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Treaty Reservations and the Economics of Article 21(1) of the Vienna Convention

Francesco Parisi

Catherine Sevcenko

ARTICLES

Treaty Reservations and the Economics of Article 21(1) of the Vienna Convention

By
Francesco Parisi* & Catherine Ševčenko**

I.
INTRODUCTION

The use of reservations in multilateral treaties reveals a seeming contradiction: 1) the law of reservations, enshrined in Articles 19-21 of the Vienna Convention on the Law of Treaties,[1] favors the reserving state,[2] but 2) the number of reservations attached to international treaties since the adoption of the Convention has been relatively low in spite of that natural advantage.[3] This Article posits that Article 21(1) of the Vienna Convention is a good place to search for an explanation. This provision creates a mechanism to make reservations reciprocal: between a reserving state and a state that objects to the reservation, that part of the treaty will not be in force.[4] Therefore, if a state wants to exempt

* Professor of Law & Director, Law and Economics Program, George Mason University, School of Law.

** Legal Writing Fellow, George Mason University, School of Law.

1. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980) [hereinafter Vienna Convention]. The United States is not a party to the Vienna Convention. However, the international community generally accepts the Convention as an authoritative codification of treaty law. *See* Daniel N. Hylton, Note, *Default Breakdown: The Vienna Convention on the Law of Treaties: Inadequate Framework on Reservations*, 27 VAND. J. TRANSNAT'L L. 419, n.2 (1994).

2. *See, e.g.*, D.W. Grieg, *Reciprocity, Proportionality, and the Law of Treaties*, 34 VA. J. INT'L L. 295, 299-300 (1994).

3. John King Gamble, *Reservations to Multilateral Treaties: A Macroscopic View of State Practice*, 74 AM. J. INT'L L. 372 (1980).

4. The precise language of the treaty is as follows:

> 1. A reservation established with regard to another party in accordance with articles 19, 20 and 23:
>
> (a) modifies for the reserving State in its relations with that other party the provisions of the treaty to which the reservation relates to the extent of the reservation; and
>
> (b) modifies these provisions to the same extent for that other party in its relations with the reserving State.

Vienna Convention, *supra* note 1, art. 21.

itself from a treaty obligation, it must be willing to let other nations escape that same burden as well.

Game Theory sheds light on understanding the efficacy, and limits, of Article 21 in preserving treaty obligations. After a treaty has been signed, states have an opportunity to attach reservations to it before ratification. Absent Article 21, the traditional prisoner's dilemma paradigm[5] illustrates that a state will always act in its best interest (reserve), thereby prompting other states to do the same, resulting in a sub-optimal result for both of them: a fragmented treaty with ambiguous obligations. If a state knows, however, that the mechanism of reciprocity will make its sought-after advantage automatically available to others, then, under most circumstances, the possibilities for achieving post-negotiation advantages are precluded, and a state will not attach reservations to the treaty.

Article 21 reciprocity only provides a solution to the prisoner's dilemma game when both states enter into the negotiations in symmetrical positions and it is unclear how the treaty will regulate their future relationship. For example, when two states sign an extradition treaty, neither state knows whether it will be requesting or surrendering a fugitive. By contrast, when states enter a treaty from asymmetric positions, the costs and benefits for each side are clear in advance. Therefore, they will each have incentives to attach reservations to preserve national interests as much as possible. For instance, states will have different approaches to signing multilateral agreements governing intellectual property rights, depending on whether they have highly developed entertainment industries or large capacity to produce videos or CDs cheaply. The erosion of the integrity of the treaty will be inevitable unless the parties explicitly preclude reservations as part of the treaty itself.

Finally, the observation that reservations are fairly rare does not hold true for human rights treaties. Unlike asymmetric treaties in which states have to reconcile interests of differing national importance in order to achieve an overall treaty regime that reflects a Pareto superior outcome[6] for all parties, human rights treaties are unilateral declarations of a state's intentions concerning the treatment of its own citizens. The equalizing mechanism of reciprocity cannot function because human rights conventions do not fit the model of contractual agreements among states. A nation has no incentive to accommodate another state's value system at the cost of its own national interest because it will not receive anything concrete in return. For instance, if a country attached a reservation to the Convention on Elimination of All Forms of Discrimination Against Women allowing it to practice female circumcision, it would hardly benefit the United States to have the same "right." As of now, the benefits of a human rights treaty are not considered tangible enough to motivate a state to give up its right to attach reservations, and the political cost for compromise on such issues may be too high for governments to pay.

5. *See infra* note 55 and accompanying text.
6. *See infra* note 57.

II.
HISTORY OF TREATY RESERVATIONS[7]

A. *Pre-World War I: Unanimity Rule*

Until the late nineteenth century, accession to, and ratification of, multilateral agreements was an all or nothing proposition. Ratifying states had an opportunity to negotiate specific treaty provisions before signing a treaty, rendering ex post departures from such agreements suspect. As a result, if a state had a position on a particular provision that was not adopted, it had the limited choice of accepting that aspect of the treaty, in spite of national concerns, or not being a party to the entire agreement.[8] This approach preserved unanimity, and any treaty that did come into force had the clear backing of its constituent parties, laying a strong foundation on which compliance could be built. While this approach first began to change in the late nineteenth century with a series of conventions, starting with the International Sanitary Convention, all of the signing parties had to accept, at least tacitly, any reservation before it could be considered valid.[9] Although this practice became increasingly unworkable in light of the increased international cooperation that followed World War I and the establishment of the League of Nations, the leading European nations adhered to this unanimity principle.[10] As European nations dominated the world stage, this practice continued until after World War II.

B. *Inter-War Period: Pan-American Rule*

While the European powers continued their insistence on unanimous consent to treaty provisions, a different approach developed in Latin America. Known as the Pan-American Rule and articulated in the Havana Convention on the Law of Treaties in 1928,[11] it provided for three levels of reciprocal rights and obligations between signatory states. Between states that did not file reservations to treaty language, the treaty applied as written. Between a reserving state and a state that accepted the limitation, the treaty applied in its modified form. If a state attached a reservation and another state did not accept it, then the

7. This description of the history of treaty reservations is based on the classic works outlining this development from the 19th century to the adoption of the Vienna Convention on Treaties. Specifically, it draws heavily on IAN SINCLAIR, THE VIENNA CONVENTION ON THE LAW OF TREATIES (2d ed. 1984) and SHABTAI ROSENNE, DEVELOPMENTS IN THE LAW OF TREATIES, 1945 - 1986 (1989). *See also* MARK E. VILLIGER, CUSTOMARY INTERNATIONAL LAW & TREATIES 259-278 (1985); UNITED NATIONS GENERAL ASSEMBLY, INTERNATIONAL LAW COMMISSION, SECOND REPORT ON RESERVATIONS TO TREATIES, ANNEX I, BIBLIOGRAPHY CONCERNING RESERVATIONS TO TREATIES; BY ALAIN PELLET, SPECIAL RAPPORTEUR, U.N. Doc. A/CN.4/478/Rev.1 (1999).

8. PAUL REUTER, INTRODUCTION TO THE LAW OF TREATIES 78 (trans. Jose Mico & Peter Haggenmacher) (1995).

9. SINCLAIR, *supra* note 7, at 55.

10. ROSENNE, *supra* note 7, at 356-357. *See also* LAURI HANNIKAINEN, PEREMPTORY NORMS (JUS COGENS) IN INTERNATIONAL LAW 49 (1988).

11. Catherine Logan Piper, Note, *Reservations to Multilateral Treaties: The Goal of Universality*, 71 IOWA L. REV. 295, 308 n.121 (1985) (quoting Article 6 of the Havana Convention). *See also* Andres E. Montalvo, *Reservations to the American Convention on Human Rights: A New Approach*, 16 AM. U. INT'L L. REV. 269, 274-75 (2001).

treaty would not be in force between them. Finally, if a state signed onto the treaty with a reservation after the treaty had entered into force, the agreement would not be in force between it and any other signatory state that did not accept the reservation.[12] This latter provision represented a significant departure from earlier refusal to allow a latecomer state any flexibility. In essence, the Pan-American rule widened the scope of engagement in a multilateral treaty by allowing for a variety of related bilateral sub-agreements under the treaty's general umbrella.[13]

The international community, therefore, had two methods for dealing with reservations leading into the post-War period.

C. Post World War II

These two different approaches co-existed until the post-war period, when, in the aftermath of the horrors of the Holocaust, the members of the United Nations negotiated the Convention on the Prevention and Punishment of the Crime of Genocide.[14] Although the treaty was meant to stand as an articulation of humanity's universal condemnation of genocide, individual states attached reservations to their ratifications of the treaty itself.[15] The Secretary General then faced the dilemma of whether to count signatures with reservations towards those needed for the Convention to enter into force. Accordingly, the General Assembly called upon both the International Court of Justice (ICJ) and the International Law Commission (ILC) for guidance on this matter.[16]

1. International Court of Justice Advisory Opinion

The foundation for the Vienna Convention's approach to reservations lies in the International Court of Justice Advisory Opinion on Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide.[17] In that landmark decision, the ICJ had to balance the need for universal condemna-

12. SINCLAIR, *supra* note 7, at 57. Piper, *supra* note 11, at 308. *See also* Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, 1951 I.C.J. 15, 22 (May 28) [hereinafter Genocide Reservations].

13. Piper, *supra* note 11, at 308.

14. Convention on the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951) [hereinafter Genocide Convention].

15. Genocide Reservations, *supra* note 12, at 22. For an overview of the Convention's scope and purpose, see Matthew Lippman, *The Convention on the Prevention and Punishment of Genocide: Fifty Years Later*, 15 ARIZ. J. INT'L & COMP. L. 415, 451 (1998).

16. U.N. GAOR, 5th Sess., Annex, Agenda Item 5b, at 29, U.N. Doc. A/1517 (1950). *See* ROSENNE, *supra* note 7, at 425.

17. The ICJ addressed the following two issues at the request of the U.N. General Assembly:

> I. Can the reserving State be regarded as being a party to the Convention while still maintaining its reservation if the reservation is objected to by one or more of the parties to the Convention but not by others?
>
> II. If the answer to Question I is in the affirmative, what is the effect of the reservation as between the reserving State and:
>
> (A) The parties which object to the reservation?
>
> (B) Those which accept it?

Genocide Reservations, *supra* note 12.

tion of genocide[18] with the mandate to preserve the integrity of the original agreement to which the parties agreed.[19] Granting states flexibility in accepting the terms of the treaty would promote ratification, but could not risk undermining the treaty itself.[20] The ICJ wrestled with the dilemma, which continues to vex states today.[21] The resulting compromise set the framework for negotiating multilateral treaties in the expanded international community that emerged from the wreckage of the War.

The ICJ found a balance between state sovereignty and the integrity of the Convention by limiting reservations to those that were compatible with the purpose of the treaty itself.[22] States had to accept some limitation of their prerogative to attach reservations because the Genocide Convention was more than a simple contractual treaty.[23] It dealt with an issue that shocked the "conscience of mankind," meaning that states could not negotiate around, or stray from, the black letter law of the Convention.[24] Bolstered by the fact that the General Assembly had not allowed for reservations,[25] and given the high moral principles involved, especially important in the immediate aftermath of World War II, the ICJ circumscribed state autonomy in treaty ratification.

Nevertheless, the ICJ could not ignore the long-standing European tradition of complete unanimity in acceptance of treaty provisions, given its grounding in the fundamental principle that no state can be bound against its will.[26] The ICJ therefore could not ban reservations altogether, especially since the General Assembly had hinted that reservations might be acceptable under certain circumstances.[27] By recognizing the need for some form of reservation but attempting to limit its scope, the ICJ created the possibility of "subtreaties." Each state would judge for itself whether a reservation was compatible with the purpose of the Convention, and, based on its conclusion, either consider the treaty in force between itself and the reserving state, or not.[28] It avoided binding states against their will to accept the reservations of other states because it protected the core

18. *Id.* at 23.

19. *Id.* at 21.

20. *Id.* at 24.

21. *See Report of the International Law Commission on the work of its Forty-Ninth Session 12 May-18 July*, U.N. GAOR, 52nd Sess., Supp. No. 10, U.N. Doc. A/52/10 (1997).

22. Genocide Reservations, *supra* note 12, at 24.

23. *See id.* at 22-24.

24. *Id.* at 21-24. This theme of contract versus normative treaty has gained greater prominence in the past decades as the number of human rights conventions has increased. The trade-off between flexibility in allowing reservations and integrity of the treaty purpose has been questioned as states have used reservations and declarations essentially to undermine the intent of the treaty itself, at least in some cases. *General Comment on Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols Thereto, or in Relation to Declarations under Article 41 of the Covenant*, U.N. Doc. CCPR/C/21/Rev.1/Add.6, para. 1 (1994); Elena A. Baylis, *General Comment 24: Confronting the Problem of Reservations to Human Rights Treaties*, 17 BERK. J. INT'L LAW 277, 293-295 (1999).

25. Genocide Reservations, *supra* note 12, at 21-24.

26. U.N. GAOR, 5th Sess., Annex, Agenda Item 5b, at 29, U.N. Doc. A/1517 (1950). *See* ROSENNE, *supra* note 7, at 425.

27. Genocide Reservations, *supra* note 12, at 22.

28. *Id.* at 26-27.

areas of the convention from adjustment; nevertheless it walked back from an "all or nothing approach" to facilitate universal participation.[29] This compromise opened the door to the solution to the reservations problem that was incorporated in the Vienna Convention some fifteen years later.

However, the ICJ's approach tips the balance in favor of the reserving state. The ICJ noted that it must be "clearly assumed" that a potential objecting state would make every effort to find the reservation acceptable, since it would be "desirous of preserving intact at least what is essential to the object of the Convention."[30] As a result, the ICJ ventured the hope that any divergence of views would be irrelevant in the big picture, that the states might enter into some dispute resolution process, or that there would be "an understanding between that state and the reserving states [allowing] the convention to enter into force between them, except for the clauses affected by the reservation."[31]

What the legal ramifications of that arrangement would be, the ICJ did not attempt to figure out. It addressed the question only by commenting on previous history:

> [W]hile it is universally recognized that the consent of other governments concerned must be sought before they can be bound by the terms of a reservation, there has not been unanimity either as to the procedure to be followed by a depositary in obtaining the necessary consent or as to the legal effect of a State's objecting to a reservation.[32]

Mentioning the Pan-American system, the ICJ merely noted that the European approach was not the only option[33] and that case-by-case analysis of how to handle reservations would be the most prudent approach. In spite of these gaps, however, the ICJ shifted the grounds of debate and laid the foundation, shaky as it might be, for Article 21 of the Vienna Convention.

2. *International Law Commission*

At the same time that the General Assembly asked the ICJ to offer its guidance on the question of reservations, it also turned to the International Law Commission (ILC) for its expertise.[34] Even after the Court rendered its opinion,

29. One commentator has characterized this as a decision that carves out a middle ground between the Pan-American rule and the European unanimity rule. The ICJ maintained the European all or nothing approach concerning the essence of the Convention: reservations "incompatible with the treaty" are forbidden. *Id.* at 24. Each signatory state would determine for itself if the reservation of another state were incompatible; in the event that it decided in the affirmative, the Convention would not be in force between the two parties. Reservations on ancillary issues would be allowed, and the treaty would be in force between the two states, except for the reservation, reflecting the flexibility of the Pan-American rule. *See* Leila Nadya Sadat & S. Richard Carden, *The New International Criminal Court: An Uneasy Revolution*, 88 GEO. L.J. 381, n.433 (2000).

30. Genocide Reservations, *supra* note 12, at 27. The ICJ dodged the difficult question of deciding who would have authority to determine if a reservation were compatible with the object of the treaty.

31. *Id.* at 27.

32. *Id.* at 25.

33. *Id.* at 25.

34. The General Assembly asked the ILC to "study the question of reservations to multilateral conventions both from the point of view of codification and from that of progressive development. G.A. Res. 478, 5th Sess., Supp. No. 20, at 74, U.N. Doc. A/1775 (1950).

the ILC input remained relevant because the Court, relying on the abstract nature of an advisory opinion, left many questions unanswered about how a regime would work that did not require unanimous acceptance of reservations. However, the ILC came to the opposite conclusion from the Advisory Opinion. It advocated the traditional European unanimity model, calling for the Secretary General to notify all other states that either are, or are entitled to become, parties to the Convention when any state submitted a reservation. If any other state objected within a certain amount of time, then the reservation would have to be withdrawn or the reserving state could not become a party to the treaty.[35]

The General Assembly thereby faced the task of reconciling these two opposing recommendations. It passed an initial resolution dodging the problem by instructing the Secretary General simply to inform all member states of any reservations to treaties of which he was the depository and allow them to draw any legal conclusions from the reserving state's statement.[36] This arrangement lasted until 1959, when India demanded clarification of the legal status of a reservation it had appended to a 1948 Convention.[37] The General Assembly then had to take a clearer stance on the question of reservations. It called upon the Secretary General to collect information on practices concerning reservations from different regions of the world and submit the information to the ILC for its further consideration.[38] In this way, the General Assembly gave the first signal that the unanimity rule was a thing of the past and that political, rather than legal, considerations would govern the question of reservations. The General Assembly's resolution thus ushered in the end of the dominance of the European states on the codification of international law.[39] Three years later, Special Rapporteur Sir Humphrey Waldock presented the ILC's new thinking on reservations,[40] ideas that in six additional years would become Articles 19-23 of the Vienna Convention itself.

III.
THE VIENNA CONVENTION ON THE LAW OF TREATIES

The Vienna Convention on the Law of Treaties became available for signature in 1969 and came into force in 1980, culminating negotiation efforts begun in 1949. The purpose of the Convention was to articulate the framework for treaty-making, codify practice on how treaties should be concluded, entered into force, applied, and interpreted, as well as determine the procedural rules for

35. ROSENNE, *supra* note 7, at 428-29.

36. G.A. Res. 598, U.N. GAOR, 6th Sess., Supp. No. 20, at 84, U.N. Doc A/2119 (1952).

37. ROSENNE, *supra* note 7, at 431 (*citing* U.N. GAOR, 14th Sess., Annex 1.65 (1959)).

38. G.A. Res. 1452, U.N. GAOR, 14th Sess., Supp. No. 16, at 56, U.N. Doc. A/4354 (1959).

39. ROSENNE, *supra* note 7, at 434.

40. UNITED NATIONS, GENERAL ASSEMBLY, INTERNATIONAL LAW COMMISSION, FIRST REPORT ON THE LAW OF TREATIES; BY SIR HUMPHREY WALDOCK, SPECIAL RAPPORTEUR, U.N. Doc. A/CN.4/144 (1962), and add., U.N. Doc. A/CN.4/144/Add1, *reprinted in* [1962] 2 Y.B. Int'l Comm'n 27, 80, U.N. Doc. A/CN.4/SER.A/1962, Add.1.

treaty administration. It represents a comprehensive set of principles and rules governing significant aspects of treaty law.[41]

A. *The Vienna Convention Rules on the Issue of Reservations*

The Vienna Convention defines a reservation as "a unilateral statement, however phrased or named, made by a State when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State."[42] Echoing the Genocide Convention language, Article 19 allows states to include reservations in their acceptance of treaty obligations, unless the treaty itself expressly forbids reservations or the reservation is incompatible with the object and purpose of the treaty.[43] Article 20 outlines the rules for accepting and objecting to reservations. It differentiates between types of treaties,[44] but for the majority, if State B does not object to State A's reservation, it modifies the treaty relations between the two states according to the scope of the reservation.[45] An objection to a reservation does not, however, automatically preclude entry into force between the two states. The objecting state must declare that it does.[46] Furthermore, if State B does not object to a reservation from State A within a set amount of time, its silence is construed as tacit acceptance.[47] Once the reservation is in place, however, Article 21 restores the balance in the relationship between the two states by declaring that the reservation is reciprocal, namely, the non-reserving state is also not bound by the provision.[48] Some commentators have criticized this approach as effectively eliminating the ability of states to object to reservations: under the Vienna regime, State B is left with the option of accepting State A's reservation or not having the treaty in force at all between the two countries. Given the drastic remedy, the argument is that states have little recourse other than to accept an unpalatable reservation.[49] Another strategy would be to invoke good faith in negotiation as a basis for rejecting the reservation and hope that the reserving state backs down, at least as the reservation applies between the two nations.[50]

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41. For a complete listing of all U.N. Documents covering the negotiation of the Vienna Convention, see International Law Commission, Law of Treaties (1998), *available at* http://www.un.org/law/ilc/guide/treaties.htm.

42. Vienna Convention, *supra* note 1, at art. 2(1)(d). For a drafting history of the definition of reservation, see UNITED NATIONS, GENERAL ASSEMBLY, INTERNATIONAL LAW COMMISSION, THIRD REPORT ON RESERVATIONS TO TREATIES; BY ALAIN PELLET, SPECIAL RAPPORTEUR, U.N. Doc. A/CN.4/491/Add.1 (1998), *to be reprinted in* [1998] 2 Y.B. Int'l L. Comm'n, U.N. Doc. A/CN.4/SER.A/1998/Add.1.

43. Vienna Convention, *supra* note 1, at art. 19.

44. *Id.* at art. 20(1)–(3).

45. *Id.* at art. 20(4)(a).

46. *Id.* at art. 20(4)(b).

47. *Id.* at art. 20(5).

48. *Id.* at art. 21(1)(b).

49. *See, e.g.*, Grieg, *supra* note 2, at 322 (considering the context of a disagreement between France and the United Kingdom over reservations to the 1958 Continental Shelf Agreement and arguing that the final legal effect of protesting and accepting a reservation are the same, as long as the objecting state wants to maintain some level of obligation).

50. *Id.*

In light of the relatively liberal approach to reservations in the Vienna Convention, one might think that the number of reservations appended to multilateral treaties would be relatively high. In fact, few states actually do attach reservations to their accession to a treaty. Although the percentage of treaties with reservations rose after World War II, when reservations became more widely accepted, the high point, as of 1980, was only six percent of treaties in force.[51] We suggest that the reciprocity mechanism of Article 21(1) plays an important role in limiting the number of reservations. One reason may be that realization that if too many states attempt to tailor treaties precisely to parochial interests by attaching reservations, the resulting patchwork will ultimately undermine the value of the agreement itself. Something more must be involved, however, given the practical limitations to effective objection to a reservation. While the threat of a reservation may be useful as a bargaining chip in negotiations, a reservation itself is a double-edged sword because of Article 21(1) and therefore not as useful a weapon as might appear at first glance. As explained in the section below, the prisoner's dilemma game illustrates how reciprocity provides a powerful deterrent on the appendage of reservations to multilateral contract-type treaties.

IV.
TREATY RESERVATIONS AND THE ECONOMICS OF ARTICLE 21(1)

Game theory is a useful tool for understanding the effects of reciprocity on states' reservations to treaties. Signing a treaty gives a state the *option* to be bound by the treaty but until ratification, the state has no enforceable obligation to adhere to it. Absent effective contractual constraints in the pre-ratification phase, states would have a clear opportunity for strategic behavior and therefore would rationally introduce unilateral reservations at the time of ratification.[52] Left unconstrained, this strategy would dominate in equilibrium. To cope with this reality, basic norms of reciprocity have emerged as international law. In particular, Article 21(1)(b) of the 1969 Vienna Convention creates a mirror-image mechanism to counteract unilateral reservations.[53] The effects of this automatic reciprocity mechanism are similar to a tit-for-tat strategy[54] with the added advantage that states do not need to retaliate actively: whenever one state

51. Gamble, *supra* note 3, at 378. Recent multilateral conventions have precluded the use of reservations entirely or severely limited them. This reflects the same calculus, however: although the Vienna Convention allows reservations, states find it in their interest to give up use of that mechanism. *See infra* Part V. For examples of multilateral treaties that prohibit or limit reservations, see, e.g., Agreement on Trade-Related Aspects of Intellectual Property Rights, Dec. 15, 1993, *reprinted in* 33 I.L.M. 81,110 (1982); Kyoto Protocol, Dec. 10, 1997, *reprinted in* 37 I.L.M. 22, 42 (1998); Marrakesh Agreement Establishing the World Trade Organization, art. XVI(5).

52. Standards of compliance in treaty implementation also rely heavily on the subsequent practice of states. The post-contractual behavior of states can shape and modify the content of an already finalized agreement, or even abrogate a treaty.

53. The specific language is as follows: "Legal Effects of Reservations and of Objections to Reservations: A reservation established with regard to another party . . . modifies those provisions to the same extent for that other party in its relations with the reserving state." Vienna Convention, *supra* note 1, art. 21(1)(b).

54. *See infra* note 59 and accompanying text.

modifies a treaty unilaterally in its favor, the reflexive result will be a *de facto* across-the-board introduction of an identical reservation against the reserving state. In the following section, we will illustrate how, by imposing a symmetry constraint on the states' choices, this rule offers a possible solution to prisoner's dilemma problems.[55]

A. Prisoner's Dilemma, Reciprocity and Incentive Alignment

Given a perfect alignment of incentives, no state would want to introduce unilateral reservations, nor would it have a reason to fear that other signatory states would introduce them. In such an ideal world, stable treaty relationships of mutual cooperation would preclude the need for international treaty reservations and the equilibrium would converge towards mutually desirable outcomes. Because strategies that maximize an individual state's expected payoffs would also maximize the interest of other states, no player would have any reason to challenge the emerging equilibrium. The perfect alignment of states' incentives can be either endogenous or exogenous. In the former case, signatory states naturally find themselves in such a heavenly relationship.[56] In the latter case, outside constraints induce the parties to behave "as if" their incentives were perfectly aligned, thereby overcoming any underlying conflict of interests.

The Article 21(1) reciprocity constraint is an important example of such exogenous force because it shapes states' strategic choices. Although each player can cause the joint enterprise of the international agreement to fail by defecting (that is, by introducing reservations), no state can, in fact, obtain the unilateral reservation payoff. Withholding complete ratification of the treaty triggers a mirror-image reduction in the other states' implementation of the treaty with respect to the reserving state. Under most circumstances, this reciprocity mechanism prevents unilateral defection and free-riding strategies from dominating in equilibrium because states can only *reduce* the anticipated benefit of the treaty for other states, and, by doing so, for themselves. In the end, the unilateral veto effect of the reciprocity rule only creates an illusion that the agreement is fragile; in reality, it makes the negotiated cooperative solution more robust.

55. In the classic prisoner's dilemma scenario, two perpetrators are arrested by the police and held in isolation from each other. If neither confesses, the D.A. will have to cut a favorable plea bargain in which each will serve one year in prison. If one confesses and the other does not, the silent one will receive a ten-year sentence and the confessor will go free. If both confess, then both will receive a five-year sentence. Although it would be in their interest to keep quiet, neither can trust the other not to try to opt for the best deal by confessing, and therefore they will inevitably end up with five year sentences, a less than optimal outcome for both. ERIC RASMUSEN, GAMES AND INFORMATION: AN INTRODUCTION TO GAME THEORY 17-19 (Blackwell Publisher 1994).

56. The perfect alignment of individual interests, however, rarely occurs in real life situations. In the absence of proper enforcement mechanisms, even a Pareto improving exchange opportunity creates a temptation for shirking and ex post opportunism. When shirking and post-contractual opportunism becomes a dominant strategy for one or both players, the exploitation of opportunities for mutual exchange becomes difficult or unobtainable. *See* Anthony Kronman, *Contract Law and the State of Nature*, 1 J. L. ECON. & ORG. 1, 5 (1985).

However, we should point to the important fact that, while the principle of reciprocity of Art. 21(1) solves conflict situations characterized by a prisoner's dilemma structure (in both symmetric and asymmetric cases), reciprocity is, on its own, incapable of correcting other strategic problems. Reciprocity constraints are effective only if there are incentives for unilateral defection. As will be discussed below, reciprocity will be ineffective in other strategic situations (for example, asymmetric cooperation games, Battle of the Sexes games, and pure conflict situations).

B. Article 21 and the Game Theory of Reciprocity in Symmetric Situations

Reciprocity constrains states' action. The well-known prisoner's dilemma game illustrates in interesting ways how Article 21(1) can influence states' incentives related to treaty ratification because it aptly depicts the ratification problem faced by sovereign states. Unlike the atomistic world of non-strategic economics, the ability to introduce unilateral reservations may produce sub-optimal equilibria. Game theory teaches that such strategic problems result when players are only allowed to choose strategies, but cannot single-handedly determine outcomes, as in our situation when states can only choose their level of ratification and cannot unilaterally compel full ratification by the other states. If there were no reciprocity constraints, each state would try to gain national advantage by accessing the unilateral reservation payoffs through introducing unilateral reservations, thereby submitting to the temptation to defect from optimal strategies. The combined effect of such unilateral strategies would generate outcomes that are not Pareto optimal[57] for all states, as in the classic prisoner's dilemma setting.

By eliminating access to asymmetric outcomes of the game, Article 21(1) induces states to choose ratification strategies that take into account the reality of reciprocity, namely that the reward for unilateral defection is unobtainable. As a result, no rational state would employ defection strategies (unilateral reservations) in the hope of obtaining higher payoffs, nor would it select reservation strategies as a merely defensive tactic. Automatic reciprocity mechanisms thus guarantee the destabilization of mutual defection strategies and the shift toward optimizing cooperation in the ratification of international treaties.[58]

This mechanism of automatic reciprocity produces effects that are similar to a tit-for-tat strategy without any need for active retaliation by other states.[59]

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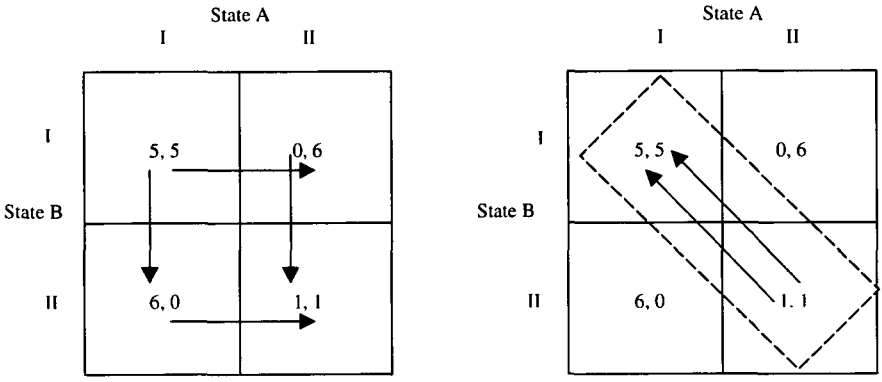
57. Pareto optimal refers to the condition in which players have achieved an optimal allocation of benefits in reference to each other. Once in a Pareto optimal allocation, no player can move to increase his advantage without putting another player in a less desirable position. Conversely, a Pareto superior opportunity allows a welfare improvement for at least one party, with no prejudice for the other parties.

58. For a similar argument relying on tit-for-tat strategies in iterated games, see R. M. AXELROD, THE EVOLUTION OF COOPERATION (1984); R.M. Axelrod, *The Emergence of Cooperation Among Egoists*, 75 AM. POL. SCI. REV. 306, 306-307 (1981).

