PURPOSES OF THE ACT

A. *Will the Act Be Effective?*

The Act serves to exclude foreign gambling entities, thereby segregating Americans from the rest of the world. With this in mind, the larger question is, whether the Act will actually prevent Americans from gambling online? Although it is a minority view, some say that removing the means by which customers fund their accounts will impede, if not altogether stop, Americans from participating in Internet gambling.[115]

Conversely, others feel that, "[l]ike the prohibition of alcohol, which did not work, the prohibition of Internet gambling is destined to fail."[116] The Act by no means criminalizes Internet gam-

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> As the United States puts up more barriers, online gambling companies have been emphasizing growth in other markets. 888 Holdings said 68 percent of new customers who registered on its sites in the first half of the year were from outside the United States, 56 percent more than a year earlier. PartyGaming says it now has as many players outside the United States as it had in America in 2004.

Id.

[114] *See* McCarthy & Swartz, *supra* note 12

[115] Harrison, *supra* note 96 ("'We believe that this will have a very material impact on the long-term prospects of online gambling, and in particular poker,' said analyst Julian Easthope at UBS. 'This will lead to a rapid decline in the use of online poker sites.'"). *See also* Walsh & Bawden, *supra* note 83 (Mr. Kane, a former advisor to the U.S. Federal Reserve, believes that because the Act does not impose liability on the individual gambler (and only on the financial institution), the individual will not curb his activities. However, "[t]here will obviously be some people—maybe 30 percent at a very rough estimate—who are law abiding citizens and will stop online gambling immediately."). R

[116] Gross, *supra* note 3. Likewise: R

> Britain's culture secretary . . . compared the U.S. crackdown on online gambling to the failed alcohol ban of the Prohibition as she prepared to host an international summit on Internet gambling . . . . Tessa Jowell warned that the U.S. ban on Internet gambling would make unregulated offshore sites the "modern equivalent of speakeasies," illegal bars that opened in 1920s America when alcohol was banned.

Wardell, *supra* note 111. *See* also Weinberg, *supra* note 2 at 315: R

> Alcohol prohibition is a clear example that when the United States government attempts to stop its citizens from participating in an allegedly illicit activity, it will fail. Furthermore, the War on Drugs has demonstrated that the threat of punishment is not a practical deterrent. "History has proven the dangers of prohibition."

bling, although it does make it more difficult for Americans to fund their online accounts.[117] But even with the funding complications, "these sites are not just going to walk away from a $12 billion-a-year industry."[118] Foreign gaming companies feel that they can succeed through loopholes in the Act; "when one funding source is blocked, they will open another . . . . [T]here are already offshore third-party companies in place that are more than happy to handle [American gamblers'] financial transactions."[119] Even Representative Leach admitted:

> Having new overseas processors . . . spring up does present a problem . . . . But [the Act] also prohibit[s] American financial institutions from transferring money to overseas payment processors known to do a lot of business with casinos. In turn, it *could* make people work harder to place bets.[120]

Others say that the Act will be ineffective to prevent Internet gambling because it is inherently unworkable.

> The bill passed by Congress could allow regulators to exempt checks and money transfers because they are more difficult to track. "Analyzing 40 billion checks a year would be a largely manual process," [according to a spokeswoman for the American Bankers Association]. If checks are not exempt, this would break our banks as it would be too costly to enforce. If checks *are* exempt, players could simply send a check to an online site.[121]

Ahrens, *supra* note 7 ("While proponents decried the effects of gambling on society, opponents pointed to the enormous popularity of Internet gambling and compared the new law to the Prohibition amendment of 1919, which led to the rise of illegal speak-easies and organized crime."). R

117 To prohibit Internet gambling, Congress would have had to modify the Wire Act to explicitly ban such gambling, but that provision in the House version of the Act was dropped in the Senate. Given the current state of the law, the government still lacks the jurisdictional reach to prosecute foreign gaming sites. Allyn Jaffrey Shulman, *What's NOT Included in Anti-Gaming Legislation*, CARDPLAYER, Oct. 6, 2006, http://www.cardplayer.com/poker_law/article/1428 *See also* Shulman, *supra* note 56 ("The statute is primarily no big deal since poker players stopped using credit cards a few years ago and found other ways to get their money into their favorite gaming sites."). R

118 Shulman, *supra* note 115.

119 *Id. See* Goldman, *supra* note 19 ("Gamblers may look over their shoulder now, but experts say a new Internet gambling ban won't keep bettors from ponying up, just turn them on to overseas payment services out of the law's reach.").