59. The tit-for-tat strategy can be undertaken in repeated prisoner's dilemma games. According to the tit for tat strategy, in round one, Player A undertakes a cooperative strategy. In round two, Player A continues the interaction with his opponent undertaking the same strategy that his opponent, Player B, chose in round one. Under certain conditions, this may facilitate cooperation be-

Whenever one state makes a unilateral modification in its own favor, it will be as if all the other states had introduced an identical reservation against the reserving state. This rule imposes a symmetry constraint on the parties' choices and offers a possible solution to prisoner's dilemma problems. In Figure (1) the equilibrium obtained in the absence of reciprocity (left matrix) is contrasted with the outcome induced by a reciprocity constraint (right matrix).

FIGURE (1): RECIPROCITY CONSTRAINT FOR A TREATY RATIFICATION PROBLEM WITH SYMMETRIC STATES



For the sake of graphical clarity, Figure (1) depicts the simplest scenario of two states faced with a ratification problem, although the results also hold in the more complex case of multilateral treaties described in the present paper. In Figure (1) we consider the choices of two states faced with a treaty ratification problem. Both states have a choice between strategy I, full ratification, and strategy II, unilateral reservation. The payoffs for State A's choices between two strategies (strategy I and II) are marked on the right side of each of the eight boxes. Likewise, State B' s choices between strategy I and II, are marked on the left side of each of the eight boxes.

As shown by the payoff matrix on the left, in the absence of a reciprocity constraint similar to the one introduced by Article 21(1) of the Vienna Convention, each state would be better off, winning six points, if it were able to obtain the ratification of the other state, while introducing a unilateral reservation itself. Thus, as shown by the direction of the arrows, the Nash strategies[60] of the par-

tween the players since Player B will lose in the second round whatever advantage he might have had over Player A in the first round. For instance, if Company A prices candy bars at seventy-five cents and Company B sells them for seventy cents, Company A will then lower its price. Company B either has to sell at a greater loss or give up its advantage and settle on seventy cents as the price. For a brief explanation see Robert Shenk, *Tit for Tat, available at* http://ingrimayne.saintjoe.edu/econ/IndividualGroup/TitForTat.html (last accessed Oct. 8, 2002). *See generally* AXELROD, *supra* note 58.

60. A party's Nash strategy is the conditional best response to the opponent's choice of strategy (i.e., it is the strategy that will make the player better off than all other courses of action, given the opponent's move).

ties tend to produce the outcome that both states introduce reservations, which in turn yields the lowest aggregate payoff for the two states (1, 1). Indeed, both states face dominant strategies of unilateral reservation (that is, reservation is the best response to the other state's action under all conditions). Similar to a prisoner's dilemma, this yields a single Nash equilibrium[61] of bilateral defection. In our context, the equilibrium would be characterized by mutual reservations of all states.

The payoff matrix on the right shows the effect of Article 21(1) on the optimal strategies of the parties. By eliminating access to asymmetric outcomes, reciprocity compels a party to take into account the effect of the opponent's reciprocal choice when selecting its own optimal strategy. In this way, the dominant strategy of attaching reservations, obtained in the absence of reciprocity, is transformed into a dominant strategy of full ratification, producing optimal levels of treaty ratification for the signatory states (5, 5).

V.
TREATY RESERVATIONS IN PRACTICE: THE ICJ AND THE ENFORCEMENT OF RECIPROCITY

The following cases illustrate how the general principle of reciprocity has worked in practice and demonstrate how, in cases of uncertainty, reserving states have in fact been disadvantaged by putting limitations on their adherence to a treaty.

A. Norwegian Loan Case

In considering cases related to reservations, the ICJ has raised the price of attaching one to a treaty and thus perhaps discouraged their use. The concept of reciprocity has played an important role in this, as the ICJ has been generous in allowing others states to take advantage of an exception insisted upon by a particular signatory. For instance, in *Certain Norwegian Loans*, Norway was able to use a French reservation to argue successfully to the ICJ that it did not have jurisdiction to hear a dispute between France and Norway over repayment of loans that Norwegian banks made to France.[62]

Both France and Norway had submitted to the jurisdiction of the ICJ, but with differing declarations. Specifically, the French added the following reservation to its declaration: "This declaration does not apply to differences relating to matters which are essentially within the national jurisdiction as understood by the Government of the French Republic."[63] As Norway took the position that the resolution of the loan repayment dispute was a question governed by munici-

61. The Nash equilibrium is reached when no player can improve his position as long as the other players adhere to the strategy they have adopted.

62. Certain Norwegian Loans (Fr. v. Nor.), 1957 I.C.J. 9, 11 (July 6).

63. *Id.* at 23. It is worth noting that the validity of the reservation itself was not in doubt, although it did aim to circumscribe the jurisdiction of the Court and therefore perhaps enter the zone of the "essential function" of the Statute creating the court, as envisioned in the Genocide Advisory Opinion. *Id.* at 27.

pal, not international, law,[64] it sought to avail itself of the French reservation blocking the ICJ from considering questions within national jurisdiction. Accordingly, it insisted that, although it "did not insert any such reservation in its own Declaration. . . . it has the right to rely upon the restrictions placed by France upon her own undertakings."[65] The ICJ agreed that the basis of its jurisdiction was the voluntary, reciprocal submission of the parties, and so "consequently, the common will of the Parties, which is the basis of the Court's jurisdiction, exists within these narrower limits indicated by the French reservation."[66] Accordingly, Norway, taking advantage of France's reservation, could shield from the ICJ a dispute with France that Norway felt was in the purview of its national jurisdiction, although it originally has not restricted the scope of its participation in the ICJ.[67]

B. The Interhandel Case

Shortly after the Norwegian Loans case, the ICJ set down the guiding principle for handling reservations to submission to its jurisdiction. In *Interhandel*, a dispute between the United States and Switzerland over unfreezing Swiss assets after World War II,[68] the ICJ found that "[r]eciprocity in the case of Declarations accepting the compulsory jurisdiction of the Court enables a Party to invoke a reservation to that acceptance which it has not expressed in its own Declaration but which the other Party has expressed in its Declaration."[69] This would seem to be in keeping with the Pan-American Rule, later reflected in Article 21 of the Vienna Convention, that a reserving state must share the advantage that it is trying to preserve within the framework of its bilateral relations with other parties to the treaty. The ICJ went further, however, by limiting the benefit of the reservation to the other states, rather than the reserving state. The United States had limited its submission to the jurisdiction of the ICJ to disputes arising after the treaty entered into force; Switzerland did not have any such restriction.[70] The United States tried to argue that because Switzerland *could* have invoked the reservation against the United States to avoid the jurisdiction of the court, as Norway did against France, that the United States should, under the reciprocity principle, be able to claim lack of jurisdiction based on the date of the dispute.[71] The ICJ rejected that argument:

> Reciprocity enables the State which has made the wider acceptance of the jurisdiction of the Court to rely upon the reservations to the acceptance laid down by the other Party. There the effect of reciprocity ends. It cannot justify a State, in

64. *Id.* at 22.
65. *Id.* at 23.
66. *Id.*
67. *Id.* at 24.
68. Interhandel (Switz. v. U.S.), 1959 I.C.J. 6 (Mar. 21).
69. *Id.* at 23.
70. *Id.* at 14-15.
71. *Id.* at 23. This was an issue because the ICJ rejected the primary U.S. argument that the dispute had arisen before the U.S. had submitted to the compulsory jurisdiction of the court. *Id.* at 21.

> this instance, the United States, in relying upon a restriction which the other Party, Switzerland, has not included in its own Declaration.[72]

In short, the effect of a reservation cannot bounce back to the reserving state simply because the other party has the option of availing itself of the limitation. Seen against the backdrop of the Advisory Opinion effort to prevent reservations that would contradict the "essential object of the treaty," the ICJ wanted to limit the natural tendencies of states to hedge their submission to the jurisdiction of the Court when another state was trying to press its case.

VI.
THE LIMITS OF RECIPROCITY AND EMERGING PROBLEMS IN TREATY RESERVATIONS

A. *Heterogeneous States and Asymmetric States' Interests: Ex-Ante Preclusion of Reservations*

States often find themselves with asymmetric treaty interests at the time of treaty ratification. This enables states to calculate how they and other nations will benefit from the agreement. If there is no uncertainty about the effects of treaty terms, then the costs and benefits of attaching reservations become much clearer. In such situations, states may face incentives for unilateral reservations, in spite of reciprocity constraints. We suggest that the principle of reciprocity, while solving conflict situations characterized by a symmetric prisoner's dilemma structure, may by itself be incapable of correcting other strategic problems. In spite of the reciprocity constraint of Article 21(1), states can find it valuable to introduce reservations that impose asymmetric costs and benefits on the various participants.

Reciprocity constraints are, indeed, effective only in those cases that generate incentives for unilateral defection. Figure (2) illustrates a situation where reciprocity is ineffective. The matrix depicts a Battle of the Sexes game,[73] but the same conclusion would hold for a pure-conflict (zero-sum) situation.[74] This figure again presents the simplest scenario of two states faced with a ratification problem, although here too the results hold in the more complex case of multilateral treaties, considered in the present paper. For example, this scenario could illustrate a treaty for the coordination of communication or transmission frequencies. If states do not coordinate, but rather choose to depart unilaterally from the treaty regime, they will literally not be able to communicate, and no one will benefit. Coordination is paramount, but states have different preferences on how to cooperate, given differing national technological standards and infrastructure.

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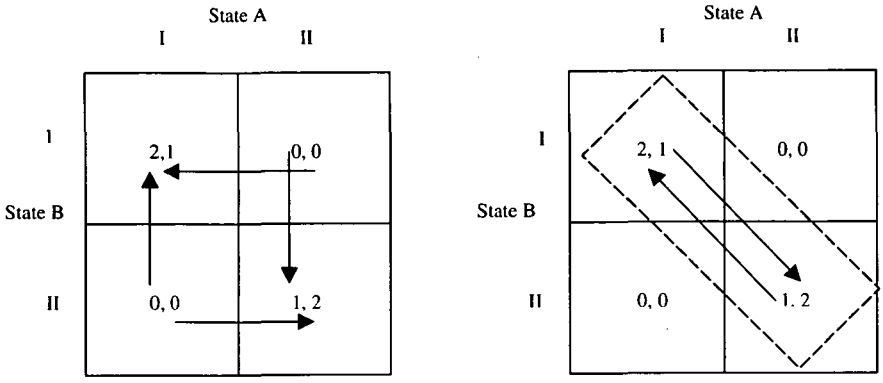
72. *Id.* at 23.

73. In the classic Battle of the Sexes scenario, the husband wants to go to a sporting event and the wife to the opera, yet both want to spend time together. There is no uncertainty in this situation, yet also no solution that will avoid some loss of enjoyment for one of the parties (either one will have to go to an unenjoyable event or both will have to forego the pleasure of each other's company). RASMUSEN, *supra* note 55, at 25-26.

74. A zero sum game is one in which players are competing for a finite number of resources; a gain by one necessitates a loss by another.

FIGURE (2): A CASE OF INEFFECTIVE RECIPROCITY



In Figure (2) we illustrate the choices of two states faced with such a treaty ratification problem. For both states, strategy I represents a choice of full ratification, while strategy II represents a choice of unilateral reservation. Recall that State A chooses between strategies I and II, yielding the payoffs marked on the right side of each of the eight boxes. Likewise, State B chooses between those two strategies, attempting to maximize the payoffs marked on the left side of each of the eight boxes. The payoff matrix on the left shows the states' optimal strategic choice in the absence of the reciprocity constraint found in Article 21(1) of the Vienna Convention. Similar to a Battle of the Sexes game, this mixed coordination and cooperation problem yields multiple Nash equilibria. The payoff matrix on the right shows the effect of Article 21(1) on the optimal strategies of the parties. The reciprocity constraint introduced by such a rule eliminates the possibility of asymmetric outcomes and compels each party to take into account the effect of the opponent's reciprocal choice. Yet, Figure (2) illustrates the limits of the reciprocity, as, despite its restraining force, both scenarios produce identical results.

The limited ability of reciprocity to constrain the strategic action of states explains the emergence of other legal mechanisms to prevent the unraveling of treaty terms due to unilateral reservations attached at the time of treaty ratification. As discussed in the following section, the emergence of concepts such as the "package deal" helps promote optimal levels of treaty ratification when multiple states with substantial asymmetries in their interests are involved.

B. Asymmetric Reservations and the Concept of the "Package Deal"

When states discover during treaty negotiations that they have asymmetric interests, they have an opportunity to introduce reservations that, in spite of the reciprocity constraint of Article 21(1), would create asymmetric costs and benefits for the various participants. For example, a state that has extensive coastlines may have a different substantive interest in the definition of territorial water limits than states with coastlines of average length. Likewise, a state with

uniquely configured coastal contours may have different preferences than the majority with respect to rules defining bays, straits, archipelagoes, and so on. This limitation in constraining the strategic action of states explains the emergence of the concept of the "package deal" to ensure ratification of treaties involving multiple states with substantially different underlying interests. Articles 309 and 310 of the Law of the Sea Convention offer an important illustration of this concept.[75]

1. The "Package Deal" under Articles 309 and 310 of the UN Convention on the Law of the Sea

Until the late nineteenth century, the law of the sea operated on the basis of customary norms, but the trend towards codification influenced it as well. Milestones in this process included the Hague Codification Conference of 1930, the Geneva Conventions of 1958 and finally the United Nations Convention on the Law of the Sea, which ended with a Convention text in 1982 that largely reflects existing customary rules pertaining to the law of the sea.[76]

Although the Convention itself may reflect customary international law, the negotiations demonstrated an important shift towards treaty drafting by consensus. The General Assembly set the tone with a resolution recognizing that the main issues, such as territorial waters, the continental shelf, and the ocean floor beyond national jurisdiction are "closely linked together," leading to the concept that they should all be treated as a "package."[77] The final clauses of the treaty enshrined this consensual approach. Nations saw this part of the treaty that regulated procedural matters including the approach towards reservations, as critical for preserving the integrity of the Convention.[78] A report of the Australian delegation noted that solution on the substantive issues and agreement on the prohibition on reservations were linked, as states were not willing to give up the latter until they were convinced that they had secured every advantage in the former.[79] Although states attempted to use the final clauses as a bargaining chip to secure favorable language in the substantive provisions, there was an underlying understanding that, in the end, acceptance of the treaty would have to be an all or nothing proposition.[80] The United States was even more direct: "Since the Convention is an overall 'package deal'. . . . to permit reservations would inevitably permit one State to eliminate the 'quid' of another State's 'quo.' Thus

75. United Nations Convention of the Law of the Sea, Dec. 10, 1982, art. 309-310, U.N. Doc. A/CONF.62/122, *reprinted in* 21 I.L.M. 1261 (1982) [hereinafter Law of the Sea Convention], *available at* http://www.un.org/Depts/los/convention_agreements/texts/unclos/closindx.htm (last visited Nov. 8, 2002).

76. Hugo Caminos, *Progressive Development of International Law and the Package Deal*, 79 AM. J. INT'L L. 871, 871 (1985).

77. G.A. Res. 2574A, U.N. GAOR, 24th Sess., Supp. No. 30, at 10, U.N. Doc. A/7630 (1969), *quoted in* Caminos, *supra* note 76, at 874.

78. Department of Foreign Affairs, *Report of the Australian Delegation*, 3d UN Conference on the Law of the Sea, 9th Sess., at 25 (1980).

79. *Id.* at 25-26.

80. Bernard H. Oxman, *The Third United Nations Conference on the Law of the Sea: the Ninth Session*, 75 AM. J. INT'L L. 211, 248 n.172 (1981).

there was general agreement in the Conference that in principle reservations could not be permitted."[81]

A 1979 President's note outlining the discussion at an August 1 informal plenary also drew the link between the substantive provisions of the treaty and states' willingness to give up the right to append a reservation. Describing the realization of the delegates that the question of reservations was both "delicate" and "complicated," the report captured the consensus that the "basic and overriding policy" would be to preserve the "package deal," which could be fatally undermined by allowing a wide range of reservations.[82] Discussion ensued on how best to achieve that objective. A 1976 Report by the Secretary General listed four options for handling reservations.[83] The informal plenary discussed the possibility of allowing reservations under limited circumstances, although no state specified to what provision it might attach a reservation.[84] The current of the discussion ultimately ran against allowing reservations, however. For instance, concerns were raised about permitting reservations "not incompatible with the treaty," because there was no agreed mechanism for determining which reservations would meet that standard.[85] Other arguments for not allowing any reservations centered around the unique character of the Convention as a whole and a variety of global policy considerations.

In the end, Ambassador Jens Evensen from Norway, the chief drafter of the Final Clauses, followed the Convention's overall approach of negotiation by consensus to introduce a draft text of a one paragraph prohibition on all reservations: "no reservations or exceptions may be made to this Convention unless expressly permitted by other articles of this Convention."[86] This approach mirrored the general agreement among the states that they would have to accept the good and bad of the Convention because the "rights and obligations go hand in hand and it is not permissible to claim rights under the Convention without being willing to shoulder the corresponding obligations."[87] It does not appear that this approach precluded participation in the treaty itself because the question of reservations barely appeared in the official declarations that were made

81. REPORTS OF THE UNITED STATES DELEGATION TO THE THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA 449 (Myron Nordquist & Choon-ho Park eds., 1983).

82. President's Note, Informal Plenary on Final Clauses, FC/6 7 Aug. 1979.

83. 1) allow no reservations; 2) allow reservations only on specific provisions of the treaty, thereby balancing the need for consensus with the rights under the Vienna Convention to apply reservations; 3) designate a limited number of provisions to which reservations may be attached; or 4) include no provisions on reservations, allowing Article 19 of the Vienna Convention to be the default position. Third U.N. Conf. on the Law of the Sea Off. Records at 125-27. Another suggestion was to preclude reservations for twenty-five years after the treaty went into force and then to hold a review conference to identify which provisions could be accepted as customary international law or integral parts of package deals. President's Note, *supra* note 82, paras. d-e.

84. President's Note, *supra* note 82, para. e.; Department of Foreign Affairs, *supra* note 78, at 26.

85. Presidential Note, *supra* note 82, para. f.

86. Jens Evensen, *Wrapping Up the UNCLOS III 'Package': At Long Last, the Final Clauses* 20 VA. J. INT'L. L. 347, 365 (1980); Law of the Sea Convention, supra note 75, art. 309.

87. Statement of Tommy Koh, President of the Third Coference of the Law of the Sea, quoted in Caminos, *supra* note 76, at 886.

after the negotiations were concluded.[88] Even the United States did not mention the reservation issue, in spite of the fact that more flexibility might have induced the Reagan Administration to change its policy and sign the Convention.[89] Finally, 157 states signed the Convention, certainly a strong turn-out, 35 of which added declarations. The treaty entered into force on November 16, 1994, and currently has 137 ratifications, 50 of which include some sort of declaration.[90]

Although the language of Article 309 prohibiting reservations mirrors the approach of the treaty as a whole, the states did preserve the right to attach declarations and other indications of national understanding of the treaty and its ramifications. Article 310 allows states to make declarations explaining the integration of their "laws and regulations . . . with the provisions of [the] Convention, provided that such declarations or statements do not purport to exclude or to modify the legal effect of the provisions of [the] Convention in their application to that State."[91]

There was some concern that states would use Article 310 as a vehicle to declare reservations to the treaty under another label, thereby winning for themselves an advantage without the restraint that the principle of reciprocity offers in a straightforward reservation. Where the admonition of the President of the Convention was gentle,[92] the warning of the delegate from the Ukrainian Soviet Socialist Republic was blunt: "we are going to object categorically to the proposals aimed at amending by any pretext the provisions of the Conventions . . . the Ukrainian S.S.R. will abstain from the declarations provided for in Article 310 of the Convention. We expect the same approach from other delegations."[93] An analysis of the declarations themselves, done five years after the treaty was completed, revealed that few of them could be interpreted as reservations in fact, if not in form; few appeared to have the potential to change the legal effect of the treaty itself.[94] It appears that Article 310 fulfilled its purpose as a platform for national interpretations of the treaty, but that the basic commitment was to preserving the terms of the treaty in their entirety, showcasing the general understanding that individual state interest on specific items would have to be set aside in favor of a consensual comprehensive regime.

88. For instance, Tommy Koh only alluded to reservations in his remarks encouraging signature of the treaty. *Id.* Statements of other countries indicated that, on balance, the Convention promoted national interests, and so the lack of provision for reservations was not a problem. John King Gamble, *The 1982 U.N. Convention on the Law of the Sea: A "Midstream" Assessment of the Effectiveness of Article 309*, 24 SAN DIEGO L. REV. 627, 630-31 (1987).

89. Gamble, *supra* note 88, at 631.

90. STATUS OF THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA (2002), *available at* http://www.un.org/Depts/los/reference_files/status2002.pdf (last visited Oct. 10, 2002).

91. Law of the Sea Convention, *supra* note 75. For a discussion of these declarations, finding that about a dozen of the 146 declarations may, in fact, cross the line into de facto reservations, see Gamble, *supra* note 88, at 644.

92. Statement by Tommy T.B. Koh, President, 185th meeting, held 6 Dec. 1982 in Vol. 17 Third United Nations Conference on the Law of the Sea Official Records, U.N. Press Release SEA/MB/1/Rev.1, Dec. 6, 1982, at 6.

93. Statement by V.N. Martynenko, Chairman of the Ukrainian S.S.R. Delegation, made at the Law of the Sea Convention Plenary Session of Dec. 7, 1982, at 3, *quoted in* Gamble, *supra* note 88, at 630.

94. Gamble, *supra* note 88, at 630.

The package deal solution in essence returned the approach to reservations to the Pre-World War II norm of the unanimity rule. Although the solution was voluntary, the result was the same: each state had to accept the treaty as written, and no latecomer to the agreement could change the treaty as applied to itself by appending a reservation. States were willing to give up the ability to append reservations because it was easy to do the cost-benefit analysis of treaty ratification and quantify how the material situation of each state would improve by adhering to the terms of the Convention. This solution, however, is dependent on states' voluntary agreement to surrender the right to make reservations. In the arena of human rights conventions, which are also characterized by asymmetric interests and negotiating positions, states are not willing to give up the Vienna Convention right to make reservations. The treaties themselves are therefore vulnerable to erosion, and the international community still needs a mechanism to encourage adherence to this kind of international agreement.

C. The Irrelevance of Reciprocity in Human Rights Conventions

Although reciprocity is a fundamental principle of international law that governs treaty relations between states, it does not form the foundation for human rights treaties. These conventions do not represent agreements among states, but often amount instead to unilateral declarations by governments that they are willing to abide by international norms in their dealings with their own citizens.[95] A human rights treaty often nets the signing state little in concrete benefits. It is instead an assumption of obligations for purposes of prestige. As a result, the mechanism of reciprocity is not a direct factor in the implementation of such treaties.[96]

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95. Curtis Bradley & Jack L. Goldsmith, *Treaties, Human Rights, and Conditional Consent*, CHICAGO PUBLIC LAW AND LEGAL WORKING PAPER NO. 10 at 2-3 (2000); *Report of the International Law Commission on the Work of its Forty-Ninth Session*, para. 69, U.N. Doc. A/CN.4/483 (1998) (expressing the view of some states that human rights are not based on reciprocity and therefore are beyond the scope of the Vienna Convention); *General Comment on Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols Thereto, or in Relation to Declarations under Article 41 of the Covenant*, U.N. Doc. CCPR/C/21/Rev.1/Add.6, para. 8 (1994) (stating that "(a)lthough treaties that are mere exchanges of obligations between States allow them to reserve *inter se* application of rules of general international law, it is otherwise in human rights treaties, which are for the benefit of persons within their jurisdiction"). *See also id.* at para. 17 (declaring that "the principle of inter-State reciprocity has no place" in the human rights context).

96. The ICJ drew this distinction in *Barcelona Traction*, when it considered whether Belgium had the right to press for compensation for shareholders of a Canadian company who were Belgian nationals. Barcelona Traction, Light & Power Co. (Belg. v. Spain), 1970 I.C.J. 3 (Feb. 5). The ICJ distinguished between the "obligations of a State towards the international community as a whole," and those arising out of bilateral relations between states. *Id.* at 32. In the latter case, a state must demonstrate a basis for a right to bring action against another state in a dispute. The court listed as examples of such universal obligations "outlawing of acts of aggression, and of genocide, . . . [and enforcement of] rules concerning the basic rights of the human person, including protection from slavery and racial discrimination." *Id.* Because of the importance of these objectives, they are "obligations erga omnes" and all states have the legal authority to bring action against other states that violate them. The basic reciprocal nature of treaty rights breaks down and nations ratify, or encourage enforcement, of treaties based on political calculations and value judgments, rather than the desire to maintain the status quo through recognition of bilateral rights and responsibilities. *See,*

Because of this essential difference, the circumspection with which countries approach reservations in the context of contractual treaties does not hold in the arena of human rights conventions. For instance, the Convention on the Elimination of Discrimination Against Women, although negotiated and adopted very quickly, came into force with at least 23 of 100 states attaching a total of 88 significant reservations.[97] The International Covenant on Civil and Political Rights met with a similar reaction, as 46 states attached 150 reservations to the treaty by November 1, 1994.[98] Resistance to human rights treaties is not limited to non-democratic countries. The United States ratified the Covenant on Political and Civil Rights but attached five reservations, as well as some understandings and declarations, to the twelve Articles of the agreement, essentially insulating itself from any obligation to change its laws to comply with it.[99]

By their very nature, human rights treaties touch on sensitive cultural issues, meaning that states may hesitate to object to a reservation for fear of causing unnecessary tension in existing bilateral relationships.[100] The focus is on a state's individual actions and the extent to which it meets international standards, or fails to do so, so that other states generally do not have a vested interest in policing how closely a reserving state is respecting the letter of the convention.[101] Although states may object to a reservation, each convention has an international body that is responsible for monitoring implementation, although it does not have any enforcement powers in the event it determines that a reservation is incompatible with the intent of the treaty.[102]

As a result, states generally do not hesitate to attach reservations to ratifications of human right treaties. While reciprocity forces states to assess the pluses and minuses of attaching reservations in a contractual setting, acting as a general deterrent for reservations, this mechanism is absent in the human rights arena. This leads to obvious abuses of the system and reservations that are arguably contrary to the object and purpose of the treaty in violation of the Vienna Convention prohibition against reservations.[103] The United Nations has been grap-

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e.g., the Nuclear Tests cases and the East Timor Case, in which Australia and Portugal, respectively, asserted the right to represent the international community in a dispute.

97. Rebecca Cook, *Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women*, 30 VA. J. INT'L L. 643 (1990).

98. *General Comment on Issues Relating to Reservations*, *supra* note 95, at para. 1.

99. John Quigley, *The International Covenant on Civil and Political Rights and the Supremacy Clause*, 42 DEPAUL L. REV. 1287, 1289-90 (1993). *See also* Louis Henkin, *Comment: U.S. Ratification of Human Rights Conventions: the Ghost of Senator Bricker*, 89 A.J.I.L 341 (1995) (urging that the United States be less restrictive in its ratification of human rights treaties).

100. For instance, when criticisms of the reservations that some Islamic states attached to the Convention to End All Discrimination against Women was portrayed as a Western attack on Islamic states, other countries from the developing world rallied to the reserving states, although initially it appeared that they had concerns about the reservations as well. Belinda Clark, *The Vienna Convention Reservations Regime and the Convention on Discrimination Against Women*, 85 AM. J. INT'L L. 281, 284 (1991).

101. Baylis, *supra* note 24, at 312.

102. *See also Report of the International Law Commission*, 48th Sess., ch. 6, para. 129-32, U.N. Doc. A/51/10 (1996).

103. For references to official expressions of concern, see *Review of Further Developments in Fields With Which the Subcommission Has Been or May Be Concerned: Reservations to Human*

pling with this problem for nearly a decade with no indication that a solution is in the offing.[104]

The International Law Commission put the question of reservations to treaties on its agenda in 1993 and named as Special Rapporteur Alain Pellet of France, who has submitted seven reports since then.[105] The overall purpose of the effort is to draft a guide to practice regarding reservations, that would provide guidance on determining if a reservation is compatible with the purpose of a treaty and develop a mechanism for indicating acceptance or objection to the reservation.[106] Pellet rejected, however, the idea that the question of reservations to human right conventions should be handled outside the regime of the Vienna Convention.[107]

One impetus for the decision to review reservations practice was the attempt by the Committee on Human Rights to assign itself the responsibility of reviewing reservations to human rights treaties to determine if they were in harmony with the object and purpose of the treaty.[108] If they were not, the Committee asserted it would be able to disallow the reservation while still holding

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Rights Treaties, Subcommission on Prevention of Discrimination and Protection of Minorities, Fifty First Session, para. 1, U.N.Doc. E/CN.4/Sub.2/1999/28 (1999). *See also Review of Further Developments in Fields With Which the Sub-Committee Has Been or May Be Concerned: Views of the Six Human Rights Treaty Bodies on the Preliminary Conclusions of the International Law Commission: Report of the Secretary General*, 50th Sess., U.N. Doc E/CN.4/Sub.2/1998/25 (1998). The terms of the Vienna Convention favor the reserving state, as objecting states' only options are 1) not to accept the reservation, meaning that the provision is not in force between them or 2) declare the entire treaty not in force between reserving and objecting state. Furthermore, a state could theoretically attach a reservation to an obligation that it would otherwise have under international norms, thereby potentially circumventing this obligation. *See* Hylton, *supra* note 1, at 441.

104. Subcommission on Prevention of Discrimination and Protection of Minorities, *supra* note 103, at para. 35 (describing the current debate on the use of reservations in human rights treaties as having "reached an impasse"). Although the Special Rapporteur intends to address the specific problem of human rights treaties again sometime in 2003, a parallel study has been initiated by the Commission on Human Rights, leading to a bureaucratic turf battle that promises to complicate the issue further.

105. *Seventh Report on Reservations to Treaties*, International Law Commission, 54th Sess., para. 12, U.N.Doc. A/CN.4/526 (2002).

106. *Id.* at para. 11 (noting that a full survey of the "ambiguities and gaps" related to reservations is included in the First Report on the Law and Practice Relating to Reservations to Treaties, International Law Commission, 47th Sess., A/Cn.4/470, paras. 91-149 (1995)) and para. 15.

107. Specifically, he rejected the idea of exempting human rights treaties from the Vienna Convention regime for the following reasons: (a) The Vienna regime was designed to be universal and, in fact, is derived from a ruling on a human rights treaty (*see supra* Part I(C)); and (b) no state or international body, including the Human Rights Committee in its Comment 24, had challenged the applicability of the Convention to human rights treaties and the majority of such treaties contained specific provisions outlining how reservations would be handled, providing further clarity. He acknowledged the dilemma, first enunciated in the Genocide Case, of balancing broad participation with preservation of the treaty, yet believed that the current reservations regime contained the requisite flexibility to achieve that equilibrium. He also found dispositive the fact that the drafters of the Convention had considered, and rejected, exempting normative treaties from the general reservations regime. *The Report of the International Law Commission on the Work of the Forty-Ninth Session*, U.N. GAOR, 52nd Sess., 75-76, U.N. Doc. A/52/10 (1997), *available at* http://www.un.org/law/ilc/reports/1997/97repfra.htm. *See also Report of the International Law Commission*, 48th Sess., ch. 6, *supra* note 102, at para 123- 24.

108. *General Comment on Issues Relating to Reservations*, *supra* note 20, at para. 18 ("It necessarily falls to the Committee to determine whether a specific reservation is compatible with the object and purpose of the Covenant.").

the country in question accountable for compliance with the treaty as a whole.[109] While the International Law Commission has drawn the preliminary conclusion that monitoring bodies do have the authority to make that assessment, it did not accept the idea that the Committee could act unilaterally on that conclusion.[110] The obvious drawback to the Committee's approach is that it violates state sovereignty and the consensual basis of international treaty law because the Committee is essentially enforcing a treaty against a state in spite of its expressed unwillingness to take on that obligation.[111] Because the Committee was contradicting this basic premise of international law, its approach met with a great deal of protest.[112]

Because of the negative reaction, the declaration of a right to review reservations in Comment 24 has virtually never been tested.[113] In his seventh report, the Special Rapporteur referred to the increasing willingness of human rights monitoring bodies to take a more cooperative approach to working with states to ensure full compliance with the provisions of the convention.[114] Earlier, he had also suggested that facilitated mediation between reserving and objecting states and continued monitoring for compliance with the Vienna Convention by human rights bodies could serve as important tools for ensuring treaty compliance.[115] Although important activities, on their own these will not provide the answer.

If the analysis in this paper is correct, the premise of the Special Rapporteur that human rights treaties fall squarely within the framework of the Vienna Convention maybe wishful thinking from the point of view of game theory analysis.[116] Although undoubtedly correct as a matter of law, and supported by the

109. "The normal consequence of an unacceptable reservation is not that the Covenant will not be in effect at all for a reserving party. Rather, such a reservation will generally be severable, in the sense that the Covenant will be operative for the reserving party without benefit of the reservation." *Id.*

110. Richard W. Edwards, Jr., *Reservations to Treaties: The Belilos Case and the Work of the International Law Commission*, 31 U. TOL. L. REV. 195, 203 (2000).

111. *Report of the International Law Commission*, 48th Sess., ch. 6, *supra* note 102.

112. For instance, the U.S. Congress attempted to cut off funding for U.S. obligations under the Covenant unless the Committee recognized the validity of U.S. reservations. Baylis, *supra* note 24, at 318.

113. The sole exception was a decision by the European Court of Human Rights, *Belilos v. Switzerland*, that adopted the Committee's logic in holding that Switzerland's reservation to the European Convention on Human Rights concerning rights to a fair trial was invalid both because it was not sufficiently specific and because Switzerland had not followed proper procedures. The Court then held Switzerland to the Convention obligations as written, in spite of the fact that it had clearly not intended to be bound to the letter of the agreement. Belilos v. Switzerland, European Court of Human Rights, Docket no. 20/1986/118/167 *at* http://hudoc.echr.coe.int/Hudoc2doc/HEJUD/sift/19.txt (last visited Oct. 8, 2002). The Plaintiff had been arrested and fined by a Police Board for taking part in an unauthorized demonstration. She argued that this action violated the European Convention on Human Rights because the same municipal authority had charged, judged, and fined her in violation of the due process rights afforded her under the convention. *Id.*

114. UNITED NATIONS, GENERAL ASSEMBLY, INTERNATIONAL LAW COMMISSION, SEVENTH REPORT ON RESERVATIONS TO TREATIES; BY ALAIN PELLET, SPECIAL RAPPORTEUR, U.N. Doc. A/CN.4/526 (2002) at para. 50.

115. *Report of the International Law Commission on the Work of the Forty-Ninth Session*, *supra* note 107, at 77.

116. The Special Rapporteur asserted that "problems with regard to the 'non-reciprocity' of undertakings and problems of equality between the parties were not likely to prevent the 'Vienna

majority of states, this premise ignores the critical role of reciprocity in the functioning of reservations, notably absent in the enforcement of human rights treaties in general.

Although work will continue on finding a way to reduce the number of reservations to human rights treaties, the most promising path might inject some aspect of reciprocity into the human rights protection. As illustrated above, a "package deal" approach is an effective way to ameliorate the problem of excessive reservations: expressly limiting the opportunity to make reservations in the human rights treaty itself would obviously solve the problem. The political will for such national hand-tying will come when nations begin to review the human rights conditions in other countries as vital to their own national interest. This connection has been made in a paper by Françoise Hampson, sponsored by the Subcommission on Prevention of Discrimination and Protection of Minorities.[117] In it, Hampson points out the essential link between promotion of human rights and international stability: "human rights norms do not exist in a legal vacuum. One of the objects of the Charter of the United Nations is the promotion of human rights and there has been increasing recognition of the link between respect for human rights and the fundamental goal of any international legal order, that of maintaining international peace and security."[118]

Certainly Americans now understand the importance of promoting education in Afghanistan with a clarity that would have been unthinkable two years ago.[119] Both the repression that allowed the Taliban to keep its grip on power and the subsequent need for Afghanistan to rebuild its economy have directly affected the interests of the American taxpayer. The National Security Strategy for the United States currently has, as its first point, the championing of human dignity around the world.[120] Now that the connection between human rights and national security has been made, perhaps human rights treaties will be seen less as unilateral declarations and more as tools of diplomacy to achieve international stability. Ideally, the greater engagement of states will lead to a greater alignment with the "package deal" model and, thereby, adherence to human right obligations.

Regime' from being applicable." Although the regime may be applicable, this paper illustrates that such application is problematic. *Report of the International Law Commission*, 48th Sess., ch. 6, *supra* note 102, at para 126.

117. Subcommission on Prevention of Discrimination and Protection of Minorities, *supra* note 103.

118. *Id.* at para. 12.

119. Consider, for example, the efforts of a variety of U.S. educational associations to raise money to raise two million dollars to build on an existing effort to distribute school supplies to Afghan children. Information is available at http://www.bluepack.org (last visited Nov. 12, 2002).

120. National Security Strategy for the United States, *at* http://www.whitehouse.gov/nsc/nss.html (last visited Nov. 12, 2002).

VII.
CONCLUSION

Our study of the history and evolution of the law of treaty reservations has revealed conflicting policy goals. On the one hand, allowing unilateral reservations at the time of signature or ratification facilitates broad participation in major international treaties. On the other, the unconstrained introduction of unilateral reservations risks corroding the unity and cohesiveness of multilateral treaties, reducing the net benefits of treaty participation for potential signatory states.

The exceptions carved by the Vienna Convention to the default rules governing unilateral treaty reservations create the possibility of a large number of situations in which states would choose to make reservations in an uncoordinated way, leading to negative results. Although the great majority of cases covered by Articles 19-21 of the Vienna Convention favor the reserving state, it is striking that the number of reservations attached to international treaties is relatively low in spite of that natural advantage. In this Article we have tried to explain this phenomenon by positing that Article 21(1) of the Vienna Convention establishes an effective reciprocity constraint on the uncoordinated reservation choices of states: if a state wants to exempt itself from a treaty obligation, it must be willing to let other nations escape that same burden as well.

The economic model of reciprocity identifies the strengths and weaknesses of the Article 21(1) solution. The problematic results of most strategic interactions stem from the fact that players can only select strategies: outcomes are beyond the control of any individual player and are generated instead by the combination of strategies which each player selects. The reciprocity constraint introduced by Article 21(1) eliminates this problematic feature of the game by preventing asymmetric combinations of strategies. Under Article 21(1), players know that, by selecting a strategy, they are actually determining the outcome of the game. The incentives for unilateral reservation are substantially reduced because the reciprocity constraint transforms a situation of unilateral reservation into one of reciprocal reservation with mutual losses for all states. In symmetric strategic problems, the expected costs and benefits of alternative rules are the same for all group members, and each has an incentive to agree to a set of rules that benefits the entire group, thus maximizing the expected return from the treaty relationship.

However, the game-theory analysis of reciprocity under Article 21 reveals that such mechanisms only guarantee a solution to symmetric strategic problems, such as when states enter into the negotiations with similar interests or when the way the treaty will affect states' future relationships is sufficiently unclear as to make their position statistically symmetrical. This analysis thus unveils the limits of reciprocity in situations where states have asymmetric interests and so have reason to introduce unilateral reservations in spite of the automatic reciprocity effect of Article 21(1)(b). In such cases, erosion of treaty

integrity may be inevitable unless the parties explicitly preclude reservations in the treaty itself.[121]

This analysis suggests the reason that human rights treaties have a much higher rate of unilateral reservations than other categories of treaties. Broad treaty participation is paramount, but the package deal approach does not yet provide a solution to reconciling asymmetric state interests. Human rights conventions obligate states to benefit third parties, thereby rendering the automatic reciprocity effect of reservations less effective than usual. In this scenario, the players have an irreconcilable clash of values and there is no unique equilibrium point; thus reciprocity does not offer a way out of the dilemma. Rather, the only solution is a liberal reservations regime that makes it easy for states to ratify human rights conventions, even though the unilateral reservation of one state would hardly benefit the other non-reserving states by guaranteeing the same "right" to deny human right protection under similar circumstances. In turn, our analysis suggests that only when states view human rights treaties under the "package deal" model, namely when the states see the well-being of third party beneficiaries as critical to their national interest, will states be precluded from weakening their commitment to human rights treaties.

121. Clearly, the problem of opportunistic pursuit of states' idiosyncratic interests will be minimized by the fact that states generally act as long-lived players, faced with a long horizon of repeated international interactions. In such an ideal world of long-term international relations, states may have incentives to refrain from engaging in opportunistic reservation strategies. Yet the shortsighted interests and actions of states' governments may disrupt such ideal conditions.

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Constitutional Precommitments to Gender Affirmative Action in the European Union, Germany, Canada and the United States: A Comparative Approach

Christopher D. Totten

Constitutional Precommitments to Gender Affirmative Action in the European Union, Germany, Canada and the United States: A Comparative Approach

By
Christopher D. Totten*

I.
INTRODUCTION

This Article analyzes the constitutionality of gender affirmative action programs in the United States, Canada, Germany and the European Union. Further, it addresses how the existence of constitutional provisions promoting affirmative action affects public debate in those countries. Germany, Canada, and the European Union have constitutional commitments to at least the maintenance, if not the promotion, of gender affirmative action programs. The United States, on the other hand, has not made a firm, explicit precommitment to such programs in either its Constitution or constitutional jurisprudence.[1]

While Canada, Germany and the European Union have increasingly supported notions of substantive equality, positive governmental duties and indirect discrimination in their gender equality jurisprudence, American constitutional jurisprudence in this area has largely espoused contrary notions of formal equality, negative duties and purposive-only discrimination.[2] Although constitutional

* Visiting lecturer, West Virginia University College of Law.

1. "Constitutional precommitment" is a term of art borrowed from Cass Sunstein. *See generally* Cass Sunstein, *Constitutionalism and Secession*, 58 U. CHI. L. REV. 633, 637-43 (1991). Sunstein's discussion of constitutional precommitments suggests that he views precommitments as including both textual provisions in constitutions and judicial decisions interpreting such provisions. For example, he comments generally that "constitutional provisions may be facilitative [in the sense of constituting] a decision to take certain issues off the ordinary political agenda." *Id.* at 639. Later on, he also points out that "the decision to constitutionalize the right to abortion [in *Roe v. Wade*] might be justified because it minimizes the chances that this intractable and polarizing question will intrude into and thus disable the political process." *Id.* at 639-40. Similarly, unless otherwise indicated, my own reference throughout the Article to "constitutional precommitments" or "precommitments" will imply both sources for precommitments: textual constitutional provisions and judicial decisions containing interpretations of those provisions.

2. The degree to which German equality jurisprudence supports these concepts remains contested; generally, the jurisprudence of the highest German Federal Constitutional Court supports these concepts more than its American counterpart. Substantive equality recognizes that for individ-

precommitments in Germany, Canada and the European Union permit the highest constitutional courts in those countries to uphold challenged gender affirmative action programs, these courts have not held that the precommitments grant women a positive right to seek judicial enforcement of affirmative action programs in the face of existing societal inequality.[3] Conversely, though the United States Constitution and related jurisprudence lack a firm precommitment to gender affirmative action, and the U.S. Supreme Court must overcome significant constitutional hurdles before it finds a gender affirmative action program permissible, American jurisprudence does not unequivocally prevent the United States Supreme Court from upholding such a program.[4]

My findings regarding the implications of constitutional precommitments for gender affirmative action in Germany, the European Union, and Canada, suggest the need for a reassessment of the value of constitutional precommitments. In *Constitutionalism and Secession*, Cass Sunstein posited several reasons why a nation might adopt constitutional precommitments, whether in the form of a textual provision or as part of a judicially developed interpretation of such a provision.[5] Relevant to gender affirmative action programs, Sunstein argued that a state might choose a constitutional precommitment in order to effectively remove potentially destabilizing debate from a nation's political agenda.[6] He argues that constitutional precommitments prevent potentially divisive issues, such as religion or abortion, from impeding day-to-day governmental decisions, thereby enabling the democratic process to continue.[7] Various jurisprudential and political developments in Germany, the European Union, Canada and India illustrate that these countries' constitutional precommitments to gender affirmative action have not taken all, or even most, of the debate regarding this potentially divisive issue out of their respective political arenas.[8]

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uals to receive equal treatment in practice, they must often receive different or unequal treatment. Formal equality, on the other hand, forbids any form of discrimination in order to achieve equal treatment.

3. Although technically incorrect, I will refer to the European Union as a country for the sake of convenience. In addition, when I refer to the "constitution" of the European Union, I am using that term loosely to mean the European Community's body of primary law, mainly in the form of treaties, as well as secondary law such as binding directives, whose objectives the Member States must follow.

4. United States Supreme Court jurisprudence suggests that a future holding that such programs are constitutional is unlikely.

5. Sunstein, *supra* note 1, at 637-643.

6. *See id.* at 639.

7. *Id.* at 639-40.

8. Though this Article will primarily focus on the experiences of Canada, Germany and the European Union, India provides an example where a constitutional precommitment has failed considerably in taking debate out of the political arena. Though it is beyond the scope of this Article, one example from the Indian experience merits brief discussion: India's Constitution, in Articles 15(4) and 16(4), allows the State to implement affirmative action programs for the "socially and educationally backward classes of citizens" or for the scheduled castes or Tribes. *See* INDIA CONST. art. 15(4), 16(4). Because of the open-ended nature of the phrase "backward classes", it is not readily apparent who qualifies for preferential treatment under these articles. *See* MARC GALANTER, LAW AND SOCIETY IN MODERN INDIA, *quoted in* VICKI JACKSON & MARK TUSHNET, COMPARATIVE CONSTITUTIONAL LAW 1107, 1111 (1999). Take, for example, the response to the decision by Indian Prime Minister Singh in 1990, acting on a government report, to identify and then set aside a certain,

In the European Union, interpretations of the constitutional precommitment to gender affirmative action by the European Court of Justice sparked debate and even amendment by the Member States and political institutions of the Union. Similarly, in Germany, the precommitment to gender affirmative action did not prevent major political parties from seriously debating this issue. In Canada, although national political actors have not debated the validity of gender affirmative action programs, recent contention and strife over this issue have developed among the general public and provincial leaders despite the existence of a precommitment.

This Article also addresses how the absence of a constitutional precommitment to gender affirmative action has affected discourse on that issue. Though the United States lacks a textual precommitment to gender affirmative action and, in all likelihood, a jurisprudential precommitment as well, American constitutional jurisprudence may reflect a precommitment to formal gender equality. Accordingly, this Article examines how this precommitment has shaped public debate.

II.
THE EUROPEAN UNION

The European Court of Justice's ("ECJ") interpretive experience with a directive on gender equality in the workplace and affirmative action has evolved incrementally.[9] Recently, the ECJ has moved toward an increasingly substantive understanding of equality, perhaps in an effort to conform more closely to the will of the Member States and political institutions of the European Union. This incremental development demonstrates that the European Union's textual precommitment to gender affirmative action did not remove contentious debate from the political arena. In fact, the ECJ's interpretations of this precommitment stirred debate among the political institutions of the Union and the Member States that led to amendments to the original precommitment.

Article 2(1) of binding European Council Directive No. 76/207 provides: "[T]he principle of equal treatment shall mean that there shall be no discrimination whatsoever on grounds of sex either directly or indirectly by reference in particular to marital or family status."[10] Article 2(4) of the directive states, "This Directive shall be without prejudice to measures to promote equal oppor-

large percentage of government jobs and university openings to the loosely defined "Other Backward Classes." The Prime Minister's mere proposal to implement this aspect of the report led to protests and self-immolation by students, and even contributed to the downfall of the Singh government. *See* COMPARATIVE CONSTITUTIONAL LAW, *supra*, at 1120, 1121 (citation omitted). No one in India would argue that affirmative action programs violate the Indian Constitution—that debate has been removed from the political arena; however, the debate concerning the operational aspects of affirmative action programs presents as much a source of divisiveness as any debate on the constitutionality of affirmative action would. *See generally id.* at 1047; *see also* INDIA CONST. art. 15(4), 16(4).

9. While technically affirmative action is referred to as positive action in European Union jargon, I will, for the sake of consistency, employ the former terminology.

10. Council Directive 76/207 art. 2 (1) 1976 O.J. (L 39) 40. Also, Article 1(1) of the Directive reads, "The purpose of this Directive is to put into effect in the Member States the principle of equal

tunity for men and women, in particular by removing existing inequalities which affect women's opportunities."[11] Albertine Veldman writes, "This Directive obliges Member States to introduce national legislation prohibiting sex discrimination according to the stipulations set out."[12]

Interpretation of Article 2(4), the provision that deals most directly with gender affirmative action, began with a decision by the ECJ in *Kalanke v. Bremen*. The ECJ in *Kalanke* found that a gender affirmative action measure did not comport with Article 2 where it allowed for an automatic preference in appointment and promotion for women who were equally qualified with men, in employment sectors where women were underrepresented.[13] Specifically, the ECJ believed that "[n]ational rules [like the German one in *Kalanke*] which guarantee women absolute and unconditional priority for appointment or promotion go beyond promoting equal opportunities and overstep the limits of the exception in Article 2(4) of the Directive."[14] Significantly, the ECJ viewed Article 2(4) as a derogation from the individual equality right contained in Article 2(1); therefore, according to the ECJ, 2(4) should be interpreted narrowly as disallowing the automatic preference contained in the German statute under review.[15]

The ECJ, in providing such a narrow interpretation of Article 2(4), did not recognize a right to substantive equality. By treating Article 2(4) as a narrow exception to the non-discrimination principle in Article 2(2), the ECJ maintained a formal approach to equality. This approach involves treating similarly situated individuals in the same manner. The ECJ did not take the view that 2(4) allows Member States or political institutions of the European Union to take the positive step of passing remedial legislation aimed at compensating women for past inequalities and improving the situation of women for the future.[16]

Arguably, the court could have marshaled existing European Community jurisprudential theories to support this view.[17] In the areas of gender equality

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treatment for men and women as regards access to employment, including promotion, and to vocational training and as regards working conditions. . . ." *Id.* art. 1(1).

11. *Id.* art. 2(4).

12. Albertine G. Veldman, *Preferential Treatment in European Community Law: Current Legal Developments and the Impact on National Practices, in* NON-DISCRIMINATION LAW: COMPARATIVE PERSPECTIVES 279, 280 (Titia Leonen & Peter R. Rodrigues eds., 1999).

13. Case 450/93, Kalanke v. Bremen, 1995 E.C.R. I-3051, 1995 ECJ CELEX LEXIS 9529, at *16.

14. *Id.* at *15-16. The affirmative action measure, according to the ECJ, "substitutes for equality of opportunity as envisaged in Article 2(4) the result which is only to be arrived at by providing such equality of opportunity." *Id.* at *16.

15. *Id.* at *15 (citation omitted).

16. When used here, the phrase "political institutions of the Union" refers principally to the European Commission, Parliament and Council. For a general discussion of the duties and roles of each of these particular institutions of the Union, as well as their relationship to the Member States, *see* the European Union website, *available at* http://europa.eu.int/inst-en.htm (last visited Nov. 20, 2002).

17. Indeed, the ECJ in dicta in *Kalanke* acknowledged that Article 2(4) allows measures which are discriminatory in appearance, but which intend to eliminate actual instances of inequality, and that it permits measures that give women a specific advantage in order to improve their ability to compete on the labor market. 1995 ECJ CELEX LEXIS 9529, at *14-15.

and affirmative action, European Community law supports the concept of indirect, or effects-based, discrimination.[18] According to Klaartje Wentholt, the concept of indirect discrimination recognizes that if a gender-neutral measure "affects a considerably larger percentage of women, then a 'prima facie' case of indirect discrimination is established."[19] This framework widens the permissible scope of application for affirmative action in general because it acknowledges and proves discrimination more frequently.

The principal political institutions and Member States of the European Union did not accept the ECJ's analysis in *Kalanke* of the gender affirmative action provision and extensively debated the matter.[20] In fact, the level of debate was such that the European Commission, the political institution of the European Union responsible for making legislative proposals to the European Parliament and Council, decided tentatively to clarify the affirmative action principle in 2(4) through the introduction of an amendment.[21] The amendment considered proposed priority rules for women provided there was an "'assessment of the particular circumstances of an individual case.'"[22] The Commission believed the amendment would accord with the ECJ's decision in *Kalanke*.[23]

The Commission ultimately abandoned this amendment proposal and decided to await action by the Member States on the gender affirmative action issue at the Intergovernmental Conference at Amsterdam in the summer of 1997.[24] At the Conference, an additional paragraph was added to Article 119 of the European Community Treaty, stating:

> With a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the underrepresented sex to pursue a vocational activity, or to prevent or compensate for disadvantages in professional careers.[25]

Though the Member States framed Article 141(4) (Article 119 became Article 141 upon the Treaty's entry into force) as an exception to the principle of equal treatment and thus it technically keeps in place a structure supporting formal equality, its textual language distinguishes it from Article 2(4) of the Directive.

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18. *See* Case 79/99, Schnorbus v. Land Hessen, 2000 E.C.R. I-10997, 2000 ECJ CELEX LEXIS 7741. This decision in the gender equality/ affirmative action area relies directly on the concept of indirect discrimination.

19. Klaartje Wentholt, *Formal and Substantive Equal Treatment: The Limitations and the Potential of the Legal Concept of Equality*, *in* NON-DISCRIMINATION LAW: COMPARATIVE PERSPECTIVES, *supra* note 12, at 53, 62.

20. *See* Veldman, *supra* note 12, at 279, 281.

21. *Id.* at 283.

22. *Id.*

23. *Id.*

24. *Id.* At the Conference, Member States would work, in particular, on formulating the Treaty of Amsterdam. Treaties are significant pieces of primary legislation in the European Union, to which each Member must accede for the treaty to become law. *See* the European Union website, *available at* http://europa.eu.int/eur-lex/en/about/pap/process_and_players2.html#1 (last visited Nov. 20, 2002).

25. TREATY OF AMSTERDAM AMENDING THE TREATY ON EUROPEAN UNION, THE TREATIES ESTABLISHING THE EUROPEAN COMMUNITIES AND CERTAIN RELATED ACTS, Oct. 2, 1997, O.J. (C-340) 1 (1997) [hereinafter TREATY OF AMSTERDAM].

This language reveals that Article 141(4), unlike Article 2(4), aims towards substantive equality. For instance, the following phrases from the Article highlight a commitment to a substantive notion of equality: "With a view to ensuring full equality *in practice* between men and women in working life," "measures providing for *specific advantages* in order to make it *easier* for [women] to pursue a vocational activity," and "measures to prevent or compensate for disadvantages in [female] professional careers." By focusing on realizing equality in practice and providing specific advantages, Article 141 strives to achieve substantive equality. It recognizes the need for governments to undertake positive efforts on behalf of women. Furthermore, the language of the Article indicates a clear desire on the part of the Member States to ameliorate the condition of women.[26]

The Member States present at the Conference also made clear through a non-binding declaration that the amendment aimed principally at advancing the condition of women.[27] In *Badeck*, the ECJ noted that this "fourth paragraph of Article 119, being primary Community law, [took priority over] Article 2 para. 4 of [Council Directive No. 76/207]."[28] While it is clear that the amendment to Article 119 will require interpretive efforts by the ECJ, especially as to the meaning of "specific advantages," several ECJ cases decided after *Kalanke* indicate that the court incorporated the outcome of the political debate concerning the broadening of the language and scope of gender affirmative action.[29]

While still interpreting Article 2(4) of the Directive, the ECJ's decisions in *Marschall v. Land Nordrhein-Westfalen* and *Badeck* reflect its receptiveness to

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26. *See* TREATY OF AMSTERDAM art. 119(4) (italics supplied); *see also* TREATY ESTABLISHING THE EUROPEAN COMMUNITY, Nov. 10, 1997, O.J. (C 340) 3, decl. 28 (1997) [hereinafter EC TREATY].

27. *See* EC TREATY decl. 28. *See also* Case 158/97, Badeck and Others, 2000 E.C.R. I-1875, 2000 ECJ CELEX LEXIS 7739, at *8.

28. *Id.* The Treaty of Amsterdam, and hence article 119(4), came into force on May 1, 1999. *See* http://europa.eu.int/abc/obj/amst/en/ (last visited Nov. 20, 2002). Article 119(4) became Article 141(4) upon the entry into force of the Treaty. *See* http://www.europarl.eu.int/topics/treaty/pdf/amst-en.pdf (last visited Nov. 20, 2002). *See also* Badeck, 2000 ECJ CELEX LEXIS 7739, at *7-8.

29. The ECJ, in the summer of 2000, actually handed down a judgment based, in part, on Article 141(4) of the Treaty of Amsterdam. *See* Case 407/98 Abrahamsson v. Fogelqvist, 2000 E.C.R. I-5539, 2000 ECJ CELEX LEXIS 7740. The ECJ was asked to determine the conformity of a particular national law of a Member State with Community law. *Id.* at *7-12. The national law at issue concerned professor and research assistant posts created and filled in the context of efforts to promote equality in professional life. *Id.* While posts were to be filled, to some extent, according to the individual merits of each candidate, significant derogations were permitted. *Id.* The ECJ found that such a national law, which provides for an automatic preference for a female candidate who is not equal in terms of career qualifications to a male candidate and who only possesses "sufficient" qualifications, and which does not allow for an objective assessment taking account of the specific personal situations of all the candidates, was not in conformity with Article 2(4) of the Directive on equal treatment of the sexes. *Id.* at *35-36. Concerning Article 141(4) of the Amsterdam Treaty, the ECJ noted

> even though Article 141(4) EC allows the Member States to . . . adopt measures providing for special advantages . . . in order to ensure full equality between men and women in professional life, it cannot be inferred from this that it allows a selection method of the kind at issue in the main proceedings which appears, on any view, to be disproportionate to the aim pursued.

Id. at *33. Thus, the national provision at issue in *Abrahamsson* was also not in conformity with Article 141 (4) of the Treaty of Amsterdam.

the gender affirmative action political debate.[30] In fact, the ECJ's holding in *Marschall* appears to rely upon language in the European Commission's proposed amendment to Article 2(4), which the commission later abandoned in favor of the changes wrought by the Treaty of Amsterdam.[31] In *Marschall*, a schoolteacher had his application for a promotion to a higher career bracket rejected because an equally qualified woman also had applied, and fewer women than men worked in this bracket.[32] The ECJ held that a national priority rule favoring women does not violate Article 2(4) as long as an objective assessment of the criteria of all candidates occurs and if these criteria favor the male, the woman is not preferred.[33] Similarly, the amendment to 2(4) proposed by the Commission would have permitted priority rules provided there was the possibility of "an assessment of the particular circumstances of an individual case."[34] Thus, the ECJ aligned itself with the view of the Commission concerning the necessity of savings clauses in priority rules. The ECJ also held the priority rule in *Marschall* did not violate Article 2(4) since it "may counteract the prejudicial effects on female candidates of [certain] attitudes and behaviour . . . and thus reduce actual instances of inequality which may exist in the real world."[35]

However, those expecting that the ECJ would pursue fully a course of substantive equality for women in *Marschall*, thereby embracing the twin remedial and preventative aims of affirmative action, were mistaken. The ECJ held that Article 2(4) forbids unconditional priorities for women in job selection and promotion because it remains a derogation from the individual right to equality contained in Article 2(1).[36] The ECJ still conceived of Article 2(4) as a narrow exception to the equality right in 2(1).[37] In addition, commentators complained that in assessing criteria specific to the individual candidates, as required by the

30. *See* Case 409/95, Marschall v. Land Nordrhein-Westfalen, 1997 E.C.R. I-6363, 1997 ECJ CELEX LEXIS 13976; *see also* Badeck, 2000 ECJ CELEX LEXIS 7739.

31. See Veldman, *supra* note 9, at 284.

32. *Marschall*, 1997 ECJ CELEX LEXIS 13976, at *9.

33. *Id.* at *17.

34. Veldman, *supra* note 9, at 283.

35. *Marschall*, 1997 ECJ CELEX LEXIS 13976, at *16-17. The attitudes and behaviour referred to in this quotation include the following:

> prejudices and stereotypes concerning the role and capacities of women in working life and the fear, for example, that women will interrupt their careers more frequently, that owing to household and family duties they will be less flexible in their working hours, or that they will be absent from work more frequently because of pregnancy, childbirth, and breastfeeding.

Id. at *16. The ECJ acknowledged that because of these prejudices and stereotypes, "where male and female candidates are equally qualified, male candidates tend to be promoted in preference to female candidates." *Id.*

36. *Id.* at *17. *See also* Wentholt, *supra* note 19, at 60 (arguing that, because Article 2(4) is viewed as a narrow exception to 2 (1), "affirmative action infringes the right of each individual [under 2(1)] to be treated equally"). Thus, the formal approach to equality in Article 2(1) makes "it difficult to justify affirmative action, for affirmative action does not take individual characteristics but rather group characteristics into account. . . . So the goal of preferential treatment for women is contradictory to the condition of not infringing an individual right of a man." *Id.*

37. *Id.*

savings clause in *Marschall*, the types of criteria selected would, themselves, tend to discriminate against women.[38]

In light of the criticisms still lingering after the ECJ's decision in *Marshall*, one can interpret *Badeck* as an attempt to move the ECJ closer to the understanding of gender affirmative action expressed by the Member States in the Treaty of Amsterdam. The priority rule in *Badeck* that the European Court reviewed contained "binding targets" of two years duration, aimed at "increasing the proportion of women in sectors [of careers] in which [they] are underrepresented."[39] The advancement plan in Badeck reserved more than half of all available positions for women in each sector where women were underrepresented.[40] Moreover, this plan called for filling certain academic posts with women in at least the same proportion of women among graduates, holders of higher degrees, or actual students in the relevant discipline.[41] The plan also allocated a set number of training places to women for careers in which women were traditionally underrepresented and that required training.[42] Lastly, the plan required interviews of a certain number of qualified women in underrepresented career sectors, as well as a set number of women to serve as representatives on collective bodies such as commissions, advisory boards, boards of directors and supervisory boards.[43]

In addition to target percentages, the plan called for certain criteria to factor into individual selection decisions. One criterion stands out as particularly favorable to women—interruptions in completing job training as a result of looking after children could not negatively affect women in terms of job evaluations or career progression.[44] The plan further required that hiring decisions do not take into account the applicant's family status or partner's income.[45] This latter factor prevents discrimination against women for not being perceived as the family "breadwinners."