120 Richtel & Timmons, *supra* note 79 (emphasis added) ("But even [Representative Leach] concedes that Washington's best efforts will lead only 'to a reduction but not necessarily to an ending' of online gambling.'"). R

121 Shulman, *supra* note 56 (emphasis added) ("Representatives of the financial services industry worry about a heavy regulatory burden being placed on banks. 'The bill sets up R

The consensus seems to be that, although at the Act was initially aimed toward preventing Americans from funding their Internet gambling accounts, in effect, it will only slow the funding process for the time being.[122]

B. *Legislators Should Regulate, Not Prohibit*

As noted above, "[h]istory teaches us that regulation, not prohibition, is the responsible solution for our lawmakers to pursue."[123] Furthermore, while prohibition may not address legislative concerns with Internet gambling, many experts believe that regulation will solve the social problems often associated with it; "[a] system of licensing and regulation would require that sites maintain objective standards, safeguards for age verification, identity verification, financial solvency, fairness of game, and even measures to help problem gamblers."[124] Additionally, by regulating Internet gambling the government will have the opportunity to ensure that

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banks to police a social issue,' said Laura Fisher, spokeswoman for the American Bankers Association. 'It's not something we want to encourage.'"). Furthermore, the Act may be impractical because it "puts enforcement on the shoulders of banks and other U.S. financial institutions, some of which fought the legislation." Ahrens, *supra* note 7. R

122 Reiter, *supra* note 73 ("[A]nti-gambling activists say the legislation will do little to stop problem gamblers."). Similarly, Coleen Moore, the resource development coordinator at the Illinois Institute for Addiction Recovery, believes that "[i]f the gambling sites do shut down, compulsive gamblers, like other addicts, will seek out a new way to gamble, even if it means doing something illegal." *Id.* *See also* Richtel & Timmons, *supra* note 79 ("Sebastian Sinclair, an analyst with Christiansen Capital Advisors, which tracks online gambling trends, said offshore gambling could be 'curtailed but it cannot be stopped.'"). R R

123 Bolcerek, *supra* note 86, at 56. *See* Adam Goldman & Ryan Nakashima, *New Law on Web Gambling May Hurt Poker*, ASSOC. PRESS, Oct. 24, 2006. Michael Bolcerek, President of the Poker Players Alliance, a 130,000-member group that opposes the Act, believes that prohibition is the wrong approach ("'The hardcore ones will find somewhere, they won't care whether it's regulated . . . . That's what a prohibition does. It drives everything underground.'"). *Id.* R

124 Bolcerek, *supra* note 86. *See also* Gross, *supra* note 3 ("Instead of fighting to ban Internet gambling, the government should regulate Internet gaming and adopt a regulatory structure that ensures that Internet gambling is conducted honestly, fairly and competitively, safeguards the rights of players, casinos and others and enforces age and identity verification."); Weinberg, *supra* note 2, at 326 ("Money laundering would be eliminated from regulated Internet gambling websites."). *Cf. 60 Minutes*, *supra* note 3 (Senator Kyl believes that regulation would not solve social problems associated with Internet gambling. "'Most [Internet gambling] is done in foreign countries. So even if we try to create some kind of standards, it's not to say that it's going to be enforced by a foreign government.'"). If Congress chooses to regulate Internet gambling, companies may open inside U.S. borders, alleviating Senator Kyl's fears. Additionally, even if companies did not operate inside the United States, the statute could provide for jurisdiction over companies that do business within the United States. R R R

all online gambling transactions are appropriately reported and taxed, creating substantial revenue for both state and federal entities.[125] Finally, regulation will actually fulfill an important goal of the legislators in creating this Act: keeping American money in the U.S. economy.[126]

Currently, there are approximately eighty countries in the world that regulate or license Internet gambling.[127] Leading the field are Australia, the Caribbean nations, and most recently, the United Kingdom.[128] "Australia opted for regulation over prohibition because, similar to the situation in the United States, online gambling was already taking place by Australian users."[129] By doing this, Australia was able to address social considerations like underage gambling while ensuring that "companies are solvent, the games are fair, and the winners can claim their loot."[130] Likewise,

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125 Weinberg, *supra* note 2, at 293. R

> Regulation means that the federal and State governments gain revenue from this booming economic activity, and that those people who wish to pursue Internet gambling can do so knowing that the games are as safe as they are in any land-based casino. Considering the recurring problem of the national debt, the United States must consider any means by which tax revenue can be raised.