In *Badeck*, the ECJ upheld under Article 2 the binding target provision generally applicable to cases where women were underrepresented in a specific public job sector, because it was a flexible, conditional quota.[46] While the gender affirmative action scheme in *Badeck* appears to represent an absolute quota, the fact that the scheme would not apply in cases in which a "particular sex is an indispensable condition for an activity," mitigates this conclusion.[47] Furthermore, the plan allowed for the following variance from the scheme: "If it is

38. *See id. See also Marschall*, 1997 ECJ CELEX LEXIS 13976, at *17-18.

39. *Badeck*, 2000 ECJ CELEX LEXIS 7739, at *12. Women are deemed underrepresented under the Plan when fewer women than men are employed in *any salary* bracket. *See id.* at *11.

40. *Id* at *12.

41. *Badeck*, 2000 ECJ CELEX LEXIS 7739, at *13-14.

42. *Id.* at *12. This aspect of the plan did not apply if the State exclusively provided the training or if an insufficient number of women submitted applications. *Id.* at *12-14.

43. *Id.* at *14-15, *17.

44. *Id.* at *15-16.

45. *Id.* at *15.

46. *Id.* at *24. Given the nature of this aspect of the provision, the definition of what constitutes a flexible, conditional quota is rather expansive.

47. *Id.*

convincingly demonstrated that not enough women with the necessary qualifications were available, a correspondingly smaller number of posts may be designated for filling by women."[48] Also, for the women to be preferred through the plan, they had to be equally qualified with the men in the first place.[49] The court reasoned that the plan did not fix numeric targets uniformly across all sectors; rather, "the characteristics of those sectors and departments [were] to be decisive for fixing the binding targets."[50] Moreover, according to the ECJ, the provision did not guarantee the selection of a female candidate where the candidates possess equal qualifications.[51] The ECJ noted that the plan did not give preference to women in career sectors where women were not underrepresented.[52] The ECJ also referred to the existence of five other groups of individuals that could "override" the normal priority given to women.[53] The fact that this "override" clause qualified the binding target provision dispelled the notion, at least for the ECJ, that the provision led inevitably to the preference of equally qualified women.[54]

The ECJ also permitted the specific provision of the advancement plan dealing with academic posts due to its conditional nature.[55] It did not "fix an absolute ceiling but fix[ed] one by reference to the number of persons who have received appropriate training [in the relevant academic discipline], which amounts to using an actual fact as a quantitative criterion for giving preference to women."[56] The fact that the provision influences selection decisions only if candidates possess equal qualifications also played an important role in the ECJ's finding of compatibility.[57] Moreover, the ECJ believed the provision was limited since "all the selection decisions which have to be made taking into account the [numerical] targets of the women's advancement plan," and "gen-

48. *Id.* at *12-13.

49. *See id.* at *20-21. From the manner in which the questions referred to the ECJ for specific rulings framed the requirements of the advancement plan, it is apparent that women and men must have equal qualifications before the terms of the plan are triggered. In light of a subsequent decision by the ECJ in Case 407/98, Abrahamsson v. Fogelqvist, 2000 E.C.R. I-5539, 2000 ECJ CELEX LEXIS 7740, the fact that women and men must be equal in this respect before the priority rule applies, is significant. Largely because the affirmative action measure in *Abrahamsson* provided women who were *less qualified* than men with priority, the ECJ found that the measure was not in conformity with applicable Community law. *Id.* at *30.

50. *Badeck*, 2000 ECJ CELEX LEXIS 7739, at *24.

51. *Id.* at *25.

52. *Id.*

53. *Id.* at *27-28.

54. *Id.* at *28. These five groups whose existence justified the override of the normal priority given to women had nothing to do with gender, and were based on rules of law covering certain "social aspects." *Id.* at 27. They included, for example, preferences for former employees who left public jobs because of family work, workers who were part-time because of family work and wished to be full-time, former temporary soldiers, seriously disabled persons, and long-term unemployed persons. *Id.* at 27-28. It seems fair to say that women may also benefit from their inclusion into some of these categories, such that the fact that they override the preference for women may be of scant significance in practice.

55. *Id.* at *30-31.

56. *Id.* at *30.

57. *Id.* at *28-29. For a discussion of the apparent importance of this factor in the rationale of the ECJ's decision, see the discussion of the *Abrahammson* decision *supra* at note 49.

eral considerations as regards the binding nature of a women's advancement plan also apply."[58] Here, the ECJ ostensibly refers to the indispensability of the sex exception, the underrepresentation requirement, and the five other groups who can override the normal priority in favor of women.[59]

In light of the ECJ's upholding of various aspects of the advancement plan under Article 2, the ECJ in *Badeck* appears to realize a degree of substantive equality between men and women. Though it was not necessary to reach an interpretation of Article 141 (4) of the Treaty of Amsterdam because it found the advancement plan compatible with Article 2,[60] the ECJ evidently took the Amsterdam provision into account.[61] Indeed, the gender advancement/affirmative action plan upheld in *Badeck* mirrors that provision's call to "ensur[e] full equality in practice between men and women in working life," and "provid[e] for specific advantages in order to make it easier for the underrepresented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers."[62]

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58. *Badeck*, 2000 ECJ CELEX LEXIS 7739, at *30.

59. Notably, in characterizing other aspects of the advancement plan in *Badeck* as conditional or optional, the ECJ found them consistent with its laws. In particular, in finding consistent with Community law the provision of the plan concerning the allocation of training places, the ECJ commented that while it may appear to be based on a fixed, inflexible quota allowing greater employment opportunities for women, it also does not apply where there are insufficient applications from women. *Id.* at *34. If there are insufficient applications, "it is possible for more than half of those [training] places to be taken by men." *Id.* Moreover, the ECJ noted the fact that the provision only reserves access to training and not employment slots. *Id.* Lastly, the ECJ pointed out that when the State does not have a monopoly in training places (and therefore the provision applies), men can effectively choose to train at private sector locations. *Id.* at *34-35. The ECJ commented that as a result, "no male candidate is definitively excluded from training. . . . the provision at issue therefore merely improves the chances of female candidates in the public sector." *Id.* Furthermore, regarding the interview provision of the advancement plan, the ECJ found it permissible under Article 2 because it did not guarantee a final result in promotion or appointment but rather "affords women who are qualified additional opportunities to facilitate their entry into working life and their career." *Id.* at *37. While the provision contains fixed rules on the number of women to be called to an interview, the ECJ finds significant that only qualified women are to be interviewed who possess at least equal qualifications to men. *Id.* at *37-38. Lastly, regarding the provision of the plan specifying a desired number of women to serve on collective bodies, the ECJ found that since it is not mandatory, it permits other criteria besides gender to be taken into account. The optional nature of the provision, according to the ECJ, is merely reflective of the fact that many bodies are either elected or determined by legislative provisions. *See id.* at *38-39. Here, the ECJ implied that this aspect of the plan concerning collective bodies would hardly ever be realized without formal amendment to the statutory provisions creating such bodies. *Id.* at *39.

60. The initial finding rendered by the ECJ in *Badeck* concerned the controlling provisions it would apply. As the parties framed their arguments around the compatibility of Articles 2(4) and 2(1) with the advancement plan, the ECJ determined that interpretation of the Treaty of Amsterdam would only be necessary if it found that Article 2 precluded the advancement plan. *Id.* at *19-20. Significantly, the ECJ found the advancement plan to be consistent with Articles 2(1) and 2(4). *Id.* at *38-39. Consequently, no interpretation of Article 141 became necessary.

61. Indeed, the ECJ confirmed in *Abrahamsson* that it had the treaty and substantive equality in mind when it noted that the selection criteria in the advancement plan in *Badeck* sought to achieve substantive rather than formal equality, "in accordance with Article 141(4) EC, to prevent or compensate for disadvantages in the professional career of persons belonging to the underrepresented sex." 2000 ECJ CELEX LEXIS 7740, at *17.

62. TREATY OF AMSTERDAM art. 119 (4).

Several aspects of the case merit highlighting for their support of substantive equality.[63] First, in *Badeck*, the rather comprehensive gender affirmative action remedy is a binding target. Notably, the remedy in *Badeck* uses general targets whereas the affirmative action measure in *Marschall* required application on a case-by-case basis.[64] Second, the "savings clause" in *Badeck*, to the extent it can be termed one,[65] is not as strong as the one in *Marschall* because it does not require a subsequent and necessary balancing to follow an individual evaluation, while the one in *Marschall* does. Therefore, the savings clause in *Marschall* provides for a more powerful override by allowing the distinct possibility that an equally qualified woman would not be preferred over a man in individual employment selection decisions.[66] Certainly, the preference in *Badeck* for the five "social" categories of individuals overrides the preference for equally qualified women and the affirmative action scheme does not apply if men are an "indispensable sex" for a given occupation.[67] Significantly, however, the five categories potentially include a larger percentage of women than men.[68] Further, the number of careers where men are considered an indispensable sex is very small. Compared with *Marschall*, *Badeck* decreases the likelihood that the preference for a female candidate will be overridden by a male candidate, and therefore lessens the likelihood that substantive equality will be compromised. Under the *Badeck* plan, a woman may "lose out" to another woman (or man) who is in more need of a preference than she. This is less troubling than the significant possibility in *Marschall* of numerous overrides in favor of less sys-

63. Though it is beyond the scope of this Article to provide an extensive textual discussion of the substantive equality provided by an affirmative action plan such as the one in *Badeck*, I will list several other aspects of the plan which facilitate substantive equality: (1) women are deemed underrepresented under the Plan when fewer women than men are employed in *any salary bracket*; (2) the general remedy is to give women more than half of the posts in a public sector in which they are underrepresented, sector being defined as a single salary bracket; (3) the remedy itself is in the form of a binding target in two-year time period intervals; (4) if such targets are not met, measured by a certain proportion of women in appointments and promotions to sectors in which they are underrepresented, "every further appointment or promotion of a man in a sector in which women are underrepresented shall require the approval of the body which has approved the women's advancement plan." *Badeck*, 2000 ECJ CELEX LEXIS 7739, at *16.

64. The binding nature of the plan in *Badeck* is noteworthy even though the plan in *Marschall* may also, over a longer period of time, achieve the desired level of representation of women in public sector careers. In *Marschall*, the measure applied only if fewer women than men were employed in the relevant higher grade post in the career bracket, as opposed to in each salary bracket. 1997 ECJ CELEX LEXIS 13976, at *7. Since multiple salary brackets can conceivably exist in a single grade post, the *Badeck* plan is potentially more comprehensive in scope.

65. The ECJ in *Badeck* requires of affirmative action measures "that candidatures are the subject of an objective assessment which takes account of the specific *personal situations* of all candidates." 2000 ECJ CELEX LEXIS 7739, at *38 (emphasis added).

66. There is a weak version of a savings clause in *Badeck* which permits the evaluation of each individual based on particular employment selection factors; however, some of these factors actually tend to favor women. For a discussion of these factors, *see supra* note 54 and accompanying text. The *Badeck* savings clause, though it does not require a balancing process, as in *Marschall*, does provide for an individual evaluation of candidates. 2000 ECJ CELEX LEXIS 7739, at *38.

67. *Id.* at *12, *27-28.

68. For example, women will frequently be individuals who left public sector jobs because of family work, workers who were part-time because of family work and wish to be full-time again, seriously disabled persons, long-term unemployed persons and, to a lesser extent, former temporary soldiers.

tematically disadvantaged men simply because some indeterminate criterion favored the man.

Finally, the plan in *Badeck* leads to the realization of substantive equality through its framework for the selection of candidates. Indeed, the ECJ squarely accepted the selection criteria used in the plan, even though it acknowledged that, although capable of benefiting men, these criteria generally benefit women.[69]

The debate regarding the precommitment to affirmative action in the European Union continues as a recent ECJ decision involving both Article 141 of the Treaty of Amsterdam and Article 2(4) of the Directive, further delineated the scope of these provisions.[70] In *Abrahamsson v. Fogelqvist*, the ECJ found that a national law permitting positive discrimination towards men, and automatic preferences for women, as a means to promote equality between men and women in their professional lives, violated Article 2(4) of the Directive and Article 141(4) of the Amsterdam Treaty.[71] The national law evaluated by the ECJ in *Abrahamsson* permitted the selection of a sufficiently qualified woman over a man, even where the man was marginally more qualified, in professions in which women are traditionally underrepresented.[72] Contrary to the ECJ's holding, Article 141(4) of the Treaty and perhaps even Article 2(4) of the Directive arguably permit such a law. For example, as long as the personal situation of candidates is taken into account, Article 141(4) appears to allow for the preference of female over male candidates where they possess "substantially equivalent" job qualifications. Arguably, this phrase captures the marginally more qualified man from *Abrahamsson*. Given their past responses, *Abrahamsson* may compel the political institutions and Member States of the E.U. to further clarify the precommitment to gender affirmative action. Specifically, they may disagree with the ECJ's interpretation of "substantially equivalent."

The European Union's experience with a constitutional precommitment to gender affirmative action has included dialogue and debate within and between the political institutions of the Union, the individual Member States, and the ECJ. Moreover, a certain level of divisiveness characterized this debate. A pro-

69. Id. at *26. In *Abrahamsson*, the ECJ referred to and reaffirmed its holding in *Badeck* that positive and negative criteria which generally favor women can be legitimate. 2000 ECJ CELEX LEXIS 7740, at *30. These criteria included the consideration by employers of childcare and housework when they were part of the qualifications for the job. *Id.* at *31. Apparently, not only did the parties in *Badeck* not challenge these criteria, but the use of such criteria was manifestly permitted. *Badeck*, 2000 ECJ CELEX LEXIS 7739, at *26.

70. *See Abrahamsson*, 2000 ECJ CELEX LEXIS 7740.

71. For a more detailed description of the national law under scrutiny in this decision as well as the ECJ's particular findings, *see supra* note 29.

72. *Abrahamsson*, 2000 ECJ CELEX LEXIS 7740, at *33. The ECJ held that affirmative action measures may prefer members of the underrepresented sex only if the candidates possess the same or substantially the same qualifications and an objective assessment is employed. *Id.* at *35-36. The ECJ, however, did not analyze what "substantially equivalent" means. Since historical discrimination against women decreases the potential that they will have equal qualifications with men, a flexible interpretation of the term could yet provide for more substantive equality for women in the European Union.

cess of proposed and formal amendment altered the original precommitment contained in Article 2(4) of European Council Directive 76/207.

The ECJ ruling in *Kalanke* stirred the political institutions of the Union and the individual Member States to debate over the original gender affirmative action precommitment. In response to this debate and to proposed and actual amendments, the ECJ, in *Marschall* and *Badeck*, interpreted the gender affirmative action precommitment more consistently with the will and understanding of the political institutions of the Union and individual Member States.[73] Though the textual precommitment to gender affirmative action and subsequent interpretation by the ECJ did not curtail debate over the scope and meaning of gender affirmative action, this debate did not thwart the democratic process. Though not lacking in potentially destabilizing moments within the E.U. system, a reasoned and peaceful exchange of ideas characterized the debate within and between the political institutions of the Union, the individual Member States and the ECJ.[74] The way in which this exchange about gender affirmative action occurred indicates that the deliberative and checks and balances aspects of federalism, normally regarded as key components of any democratic process, thrive in the European Union. Thus, the precommitment to gender affirmative action in the European Union provoked a debate that proceeded within the framework of the democratic process.

Past experience suggests that the political institutions and Member States should consider, as should all states engaged in constitution-making, the drafting of foundational principles, or precommitments, with the highest degree of precision and foresight possible. Such precision and foresight might decrease potentially divisive debate over basic constitutional provisions, such as Article 141(4) of the Treaty of Amsterdam; however, perhaps even the most masterful drafting would not prevent such debate. Accordingly, constitutional precommitments simply do not function in the fashion suggested by Sunstein in *Constitutionalism*.

III.
GERMANY

As in the European Union, the constitutional precommitment to gender affirmative action in Germany has failed to remove contentious, potentially destabilizing debate from the political arena. Neither textual provisions in the German Constitution nor German constitutional jurisprudence has prevented ongoing political divisions concerning the permissibility of gender affirmative action. While in the European Union subsequent judicial interpretation of the precommitment to gender affirmative action prompted political debate, in Ger-

73. *Abrahamsson* may reflect the extent of how far the ECJ will go in finding national priority rules consistent with European Community law. However, given past responses to ECJ rulings, there is little reason to believe that if the Member States desire a more comprehensive affirmative action plan than the one in *Badeck*, they will be unable to amend the Treaty of Amsterdam.

74. There is simply no reason to believe the debate will not continue in this manner in the future.

many the public debate grew out of the political parties' own conflicting interpretations of the precommitment. Apart from the debate in Germany over the precommitment, recent constitutional jurisprudence in the gender equality area in Germany, though not without its limitations, reflects increasing support for a substantive notion of equality. Indeed, the highest German constitutional court, the German Federal Constitutional Court, has demonstrated receptiveness to gender affirmative action programs.

Article 3 of the German Constitution, known informally as the "gender equality guarantee," consists of three parts. Article 3(2) of the German Constitution, in its original form, provides: "Men and women shall have equal rights."[75] Article 3(1), the general equality clause, stipulates that "[a]ll persons are equal before the law."[76] Finally, Article 3(3) states, "No one may be disadvantaged or favoured because of his gender, his parentage, his race, his language, his homeland and origin, his faith, or his religious or political opinions. . . . [or] his disability."[77] In 1994, after the reunification of East and West Germany, the Joint Commission of Constitutional Reform drafted an amendment to the existing constitutional gender equality guarantee.[78] The Commission added the following sentence to Article 3(2): "The State promotes the factual realization of equal rights of men and women and works towards the abolition of existing disadvantages."[79] The Commission considered this equal rights amendment as a remedy for the disparate treatment of women in former East and West Germany.[80]

Though the Commission agreed on the need for an equal rights amendment, it could not reach consensus on its intended meaning. In particular, during the amendment process and since that time, the Christian Democratic Union ("CDU") and the Social Democrats ("SPD") political parties have vigorously debated the issue of gender affirmative action in the form of quotas:

> The reform debate focused on quotas, and it was with this hot topic in mind that the equal rights amendment was formulated, albeit in highly compromised language. The controversy whether the Constitution allows preferential treatment of women, notably in the form of quotas, *continues*.[81]

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75. GRUNDGESETZ [GG] [Constitution] art. 3 (F.R.G.), *translated in* ANNE PETERS, WOMEN, QUOTAS AND CONSTITUTIONS: A COMPARATIVE STUDY OF AFFIRMATIVE ACTION FOR WOMEN UNDER AMERICAN, GERMAN, EUROPEAN COMMUNITY AND INTERNATIONAL LAW 138 (1999) [hereinafter, WOMEN, QUOTAS & CONSTITUTIONS]; translation also *available at* http://www.lib.byu.edu/~rdh/eurodocs/germ/ggeng.html (last visited Oct. 30, 2002).

76. GRUNDGESETZ [GG] art. 3(1) (F.R.G.), *supra* note 75.

77. GRUNDGESETZ [GG] art. 3(3) (F.R.G.), *supra* note 75.

78. WOMEN, QUOTAS & CONSTITUTIONS, *supra* note 75, at 178-180. Peters notes that controversy existed among scholars and politicians about quotas even before the adoption into law of the German Equal Rights Amendment on November 15, 1994. *Id.* at 191. She writes, "Depending on their position . . . proponents of reform of article 3 either wanted to clarify that quotas are permissible or aspired to create such an allowance, while opponents sought to settle that quotas are definitely unconstitutional." *Id.*

79. GRUNDGESETZ [GG] art. 3(2) (F.R.G.), *supra* note 75.

80. WOMEN, QUOTAS & CONSTITUTIONS, *supra* note 75, at 178-80. Women in East Germany made up a larger percentage of the workforce than in West Germany and enjoyed childcare facilities. *Id.* at 179.

81. *Id.* at 180 (emphasis added).

While the CDU believes the amendment as adopted precludes all quotas, the SPD understands the same amendment to permit them, at least in their soft form.[82] Scholars and German courts have not clarified the matter. In particular, while the German Federal Constitutional Court has not yet decided a case involving the interpretation of the equal rights amendment, some lower courts have found that "article 3(2) as amended does not authorize quotas."[83] However, even lower court jurisprudence in Germany is inconclusive on the permissibility of quotas.[84] Thus, the precommitment to gender affirmative action remains subject to an on-going political debate and awaits interpretation by the German Federal Constitutional Court. Anne Peters argues that the Court will have to balance the conflicting constitutional values of freedom from gender discrimination embodied in Article 3(3) with the objective governmental goal of gender equality embodied in Article 3(2).[85]

Peters theorizes that the jurisprudential inquiry to determine the constitutionality of gender affirmative action under Article 3 would proceed by a two-step process: "First, the extent to which dispreferred men may rely on the defensive right to be free from gender discrimination (Article 3(3)) must be examined,"[86] and second, "constitutional limitations to this right must be

82. "Soft quotas" in the gender context refer to preferences for women as opposed to firm numerical targets.

83. *See id.* at 180 (citing VG Schleswig, 14 *NVwZ* 724 (1995); VG Arnsberg, 14 *NVwZ* 725 (1995); OVG Nds., 110 *DVBl.* 1254, 1257 (1995)). For scholarly interpretation of Article 3(2), *see* SABINE MICHALOWSKI & LORNA WOODS, GERMAN CONSTITUTIONAL LAW: THE PROTECTION OF CIVIL LIBERTIES 169 (1999) [hereinafter, GERMAN CON LAW]. Michalowski and Woods write, "The [Equal Rights Amendment/ Article 3(2)], however, could now be used when arguing in favour of the constitutionality of quota regulations, as these regulations seem to be a possible means of overcoming the factual discrimination of women." *Id.* For a somewhat contrary scholarly interpretation, *see* WOMEN, QUOTAS & CONSTITUTIONS, *supra* note 75, at 178-192. Anne Peters undertakes an incisive analysis of Article 3(2). She chooses four grounds of interpretation arguing that the German Federal Constitutional Court would likely use the same bases in a future case. She concludes, "[L]anguage, legislative history, the amendment's objective and constitutional structure [do] not reveal clear constitutional support for affirmative action in the form of hiring and promotion quotas. . . . [o]n the other hand, the amendment does not unequivocally preclude such policies." *Id.* at 190. Peters elaborates further that the amendment is "an objective government goal" and, as such, "does not grant women a subjective [right] to [affirmative action]." *Id.* at 192. As a "constitutional mandate", it requires "effective . . . implementation of the . . . goal." *Id.* However, because it "does not specify [actual,] concrete measures" to be taken by the government, the amendment does not strictly require preferential hiring of women. *Id.*

84. WOMEN, QUOTAS & CONSTITUTIONS, *supra* note 75, at 180.

85. For a detailed explanation of this balancing process, see *id.* at 201-213. The test involves a four-pronged reasonableness or proportionality inquiry: "[T]o qualify as a constitutional limitation on the fundamental right to be free from gender discrimination, the challenged statute must first serve a constitutional objective; it must be suitable and necessary to achieve this goal, and finally it must be equitable under due consideration of the conflicting rights in the concrete situation." *Id.* at 203-04.

86. *Id.* at 140. As a preliminary matter, Peters explains that German fundamental rights doctrine understands rights as having two characteristics: subjective rights and objective principles. *Id.* at 138, 139. Peters writes that subjective rights "are an entitlement of the individual that must be respected by the government," and that an individual may seek a remedy before the Federal Constitutional Court for the violation of such rights. *Id.* at 139. Subjective rights include "defensive, negative rights against government interference," and "may also, under certain conditions, generate a positive entitlement to government action." *Id.* On the other hand, "as objective principles, fundamental rights constitute a legal framework for the entire state order. . . . [and] thereby influence the

examined."[87] This test presumably derives from a textual analysis of the constitutional article, and perhaps from statements gleaned from the constitutional equality jurisprudence of lower courts in Germany as the Federal Constitutional Court has yet to decide any case involving gender quota statutes, or for that matter, any gender affirmative action measure.[88]

By upholding quota schemes, however, German lower courts may have developed an increasingly substantive notion of equality. In particular, two decisions by the lower Federal Labour Court in Germany addressed provisions of the gender equality guarantee.[89] In both decisions, the Court upheld statutes containing soft quotas as constitutional.[90] The court, relying on a Federal Constitutional Court decision, held that Article 3(3) did not prohibit gender affirmative action measures: "[M]en's rights to be free from gender discrimination (article 3(3)) may be limited by the programmatic, positive content of article 3(2), which generally allows measures designed to counteract factual disadvantages that typically affect women."[91] The court held that Article 3(2) allows for laws containing soft quotas for equally qualified women.[92] Furthermore, the Federal Labour Court recently upheld another statute containing a preference in hiring for

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creation, interpretation and application of all law." *Id.* The objective principle "exists independently of the . . . bearers of the rights . . . [so t]he individual has no standing to claim a violation of objective principles." *Id.* Also, Peters believes that because preferential treatment of women infringes upon men's subjective, personal right to be free from gender discrimination under Article 3(3), "differential treatment of men and women is justifiable only in exceptional circumstances and on narrow grounds that must have a constitutional basis." *Id.* at 139. Accordingly, for Peters, clause 3(3) mandates heightened judicial scrutiny of gender classifications. *Id.* at 138. *See also* GERMAN CON LAW, *supra* note 82, at 169 (arguing that quota regulations are incompatible with Article 3(3) because it prohibits preferential treatment on the grounds of gender).

87. WOMEN, QUOTAS & CONSTITUTIONS, *supra* note 75, at 140. According to Peters, this second prong includes four considerations:

> First, women have a subjective, arguably positive right to equal protection (article 3(2), sentence 1). Secondly, the objective principle of equal protection, which is likewise embodied in [sentence 1 to article 3(2)] may legitimate affirmative action. Thirdly, the state goal of promotion of equal rights (article 3(2), sentence 2) requires the state to take some forms of affirmative action. Finally limitation of men's . . . right to be free from discrimination may arguably stem from other constitutional principles such as the principle of the social state.

Id.

88. *Id.* at 140. "The administrative courts of the Lander have, [with some exceptions], found the quota statutes unconstitutional. . . . All the decisions have dealt with soft quotas (preferences for equally qualified women) in government employment, provided for in statutes or regulations." *Id.* For a discussion of individual cases in these administrative courts, see *id.* at 140-146.

89. WOMEN, QUOTAS & CONSTITUTIONS, *supra* note 75, at 146.

90. *Id.* The administrative courts of the Lander, on the other hand, continued to hold quota statutes unconstitutional even after the constitutional amendment in 1994 to Article 3(2). *Id.* (citations omitted). Labor courts, which have jurisdiction for contracted employees in the public sector, not for employees with vested employment status as the Lander courts do, have tended to support quotas. *Id.* (citations omitted).

91. *Id.* at 145 (citing Federal Labour Court (Bundesarbeitsgericht-BAG), order of 22 June 1993, 11 *NZA* 77 (1994)). The court here must be referring to Article 3(2), sentence 1, "Men and women shall have equal rights," because Article 3(2), sentence 2 was not added as an amendment until 1994.

92. *Id.* at 145 (citing BAG, order of 22 June 1993, 11 *NZA* 77, 81 (1994)).

equally qualified women where fairness considerations played a role.[93] As a conceptual matter, lower courts in Germany support substantive equality.

Although no German Federal Constitutional Court case directly addresses a gender affirmative action measure, there are cases from the Court that signal the beginning of a shift to a substantive notion of equality, and shed light on any future inquiry by the Court into gender affirmative action.[94] In a 1992 gender discrimination case concerning night-work by female employees ("the night-work case"),[95] the Constitutional Court stated, "The [first] sentence [of Article 3 (2)] 'Men and women shall have equal rights' not only seeks to abolish legal norms that link advantages or disadvantages to gender, but seeks to implement equal rights for the future."[96] The Court noted that the clause focuses upon equality of living conditions.[97] In fact, in dicta in the night-work case, the Court commented that under Article 3(2), women can receive preferential treatment for disadvantages they experience within society.[98] Moreover, Peters notes, "The Court explicitly called article 3(2) 'a constitutional mandate to foster equal standing of men and women . . . that extends to social reality.'"[99] Indeed, these statements suggest that the Court fosters and promotes substantive equality between the sexes. Similarly, the Court may prove receptive to gender affirmative action as a mechanism for realizing this equality.

Nevertheless, Peters comments that scholars of German constitutional jurisprudence recognize that the court's reference in the night-work case to Article 3(2) as a "'constitutional mandate' . . . does not necessarily imply that individual women have a subjective right to governmental promotion of factual equal standing in society."[100] In fact, without an explicit holding by the Federal Constitutional Court, she argues that one can only understand the mandate from the Court to foster equality between men and women in society as an "objective principle."[101] This understanding of Article 3(2) means the German government must actively support the realization of gender equality, and even gender affirmative action measures only once it or a private entity voluntarily decides to

93. *Id.* (citing BAG, judgment of 2 December 1997, 12 *ZTR* 419 (1998)).

94. In this regard, there is considerable resemblance to the state of equality jurisprudence in Canada.

95. This case, formally titled *Prohibition on Working at Night Case*, BVerfGE 85, 191 (1992), was decided by the Federal Constitutional Court before the amendment to Article 3(2). GERMAN CON LAW, *supra* note 82, at 173. The case concerned a particular provision of a German employment law that prohibited women from working shifts between 8 p.m. and 6 a.m. *Id.* When an employer was issued a fine for non-compliance, she sued by bringing the constitutional complaint the Court eventually ruled upon. *Id.* The Court ultimately held that the provision of the employment law violated Articles 3(2) and 3(3). *Id.* at 175-76. For a further discussion of the case, *see id.* at 173-76.

96. WOMEN, QUOTAS & CONSTITUTIONS, *supra* note 75, at 161 (quoting BVerfGE 85, 191, 207 (1992)).

97. *Id.*

98. GERMAN CON LAW, *supra* note 82, at 169 (quoting BVerfGE 85, 191, 207 (1992).

99. WOMEN, QUOTAS & CONSTITUTIONS, *supra* note 75, at 161 (quoting BVerfGE 85, 191, 207 (1992)).

100. *Id.* at 161.

101. *Id.* at 161-62. The language, legislative history, and structure of the provision further support that the first sentence of Article 3(2) embodies an objective principle. *Id.* at 173.

undertake them. However, as Peters notes, "women cannot rely on the objective, positive principle of gender equality before courts to force governmental action. . . . directed at the abolition of factual inequalities in social life."[102] Women would only gain the right to demand affirmative action by the government if the Court holds that women possess a subjective right to equality. Thus, while the notion of substantive equality finds some support in German constitutional jurisprudence, and lower courts have upheld gender affirmative action programs in the form of quotas, German women presently do not have a constitutional right to demand affirmative action in the face of inequality allowed to exist by the government.

Lastly, Article 3(3) likely prohibits gender-neutral rules having a disparate impact on one particular gender. According to Peters, one "can conclude that the constitutional gender equality clause in principle prohibits indirect discrimination . . . [however] the exact scope of this prohibition is not yet clear."[103] Though German case law on indirect discrimination in the gender context is "sparse and incoherent," recent cases tend to support the notion that constitutional provisions on gender equality prohibit indirect discrimination.[104] As Peters validly points out, the recognition of indirect, effects-based discrimination "adds legitimacy to affirmative action, because affirmative action may remedy indirect discrimination."[105] Consequently, Article 3(3) presumably improves the prospects for many types of gender affirmative action programs.

In Germany, the constitutional precommitment to gender affirmative action did not remove contentious debate from the political arena. Neither textual provisions in the German Constitution dealing with gender equality and affirmative action, including the equal rights amendment of 1994, nor German constitutional jurisprudence prevented an on-going debate. To the extent this debate may produce instability and divisions within German political society, the constitutional precommitment does not function as contemplated by Sunstein in *Constitutionalism.* In fact, the heated debate between the Christian Democratic Union (CDU) and the Social Democrats (SPD) in Germany over the quota issue represents the existence of continued political divisions concerning gender affirmative action.[106]

IV.
CANADA

Recently, debate and discord has surfaced within Canada's political arena over affirmative action despite the presence in Canada of a constitutional

102. *Id.* at 162.

103. *Id.* at 157. According to Peters, scholarship has "pointed out that language, original intent, function and structure of the gender equality clause permit the conclusion that the equal protection clause prohibits indirect discrimination. . . . This conclusion is supported by the 1994 amendment of article 3(2)." *Id.* (citations omitted).

104. *Id.* at 156 (citation omitted). For a discussion of these cases, *see* WOMEN, QUOTAS & CONSTITUTIONS, *supra* note 75, at 156-157.

105. *Id.* at 157.

106. *See supra* note 78.

precommitment to affirmative action. Though national political actors in Canada have not debated the issue of gender affirmative action, evidence shows that the general public and provincial political leaders have questioned the appropriateness of such measures. Therefore, though the precommitment to gender affirmative action in Canada may have prevented debate on this issue from surfacing in Canadian national politics thus far, the precommitment's ability to continue to do so in the future remains in doubt. Indeed, although it has not yet decided a gender affirmative action case, the Supreme Court of Canada's jurisprudence indicates a high likelihood of upholding these programs. Such a decision could intensify national political debate.

Section 15 of the Canadian Charter, Canada's principal constitutional document dealing with individual rights and freedoms, addresses gender equality and affirmative action. It states, "Every individual is equal before the law and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."[107] Section 15(2) states, "Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."[108] The Supreme Court of Canada has not yet decided a case directly on section 15(2), which ostensibly permits and encourages gender affirmative action programs. Recent cases in Canada concerning section 15(1), and one non-Charter case, support a substantive notion of equality and shed light on any future inquiry by the Supreme Court on gender affirmative action.

The Canadian Supreme Court's interpretations of the equality provisions under the Charter suggest receptivity to affirmative action programs.[109] In *Eaton v. Brant County Board of Education*, the Supreme Court found that a decision by an administrative board and Tribunal to place a child in a special education classroom did not violate section 15.[110] According to the Court, the board and Tribunal decisions did not impose on the child a burden or disadvantage, though they did distinguish between the child and others based on an educational disability (i.e., a "mental disability" under section 15(1)).[111] Importantly, the Court pointed out that not every distinction drawn between individuals based on a prohibited ground under 15(1) constitutes discrimination.[112] According to the Court, an understanding of equality as "accommodation of differences" leads to the acknowledgement that section

107. CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 15(1).

108. *Id.*

109. Of course, this lack of Supreme Court case law on point is a source of tremendous potential for uncertainty for both the general development of gender equality affirmative action jurisprudence, and specifically for future Canadian jurisprudence on section 15(2).

110. Eaton v. Brant County Bd. of Educ., [1997] S.C.R. 241.

111. *Id.* at 274, 277.

112. *Id.* at 272.

15(1) has two distinct purposes: to prevent discrimination by "the attribution of stereotypical characteristics to individuals," and "to ameliorate the position of groups within Canadian society who have suffered disadvantage by exclusion from mainstream society as has been the case with disabled persons."[113] The Court's language in *Eaton* affirms the over-all ameliorative dimension of section 15.

The Supreme Court of Canada recently further expounded upon the ameliorative, as well as other, aspects of section 15 of the Charter. In *Law v. Canada*, the Court held that the denial of a female survivor's pension benefit under the Canada Pension Plan because of the survivor's age (not, notably, gender) did not violate section 15(1).[114] The Court's reasoning advanced considerably its equality jurisprudence under Section 15(1).[115] As part of its section 15 analysis of whether a claimant was subject to differential treatment on the basis of "race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability," *Law* emphasizes the need for a court to inquire as to whether the unequal treatment provided by a law discriminates in a substantive sense.[116] Instances of substantive discrimination violate the overall purpose of section 15(1) of the Charter—to remedy prejudice, stereotyping and disadvantage.[117]

As *Law* makes clear, section 15 contains a remedial component; therefore, it must also have as one of its intended aims the improvement of the position of disadvantaged groups within society.[118] The provision reflects a recognition that real social equality may require disparate treatment of individuals.[119] The

113. *Id.* (citing Andrews v. Law Soc'y of B.C., [1989] S.C.R. 143, 169).

114. Law v. Canada (Minister of Employment and Immigration), [1999] S.C.R. 497. The Court in *Law*, in developing three broad inquiries a court should undertake in its section 15(1) analysis, employed a multi-layered analysis alluding to purposive, contextual and ameliorative aspects.

115. *Id.*

116. *Id.* at 524. As part of the multi-layered section 15 analysis, a court should inquire whether a law "draw[s] a formal distinction between the claimant and others on the basis of one or more personal characteristics." *Id.*

117. *Id. See* CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 15(1). Interestingly, the Court in *Law*, as part of the section 15 inquiry, devoted very little attention to the role of section 1 of the Canadian Charter, which allows the "infringement [of a Charter right if it can] be demonstrably justified in a free and democratic society." The Court only held that since it had "found no violation of s.15(1) of the Charter, it [was] not necessary to turn to [section] 1." *Law*, [1999] S.C.R. 497, at 563. The precise role of section 1 in the new section 15 analysis adopted by the Court in *Law* awaits a future case.

118. After surveying statements from previous decisions, including *Eaton*, the Court elaborates on the essential purpose of section 15(1) in deterring discrimination and fostering equality among all groups within society. The Court states,

> [T]he purpose of s. 15(1) is to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration.

Law, [1999] S.C.R. 497, at 500.

119. Indeed, the Court later states that the third broad inquiry under section 15(1) analysis is "really . . . a restatement of the requirement that there be substantive rather than merely formal inequality" in order for an infringement of section 15(1) to exist. The Court stated, "Under this alternative view, the definition of 'substantive inequality' is 'discrimination' within the meaning of the Charter, bringing into play the claimant's human dignity." *Id.* at 546-47. Since substantive

Law Court acknowledges that the formal equal treatment of individuals does not always result in substantive equal treatment, and will not, by itself, always suffice. This emphasis on substantive equality and the improvement of disadvantaged groups strongly signals a jurisprudential climate favorable to gender affirmative action programs.[120]

However, the Court in *Law* qualified its findings somewhat, throwing into question whether ameliorative legislation would always comport with section 15. Judge Iacobucci, writing for the majority, pointed out that ameliorative legislation excluding individuals from a historically disadvantaged group will rarely be permitted under section 15.[121] Furthermore, the Court remarked that it was not foreclosing the possibility that a statute ameliorating the position of one group might violate another member of society's rights.[122] Following this remark, the Court left room for the possibility of novel types and forms of discrimination.[123] Thus, while the nature of the equality analysis in *Law* under section 15(1) indicates that the Court will uphold gender affirmative action pro-

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inequality triggers a violation of section 15, the resulting remedy would require not simply the institution of a non-discrimination principle but also the disparate treatment of groups to improve a particular group's position within society in an effort to make all groups equal. *Id.* at 529.

120. The Court in *Law*, drawing on its previous jurisprudence, also points out that not all legislative distinctions will conflict with the purposes of section 15:

> [D]ifferential treatment will not likely constitute discrimination within the purpose of s.15 (1) where it does not violate the human dignity or freedom of a person or group . . . *and in particular where the differential treatment also assists in ameliorating the position of the disadvantaged within Canadian society.*

Id. (emphasis added). Given the correlation between this language and most affirmative action programs, the Court would likely find that such programs do not constitute discrimination and, therefore, do not violate section 15. *See also* Beatrice Vizkelety, *Adverse Effect Discrimination in Canada: Crossing the Rubicon from Formal to Substantive Equality*, *in* NON-DISCRIMINATION LAW: COMPARATIVE PERSPECTIVES, *supra* note 12, at 223, 232 (explaining that since 1995, the Supreme Court of Canada has, through several of its decisions, recognized "the concept of substantive equality and also [shown] a willingness to ensure the amelioration of the situation of disadvantaged groups by imposing, where necessary, a positive duty to act"). As part of its contextual focus under section 15, the Court in *Law* again indicates the probable constitutionality of affirmative action programs under section 15 equality analysis. Linking its purposive analysis to its contextual and comparative approach to section 15, the Court states, "In order to determine whether the fundamental purpose of s.15(1) is brought into play in a particular claim, it is essential to engage in a comparative analysis which takes into consideration the surrounding context of the claim and the claimant." *Law*, [1999] S.C.R. 497, at 531. The Court lists the following particular contextual factors relevant to the determination of whether a legislative distinction conflicts with the overall purpose of 15(1): any pre-existing disadvantage on the part of the group singled out for the distinction, and the ameliorative purpose and effects of the distinction. *Id.* at 534, 539. For other contextual factors, see *id.* at 537, 540. The latter contextual factor is particularly relevant to the determination of the constitutionality under section 15 of gender-based distinctions, such as those implicated by various affirmative action schemes. After citing Judge Sopinka's opinion in *Eaton* as to the ameliorative aspect of section 15, the Court in *Law* further elaborated that disadvantaged individuals in need of assistance can benefit from the targets of affirmative action-type legislation without violating the dignity of more advantaged individuals. *Id.* at 539. Accordingly, a section 15 violation does not exist if there is no violation of human dignity and, consequently, no discrimination.

121. *Id.* at 539 (citation omitted).

122. *Id.* at 540.

123. *Id.*

grams under section 15(2), the Court gives itself the flexibility to find that 15(2) might prohibit particular, perhaps novel gender affirmative action measures.[124]

One final aspect of *Law* completes the analysis of Canadian equality jurisprudence under section 15(1), and its implications for gender affirmative action. In its discussion of the burden on the claimant under section 15(1), the Court revealed that a section 15(1) claimant may prove discrimination by showing either a discriminatory legislative intent or a discriminatory effect.[125] Thus, the Canadian Supreme Court recognizes indirect, or effects-based, discrimination. Because affirmative action largely aims at redressing and preventing the asymmetrical effects on men and women of facially neutral laws, such recognition widens the allowable scope for gender affirmative action measures. Indeed, if a court does not acknowledge discriminatory effects, then it will deny justifications for several types of measures aimed at addressing such effects.

Moreover, another Canadian case, though it does not implicate the Charter, illustrates the general receptiveness of the Court to gender affirmative action schemes. In *Canadian Nat'l Ry. Co. v. Canada*, the Canadian Supreme Court upheld a federal human rights tribunal order establishing an affirmative action program designed to remove existing inequalities against women and improve their representation in non-traditional occupations.[126] As a preliminary matter, the case did not require the Court to interpret the equality provisions in the Charter because the plaintiff originally challenged Canadian National Railway's alleged discriminatory hiring practices on the basis of the Canadian Human Rights Act ("Act"), and not the Charter.[127] The federal human rights tribunal constituted under the Act required the railway, by the terms of its order, to im-

124. Again, the Court noted that section 15 under most circumstances prohibits ameliorative legislation that excludes disadvantaged groups. *Id.* at 539. Under the new section 15(1) analysis, the Court in Law found that although the survivor pension at issue distinguished between groups based on age, the distinction did not violate section 15(1) because it did not involve substantive discrimination. *Id.* at 552-55. It noted that the law did not "reflect or promote the notion that [young people] are less capable or less deserving of concern, respect, and consideration, [given] the dual perspectives of long-term security and the greater opportunity of youth." *Id.* at 559. Furthermore, the Court found the statutory distinction permissible, reasoning that it accords with the ameliorative purpose of 15(1) and that the distinctions drawn by the law corresponded with the different circumstances of older individuals as less likely to remain financially independent. *Id.* at 559-60.

125. *Id.* at 543-44 (citing *Andrews*, [1989] S.C.R. 143, at 174).

126. *See generally* Canadian Nat'l Ry. Co. v. Canada (Canadian Human Rights Commission), [1987] S.C.R. 1114. Non-traditional occupations, in the context of this case, mean "occupations in which women have been significantly underrepresented considering their proportion in the workforce as a whole." *Id.* at 1124.

127. *Id.* at 1118. Although the Court in *Canadian Nat'l Ry.* did not address the matter, the plaintiff may have originally proceeded under the Act instead of the Charter by reason of: (1) the lower cost and less formal nature of challenges under the Act; (2) the fact that human rights laws, though not de jure constitutional law, enjoy a quasi-constitutional status before Canadian courts (this reasons works in tandem with the first); and more fundamentally, (3) the Charter's applicability to federal and provincial governments only and not to private sector entities. *See* John Hucker, *Anti-Discrimination Laws in Canada: Human Rights Commissions and the Search for Equality*, *in* MAKING RIGHTS WORK 113, 116, 120 (Penny Smith, ed., 1999). Although not indicated, it is possible that Canadian National Railway Co. is a private entity to which the Charter would not apply; however, the company's name implies a connection to at least the federal government. Perhaps the plaintiff was uncertain as to how a court would determine the issue of the railway's public versus private status and chose the safer route of a challenge under the Act. However, it is unclear, assum-

plement a gender affirmative action program in response to its discriminatory hiring practices.[128] In particular, the measure adopted by the human rights tribunal to correct this systematic discrimination against women required the railway to hire at least one woman for every four non-traditional positions to be filled.[129] Furthermore, this ratio had to be adhered to over a particular period of time until women filled a certain percentage of non-traditional positions.[130]

Similar to its constitutional equality analysis under section 15, in finding that the human rights tribunal had jurisdiction to implement the above affirmative action program, the Supreme Court in *Canadian Nat'l Ry. Co.* relied on a contextual and purposive approach to statutory interpretation.[131] Specifically, in interpreting the jurisdictional section of the Act that was at issue in the determination of the permissibility of an affirmative action measure, the Court looked to the broad purpose of this section. The Court concluded that the statutory provision permitted special measures that not only prevented future discrimination, but also allowed for remedial steps designed to compensate for past wrongs against women.[132] As part of its contextual approach, the Court reiterated that the railway had knowingly engaged in a pervasive kind of employment discrimination that resulted in almost no women obtaining non-traditional jobs. This small number itself "perpetuate[d] exclusion and, in effect . . . cause[d] additional discrimination."[133] Furthermore, the Court concluded that, given the context of the discrimination at issue, the human rights tribunal's order satisfied the purpose of the Act.[134]

Interestingly, though the recent *Law* decision indicated a decisive turn to substantive equality and recognized the ameliorative aspect of section 15 equality analysis, the Canadian Supreme Court has refrained from declaring that women, or other disadvantaged groups, may successfully bring suit demanding affirmative action from the government in the face of existing inequality.[135] In *Eldridge v. British Columbia*, the Supreme Court determined that two statutes

ing sufficient financial backing, why the plaintiff could not have proceeded using both avenues simultaneously. *See id.* at 120.

128. *Canadian Nat'l Ry. Co.*, [1987] S.C.R. at 1138.

129. *Id.* at 1127.

130. *Id.*

131. *Id.* at 1141-42.

132. *Id.* at 1142.

133. *Id.* at 1141.

134. *Id.* In holding that the affirmative action measure was permissible under the jurisdictional section of the Act, the Court reasoned that remedying past acts of discrimination and preventing such future acts are not intrinsically distinct concepts that can be neatly separated from each other: "'[T]he prevention of systemic discrimination [for the future] will reasonably be thought to require systemic remedies [for past discrimination].'" *Id.* at 1145 (citation omitted).

135. Arguably, prior to the definitive turn in *Law* to a contextual, purposive approach to section 15 equality analysis, and its corresponding focus on substantive equality, certain cases in the gender equality area avoided such an approach. *See* Thibaudeau v. Canada, [1995] 2 S.C.R. 627 (holding that there was no violation of section 15 where a divorced mother was disallowed from excluding child support payments by ex-husband from her taxable income); Symes v. Canada, [1993] 4 S.C.R. 695 (holding that a businesswoman was not allowed to deduct additional child care expenses from her taxable income as a business expense). For a thorough discussion of these cases, *see* Mary Jane Mossman, *Gender Equality and the Canadian Charter: Making Rights Work for Women?*, *in* MAKING RIGHTS WORK, *supra* note 127, at 140, 155 (remarking that *Symes* and *Thibaudeau* "confirm the

providing government-funded medical benefits violated section 15(1) because they failed to allow for the provision of sign language interpreters so that deaf persons could achieve equal access to these benefits.[136] After concluding that effective communication is an indispensable component of medical services, the Court recognized "that once the state does provide a benefit, it is obliged to do so in a non-discriminatory manner."[137] Consequently, the provision of essentially free medical services by the government to the entire provincial population triggered a corresponding responsibility to ensure that the province provided the deaf sector of that population with sign language interpreters. The Court, while recognizing this right, failed to recognize that sector's right to a positive remedy by the government in the event of systemic or general inequality.[138]

The Canadian experience with gender affirmative action provides some insightful but ultimately inconclusive evidence as to whether constitutional precommitments remove potentially destabilizing issues from a nation's political agenda.[139] First, the Supreme Court of Canada has not directly decided a case on the constitutional provision in the Canadian Charter dealing with gender affirmative action. Second, and consequently, no political branch of government on the national or provincial level has had reason to respond to any Supreme Court interpretation under 15(2). It remains possible that a future interpretation of 15(2) by the Court will spark divisive political debate on the issue.[140]

The claim that a future Court decision on gender affirmative action will itself trigger political and other forms of debate has support. Describing the impact of government (though not specifically court) action concerning affirmative action, John Hucker, the Secretary General of the Canadian Human Rights Commission, anticipated public debate as the national government and human rights agencies assume a more redistributive role through their support of affirmative action programs.[141] Furthermore, according to the Secretary General, affirmative action programs played a role in the defeat of a political party in a 1995 provincial election.[142]

Comparing the response by political actors to constitutional precommitments in the European Union and Germany, arguably Canada's current experience reflects a degree of consensus, at least at the federal level, concerning the appropriateness of the constitutional precommitment to gender affirmative action.[143] The present consensus may reflect either that most political actors and

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profound impact of the *status quo* to resist challenges to gendered social relationships among men and women, relationships of hidden power").

136. Eldridge v. British Columbia (Attorney General), [1997] 3 S.C.R 624.

137. *Id.* at 678.

138. *Id.* (citing Thibaudeau v. Canada, [1995] 2 S.C.R. 627).

139. As indicated previously, when I refer to "constitutional precommitments" or "precommitments," I generally mean both those embodied in constitutional provisions and those developed as a result of interpretation by courts of particular constitutional provisions.

140. *See* Hucker, *supra* note 127, at 130-131.

141. *Id.*

142. *See id.* at 129-131.

143. Indeed, in Canada, the federal legislature, perhaps out of a desire to adhere to the constitutional precommitment itself, has adopted various laws supportive of affirmative action in the private

their constituents genuinely believe that gender affirmative action is a sound policy for Canada or, conversely, that even though they do not support gender affirmative action, the government must comply with constitutional precommitments. Those in the latter category may believe strongly in the rule of law and specifically doubt the efficacy of tinkering with constitutional provisions.

Commenting on Canadian sentiment, Hucker notes that affirmative action is a "controversial concept . . . which is viewed in some quarters as a necessary extension of human rights principles, in others as a misguided effort at social engineering that undermines the very idea of equality."[144] This statement supports the notion that the consensus among Canadian national political actors on affirmative action programs, to the extent it exists, results from a shared belief in adhering to constitutional precommitments generally and as embodied in section 15 of the Charter in particular. Notably, it does not support the conclusion that there is absolute normative consensus among Canadians that gender affirmative action programs are inherently valuable.

Any existing consensus among national political actors in Canada concerning gender affirmative action may weaken in the future. Indeed, Canadian public opinion on affirmative action generally has increasingly diverged and political debate has intensified.[145] As political currents evolve, the Canadian precommitment to gender affirmative action may prove unable to remove divisive debate from the political arena.[146]

Any future Canadian Supreme Court ruling that deals with gender affirmative action under 15(2) may dissolve the tenuous, existing political consensus at the national level and result in destabilizing debate among Canadian political actors revealing that the consensus on gender affirmative action was illusory. Of course, the distinct possibility exists that a 15(2) affirmative action case in the gender area has not reached the Court precisely because of such a national consensus. In any event, it remains uncertain whether or not the constitutional precommitment in Canada to gender affirmative action will keep potentially destabilizing debate regarding this issue out of the political arena in the future. Present seeds of discord suggest that it will not.

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employment context. For example, both the 1986 Employment Equity Act and a new version of the same Act, which came into force in 1996, allow the Canadian Human Rights Commission, a body established by the Canadian Human Rights Act, to institute hiring goals to increase the number of members from designated groups, including women, in order to reflect workforce availability. *See id.* at 126-27. The 1996 version of the Act gives more power to the Commission to force employers to agree to an employment equity plan containing such hiring goals. *Id.* Also, Hucker writes, "[M]any major employers are actively engaged in seeking out members of [disadvantaged groups such as women] in the realization that they constitute a valuable pool of potential recruits." *Id.* at 130 (citing Margaret Wente, *The Case for Affirmative Action*, GLOBE AND MAIL (Toronto), Aug. 12, 1995, at D7 (arguing that affirmative action programs have never been more widespread or popular)).

144. Hucker, *supra* note 127, at 113.

145. *See generally id.* at 129-31.

146. *Id.* at 129.

V.
THE UNITED STATES

The United States Constitution does not contain an explicit reference to gender affirmative action or even gender equality. This stems from the distinctly unequal status of women at the time of the Constitution's adoption in 1787. In fact, women did not gain the right to vote in the United States until 1920.[147] Consequently, gender equality analysis in the United States emanates from the United States Supreme Court's equal protection analysis. This section discusses the current state of gender equality analysis. It also describes a jurisprudential evolution towards a constitutional precommitment to formal gender equality in the United States and questions whether a similar progression exists towards a precommitment to gender affirmative action. Arguably, Supreme Court jurisprudence has almost entirely removed debate from the political arena concerning formal equality for women. This provides a contrast with the experiences of the European Union, Germany and perhaps Canada, where constitutional precommitments have largely failed to remove contentious debate (albeit on the different issue of gender affirmative action).

As developed by the Supreme Court, equal protection analysis under the Constitution involves interpretation of the Fifth and Fourteenth Amendments. The Court has held that equal protection analysis proceeds in the same manner under both provisions.[148] The Court selects a level of scrutiny to evaluate a challenged statute based on the nature of the classification, such as gender. In *United States v. Virginia* ("*VMI*"), the Court elevated the level of scrutiny applied to gender classifications:

> [T]he reviewing court must determine whether the proffered justification [for the gender classification] is 'exceedingly persuasive.' The burden of justification is demanding and it rests entirely in the State. The State must show 'at least that the [challenged] classification serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.'[149]

While gender classifications may be used, according to the Court in *VMI*, to compensate women for past economic discrimination and to foster equal opportunity in employment, such classifications may not be used to place or maintain women in an inferior position in society.[150] Interestingly, the Court noted that as physical differences between men and women are constant, such differences might also justify gender classifications; however, the Court does not specify under what circumstances this is the case.[151] Despite this language from the opinion regarding permissible types of gender classifications, benign gender classifications (classifications designed to benefit a particular gender), remain technically subject to the heightened judicial scrutiny referred to in *VMI*. This level of scrutiny approaches, if not meets, the strict scrutiny analysis applied to

147. U.S. CONST. amend XIX.
148. *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 224 (1995) (citation omitted).
149. United States v. Virginia, 518 U.S. 515, 532-33 (1996) (citations omitted).
150. *Id.* at 533, 534 (citations omitted).
151. *Id.*

all racial classifications, invidious as well as benign, after *Adarand*.[152] Consequently, gender affirmative action schemes will not likely survive the constitutional test as outlined in *VMI*.

Nevertheless, the *VMI* decision leaves open the possibility that a gender affirmative action measure may survive a constitutional equal protection inquiry. *VMI* involved an admission policy at Virginia's premier military training school that categorically excluded women; accordingly, it was an invidious classification (i.e., a classification designed to harm a particular gender).[153] The Court has not specifically decided whether this test also applies to benign gender classifications. Since *Adarand*, the Court scrutinizes benign and invidious racial classifications under the strict scrutiny standard.[154] Thus *VMI*, and other constitutional precedent, may produce an unusual result: the Court potentially could uphold benign gender classifications, while denying benign racial ones. This follows from the fact that the Court could potentially apply a lower level of scrutiny to gender affirmative action measures than it does to invidious gender classifications. Indeed, in *Califano v. Webster*,[155] the Supreme Court held that a benign, gender affirmative action measure designed to remedy the effects of past economic discrimination against women satisfied the intermediate scrutiny analysis described above.[156] The fact that a lower burden could apply to a benign gender classification, and not to a benign racial one is unsettling to the extent that equal protection doctrine historically developed with efforts to remedy the disadvantaged position of racial minorities.[157] Further, the Court in *VMI* hinted at a more permissive stance to gender classifications benefiting women. It noted that sex classifications may be used to compensate women for economic disabil-

152. *See Adarand*, 515 U.S. at 224, 226.

153. *See VMI*, 518 U.S. at 519-523, 546-557. Women were actually harmed by their inability to receive the unique educational instruction that the VMI afforded. Though the state of Virginia proposed a separate military school for women, the Court determined that it was "different in kind from [the school for men] and unequal in tangible and intangible facilities." *Id.* at 547.

154. *See Adarand*, 515 U.S. at 224, 226.

155. 430 U.S. 313 (1977). The measure at issue in *Califano* involved a provision of the Social Security Act that had the effect of granting to retired female workers higher monthly old-age benefits than those received by similarly situated male workers. *Id.* at 315, 318. Because benefits under the Act were based on past earnings, and because, according to the Court, women, as a result of discrimination, have traditionally earned less than men, "allowing women . . . to eliminate additional low–earning years from the calculation of their retirement benefits [and not men] works directly to remedy some part of the effect of past discrimination." *Id.* at 318. The Court found that "the reduction of the disparity in economic condition between men and women caused by the long history of discrimination against women", was, under the test of intermediate scrutiny, "an important governmental objective", and the classification was substantially related to the achievement of this objective. *Id.* at 317, 320. Concerning the latter, the Court found the differing treatment of men and women was intended to "compensate for particular economic disabilities suffered by women." *Id.* at 320. The heightened form of scrutiny used in *VMI* for an invidious gender classification differs from the intermediate scrutiny test as applied in *Califano* to a benign classification, insofar as the phrase "exceedingly important justification" is absent from the *Califano* decision. *But see* Nguyen v. Immigration and Naturalization Service, 533 U.S. 53 (2001) (claiming to apply the heightened form of scrutiny from *VMI* to an invidious gender classification but perhaps actually applying a standard of equal protection more similar to rational basis review).

156. *Id.*

157. STONE ET AL., CONSTITUTIONAL LAW 740 (3d ed. 1996)

ities and to promote equal employment opportunity.[158] Consequently, Supreme Court precedent also exists to support the constitutionality of gender affirmative action measures that benefit women.[159]

Moreover, the Supreme Court recently threw the level of scrutiny applied to gender classifications into question, perhaps suggesting further support for gender classifications benefiting women. In *Nguyen v. Immigration and Naturalization Service,*[160] the Court purported to apply the standard of heightened scrutiny to an invidious gender-based statutory classification. The classification required that U.S. citizen-fathers, but not similarly situated U.S. mothers, of children born abroad out of wedlock satisfy certain requirements, including legitimation, before the child acquires citizenship.[161] The Court in *Nguyen* ultimately held that the gender-based classification satisfied the equal protection clause; however, the Court's analysis of the governmental interest supporting the classification and its means/ ends inquiry indicates that it did not review the classification under heightened scrutiny.[162]

The application of heightened scrutiny usually results in the striking down of the classification under review. In *Nguyen*, this did not occur.[163] A heightened scrutiny analysis requires an inquiry into the actual, governmental interests and purposes for the discriminatory classification, as well as their importance.[164] The Court's actual application, as the dissent validly points out, fails

158. *VMI*, 518 U.S. at 533 (citations omitted).

159. *See also* STONE ET AL., *supra* note 163, at 739 ("The [Supreme] Court seems to have taken the view that 'affirmative action' measures disadvantaging men are subject to intermediate scrutiny, and that remedying disparities between men and women, at least if caused by prior discrimination, qualifies as an 'important governement [sic] objective' for purposes of that test").

160. *See generally* Nguyen v. Immigration and Naturalization Service, 533 U.S. 53 (2001).

161. *Id.* at 59-60. The statute required that the following events occur before fathers of children born abroad out of wedlock transmit citizenship to their children:

> (1) a blood relationship between the person and the father is established by clear and convincing evidence,
> (2) the father had the nationality of the United States at the time of the person's birth,
> (3) the father (unless deceased) has agreed in writing to provide financial support for the person until the person reaches the age of 18 years, and
> (4) while the person is under the age of 18 years—
> (A) the person is legitimated under the law of the person's residence or domicile,
> (B) the father acknowledges paternity of the person in writing under oath, or
> (C) the paternity of the person is established by adjudication of a competent court.

Id. (internal quotation marks omitted) (quoting 8 U.S.C.A. Sec. 1409 (a)). On the other hand, mothers of children born abroad out-of-wedlock automatically confer citizenship on their children, if "the mother had the nationality of the United States at the time of such person's birth, and if the mother had previously been physically present in the United States or one of its outlying possessions for a continuous period of one year." *See* 8 U.S.C.A. § 1409(c) (1999).

162. The Court stated, "For a gender-based classification to withstand equal protection scrutiny, it must be established 'at least that the [challenged] classification serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.'" *Nguyen*, 533 U.S. at 58-60 (quoting *VMI*, 518 U.S. at 533).