Id. See generally Gross, *supra* note 3 (suggesting that a "pay-to-play" tax may be an effective way of taxing Internet gambling); Weinberg, *supra* note 2, at 320–26 (discussing methods by which to tax). *See also* Bolcerek, *supra* note 86 (An analysis of Internet poker alone "found that more than $3.3 billion in revenue could be generated annually for the federal government, and another $1 billion for state coffers."). Adding in traditional casino games and online sportsbooks, could even double these stated estimates. *See 60 Minutes*, *supra* note 3 ("[W]ere America to have regulated the industry in 2004, the American states would have earned $1.2 billion in tax."). R R R R

126 Bolcerek, *supra* note 86 ("In addition to the tax dollars that are lost by not regulating online poker, the U.S. economy is also missing out on keeping domestic revenue in the country as well as attracting substantial foreign investment to the NASDAQ or NYSE."). R

127 Gross, *supra* note 3. Italy recently announced that Internet gambling will be regulated and legalized as of January 1, 2007. John Caldwell, *Italy to Legalize and Regulate Online Poker and Gambling*, POKERNEWS, Sept. 28, 2006, http://www.pokernews.com/printable/2240. R

128 McBurney, *supra* note 10, at 352–59. *See* Andrle, *supra* note 1, at 1409 ("Of the approximately sixty-eight offshore Internet gambling sites in the Caribbean and Central America, about twenty-seven are in Antigua."). R

129 Andrle, *supra* note 1, at 1411. The Caribbean nations had different reasons for regulating Internet gambling. *See* Bolcerek, *supra* note 86 ("Caribbean nations embraced online gaming for the revenue potential and jobs it brought their countries, as well as the high-tech internet infrastructure that online gaming companies brought with them."). R

130 Andrle, *supra* note 1, at 1411. "The specifics of the Australian system demonstrate how a regulatory schema can accomplish many of the protective measures that a prohibition system aims to achieve while not completely eradicating the option to gamble online." *Id.* at 1412. R

the United Kingdom followed and enacted legislation regulating Internet gambling.[131]

> Under new British gambling laws, online operators have a 'social responsibility' duty written into licenses and policed by the independent Gambling Commission watchdog. It requires them to work to prevent underage gambling, give prominent warnings about addiction and inform users how much time and money they have spent on the site[132]

Essentially, "'[e]veryone's a winner' if Internet gambling is regulated."[133] By prohibiting rather than regulating, legislators are creating a situation where Internet gambling companies will be subject to foreign, rather than domestic laws.[134]

> If internet gambling operators are not regulated by the federal government, foreign governments that may not regulate the operators as strictly will control the market. Furthermore, the United States would not collect tax revenue from an activity in which many American citizens participate. As long as it is possible, Americans will find a way to pursue Internet gambling.[135]

This author proposes that Congress should amend the Act to regulate payment methods, rather than prohibit the funding of American Internet gambling accounts. The tax revenues would be available to fund programs that assist problem gamblers, strengthen the American family, and ensure that minors are prevented from gambling online.[136] The revenue derived from regu-

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131 Wardell, *supra* note 111. **R**

132 *Id.* Believing that regulation provides a better solution than prohibition, the United Kingdom is hosting a gambling summit in London,

> where lawmakers from 30 countries will discuss ways to regulate the industry, including the protection of minors and keeping the industry free of crime . . . . [The summit] intended to discuss ways to stop criminals from defrauding online gamblers and to prevent sites being used for money laundering.

Id.

133 Weinberg, *supra* note 2, at 326. **R**

134 *Id.* at 311. Currently there are entities in place to assist countries in regulating the industry, ensuring that all companies involved comply with determined guidelines. *See, e.g.*, Interactive Gaming Council (IGC), http://www.igcouncil.org/aboutus.php?id=2 (The IGC is a "non-profit trade association that serves as a collective voice for the interactive gaming industry. The IGC builds credibility in the industry and creates member benefits by aggressively addressing legislative and regulatory challenges and opportunities in order to promote fair and responsible gambling.").

135 Weinberg, *supra* note 2, at 311. **R**

136 A feasible solution would be to require financial information to match an individual's state driver's license, valid passport, or U.S. birth certificate.

lating Internet gambling would stimulate the U.S. economy and reduce the ever-growing national deficit.

VII. Conclusion

Although legislators claimed to promote the Act for the moral good of society, many facts point to the notion that, though their concerns may be valid, legislators enacted the law mainly for the economic benefit of the United States. Enacting legislation to promote the American economy at the expense of others in the world is both contrary to U.S. international policy and the GATS provisions of the WTO. Thus, to meet the stated purpose of the Act and simultaneously bring the United States back into the good graces of the international community, the United States should voluntarily amend the Act to license and regulate Internet gambling in the United States.