163. *Id.* at 69-70.

164. *See id.* at 76 (O'Connor, J., dissenting) (citing *VMI*, 518 U.S. at 533-36). In *Nguyen*, for example, one governmental interest suggested by the Court as justifying the classificatory gender statute is the importance of proving that a biological parent-child relationship exists. However, the Court does not discuss why this interest is important (as required by the *VMI* heightened scrutiny

to discuss the burden of justification under heightened scrutiny analysis, improperly "hypothesizes about the interests served by the statute," and inadequately explains "the importance of the interests that it claims to be served by the [statutory] provision."[165] Furthermore, as the dissent points out, "the majority . . . casually dismisses the relevance of available sex-neutral alternatives."[166] Indeed, these alternatives would support a finding that the classification was not necessary to meet the desired goals of the statute.

Perhaps *Nguyen* signifies that the Supreme Court, while claiming to apply heightened scrutiny to gender-based classifications, will in effect apply a standard more akin to rational basis review. If this accurately reflects a new trend, the Court may uphold gender-based classifications without a close examination of governmental interests and purposes for either their importance or an exceedingly persuasive justification, and by not requiring a tight means/ ends "fit."[167] Thus, gender affirmative action schemes might stand a chance of being upheld after *Nguyen*. However, because *Nguyen* concerns an invidious gender classification, it remains uncertain whether courts will review benign gender classifications under the heightened scrutiny applied in *VMI*. Furthermore, the appropriate standard for invidious gender classifications remains unclear because the closely divided court in *Nguyen* purported to apply one standard, but effectively applied another.[168]

Despite this analysis, a less formalistic interpretation of *Nguyen* leads one to doubt Supreme Court receptivity to gender affirmative action programs. According to Manisha Lalwani, the Court in *Nguyen* perpetuates out-dated stereotypes concerning women and childrearing.[169] The statutory gender

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analysis) but rather addresses why mothers and fathers are not similarly situated with respect to proof of biological parenthood; in fact, the dissent points out that the government, through the Immigration and Naturalization Service, did not itself even rely on this interest in justifying the statute. *See id.* at 78-80 (O'Connor, J., dissenting). The other governmental interest for the statute cited by the majority was

> the determination to ensure that the child and the citizen parent have some demonstrated opportunity or potential to develop not just a relationship that is recognized, as a formal matter, by the law, but one that consists of the real, everyday ties that provide a connection between child and citizen parent and, in turn, the United States.

Id. at 64-65. Because, as the dissent explains, the governmental purpose for the statute appears not to have been to ensure such a relationship between child and citizen parent, the "majority's focus on 'some demonstrated opportunity or potential to develop . . . real everyday ties,' in fact appears to be the type of hypothesized rationale that is insufficient under heightened scrutiny." *Id.* at 84 (O'Connor, J., dissenting). *See also id.* at 75 (O'Connor, J., dissenting) (quoting *VMI*, 518 U.S. at 533) ("Further, a justification sustaining a sex-based classification [under heightened scrutiny] 'must be genuine, not hypothesized or invented *post-hoc* in response to litigation'").

165. *Id.* at 78-79 (O'Connor, J., dissenting).

166. *Id.* at 79 (O'Connor, J., dissenting).

167. To uphold a classification under equal protection analysis, rational basis review only requires that some reasonably conceivable state of facts be present to support a rational basis for the classification. *Id.* at 77 (O'Connor, J., dissenting).

168. Justices Kennedy, Rehnquist, Stevens, Scalia and Thomas joined in the majority opinion. Justices O'Connor, Souter, Ginsburg and Breyer joined in the dissenting opinion. There was also a concurrence by Scalia in which Thomas joined. *Id.* at 56.

169. *See* Manisha Lalwani, *The "Intelligent Wickedness" of U.S. Immigration Law Conferring Citizenship To Children Born Abroad And Out-Of-Wedlock: A Feminist Perspective,* 47 VILL. L. REV. 707, 733 (2002)(explaining that the legitimation of paternity requirement embedded within the

classification reviewed by the Court in *Nguyen* effectively placed financial and emotional responsibility for childrearing on the U.S. citizen mother of a child born abroad out of wedlock.[170] The U.S. citizen father of a similar child, on the other hand, could avoid such responsibility completely by refusing to take the necessary steps under the statute to acquire citizenship for his child.[171] By finding this statute constitutional, the Court not only condoned certain, biased stereotypes about women but also "reinforced their legal subservience to men."[172] Since the Court in *Nguyen* permitted such discrimination against women in U.S. citizenship laws, it is unlikely that the same Court would uphold an affirmative action program designed to advance women in the workplace or other environments.[173]

Additionally, textual analysis of other aspects of American constitutional law disfavors gender affirmative action. The Fourteenth Amendment states: "[N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws."[174] Similarly, the Fifth Amendment states: "[N]or shall any person . . . be deprived of life, liberty, or property, without due process of law."[175] Arguably, the two amendments only require a state or the national government to abstain from providing unequal treatment. Neither amendment requires a state to take positive action to promote substantive gender equality. Rather, a state must refrain from denying equal treatment to all persons. Consequently, one can characterize the conception of constitutional rights in the United States as negative and formal.

Gender affirmative action, however, requires that a government take positive steps to make certain groups equal in society. Substantive equality between men and women cannot advance in a systematic fashion if the Supreme Court interprets the amendments as barring all disparate treatment.[176] Since gender

statutory scheme under review in *Nguyen*, which had to be satisfied before fathers could acquire U.S. citizenship for their children born abroad out of wedlock, "supported biased stereotypes about women as care-givers and reinforced their legal subservience to men"). The author further explains: "What history does reveal is that legitimation of paternity was a means by which unwed fathers voluntarily took responsibility for their outof wedlock children; in its absence, legitimation acted as a hook by which to burden unwed mothers with care-taking responsibilities." *Id.* The inclusion of the paternal legitimation requirement within the citizenship statute under review in *Nguyen*, made it possible for U.S. citizen fathers of children born abroad out of wedlock to withhold citizenship for these children and thereby deny them "the same 'opportunity or potential' for emotional and financial support available to the children of unwed mothers who acquire automatic citizenship at birth." *Id.* at 740. The statute thus perpetuates sexual irresponsibility for men and sexual responsibility for women. *Id.* at 739-41. *See also Nguyen*, 533 U.S. at 92 (O'Connor, J., dissenting) ("The majority, however, rather than confronting the stereotypical notion that mothers must care for these [illegitimate] children and fathers may ignore them, quietly condones the 'very stereotype the law condemns'").

170. Lalwani, *supra* note 169, at 739-40.

171. *Id.* at 740.

172. *Id.* at 733.

173. *Id.* at 733-34.

174. U.S. CONST. amend. XIV, § 1.

175. U.S. CONST. amend. V.

176. Formal equality does not preclude affirmative action programs; however, the baseline of the U.S. Supreme Court inquiry in the gender equality/affirmative action area is a notion of purely equal treatment of individuals. Consequently, affirmative action measures are subject to "tests of

affirmative action stems from the notion of the government promoting a particular group's equality through positive action, including action that requires unequal treatment of a different group (i.e., men), a negative conception of constitutional equality undermines gender affirmative action schemes. Similarly, a constitutional scheme based on individual rights prevents the development of gender affirmative action programs targeted at a particular group within society (i.e., women).

Not all constitutional scholars, however, view the Fourteenth or Fifth Amendment's equal protection clause as embodying a formal and negative conception of rights. Robin West, in her article *Progressive and Conservative Constitutionalism*, points out that according to progressive constitutionalists, "the equal protection clause not only permits, but positively requires that the community take affirmative steps to achieve substantive [equality]," and "[correct] maldistributions of social power, wealth and prestige."[177] As a general matter, progressive constitutionalists believe that "the state is affirmatively obligated under the [Fourteenth Amendment of the] Constitution to use its legal power to protect its citizens, and protect them equally, from the damage wrought by abusive social power and the damaging hierarchies of race, gender and class to which that power gives rise."[178] Consequently, a constitutional interpretation supportive of a positive right to substantive equality exists among certain scholars. A majority of U.S. Supreme Court judges has yet to adopt a similar line of thought.[179]

The predicate for gender affirmative action conflicts with the American practice of accounting only for direct, intentional discrimination under equal protection analysis.[180] Gender affirmative action aims at countering laws with a discriminatory intent and those with a discriminatory effect; consequently, in a constitutional environment like that of the United States, which recognizes only discriminatory intent, gender affirmative action measures have less potential for effecting change in society. The difficulty of proving discriminatory motive in the design of a law results in courts striking down fewer laws as unconstitutional; in turn, legislative bodies employ gender affirmative action less frequently. The United States lacks jurisprudence reflecting the need to effect the systematic amelioration of a disadvantaged group.[181] Since gender affirmative

exceptions," such as strict scrutiny or rational basis review, under which deviations from the baseline are permissible for certain groups.

177. Robin West, *Progressive and Conservative Constitutionalism*, 88 U. MICH. L. REV. 641, 693 (1990). For progressive constitutionalists, the equal protection clause "constitutes a commitment to rid the culture of the stultifying, oppressive, and damaging consequences of the hierarchic domination of some social groups by others." *Id.* at 693.

178. *Id.* at 699.

179. *See generally Nguyen*, 533 U.S. 53; *VMI*, 518 U.S. 515.

180. *See* Washington v. Davis, 426 U.S. 229, 242, 248 (1976) (citation omitted) (holding that discriminatory effect alone, while relevant, does not warrant strict scrutiny of a facially neutral law—the plaintiffs must show evidence of discriminatory intent)

181. In his concurring opinion in *Adarand*, Justice Scalia remarked on the amelioration of racial minority groups through affirmative action: "[G]overnment can never have a 'compelling interest' in discriminating on the basis of race in order to 'make up' for past racial discrimination in the opposite direction." 515 U.S. at 239. The Justice further stated,

action reflects this goal, one cannot characterize the United States' constitutional environment as conducive to measures designed to improve the condition of women in society.

Though there is no precommitment to gender affirmative action or even gender equality in the text of the United States Constitution, the Equal Rights Amendment represents an attempt to amend the Constitution to achieve formal equality between the genders through textual precommitment. It provides a view into the American approach to gender equality. The proposed amendment, never formally adopted into the U.S. Constitution, states: "Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex."[182] Notably, the amendment grants a right phrased in negative terms, and it contains no exception for affirmative action-type measures. The amendment bears little resemblance to the equal rights amendment in Germany, section 15(2) in the Canadian Charter or Article 141 of the Amsterdam Treaty, and one cannot view it from a textual perspective as an amendment designed to promote substantive equality, much less affirmative action.[183] The concept of formal equality, which the Equal Rights Amendment follows, has a chilling effect on the promotion of affirmative action measures because such measures invariably involve unequal treatment between the genders. A rights structure based on the concept may allow for some limited affirmative action measures, but does not require them.[184] Nevertheless, despite the amendment's failed adoption, constitutional precedent has arguably established its prescribed goal.[185]

> Individuals who have been wronged by unlawful racial discrimination should be made whole; but under our Constitution there can be no such thing as either a creditor or a debtor race. . . . to pursue the concept of racial entitlement – even for the most admirable and benign of purposes – is to reinforce and preserve for future mischief the way of thinking that produced race slavery, race privilege and race hatred. In the eyes of government, we are just one race here. It is American.

Id. Though Justice Scalia's opinion may not reflect the views of the entire court on ameliorative legislation, it does reflect, in general, a prevalent sentiment in the United States.

182. *See* STONE ET AL., *supra* note 157, at 742 ("Congress approved and submitted [the Amendment] to the states for ratification [in 1972]. . . . [T]he second [ratification] deadline expired [on June 30, 1982] with only thirty-five of the necessary thirty-eight states having approved the amendment"). Interestingly, the original directive of the European Union dealing with equal treatment of the sexes was drafted in 1976, and allows for an exception to the general equality principle when measures are taken to promote equality between the sexes. *See* Council Directive 76/207, art. 2 (4) 1976 O.J. (L 39) 40. Later jurisprudence interpreted this exception as permitting certain affirmative action measures.

183. *See* Wentholt, *supra* note 19, at 56.

184. *Id.*

185. Various individuals make this argument. *See* Joan A. Lukey & Jeffrey A. Smagula, *Do We Still Need A Federal Equal Rights Amendment?*, 44 B.B.J. 10 (2000) (noting that "[t]o some extent, this new heightened intermediate scrutiny standard [from *VMI*] indicates that the goals of the Equal Rights Amendment have survived and have been incorporated into judicial analysis of the Equal Protection Clause of the Fourteenth Amendment"). However, the authors agree that an Equal Rights Amendment is still necessary in order to

> remove any instability and uncertainty regarding judicial protection of legal equality of women, even as it has developed to this point . . . [a]n Equal Rights Amendment would provide clarity in equal protection jurisprudence, by providing an enduring

The American precommitment experience with formal gender equality contrasts with the functioning of constitutional precommitments to gender affirmative action in the E.U., Germany and perhaps Canada. Unlike the constitutional precommitments to gender affirmative action in Germany and the European Union, the constitutional precommitment to formal gender equality in the U.S. has removed contentious debate, at least on the equality issue, from the political arena. Indeed, United States Supreme Court precedent such as *VMI* took the once controversial and contentious issue of formal equality for women in the United States out of the political arena by raising the level of constitutional scrutiny for discriminatory gender classifications to the level essentially contemplated by the ERA. Absent an exceedingly persuasive justification, a state may not deny women equal treatment. In fact, after *VMI*, the only types of differences between men and women justifying a departure from formally equal treatment for the sexes may be ones of a physical nature.[186] In addition, cases such as *Reed v. Reed*[187] and *Craig v. Boren*[188] contributed to the extinguishing of the debate on the issue of formal equality by closely examining the governmental objectives behind laws discriminating against women as well as the relationship between those objectives and the means used to achieve them.[189] This did not result from any textual constitutional precommitment, such as the contemplated Equal Rights Amendment, but from precedent that gradually developed and supported a comprehensive precommitment to formal gender equality.

> weapon that judges can use to encourage open and honest debate about the role of women in our society.

Id. at 28. *See also* Martha Craig Daughtrey, *Seventy-Five Years Madison Lecture: Women and the Constitution: Where We Are at the End of the Century*, 75 N.Y.U. L. REV. 1, 22 (2000) (pointing out that apparently U.S. Supreme Court Justice Ruth Bader Ginsburg, author of *VMI*, thinks that that decision moves U.S. constitutional jurisprudence to the point that an Equal Rights Amendment would reach).

186. *See VMI*, 518 U.S. at 533; *Nguyen*, 533 U.S. at 53 (upholding an invidious gender classification, which treats mothers and fathers unequally with respect to the conferral of citizenship on children born abroad and out of wedlock, under the *VMI* heightened scrutiny standard, while applying the standard in a way indicative of rational basis review). Apparently, the Court in *Nguyen* justified its upholding of the gender classification under heightened scrutiny review, pointing to relevant physical differences between mothers and fathers with respect to the proof of their children's citizenship status. The Court stated,

> There is nothing irrational and improper in the recognition that at the moment of birth—a critical event in the statutory scheme and tradition of citizenship law—the mother's knowledge of the child and the fact of parenthood have been established in a way not guaranteed in the case of the unwed father. . . . This is not a stereotype.

Id. at 68.

187. 404 U.S. 71 (1971)

188. 429 U.S. 190 (1976)

189. The Court in *Boren* stated, "To withstand constitutional challenge, previous cases establish that classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives." 429 U.S. at 197. There is little political debate in the United States over formal equality for women, and, more importantly, the matter itself, apart from perhaps in some academic circles, has not attracted much attention. Perhaps *Nguyen* will begin to attract more public and political attention on this matter since one could read *Nguyen* as holding that men and women are not formally equal with respect to their ability to confer citizenship on children born abroad out of wedlock. *See generally Nguyen*, 533 U.S. 53.

As noted earlier, American jurisprudence may even contemplate a precommitment to gender affirmative action; however, the Supreme Court's decisions in *VMI* and *Nguyen* suggest that it does not.[190] While *Califano* upheld a gender affirmative action scheme under intermediate scrutiny, *VMI* presumably raised the level of scrutiny for all gender classifications, and cast some doubt as to the continued validity of *Califano* in the process. Indeed, *Nguyen* may threaten the Court's precommitment to formal gender equality and stir a renewed debate on formal equality between the sexes.

The United States experience with a precommitment to formal gender equality suggests that under some circumstances, jurisprudential precommitments prove more effective than textual precommitments in removing debate from a political arena. Perhaps this experience indicates that jurisprudential precommitments can remove issues that tend to be less divisive than gender affirmative action from the political arena.

VI.
CONCLUSION

The experience of Germany and the European Union with gender affirmative action supports the notion that constitutional precommitments do not remove contentious debate from the political arena. Contrary to Cass Sunstein's hypothesis, European Court of Justice jurisprudence, most notably the *Kalanke* decision, forced the political institutions of the Union and the Member States to debate and eventually amend the original precommitment. In Germany, at the time of the constitutional amendment in 1994 and since, the major political parties have vigorously debated as to whether the precommitment permits the use of quotas or other gender affirmative action measures. However strongly the German Constitutional Court supports the notions of substantive equality and the amelioration of the situation of disadvantaged, this continued debate questions, and perhaps endangers, the entire movement towards the adoption of comprehensive gender affirmative action programs. Although Germany has not experienced political destabilization as a result of this debate, the controversial nature of the issue always carries this potential.[191]

The Canadian experience with its constitutional precommitment to gender affirmative action presents a less clear picture than in the European Union or

190. *Nguyen* purported to continue the trend of heightened scrutiny for gender classifications. However, it is possible that the *VMI* standard only applies to invidious classifications. In addition, *Nguyen* may signal that the Supreme Court will actually subject gender classifications to a standard of review more akin to rational basis. Although it is speculation, arguably the Supreme Court will uphold gender classifications based on this standard. However, since *Nguyen* did not involve a benign classification such as an affirmative action scheme, this interpretation is open to criticism. Indeed, as noted earlier, aspects of the *Nguyen* decision displays a general lack of receptivity to affirmative action measures.

191. Indeed, India did experience destabilizing effects as a result of the affirmative action precommitment's failure to remove contentious debate from the political arena. The constitutional precommitment to affirmative action in India not only failed to remove divisive debate but it may also have been itself responsible for violence by sectors of the population displeased with the executive's choice of whom to prefer among classes of the population. *See supra*, note 8.

Germany. The facts that no case has reached the Canadian Supreme Court on the Charter clause concerning gender affirmative action and that the federal legislature has adopted various laws supportive of gender affirmative action in the private employment context may indicate that Canada's precommitment engendered consensus. On the other hand, current indicators of potential conflict may prove otherwise. Indeed, debate has begun to surface among provincial leaders and the general public regarding affirmative action despite the existence of a precommitment.

In contrast to Germany, Canada and the European Union, the United States lacks a textual or jurisprudentially-developed precommitment to gender affirmative action; however, its jurisprudence reflects a precommitment to formal gender equality. This results from Supreme Court decisions which applied a heightened level of judicial scrutiny to discriminatory gender classifications. Indeed, this precommitment may have removed this issue from political debate. The American experience with precommitment suggests that under circumstances where the underlying issue is less divisive than affirmative action, precommitments may successfully remove political debate. Also, under these circumstances, jurisprudentially-derived precommitments may be more effective at removing political debate than textual precommitments.

There are various ways in which divisive debate can arise despite the existence of a constitutional precommitment. In the case of the European Union, the debate surfaced as a result of judicial interpretation of the precommitment that conflicted with the framers' intent. In Germany, the debate erupted because of different political parties' interpretations of its precommitment. Moreover, the Canadian experience suggests that the issue of gender affirmative action is so inherently controversial that even if a consensus as to the appropriateness of a precommitment for this issue exists, some level of public debate will inevitably arise.

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Cultural Denial: What South Africa's Treatment of Witchcraft Says for the Future of Its Customary Law

Hallie Ludsin

Cultural Denial: What South Africa's Treatment of Witchcraft Says for the Future of Its Customary Law*

By
Hallie Ludsin**

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** Visiting Researcher, Centre for Applied Legal Studies of the University of the Witwatersrand (Johannesburg, South Africa).

I would like to make an earnest and humble request . . . to see to it that the magistrate courts are given unlimited powers to try cases that are related to witchcraft. It is undoubtedly true that witchcraft does exist and thousands of innocent people have died and will continue to die unless drastic measures are taken to stop this malpractice and senseless killing of the people . . . I must admit that it was not very easy for the magistrates to pass a sentence against the witch, the reason being that the Constitution was biased and, as a result, the cultures and beliefs of the Blacks were not taken into consideration. Witchcraft is a way of killing people. Therefore, if killing is a crime as in the eyes of god, why should witchcraft, as a way of killing in itself, be allowed to exist?? How many more people should die before the Government can realize that witchcraft is a social evil?? As an African, I am bound to view things from an African perspective.[1]

I.
INTRODUCTION

In the new era of democracy, South Africa and its Constitution formally recognize customary law as a legal system that should run alongside and in parity with the government-run common law legal system.[2] The official recognition holds the promise of equality for a legal system dominated by Dutch and then British colonists, and subordinated for years under successive white South African governments and Apartheid. Whether this promise will be fulfilled depends on how the South African government and its common law courts will deal with cultural beliefs reflected in customary law that conflict with the Western culture or norms that predominate the common law system. Whether these conflicting beliefs will be recognized and respected will determine whether customary law will in fact be equal to common law.

This Article will examine the treatment of witchcraft under customary law and common law, both historically and under the new legal order, and will analyze the implications this comparison reveals. The first two parts of this Article provide the background for the discussion and analysis. Part II, Section A describes the purpose of recognizing two systems of law in one country, along with the development of legal pluralism in South Africa. This section highlights the ideological and practical underpinnings of a dualist legal system. Section B

1. Letter from Bongani Siswana to the South African Constitutional Committee (Feb. 9, 1996), *at* http://cape.constitution.org.za/cgi-bin/catdoc.sh/data/dat/subs/14497.doc.

2. South Africa's government court system is a hybrid of the Roman-Dutch law instituted by the Dutch when they colonized South Africa and the British common law system enforced once Britain took over the colonies. For purposes of this Article, I will refer to the government court system as the common law system.

of Part II briefly explains what customary law is, the problems it faced under white rule, as well as the new problems it faces in complying with the Constitution. Part III explains the witchcraft belief and its role in social ordering. The majority of South Africans believe in witchcraft, despite efforts by colonists and the successive white governments to suppress this belief.[3] Belief in witchcraft prevails among the educated and uneducated and within both urban and rural settings.[4] To understand the treatment of witchcraft under customary law and common law, as well as the justices and injustices of such treatment, one must first understand the belief.

The first half of Part IV describes the customary law mechanisms developed to handle the manifestations of witchcraft belief and related violence and the changes to those mechanisms as a result of attempts to suppress the belief. The second half of Part IV examines the common law efforts to deal with the manifestations of the belief, including the Witchcraft Suppression Act, and whether this treatment changed after the end of Apartheid. The analysis in Part IV can be summed up with a quote:

> There are two schools of thought in the area of witchcraft: those who say that witches do not exist and those who say that witches do exist. This difference of opinion extends to the present system of justice in the courts. Traditional courts agree that witches exist, whilst formal courts say that witches do not exist.[5]

As examined in Part V, there are two purposes for using witchcraft as the basis of this discussion. The first is to use the common law treatment of the manifestations of witchcraft belief to examine the cultural and ideological bias of the common law system. The implication of this analysis is that the colonial repugnancy clause, which made unlawful any customary law or practice deemed by colonists as against public policy and natural justice, remains in force. This places the true equality of customary and common law in doubt. The second purpose is to show how common law principles superimposed on customary law to solve customary law problems can result in distortions to customary law and practices. These distortions show: (1) the inadequacies of the common law solutions to problems arising from cultural beliefs it finds repugnant; and (2) the effects of eliminating customary solutions to these same problems. This Article concludes that, while it is important to develop customary law to comply with the Constitution, unless development efforts gain the acceptance of the population at whom it is targeted, these developments at best will exist only on paper and at worst will distort customary law and practice to the detriment of society.

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3. REP. OF THE COMM'N. OF INQUIRY INTO WITCHCRAFT VIOLENCE AND RITUAL MURDERS IN THE N. PROVINCE OF THE REPUB. OF S. AFR. 12 [hereinafter COMM. OF INQUIRY REP.] (1996).

4. *Id.* at 12, 57.

5. REP. OF THE NAT'L CONF. ON WITCHCRAFT VIOLENCE 15 [hereinafter NAT'L CONF. REP.] (statement of Ralushai, Chairperson of Comm. of Inquiry into Witchcraft Violence and Ritual Murder in the N. Province) (convened by the Comm. on Gender Equality, Sept. 6-10, 1998).

II.
LEGAL PLURALISM IN SOUTH AFRICA

A. *What is Legal Pluralism?*

Legal pluralism is the recognition within any society that more than one legal system exists to govern society and maintain the social order.[6] Perhaps a more appropriate definition for South Africa is: "the recognition and legal protection of [differing or special] customs in situations where the legal system is exported to a community different from that which gave it birth."[7] These definitions do not suggest that each legal system is treated equally, rather legal pluralism merely accepts the existence of two or more legal systems in a society. In many instances, one legal system is treated as subordinate, allowing for the other to dominate a society.[8]

Legal pluralism serves several purposes. First, and perhaps foremost, it recognizes the different values and forms of social ordering of various cultures within a society. Since legal systems are both a part of culture and a reflection of culture,[9] recognition of the way a culture wishes to be governed contributes to the culture's self-determination.[10] Furthermore, legal pluralism provides mechanisms for dealing with cultural beliefs and practices not dealt with under the other legal systems in the society.[11]

As described below, South Africa's colonists and the successive white governments recognized customary law for reasons unrelated to self-determination or acknowledging the importance of cultural differences. Instead, they recognized customary law to maintain their own power.[12]

B. *Legal Pluralism In South Africa*

1. *The Development of Legal Pluralism*

Colonial governments recognized customary law and the authority of traditional leaders and headmen to try customary law cases to varying degrees

6. Brian Z. Tamanaha, *The Folly of the 'Social Scientific' Concept of Legal Pluralism*, 20 J.L. SOC'Y 192-93 (1993). *See also*, Alice Erh-Soon Tay, *Legal Culture and Legal Pluralism in Common Law, Customary Law, and Chinese Law*, 26 HONG KONG L.J. 194-95 (1996). The sphere within which legal pluralism may be considered depends on the purpose for which it is being examined—legal pluralism can be considered within the world as a whole, within a region, a country or a section of society. For purposes of this Article, legal pluralism will be discussed within the country of South Africa.

7. Tay, *supra* note 6, at 198.

8. Nora V. Demleitner, *Combating Legal Ethnocentrism: Comparative Law Sets Boundaries*, 31 ARIZ. ST. L.J. 737, 742-43 (1999).

9. *Id.* at 739-40.

10. David M. Bigge & Amelie von Briesen, *Conflict in the Zimbabwean Courts: Women's Rights and Indigenous Self-Determination in Magaya v. Magaya*, 13 HARV. HUM. RTS. J. 289, 305 (2000). Put differently, legal pluralism accepts that in reality a society is not governed by one uniform conception of law. Tamanaha, *supra* note 6, at 195.

11. Bigge & von Briesen, *supra* note 10, at 305 (concluding that legal pluralism within Zimbabwe is a mechanism used by the government to distribute power among traditional tribal chiefs, and in doing so, to increase the government's legitimacy in the eyes of its citizens).

12. *See* AA Costa, *Chieftaincy and Civilisation: African Structures of Government and Colonial Administration in South Africa*, 59 AFR. STUD. 13, 17 (2000).

throughout the regions that now make up South Africa. The amount of recognition typically depended on the number of indigenous people located in a region, although eventually customary law was recognized everywhere. In each of the regions, the Dutch and then British colonists implemented Roman-Dutch law, forcing it on the indigenous populations. As the British consolidated power in these regions and the indigenous populations under their control grew larger, the British began to recognize customary law as necessary to maintain social order.[13] The British, however, would apply customary law only when customary law did not clash with the "general principles of humanity observed throughout the civilized world."[14] This repugnancy clause was applied strictly in hopes of 'civilizing' the indigenous population.[15]

The colonial governments recognized customary law for pragmatic reasons. First, the colonists feared that the majority of indigenous people would be unhappy under Roman-Dutch law, which could threaten colonial power.[16] The British also recognized customary law because they believed that "English law was too advanced to be applied to the indigenous peoples."[17] Even so, the application of customary law was limited to areas considered "of marginal significance to the colonial regime, namely, marriage, succession, delict and land tenure."[18] Despite these pragmatic reasons, the colonial governments believed recognition of customary law was a privilege granted to the indigenous populations—a privilege that could be taken away.[19]

When the territories of South Africa united in 1910, the white government continued to recognize customary law and even increased recognition of traditional authority to control the social and political threat from the indigenous population.[20] In 1927, South Africa passed the Native Administration Act,

13. In the Cape region, the Dutch and then the British instituted Roman-Dutch law without regard to the law of the KhoiSan living in the region, as they were few in number. CONFLICTS OF LAW, S. AFR. LEGAL COMM'N DISCUSSION PAPER 76 at §1.3.2 (June 30, 1998). Towards the late 1800s, Britain was forced to change this policy when it annexed the Transkein territories. No longer was it practical for the colonists to force Roman-Dutch law on a large population living in a geographically remote region. *Id.* at § 1.3.3. In Natal, after taking over the territory from the Dutch, Britain continued to impose Roman-Dutch law. By 1848, Britain changed its policy after signing treaties with traditional leaders that allowed the traditional leaders to exercise judicial functions. The Transvaal did not have specific legislation regarding customary law until 1877 when the British took control of the region. *Id.* at § 1.3.7.

14. *Id.* at 1.3.4-1.3.5. These types of limitations are referred to as repugnancy clauses.

15. GJ van Niekerk, *Indigenous Law, Public Policy And Narrative In The Courts*, 63 THRHR 403-04 (2000).

16. NJJ OLIVIER, JC BEKKER, NJJ OLIVIER JR. & WH OLIVIER, INDIGENOUS LAW 197-98 (1995).

17. *Id.* at 197-98.

18. CONFLICTS OF LAW, *supra* note 13, at § 1.3.10.

19. *Id.*

20. *Id.* at § 1.4.2. After the colonies united, the new government developed a system of indirect rule under which the indigenous populations were governed by a paramount chief. The paramount chief appointed by the South African government was responsible for keeping social order within his area. Other chiefs aided in this process. *See* Costa, *supra* note 12, at 33. Ultimately, the paramount chiefs were accountable to a "Native Administrator" from the white South African government, who essentially was the supreme chief. TW BENNETT, HUMAN RIGHTS AND AFRICAN CUSTOMARY LAW 68 (1999). This system of hierarchy between chiefs had not existed prior to the union of the colonies. Costa, *supra* note 12, at 34. Nor had anything other than lineage ever determined

which eventually became the Black Administration Act 38 of 1927. Under the guise of safeguarding African tradition, the Act established segregation throughout society, including by creating separate courts to hear disputes among the indigenous populations.[21] It also consolidated the colonial laws within the territories.[22]

Under the Black Administration Act, only the courts determined to be courts of a chief or a headman or Commissioner's courts could hear customary law cases. Certain ministers to the white government had the discretion to determine which traditional leaders' courts would be officially recognized as a chief's or headman's court.[23] The jurisdiction of the approved courts was limited to "civil claims arising out of Black law and custom" and criminal suits where the accused was a black person.[24] Under Section 11(1) Commissioners courts had the authority to choose whether to apply customary law in customary law cases brought before them. Customary law, however, was limited by a repugnancy proviso. Decisions of the Commissioners' courts and the courts of traditional leaders and headmen could be appealed to the Native Appeals Court, later renamed the Bantu Appeals Court.

Eventually, the Special Courts for Blacks Abolition Act 32 of 1986 in large part abolished the separate court system for the indigenous populations, while retaining the jurisdiction of traditional leaders and headmen to hear customary law cases.[25] In 1988, South Africa introduced the Law of Evidence Amendment Act 45 of 1988. Section 1 of the law reads:

> Any court may take judicial notice of the law of a foreign state and of indigenous law in so far as such law can be ascertained readily and with sufficient certainty: Provided that indigenous law shall not be opposed to the principles of public policy and natural justice.[26]

Importantly, this section gave all South African courts jurisdiction over customary law matters. It also placed indigenous law in the same subordinate position as foreign law and subjected it to a repugnancy clause.[27]

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who was chief. This system removed chiefs from accountability to their communities and, instead, made them accountable to the Native Administrator. BENNETT, *supra* note 20, at 68. Bennett describes indirect rule as "provid[ing] future governments with the means necessary to restructure African political institutions to suit the policies of the moment." *Id.* at 69.

21. CONFLICTS OF LAW, *supra* note 13, at § 1.4.4. *See also* Phenyo Keisent Rakate, *The Status of Traditional Courts Under The Final Constitution*, 30 COMP. & INT'L L.J. OF S. AFR 175, 183 (1997).

22. van Niekerk, *supra* note 15, at 404.

23. § 12 Black Administration Act 38 of 1927.

24. *Id.* at §§ 12, 20.

25. OLIVIER, BEKKER, OLIVIER JR. & OLIVIER, *supra* note 16, at 200. Under the 1986 reforms to the Magistrates Court Act 32 of 1944, which was subsequently repealed by the Law of Evidence Amendment Act, Magistrates courts became the court of first instance for hearing customary law claims. Customary law heard by the Magistrates courts was subject to a repugnancy clause.

26. The Law of Evidence Amendment Act immunizes certain customary law practices from the application of the repugnancy clause, including the practice of lobola or the payment of a dowry by the husband to the wife's family. This tolerance of certain practices may result from the recognition by the white government of the importance of lobola to customary marriage practices or may result from an understanding of the practice itself, making it seem less repugnant.

27. The Law of Evidence Amendment Act no longer requires parties under customary law to be black before applying customary law. This means that there may be circumstances where cus-

2. Legal Pluralism Today

During the negotiations that ended Apartheid, the African National Party, the National Party and the other participants agreed to the continued recognition of customary law in the new South Africa. The Constitution of the Republic of South Africa Act 200 of 1993 (Interim Constitution), drafted as part of the settlement, contained Constitutional Principles to which the final Constitution needed to adhere before it could be adopted. Under Constitutional Principle XII:

> Every court, including courts of traditional leaders, existing when the Constitution took effect, continues to function and exercise jurisdiction in terms of the legislation applicable to it, and anyone holding office as a judicial officer continues to hold office in terms of the legislation applicable to that office, subject to –
>
> i. Any amendment or repeal of that legislation;
>
> ii. Consistency with the new constitution.

The Constitution of the Republic of South Africa Act 108 of 1996 formally recognizes customary law in Chapter 12 on Traditional Leaders. Section 211(3) of this chapter states: "The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law." By using the words "must apply customary law," the Constitution equalized customary law and common law.[28] The conditions the Constitution places on the application of customary law by courts are no different than those placed on the common law developed by courts. There are no explicit provisions in the Bill of Rights providing for a right to be governed by customary law, although arguably one could be inferred from sections 15, 30 and 32, which make up the right to culture and belief. Section 39(3) states: "The Bill of Rights does not deny the existence of any other rights or freedoms that are recognized or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill." While this provision does not grant any affirmative right to be governed by customary law, it does allow people to invoke rights granted by customary law to the extent those rights have not been removed by legislation and are consistent with the Bill of Rights.[29] Schedule 6, Section 2, however, states that all legislation in force at the time of the adoption of the Constitution remains in force unless repealed. The Law of Evidence Amendment Act has not yet been repealed, which means the repugnancy clause remains in effect. Whether customary law in fact will be treated as equal to common law will be discussed below.

Schedule 6, section 16(1) protects traditional courts in existence at the time the Constitution took effect. These courts can continue "to function and to exer-

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tomary law applies to whites. *See* C Himonga & C Bosch, *The Application of African Customary Law Under the Constitution of South Africa*, S. AFR. L.J. 306-07 (2000).

28. *Compare* § 11(1) of the Black Administration Act, which gave Commissioners courts the discretion whether to apply customary law to customary law issues.

29. § 39(2) further states: "When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights." This provision accepts that customary law will be a part of the new South Africa and seems to expect that customary law will be developed, not simply replaced, when otherwise inconsistent with the Constitution.

cise jurisdiction in terms of the legislation applicable to it" or until Parliament amends or repeals such legislation and as long as the legislation is consistent with the Constitution.[30] With respect to jurisdiction of such courts, Constitution section 211(2) allows traditional leaders to "observe a system of customary law" as long as Parliament has not repealed or amended its jurisdiction or the customs they apply. Nothing in the Constitution, however, limits the power of Parliament to remove this jurisdiction. For now, the jurisdiction of traditional leaders over customary law remains intact but is under the review of the South African Law Commission.[31]

30. This provision comports with § 166(e) of the Constitution, which allows Parliament to establish or recognize any other court.

31. THE HARMONISATION OF THE COMMON LAW AND INDIGENOUS LAW: TRADITIONAL COURTS AND THE JUDICIAL FUNCTION OF TRADITIONAL LEADERS, S. AFR. L. COMM'N. DISCUSSION PAPER 82 (May 1999) [hereinafter HARMONISATION]. In South African Law Commission's discussion of whether to change this jurisdiction, SALC listed the reasons for continuing the role of customary courts, as well as the problems with that role. Among the benefits of the traditional courts are: (1) they protect the cultural heritage of the people whom they govern; (2) disputes are resolved much more quickly; (3) they are more accessible and less expensive than the common law courts; (4) the procedure is less complex; (5) because these courts regularly apply customary law, they know the living customs, not the official interpretations of the customs; (6) they adapt to the changing needs of society and can be adapted to the requirements of the Constitution; and (7) they reduce the workload of magistrates. *Id.* §§ 2, 3.3.2.

The primary reasons for removing traditional courts from the legal process are that the traditional chiefs, who head the courts, act as the executive, legislature and judiciary, which may be a violation of the constitutional requirement of independence of the judiciary and may be contrary to basic tenets of democracy. *Id.* at § 4.2. *But see* Bangindawo v. Head of Nyanda Regional Authority, 1998 (3) SA 262, 273 (TK). Also, traditional leaders are not required to have any formal legal training and their role as judge does not comport with the requirements of judges described in the Constitution. *Id.* § 2.2.3. Finally, the system of primogeniture, which determines that only men may inherit the chieftainship, also violates section 9 of the Constitution, the equality clause. HARMONISATION, at § 2.2.3. Interestingly, SALC recommends that this inheritance scheme remain intact. S. AFR. L. COMM'N. DISCUSSION PAPER 93 CUSTOMARY LAW OF SUCCESSION [hereinafter SUCCESSION] § 4.3. Finally, it is suggested that at a minimum criminal jurisdiction will need to be removed for violating the right to a fair trial because there is no representation of an accused by a lawyer and because there is no presumption of innocence or right to remain silent. *Id.* §§ 2.2.2, 6.6.1. *See also, Bangindawo*, 1998 (3) SA at § 277 (holding the provision of Regional Authority Courts Act under which defendants in criminal matters before customary courts cannot be represented by lawyers is a violation of the right to a fair trial guaranteed by the Constitution) and Mhlekwa v. Head of Western Tembuland Regional Authority, 2001 (1) SA 574, 619 (TK).

Another reason for removing the powers of traditional courts is that under Apartheid, the powers of chiefs were determined to a large extent by the Apartheid government. As described above, a traditional court was allowed to operate only when granted permission by relevant officials. Because of the restriction on recognition of traditional courts, the traditional courts became accountable to the Apartheid government rather than to the people. Janos Mihalik & Yusuf Cassim, *Ritual Murder and Witchcraft: A Political Weapon?*, S. AFR. L. J. 127, 130 (1993). Many indigenous people perceive traditional courts as functionaries of the government or otherwise favouring the government in order to maintain power, delegitimizing the role of traditional leaders generally and traditional courts particularly. Rakate, *supra* note 21, at 186.

C. Customary Law

Customary law potentially governs the majority of South Africa's citizens.[32] Although prior South African governments believed they would eliminate customary law through the "process of acculturation" with Roman-Dutch and common law,[33] it remains vibrant.[34]

Customary law "consists of rules and customs of a particular group or community."[35] At the heart of South African customary law is the family.[36] The family is expected to provide "for all an individual's material, social and emotional needs."[37] T.W. Bennett writes, "[b]ecause the family [is] the focus of social concern, individual interests [are] inevitably submerged to the common weal, and the normative system tend[s] to stress an individual's duties instead of his or her rights."[38] Unlike most Western legal systems, customary law focuses on the obligation of an individual to the family and collective, rather than on individual personal rights.[39]

Customary law is non-specialized, meaning that it does not distinguish between varying areas of law.[40] For example, and important to this Article, customary law blurs the lines between criminal and civil law. The blurring is a recognition of the extent to which these areas of law are intertwined. Victims of criminal acts not only want to see a perpetrator punished for his or her crime, but also want to be compensated for the harm done. Rather than treat the civil and criminal actions separately, as under the common law system, traditional courts take a more holistic approach.

Traditional leaders use customary law to maintain harmony within the community.[41] The main goal of traditional courts is to reconcile or mediate between disputing parties, rather than to apply rules rigidly, finding one party right and the other wrong.[42] Traditional courts derive customary law from an oral tradition,[43] and are not bound by the requirements of the Law of Evidence Amend-

32. R. Loenen, *The Equality Clause in the South African Constitution: Some Remarks From a Comparative Perspective*, S. AFR. J. HUM. RTS. 122-23 (1994); TW Bennett, *Human Rights and African Customary Law*, S. AFR. J. HUM. RTS. 678 (1996).

33. BENNETT, *supra* note 20, at 1.

34. R.B. MQEKE, BASIC APPROACHES TO PROBLEM SOLVING IN CUSTOMARY LAW: A STUDY OF CONCILIATION AND CONSENSUS AMONG THE CAPE NGUNI 188 (1997) ("We know there are two cultures in Southern Africa. These are the European culture and the indigenous African culture. By legislation the European culture was made the general culture of Southern Africa. The indigenous African culture remains, however, very much alive because it is difficult to legislate effectively for people's private lives").

35. HARMONISATION, *supra* note 31, at § 2.1.3.

36. BENNETT, *supra* note 20, at 5.

37. *Id.*

38. *Id.* at 5.

39. WOMEN AND LAW IN SOUTHERN AFRICA RESEARCH PROJECT (WLSA), WIDOWHOOD, INHERITANCE LAWS, CUSTOMS & PRACTICES IN SOUTHERN AFRICA 25 (1995).

40. *See infra* note 54.

41. Van Niekerk, *supra* note 15, at 406.

42. GL Chavunduka, *Witchcraft and Witch Hunts in Africa,* in NAT'L CONF. REP., *supra* note 5, at 39; HARMONISATION, *supra* note 31, at § 6.4.5.

43. Ph J Thomas & DD Tladi, *Legal Pluralism Or A New Repugnancy Clause*, 32 COMP. & INT'L L.J. OF S. AFR. 354, 356 (1999).

ment Act.[44] Traditional courts are inquisitorial, not adversarial.[45] Lawyers are barred from traditional courts and the court is responsible for examination and cross-examination of parties and witnesses.[46] The chief and his councilors, who serve as advisors, question parties on the facts and evidence in each case.[47] The inquisitorial procedure is used in both civil and criminal cases. Decisions of traditional courts are final unless appealed *de novo* to Magistrates Courts, whose decisions can be appealed to the High Courts and Supreme Court of Appeal.[48]

Traditional courts have jurisdiction over civil cases arising out of customary law, except where limited by law, as well as certain criminal matters also recognized under customary law.[49] The former South African governments respected the traditional courts' criminal jurisdiction because of the chief's role in maintaining law and order in their communities.[50] Section 20 of the Black Administration Act, however, limits the types of criminal cases a traditional court may hear.[51] Criminal sentences are limited to fines as traditional courts have been prohibited from imposing sentences of "death, mutilation, grievous bodily harm or imprisonment."[52] Traditional civil remedies include damages, compensation and restitution.[53] Traditional courts often exceed their jurisdiction,[54] to some extent, as a result of the blurred distinction between civil and criminal law.[55]

Today, there are two types of customary law practiced in South Africa: (1) official customary law, and (2) living customary law. Official customary law is customary law that has been recognized in anthropological studies, court judgments, restatements and in legal codes.[56] Living customary law, in contrast, "denote[s] the practices and customs of the people in their day-to-day lives."[57]

Many consider the "official" customary law enforced by courts to be a distortion of customary law as practiced before colonialism.[58] Scholars argue that

44. GJ van Niekerk, *Democratic Aspects Of Traditional Conflict Management: Unofficial Dispute Resolution* in *Traditional Authority and Democracy*, *in* SOUTH AFRICAN 84 (UNIV. OF NABMIBIA CENTRE FOR APPLIED SOCIAL SCIENCE, ed. 1998).

45. Rakate, *supra* note 21, at 181.

46. HARMONISATION, *supra* note 31, at § 7.1.1. According to the South African Law Commission, participants at hearings in traditional courts also are allowed to ask parties questions.

47. *Id.* at § 2.2.2.

48. *Id.* at §§ 4.1, 5.1; *see also* Rakate, *supra* note 21, at 183-84.

49. HARMONISATION, *supra* note 31, at § 6.1.1. Because of the oral tradition of customary law, one may wonder how a person can live under it. Customary courts expect and assume that those governed by customary law are aware of its rules. *Id.* at § 6.3.1.

50. *Id.* at § 6.3.3.

51. According to the South African Law Commission, "The excluded offences are mainly the more serious offences such as treason, sedition, murder, culpable homicide, rape, arson, robbery. However the list includes less serious offences but whose elements may be difficult to prove such as indecent assault, receiving stolen property knowing it to have been stolen and breaking and entering any premises with intent to commit a crime." *Id.* at § 6.5.1.

52. *Id.* at §§ 6.7.1, 6.7.4.

53. HARMONISATION, *supra* note 31, at §§ 6.4.4-6.4.5.

54. *Id.* at § 6.5.2; van Niekerk, *supra* note 44, at 84.

55. van Niekerk, *supra* note 44, at 84.

56. Himonga & C Bosch, *supra* note 27, at 328-329.

57. *Id.* at 319.

58. BENNETT, *supra* note 20, at 64; SUCCESSION, *supra* note 31, at § 4.2.1.

the colonists who dominated the common law system interpreted customary law through their own belief systems and to the benefit of the colonial government.[59] In determining customary law, courts often relied on studies by colonists or on the testimony of traditional leaders. Typically, the studies and the testimony reflected the interests of the older males within both societies.[60] Thus, these scholars argue that "the official version of customary law described less what people previously did (or were actually doing) and more what the government and its chiefly rulers thought they ought to be doing."[61]

Also, some scholars believe that the common law courts destroyed customary law by trying to fit a system based on group rights and conciliation into the common law litigious system in which individual rights are supreme. Mistakenly believed to be a similar system of rules and laws, common law courts overlooked the many considerations taken by traditional courts before applying a customary rule or law.[62] The nuances of customary law could not be captured in these studies, codes or restatements, thus rendering the official customary law forever flawed. Attempts to codify or restate customary law removed its inherent flexibility and ossified a system meant to evolve with the changes in the community.[63]

In contrast to official customary law, researchers have found that living customary law is "dynamic, adaptable, flexible and practical . . . (and) devoid of rigidity."[64] The purpose of the flexibility of living customary law is to "allow for a maximum degree of latitude to achieve just and equitable results in each

59. BENNETT, *supra* note 20, at 63 ("[T]he tradition that the official version of customary law is supposed to represent is now said to be 'invented'. This epithet is meant to warn us that customary rules owe less to an ancient practice than to the interests of European writers and officials. Colonial occupation put settlers into a dominant position, one that allowed them to become arbiters of the African cultural heritage: they documented it and they determined how it was to be interpreted").

60. *Customary Marriages*, S. AFR. LEGAL COMM'N DISCUSSION PAPER 74 § 2.3.6 (Aug. 1997) [hereinafter *Customary Marriages*]; Bigge & von Briesen, *supra* note 10, at 300.

61. *Customary Marriages*, *supra* note 60, at § 2.3.5. According to Bennett, "A critical issue in any constitutional litigation about customary law will therefore be the question whether a particular rule is a mythical stereotype, which has become ossified in the official code, or whether it continues to enjoy social currency." BENNETT, *supra* note 20, at 64.

62. Rakate, *supra* note 21, at 181. *See also* A Nekam, Third Melville J. Herskovitz Memorial Lecture for the Centre of African Studies at Edinburgh University (Feb. 28, 1966) ("What seems the most misleading about these attempted codifications of customary law is not that the formulated rules would, in themselves, be necessarily wrong, but that they are fatally incomplete. For every 'rule' assumed, there are hundreds overlooked, 'rules' which would qualify those stated, balance them, enlarge them or narrow them down."); Thomas & Tladi, *supra* note 43, at 356.

63. Bigge & von Briesen, *supra* note 10, at 301. WLSA, *supra* note 39, at 122. The WLSA researchers wrote, "The fact that customary law was written down in texts to be applied by the courts, for example, means that it is expressed in terms of strict rules that cannot hope to reflect the flexible processes of decision-making that typify a truly customary system." *Id.* at 24. The South African Law Commission similarly noted that "Earlier codes and restatements are now disparagingly called the "official version of customary law. Modern scholars have called this version into question not only because it lags behind advances in community attitudes and behavior but also because it reflects the preconceptions of the time in which it was written." CONFLICTS OF LAW, *supra* note 13, at § 10.3.4.

64. WLSA, *supra* note 39, at 97; *Customary Marriages, supra* note 60, at § 2.3.1 ("The greatest value of custom in Africa is its 'dynamism reflected in the spirit or tolerance, dialogue, and consultation which bear out custom as a process whereby claims and disputes are negotiated'").

case."[65] The fact that customary law has survived concerted efforts to suppress it attests to the strength of living customary law, its ability to adapt and the ties of the indigenous communities to it.[66] Because "living" customary law evolves over time and is adapted to each individual situation, this type of customary law does not pass the stringent test of being "readily ascertainable and sufficiently certain," and cannot be applied by common law courts.[67]

Unfortunately, while living customary law grows and adapts with changes in communities, it also develops from other influences, such as interaction with the common law, urbanization, assimilation with Western norms and values, as well as the changes that result from interaction with official customary law.[68] Such influences have led one scholar to conclude that customary law is nothing more than a "myth."[69]

III.
WITCHCRAFT

To answer how South Africa treats customary law that is based on a cultural belief or practice not accepted by Western values or norms that predominate the common law system this Article will compare the treatment of witchcraft under both the customary law system and the common law. To better understand the concerns and dilemmas of both systems in dealing with witchcraft, it is necessary first to describe the belief and practice itself.

A. The Belief in Witchcraft

1. Philosophy of Witchcraft

A majority of South Africans believe in witchcraft.[70] While those beliefs vary among South Africa's different indigenous cultures, there are many similarities that run between them. This Article will describe the features of witchcraft that predominate in most, if not all, of South Africa's indigenous cultures. Significant differences in the beliefs will be described where necessary.

65. WLSA, *supra* note 39, at 97. According to the SALC, "unlike western-style courts, (traditional courts) do not feel constrained by pre-ordained rules. Their concern is with substantive justice." *Customary Marriages, supra* note 60, at § 2.3.1.

66. Van Niekerk, *supra* note 44, at 83. While living customary law represents the practices of indigenous cultures, this does not mean living customary law solves all the problems of customary law, such as the inequalities it perpetuates among men and women.

67. M Pieterse, *Killing It Softly: Customary Law In The New Constitutional Order*, DE JURE 35, 37 (2000).

68. For example, van Niekerk described how the white governments could manipulate chiefs' courts, particularly after the institution of indirect rule, suggesting that many chiefs would do anything to maintain their power. Van Niekerk, *supra* note 44, at 83. This suggests that, at least to some extent, living customary law may not reflect the natural development of customary law, but customary law as it has been manipulated by the white governments. While van Niekerk sees the survival of customary law despite efforts to manipulate and destroy it as evidence of its strength, Costa describes the result of such interactions with whites and the manipulation of customary law as rendering customary law "so flawed as to be barely operational." AA Costa, *The Myth of Customary Law*, 14 S. AFR. J. HUM. RTS. 525 (1998).

69. Costa, *supra* note 68, at 525.

70. COMM'N. OF INQUIRY REP., *supra* note 3, at 262.

The belief in witchcraft is premised on the doctrines of manism and dynamism. Under manism, deceased ancestors continue to participate in the daily lives of their families.[71] They provide guidance to their families and protect their family members from misfortune by communicating with the gods on the family's behalf.[72] To receive this protection, family members participate in rituals in recognition of the ancestors' power, continuing the connection between the family and the ancestors.[73] Should the family forget the ancestors, this connection to the spirit world will be broken.[74] Dynamism accepts that "there are innumerable spiritual beings (including ancestral spirits) . . . who not only cause natural phenomena, but are also the vital forces behind animals, plants and inanimate objects in the world."[75] These spirits can be good spirits or evil ones capable of causing harm to people in the living world.[76]

Unlike in most Western beliefs, there is little differentiation between the conscious, the unconscious and the supernatural.[77] What the Western world perceives as supernatural, traditional culture considers part of the everyday events of the natural world. Dreams and meditation, along with trance-like states or other altered consciousness, are accepted as part of the reality of people's lives.[78] What happens during these altered states actually happens to the person. Spirits and ancestors use dreams and altered states to enter a person's body in order to communicate with them.[79]

In practice, witchcraft provides an explanation for the misfortune that befalls individuals. While witchcraft believers accept that a person died of a heart attack or their cattle died from a disease—which explains *how* the misfortune happened – these cultures seek a metaphysical answer for *why* it occurred.[80]

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71. Mathole S. Motshekga, *The Ideology behind Witchcraft and the Principle of Fault in Criminal Law*, *in* LAW AND JUSTICE IN SOUTH AFRICA 149-50 (John Hund ed., 1988).

72. *Id.*; Credo Mutwa, *The Sangoma's Lore of the Sole*, 2 AFR. LEGAL STUD. 61-62 (2001).

73. Motshekga, *supra* note 71, at 150. Without this protection, one may suffer great harm. As Howard Timmins described:

> If life runs smoothly, the spirits are pleased with his (the member of the traditional culture) conduct, but he knows, as every other human being does, that there will be times when he will have to face days of anxiety. Troubles are bound to come sooner or later, dangers will assail him, physical suffering may strike him down, or the hand of death may take a dear one from his side – the spirits are then angry with him; in some way or other he has violated their laws, roused their wrath, and the forces of vengeance have been released against him.

HOWARD TIMMINS, THE WARRIOR PEOPLE ZULU ORIGINS, CUSTOMS AND WITCHCRAFT 299 (1974).

74. Mutwa, *supra* note 72, at 62.

75. Motshekga, *supra* note 71, at 150.

76. *Id.*

77. Interview with Edwin Ritchkin, (July 21, 2001).

78. John Hund, *Witchcraft And Accusations Of Witchcraft In South Africa: Ontological Denial and The Suppression Of African Justice*, 33 COMP. & INT'L L.J. OF S. AFR. 366, 372 (2000). According to Credo Mutua, a diviner, humans have twelve senses, not five. With these senses, humans have psychic powers and the ability to change levels of consciousness. Mutwa, *supra* note 72, at 75.

79. Motshekga, *supra* note 71, at 150.

80. Isak Arnold Niehaus, Witchcraft, Power and Politics: An Ethnographic Study of the South African Lowveld, 17 (1997) (unpublished dissertation, University of the Witwatersrand) (on file with the University of the Witwatersrand, Johannesburg library); MAX GLUCKMAN, CUSTOM AND CONFLICT IN AFRICA 83 (1955).

Under this belief system, misfortune results from one of two sources—the anger of one's ancestors or the evil practices of a witch.[81] Evil spirits can enter the body when the ancestors leave a person unprotected or when witches use their connection with the spirit world to open a victim's body to the evil spirit. When the harm results from the anger of the ancestors, those suffering accept the harm as just. In a sense, one who incurs the wrath of the ancestors is believed to have breached the social contract established between family members and their ancestors.[82]

Viewed as unfair, however, are the practices of witches who use the evil spirits to cause harm.[83] Some witches practice their craft for revenge, others because they are simply evil and still others in hopes of gaining luck through the misfortune of another.[84] The Venda culture offers one explanation of how harm to one through witchcraft can benefit another.[85] The Venda believe in a "cosmic good" shared by all members of a community.[86] The size of each person's share of that good depends on a person's status in the community.[87] Unfortunately, this cosmic good is finite—for one person to increase his or her share, another must lose some.[88] Witchcraft is one method of accomplishing this. When each person accepts his or her share of the cosmic good without unnatural alteration, the community lives in harmony. Once evil forces are used to alter

81. NAT'L. CONF. REP., *supra* note 5, at xiii; MICHAEL GELFAND, MEDICINE AND CUSTOM IN AFRICA 28 (1964).

82. Ron Lawrence Anderson, Keeping the Myth Alive: Justice Witches and the Law in the 1986 Sekhukhune Killings, (unpublished thesis, University of the Witwatersrand) (on file with the University of Witwatersrand, Johannesburg library).

83. TW Bennett & WM Scholtz, *Witchcraft: A Problem Of Fault And Causation*, 12 COMP. & INT'L L.J. OF S. AFR. 287, 296 (1979); Anthony Minnaar, Marie Wentzel & Catherine Payze, *Witch Killing With Specific Reference To the Northern Province of South Africa' in Elierea Bornman, Rene van Eeden and Marie Wentzel, in* VIOLENCE IN SOUTH AFRICA 181 (1998); Sean Redding, *Government Witchcraft: Taxation, the Supernatural, and the Mpondo Revolt in the Transkei, South Africa, 1955-1963*, 95 AFR. AFFAIRS 555, 559-69 (1996).

84. According to one member of the Malawi Parliament, the reasons witches practice their craft are "poverty, laziness, frustration, ignorance, jealousy and pleasure." Hon. Moses Dossi, Address in NAT'L. CONF. REP., *supra* note 5, at 34. *See also*, Niehaus, *supra* note 80, at 11; GELFAND, *supra* note 81, at 34-35; Hund, *supra* note 78, at 386; Minnaar, Wentzel & Payze, *supra* note 83, 182. In the *National Conference Report*, the Commission on Gender Equality provided an example of a story of a person performing evil for no apparent reason:

> A few years ago an old lady was caught in Vhufuli running away from her neighbour's homestead. She was only partially dressed. When asked what she wanted at the man's house so late at night, she replied as follows: We were going to a certain place and rested at this man's gate, unfortunately I overslept and decided to enter this man's homestead. The purpose of coming and entering this man's homestead was to cause his highly pregnant wife to abort. I am very sorry. The husband of the pregnant woman then asked her: Why did you single out my wife for this evil deed? She answered: I am very, very sorry, I can honestly assure you that I will not repeat this, but remember it is beyond my control. As she had assured the family that she would not cause mischief in the family again, the two families lived in peace again until the old lady died.

NAT'L. CONF. REP., *supra* note 5, at 14.

85. Whether other South African cultures share this belief with Vendas is uncertain.

86. Minnaar, Wentzel & Payze, *supra* note 83, at 179.

87. *Id.*

88. *Id.*

the natural balance of cosmic good, this harmony is disrupted.[89] Keeping in mind customary values are premised on working toward the good of the community, witches or witchcraft powers must be destroyed to end any disruption in the community.

2. *Witches and Their Powers*

There are at least two types of witches in traditional South African witchcraft belief—the night witch and the day sorcerer. Night witches use evil spirits to bewitch others, with or without any particular motive.[90] Night witches typically are women who inherit their powers from their mothers.[91] The day sorcerer uses magic formulas, spells, or medicines rather than "some unidentified mystical power inherent in their personalities."[92] They are capable of learning their powers from others.[93] The day sorcerer is considered more dangerous because his or her services can be bought, often in the form of charms or medicines capable of causing harm.[94] For purposes of this Article, both the day sorcerer and night witch will be included under the term "witch."

Witches derive their powers through harnessing evil spirits.[95] With this power, witches cast spells, curse individuals, or use charms or medicines, all of which ultimately cause harm.[96] A person under a spell or curse is bewitched. Evil spirits manipulated by the witch enter a person's body, forcing that person to suffer the symptoms of the disease;[97]presumably, witches can enter an animal's body in the same manner. Witches can use these evil spirits to capture the spirit of the newly dead; to create frightening ghosts;[98] to cause women to become infertile; to destroy crops and property; or to cause natural disasters.[99] They can cause accidents, illness, and death.[100] They are capable of turning the dead into zombies who can be used for labour.[101] Witches can use animals and

89. *Id.* at 180.

90. COMM'N. OF INQUIRY REP., *supra* note 3, at 13. GEOFFREY PARRINDER WITCHCRAFT: EUROPEAN AND AFRICAN 133 (1963).

91. PARRINDER, *supra* note 90, at 134, 143. Another way of looking at the inheritance of the powers is that ancestral spirits of a witch, who themselves were witches, possess the body of the living family member. Through this possession, the living person is able to practice witchcraft. Chavunduka, *supra* note 42, at 40.

92. Anthony Minaar, *Witchpurging and Muti Murder in South Africa*, 2 AFRICAN LEGAL STUDIES 1, 17 (2001). *Contra* Hund, *supra* note 78, at 371.

93. Chavunduka, *supra* note 42, at 40.

94. PARRINDER, *supra* note 90, at 143. All medicines, whether used for good or evil, are believed to work by magic. AC MYBURGH, INDIGENOUS CRIMINAL LAW IN BOPHUTHATSTWANA 9-10 (1980). To the extent someone purchases charms or medicines to cause harm to another, he or she also may be considered a witch. Chavunduka, *supra* note 42, at 40.

95. Motshekga, *supra* note 71, at 150; GELFAND, *supra* note 81, at 33.

96. Minnaar, Wentzel & Payze, *supra* note 83, at 181.

97. GELFAND, *supra* note 81, at 28.

98. PARRINDER, *supra* note 90, at 133.

99. *Id.* at 141; P Mayer, Witches' Inaugural Lecture at Rhodes University (1954).

100. Minnaar, Wentzel & Payze, *supra* note 83, at 182; PARRINDER, *supra* note 90, at 143.

101. Witches use a spell to raise the dead and create zombies. The zombies are used as field labour, to construct buildings or for any other work the witches need accomplish. Zombies appear only at night. Minnaar, Wentzel & Payze, *supra* note 83, at 182.

lightning bolts to create accidents and injuries.[102] A witch's powers are so volatile he or she may bewitch someone unwittingly in a moment of anger.[103] Witches also can use medicines to prevent themselves from being discovered during their mischief and can use medicines to keep their victims sleeping while they bewitch them.[104] "Because witchcraft does not respect the rules of society, it is unpredictable, uncontrolled and frightening."[105]

Those who have not inherited witchcraft powers can locate a witch capable of teaching them powers or of providing them with charms or medicines to create a desired outcome. In many cases, people seeking charms or medicines are believed to be using them to capture the fortune of those seen as more fortunate. As one scholar explained, "a man's rival or someone jealous of him or desirous of harming him, visits one of these sorcerers who is known to possess a secret medicine injurious to others. He has to pay a price for this medicine which he plants on the path of his victim or even in his food."[106]

Medicine murder is one method used to increase one's fortune. It is the practice of killing someone seen as successful and using his or her body parts in a medicine to bring power or luck to the killer. Horrifically, the participants remove the organs and body parts from the victim while he or she is alive in order "to keep as much as possible of his/her vital energy."[107] Another aspect of witchcraft-related violence is ritual murder. Ritual murder involves the sacrifice of a person to benefit the community.[108] The sacrificial organs are used to counter particularly strong evil.[109]

At one time, communities believed that chiefs had a special ability to communicate with ancestors. With this power, chiefs were able to protect the fertility of land and animals, to bring rain for crops, and to protect the community against the evil practiced by witches.[110] A chief could sanction a ritual murder if it would benefit the community by restoring order to the community.[111] This connection with the ancestors helped maintain the chiefs' power over the community. Chiefs also were believed to be able to access the power of witches for their own benefit—either to increase their own wealth or to destroy their ene-

102. Motshekga, *supra* note 71, at 150.

103. Because witchcraft can be practiced unwittingly, some people accused of witchcraft will accept as true the accusations against them. Minnaar, Wentzel & Payze, *supra* note 83, at 183.

104. Chavunduka, *supra* note 42, at 40.

105. MFC BOURDILLON, WHERE ARE THE ANCESTORS 115 (1993).

106. GELFAND, *supra* note 81, at 34-35.

107. Veronique Faure, *Notes on the Occult in the New South Africa*, 2 African Legal Studies 170-71 (2001).

108. Minnaar, *supra* note 92, at 15.

109. *Id.* at 18.

110. Redding, *supra* note 83, 557; Mihalik & Cassim, *supra* note 31, at 130. The author has not found information as to whether this belief still exists. One reason the spiritual basis of a chief's power may no longer exist is because of the interference of the colonial and then Apartheid government in the powers of chiefs as well as the succession to the role of chief. *Id.*

111. Minnaar, *supra* note 92, at 17.

mies.[112] Today, as in the past, it is accepted to at least some extent that chiefs practice medicine murder to increase their power and wealth.[113]

3. Smelling Out a Witch

People who meet with misfortune turn to traditional healers and diviners to help them determine whether their misfortune resulted from the anger of their ancestors or from the evils of witchcraft. They also enlist diviners to cure them of any physical illness.[114] Under a strict division of services, diviners determine the cause of the disease or misfortune while the traditional healers treat any medical problems resulting from the ancestors or witchcraft.[115] If a diviner determines witchcraft was involved, he or she then will determine who perpetrated the witchcraft.[116] In practice, the functions of the traditional healer and diviner overlap.[117] For purposes of this article, I will refer to all traditional healers and diviners capable of detecting and treating symptoms of witchcraft as diviners.

Diviners are believed to have the same powers as witches to access the spiritual world, but, unlike witches, diviners use their powers for good.[118] As with many witches, a diviner is believed to inherit his or her powers, although there is some suggestion that diviners learn how to harness the power of the spirits from other diviners.[119] Because the power of the witch and the diviner are the same, the diviner is able to recognize another using the power for evil.[120] Unfortunately, the identical nature of the power means that a diviner is capable of becoming a witch and, in fact, will turn into one as soon as he or she uses the connection with the spirit world for evil or for his or her own gain.[121]

There are at least three methods diviners use to determine who is responsible for bewitching, cursing or otherwise practicing witchcraft. Some diviners

112. Redding, *supra* note 83, at 557; Mihalik & Cassim, *supra* note 31, at 130.

113. Mihalik & Cassim, *supra* note 31, at 130. Chiefs have been convicted of medicine murder in South Africa's courts. Rex v. Magundane, 1915 Native High Court 64 (Natal); Rex v. Chief Butelezi, 1910 Native High Court 84 (Natal).

114. Minnaar, Wentzel & Payze, *supra* note 83, at 182; PARRINDER, *supra* note 90, at 169, 180-81.

115. GELFAND, *supra* note 81, at 34. For a description of the differences between diviners, traditional healers and sangomas in Zulu tradition, see Hund, *supra* note 78, at 370.

116. NAT'L. CONF. REP., *supra* note 5, at xiii.

117. GELFAND, *supra* note 81, at 34. Diviners and traditional healers also are able to use their powers to protect a person's home and property from attempts at witchcraft. NAT'L. CONF. REP. (statement of Ngoako Ramtlhodi), *supra* note 5, at 1.

118. INEKE VAN KESSEL, BEYOND OUR WILDEST DREAMS 132 (2000); Motshekga, *supra* note 71, at 150; GELFAND, *supra* note 81, at 37-38; PARRINDER, *supra* note 90, at 182. Traditional healers, whether or not they are diviners, also may have the same powers as those ascribed to the "sorcerers." Minnaar, *supra* note 92, at 17.

119. Hund, *supra* note 78, at 378-79; COMM'N. OF INQUIRY REP., *supra* note 3, at 16, 27. A traditional healer or diviner discovers his or her powers typically after having fallen sick with an illness Western medicine cannot cure. Ultimately, a traditional healer will tell the sick person that there is no physical ailment, instead, the person's ancestors are communicating to the person their desire that he or she become a traditional healer. During the course of dreams, and sometimes with training from the traditional healer who made the diagnosis, the person will learn the art of healing. *Id.* at 27.

120. PARRINDER, *supra* note 90, at 182-83.

121. *Id.* at 183.

use divination, others a trial by ordeal and yet others are able to "smell out" witches. Divination covers many practices. The diviner must enter a trance to discover the witch and interpret the messages from the ancestors.[122] The actual practices range from throwing bones or other objects that can be interpreted through the help of the ancestors to looking at a mirror or television screen until the image of the witch appears.[123]

To detect witches through a trial by ordeal, a diviner prepares a special medicine for community members or accused witches to drink.[124] Those innocent of practicing witchcraft will vomit the concoction, while witches will retain the drink and develop diarrhea.[125] In another version of trial by ordeal, the diviner draws a line on the ground and sprinkles medicine along the line.[126] Members of the community are asked to walk across the line. Witches are unable to cross and instead fall paralyzed.[127]

Smelling out a witch is based on the belief that witches carry a terrible smell that diviners can detect.[128] Diviners can walk through the victim's property smelling out the objects used by the witch to cause the harm.[129] Often, diviners will not provide the name of the witch alleged to have caused the misfortune, but instead will describe the witch, leaving it to the person seeking help to determine the name.[130]

Diviners are expected to counteract or destroy the witchcraft used to create a person's misfortune.[131] To fight the bewitching, diviners need to reach the ancestors in the spirit world.[132] Diviners typically charge a substantial fee for their work.[133] They further seek to find witches in hopes of curing them of evil or removing their powers.[134] One possible method of removing witchcraft powers simply is to expose the activities of the witch.[135] Religious leaders also may be capable of fighting witchcraft through prayer and exorcism.[136]

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122. GELFAND, *supra* note 81, at 48.

123. *Id.* at 48; FREDERICK KAIGH, WITCHCRAFT AND MAGIC OF AFRICA 40 (1947). The diviner who uses bones receives them from a ceremony in which a calf or goat is slaughtered and burned over a fire. Once four intact bones are found from the ashes, they are presented to the diviner for future use. Mutwa, *supra* note 72, at 70.

124. Chavunduka, *supra* note 42, at 41.

125. *Id.* Professor Chavunduka explained that there are real problems with this method because if a diviner prepared the wrong combination of medicines, innocent people could be determined as witches, while actual witches may go undetected. *Id.*

126. *Id.* at 42.

127. *Id.*

128. KAIGH, *supra* note 123, at 40.

129. Chavunduka, *supra* note 42, at 41-42.

130. AEB Bhlodhio, *Some Views On Belief In Witchcraft As A Mitigating Factor*, DE REBUS 409 (1984). PARRINDER, *supra* note 90, at 168.

131. Hund, *supra* note 78, at 386.

132. *Id.*

133. PARRINDER, *supra* note 90, at 177.

134. COMM'N. OF INQUIRY REP., *supra* note 3, at 51; TIMMINS, *supra* note 73, at 250; PARRINDER, *supra* note 90, at 187-88.

135. PARRINDER, *supra* note 90, at 170, 191-92.

136. *Id.* at 180 (describing the practices of Basuto Christian priests and Zulu Zionist prophets).

B. Social Aspects of Witchcraft Accusations

1. Witchcraft Accusations

While accusations of witchcraft could be leveled at any person within a community, certain patterns emerge in the literature. Women seem to be the most common targets of witchcraft accusations.[137] Part of this lies in the belief that a daughter inherits her witch's powers from her mother. According to the Lovendu from the Transvaal, children "drink in witchcraft with their mother's milk."[138] The Basuto describe witches as "women (and a few men) on sticks or on fleas, [who] meet in assemblies, and dance stark naked in various places" and who use their "perverted sense of humour" to harm men.[139]

Jealousy often underlies these accusations, particularly with regard to women. Anthropologists believe women are more likely to be targets of accusations because of what is considered the typically poor and often jealous relationship between mothers-in-law and daughters-in-law.[140] They sometimes vent their frustrations with each other through such accusations. Women also may be targeted because of cultural practice of polygyny. Having multiple wives creates the possibility that one will accuse another of witchcraft.[141] Similarly, the cultural practice of bringing women from their fathers' families into their husbands' leaves them vulnerable to attacks on their loyalty to their new family.[142]

Wealth plays an important role in accusations as well. Poorer members of the community are thought to use witchcraft in hopes of gaining the fortune of a wealthy person or simply out of jealousy.[143] As a result, wealthier people fear the poor will use witchcraft to force a redistribution of wealth.[144] That is not to say wealthy people are immune from such accusations, as they often are be-

137. Greg Brack & Michele Hill Carson, *Witch Persecution in Modern South Africa*, in NAT'L. CONF. REP, *supra* note 5, at 48. The Commission of Inquiry Report notes that while traditionally women are the targets of witch-killings, men also are victims of such purges. *Id.* at 14.

138. PARRINDER, *supra* note 90, at 143. *See also*, NAT'L. CONF. REP., *supra* note 5, at xiii.

139. PARRINDER, *supra* note 90, at 133, 143.

140. *Id.* at 98.

141. *Id.*

142. GLUCKMAN, *supra* note 80, at 98; Mayer, *supra* note 99, at 9. Other reasons suggested for why women are more often the targets of witchcraft accusations include:

- As women generally outnumber males, there are more female than male witches.
- Many males argued that women kill men once their sons have reached adulthood, so that they (women) would remain in control of the family.
- They further argued that there are very few cases in which husbands kill their wives as polygamy allows them to marry as many women as they can maintain.
- Jealousy, not only concerning love affairs, but jealousy concerning material possessions of the neighbour: If children are performing better than the children of the neighbour, the mother of those children who are performing poorly is believed to be more envious than the father of her children.

COMM'N. OF INQUIRY REP., *supra* note 3, at 15.

143. Chavunduka, *supra* note 42, at 39; Greg Brack & Michele Hill Carson, *Witch Persecution in Modern South Africa*, in NAT'L. CONF. REP., *supra* note 5, at 47; Niehaus, *supra* note 80, at 22; ., COMM'N. OF INQUIRY REP., *supra* note 3, at 14-15; GELFAND, *supra* note 81, at 34-35.

144. Cyprian Fisiy & Peter Geschiere, *Witchcraft, Violence And Identity: Different Trajectories In Postcolonial Cameroon*, in POSTCOLONIAL IDENTITIES IN AFRICA 194 (Richard Werbner & Terence Ranger eds., 1996).

lieved to have used witchcraft to gain their fortunes. However, this seems to be quietly condoned.[145]

Another common target of witchcraft accusations is the elderly.[146] One scholar reported a pattern in which the victims of alleged witchcraft typically are young and the accused witches middle-aged or older: "The association of elders with witchcraft is . . . based on the perception that their active power of adulthood slips away into infertility and infirmity, and that their status rests purely on their control of esoteric knowledge."[147] For older women accusations are even more likely: "If they are women living alone they are feared as were the old wise women of Europe. Why have they lived so long? Clearly they must have obtained new soul-vitality, most likely from devouring the soul of a tender child."[148]

When illness or hardship falls on a person, the first to be considered as a likely witch are those with whom the victim has had a conflict.[149] In many cases, accusations are aimed at family members or other people with whom they share a close relationship. One scholar explains this phenomenon: "As those we know best are the ones with whom there may be the greatest friction . . . [accusations are] rarely against those who live at a distance. The latter have not sufficient social contacts to make them feel hatred."[150]

The last categories of people likely to be targeted by witchcraft accusations are anti-social, individualistic or otherwise "odd" people.[151] Bearing in mind that traditional cultures value the community and are concerned with the contributions of the individual to the community, anti-social, morose or difficult people seem to contribute less to the community. When the community's suspicions of witchcraft arise, these people are the easiest targets for an accusation.[152]

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145. Niehaus, *supra* note 80, at 359-60; Fisiy, *supra* note 144; Redding, *supra* note 83, at 559-60.

146. PARRINDER, note 90, at 196.

147. Isak Niehaus, *Witchcraft in the New South Africa*, 2 AFR. LEGAL STUD. 116, 136 (2001).

148. PARRINDER, *supra* note 90, at 196.

149. Niehaus, *supra* note 80, at 123.

150. PARRINDER, *supra* note 90, at 168. *See also*, Chavunduka, *supra* note 42, at 39; Redding, *supra* note 83, at 559-560.

151. Chavunduka, *supra* note 42 , at 39; PARRINDER, *supra* note 90, at 198.

152. As TW Bennett and WM Scholtz describe:

> The witch is commonly one who is, in one way or another, a disturbing factor within the close-knit African community in that he infringes the norms and mores of that community . . . he may, for instance, merely be habitually miserly or inhospitable. He may of course, be a more obviously disturbing factor as, for example, if he is aggressive, sullen, morose or withdrawn. Whether he departs from the norms of the community to a minor or major degree, the point should be made that, within the confines of a small-scale African community, closely linked by kinship, any degree of aberration is naturally magnified by proximity and the expectations which arise from such proximity.

Bennett & Scholtz, *supra* note 83, at 290. *See also*, Brack & Carson, *supra* note 143, at 47; PARRINDER, *supra* note 90, at 198.

2. Social Purpose of Witchcraft Accusations

Accusations of witchcraft and subsequent punishment of witches seem to serve social purposes beyond just stopping witchcraft.[153] On a societal level, witchcraft beliefs help maintain social control within the community. First, witchcraft accusations bring tensions within the community into the open, often allowing for a traditional leader to mediate conflicts.[154] Second, fear of being accused of witchcraft or of angering a witch is an incentive for individuals to treat each other well.[155] Witchcraft accusations also curb antisocial behavior,[156] or remove antisocial people from the community.[157] Finally, witchcraft accusations set the boundaries of who belongs in the community and who does not.[158]

Individuals seem to receive many social benefits from a belief in witchcraft. Such belief allocates responsibility for misfortune to either the ancestors or witches.[159] To the extent responsibility is allocated to witches, afflicted individuals can avoid personal responsibility and have a target for their anger.[160] As an extension of this purpose, witch-killings provide a catharsis to the community. "They ha[ve] found the public enemy who made things go wrong for all of them; they ha[ve] destroyed him; they could all breathe more freely."[161] Witchcraft beliefs also provide a method of explaining random events like natural disasters.[162] Dangerously, witchcraft may be "a banner under which people hate, denounce and even kill one another."[163]

Some see witchcraft belief and accusations as a manner of controlling changes within society.[164] As one scholar described in 1955:

> Conflicts between old and new social principles produce new animosities, which are not controlled by custom, and these open way to new forms of accusation. . . .The system of witchcraft beliefs, originally tied to certain social relations, can be adapted to new situations of conflict—to competition for jobs in towns, to the rising standard of living made possible by new goods, which breaches the egalitarianism and so forth. In response to this situation there have arisen in Africa

153. It is difficult to present the social purposes without appearing to make judgments as to whether witchcraft actually exists. The author does not intend for this section to cast judgment upon witchcraft believers or to express an opinion about the existence of witchcraft itself. This section, however, is important for understanding the role witchcraft plays in South Africa's indigenous cultures.

154. Chavunduka, *supra* note 42, at 39; Brack & Carson, *supra* note 137, at 47; Niehaus, *supra* note 80, at 24. *See also*, Mayer, *supra* note 99, at 13 (arguing that witchcraft accusations provide "a pretext for quarreling").

155. Adrieene van Blerk, *Sorcery and Crime*, 11 COMP. & INT'L L.J. OF S. AFR. 333 (1978); PARRINDER, *supra* note 90, at 169.

156. GLUCKMAN, *supra* note 80, at 98.

157. Bennett & Scholtz, *supra* note 83, at 291. While stated mildly, removing anti-social people from a community ranges from banishing them, to burning their huts and personal goods, to killing them.

158. Niehaus, *supra* note 80, at 18.

159. *Id.*

160. Bennett & Scholtz, *supra* note 83, at 292.

161. Mayer, *supra* note 99, at 13.

162. Niehaus, *supra* note 80, at 287; Mayer, *supra* note 99, at 20.

163. Mayer, *supra* note 99, at 11.

164. Chavunduka, *supra* note 42, at 39; Fisiy & Geschiere, *supra* note 144, at 194; PARRINDER, *supra* note 90, at 201.

> movements designed to cleanse the country of witches, held responsible for social disintegration, for falling yields on over-cultivated lands, for new diseases. The philosophy of these movements against witchcraft is that if Africans would cease to hate one another and would love each other, misfortune would pass.[165]

Finally, witchcraft and witchcraft accusations help those in power to retain power and those not in power to elevate their status. Acting against witches elevates a person's status or helps them to retain authority as it "dramatize[s] their capacity to punish the perpetrators of misfortune, and to assist those who sought compensation for the crimes that had been committed against them by witches."[166] More cynically, witchcraft accusations can be used to rid oneself of opponents.[167] A person able to convince the community of the truth of the accusation gains status, while the accused loses his or her status.[168] This elevated status, however, only exists as long as the community accepts the accusation—where an accusation fails to gain currency the accuser could lose status.[169]

Unfortunately, the manifestation of witchcraft belief can lead to violence. Customary law offered its own mechanisms to control the belief, which were ultimately shut down by the successive white governments. The next section describes the historical customary law mechanisms and the common law mechanisms for controlling manifestations of witchcraft belief, as well as the results of the common law efforts.

IV.
WITCHCRAFT UNDER THE LAW

A. Treatment of Witchcraft Under Customary Law

1. Witchcraft Trials Before the Witchcraft Suppression Act 3 of 1957

Witchcraft believers take for granted that "witchcraft is an 'objective' feature of reality which invites an appropriate response from the community."[170] In the past, "an appropriate response was an institutional response in accordance with accepted African understandings of reality under the auspices of sangomas and chiefs."[171] Traditional courts developed several mechanisms to deal with the manifestations of witchcraft. They punished the practice of witchcraft, mediated conflicts blamed on witchcraft, compensated for false accusations of witchcraft and granted divorces when a husband had his wife smelled out as a witch. The most interesting for those who do not believe in witchcraft is to learn how customary courts and traditional leaders set about determining the guilt of an alleged witch. What will be described below is the procedure commonly

165. GLUCKMAN, *supra* note 80, at 101. *See also* Diane Ciekawy & Peter Geshiere, *Containing Witchcraft: Conflicting Scenarios in Post Colonial Africa*, 41 AFR. STUD. REV. 1, 3 (1998) (discussing the relationship between witchcraft and modernity).

166. Niehaus, *supra* note 80, at 260; Redding, *supra* note 83, at 559-60.

167. Minnaar, Wentzel & Payze, *supra* note 83, at 176.

168. Anderson, *supra* note 82, at 16.

169. Consider the customary court's treatment of defamation described below.

170. John Hund, *African Witchcraft and Western Law*, 2 AFR. LEGAL STUD. 22, 49 (2001).

171. *Id.* A "sangoma" is a commonly used word for "diviner."

followed by customary courts prior to the introduction of the Witchcraft Suppression Act. These procedures may be practiced covertly today. Changes in the ways indigenous cultures deal with witchcraft due to the adoption of the Witchcraft Suppression Act will be described separately below.

A trial to determine whether someone is a witch began when the alleged victim of witchcraft approached a traditional leader to complain of some harm that resulted from witchcraft.[172] Where the complainant alleged that a particular person was a witch, the chief tried to determine whether there was a legitimate claim of witchcraft or whether there was some other dispute underlying the allegation.[173] When a chief determined a dispute unrelated to witchcraft underlay the claim, he mediated between the parties to reach a solution or understanding, eliminating the allegation.[174] If the chief agreed that witchcraft might have been involved in the alleged harm, typically the chief sent the victim with his councilors to a diviner.[175] The diviner would then determine whether the harm resulted from witchcraft or the anger of the ancestors. If the diviner believed witchcraft was involved, he or she would divine or smell out the witch.[176] The complainant and councilors would report the diviner's findings to the chief. In some communities, a diviner identified the witch in the presence of the community and the chief.

There were several procedural protections in place to guard against false accusations of witchcraft by the complainant or the diviner. The first protection involved the chief choosing a diviner who lived significantly far from the community so that he or she would be unaware of the everyday happenings in the community and would be unfamiliar with the actors involved.[177] This protection was intended to stop diviners from proclaiming the guilt of a person because of influence from community members, knowledge of community relations, or because of any dislike of a community member.[178] Sending councilors with the accuser was another procedural protection. The chief sent his councilors to prevent the accuser from suggesting to the diviner the possible perpetrator and to stop the complainant from otherwise influencing the out-

172. Hund, *supra* note 78, at 368; Niehaus, *supra* note 80, at 259; Bhlodhio, *supra* note 130, at 409. Among the Shona in Zimbabwe, there is some conflict as to whether the victim will approach the chief directly. While some choose to do so, others use a procedure that begins with a victim requesting a diviner to determine whether witchcraft was involved with the harm and, if so, identifying the perpetrator. On returning to the village, the victim would place ash at the doorstep of the alleged witch. The chief then is informed of the allegation, typically by the accused witch. GELFAND, *supra* note 81, at 74-75.

173. Chavunduka, *supra* note 42, at 39.

174. *Id.* at 39.

175. COMM'N. OF INQUIRY REP., *supra* note 3, at 16; Minnaar, Wentzel & Payze, *supra* note 83, at 183; Bhlodhio, *supra* note 130, at 409.

176. In the Green Valley of South Africa, diviners from Phunda Malia were frequently called upon to perform divinations. Where they determined an accused was a witch, they would cut holes into the witch's clothes and shave his or her hair. Niehaus, *supra* note 80, at 259. If the diviner deemed the alleged witch innocent, the accused would blow a goat's horn upon returning to the village. *Id.*

177. Bhlodhio, *supra* note 130, at 409.

178. *Id.*

come.[179] Where a diviner proclaimed the witch before the chief, the chief determined for himself, with the aid of councilors, whether the complainant made any improper suggestions to the diviner. If the chief or his councilors felt something was suspect in the diviner's procedures, the chief would order a consultation with a different diviner.[180] A last protection emanated from the diviner. Diviners, at least in the past, refused to consult with complainants without the chief's permission.[181] In the Green Valley, in the Northern Province of South Africa, chiefs further required complainants to place a deposit of cattle with the court that would be used to compensate the alleged witch for a false allegation.[182] The chief similarly required the alleged witch to deposit cattle for payment to the victim should he convict the accused.[183]

Once a diviner pointed out a witch, whether by name or description, the customary court would begin a trial. Among certain indigenous cultures in southern Africa, if the complainant alleged that the accused used "poison or a potent cathartic, emetic, intoxicant, or narcotic with the intent to harm," the accused could be charged with both witchcraft and assault.[184] Other types of witchcraft that could be prosecuted by chiefs included using body parts for any purposes, including participation in medicine murder.[185]

The trial required the complainant and councilors to report back to the chief on the meeting with the diviner. Chiefs often did not rely on the evidence of the diviner alone to find someone guilty of practicing witchcraft. Instead, chiefs looked for other objective evidence such as statements by the alleged witch threatening the complainant, evidence of charms, poison or other witchcraft medicine in the home of the alleged witch, or evidence of witchcraft charms or medicines found on the complainant's property.[186] In common law terms, this could be described as an effort to prove fault.[187]

Divination was not necessarily required where an accused threatened the complainant with some type of harm and the harm actually occurred. In the Northern Province, an older man was convicted of witchcraft on evidence of a verbal threat and proof that the harm occurred as threatened.[188] The accused had warned the complainant that lightning would strike him on 9 November 1995. On that night, lightning struck the complainant's hut. He managed to escape, finding a place to stay with a friend. Two nights later, lightning struck the friend's hut. The complainant and his friend escaped the burning hut. With

179. *Id.*

180. *Id.*

181. Niehaus, *supra* note 80, at 259. While this was a successful procedural protection, the main reason the diviners refused to identify witches without a chief's permission was out of fear of reprisals from the alleged witch's family. *Id.*

182. *Id.* at 258.

183. *Id.*

184. MYBURGH, *supra* note 94, at 81.

185. *Id.* at 99.

186. *Id.* at 99; Bennett & Scholtz, *supra* note 83, at 299.

187. Bennett & Scholtz, *supra* note 83, at 294-97.

188. COMM'N OF INQUIRY REP., *supra* note 3, at 13.

evidence of both a threat and the threat coming true, the chief ordered the older man to leave the village.[189]

On a conviction, the chief would punish the witch. Except in certain emergencies, only the chief had this right.[190] For a conviction of bewitching a person, punishment ranged from ostracism to payment of a fine to death. In the Green Valley, the chief imposed a fine paid as a deposit before trial.[191] An elder in the community described: "In the past witches were not killed. Their punishment was to be exposed."[192] Other communities simply shunned the witch.[193] In some regions, the chief ordered the convicted witch to cure the victim.[194] Banishment was another form of punishment for witchcraft,[195] as was burning of the witch's hut.[196]

While some scholars protest that chiefs did not put witches to death and that this was a phenomenon that developed after the Witchcraft Suppression Act came into affect,[197] there is significant evidence to the contrary.[198] In a book published in 1947, common forms of punishment for witchcraft included "beating, spearing or burning to death."[199] Similarly, the *Commission of Inquiry Report* stated that chiefs commonly ordered the death penalty against convicted witches.[200] A death sentence also was common among the Pedi in the Northern Province.[201]

Two other causes of action relevant to witchcraft are defamation and divorce. Where a person accused another of witchcraft without evidence, the accuser could be charged under the customary law of defamation. Throughout South Africa, a false accusation of witchcraft resulted in a fine to the accuser, which was used to pay damages to the accused.[202] If a wife accused her husband of witchcraft, her biological family could be required to pay damages to her husband in the form of cattle.[203]

As described below, as a part of "official" customary law, a husband who has his wife smelled out as a witch essentially instituted a divorce. Under living

189. *Id.*

190. Bhlodhio, *supra* note 130, at 409; AC MYBURGH, PAPERS ON INDIGENOUS LAW IN SOUTHERN AFRICA 106 (1985).

191. Niehaus, *supra* note 80, at 259.

192. *Id.* at 259-60.

193. Minnaar, Wentzel & Payze, *supra* note 83, at 183; COMM'N OF INQUIRY REP. *supra* note 3, at 51.

194. MYBURGH, *supra* note 94, at 31. Myburgh reported that some chiefs would torture the witch until he or she cured the victim. Where the witch's attempts to cure were particularly inept, the conviction for witchcraft was reversed. *Id.*

195. COMM'N OF INQUIRY REP., *supra* note 3, at 51; MYBURGH, *supra* note 94, at 49. In some cases, family members of the witch would negotiate with another village for the witch to be accepted in the other village. Minnaar, Wentzel & Payze, *supra* note 83, at 183.

196. COMM'N OF INQUIRY REP., *supra* note 3, at 51; MYBURGH, *supra* note 94, at 50.

197. Minnaar, *supra* note 92, at 2.

198. MYBURGH, *supra* note 94, at 51.

199. KAIGH, *supra* note 123, at 40.

200. COMM'N OF INQUIRY REP., *supra* note 3, at 51.

201. Anderson, *supra* note 82, at 23.

202. Hund, *supra* note 78, at 368; Niehaus, *supra* note 80, at 259.

203. MYBURGH, *supra* note 190, at 22.

customary law, a husband could dissolve the marriage because he believed her to be a witch.[204] Whether a wife received a divorce for being smelled out by her husband is unclear.

With the enactment of the Witchcraft Suppression Act, customary law regarding witchcraft either came to an abrupt halt, was practiced covertly, or changed drastically. The next section details the changes that resulted from the act.

2. *Treatment of Witchcraft After the Witchcraft Suppression Act 3 of 1957*

The Witchcraft Suppression Act 3 of 1957 made it an offense to accuse someone of witchcraft, to indicate someone as a witch, to pretend or profess a knowledge of witchcraft, to ask a diviner to point out a witch, or to pay someone to use "pretended" witchcraft. While details of the act will be described more fully below, it is important at this stage to describe how traditional cultures dealt with witchcraft in light of the act.

Many scholars and law enforcement personnel believe that as a direct result of the Witchcraft Suppression Act: (1) chiefs and customary law lost some of their legitimacy in their communities; and (2) people began taking justice against witchcraft into their own hands.[205] By law, the chiefs were bound to comply with the Witchcraft Suppression Act. Also, by law, the authority of chiefs and their capacity to run traditional courts depended on the permission of the "relevant authority" on "Native Affairs" under the Black Administration Act.[206] Many chiefs complied with the Witchcraft Suppression Act for fear of losing their power. The Apartheid government's consolidation of power pressured chiefs to comply with this act more strongly than in the past under the variety of colonial laws suppressing witchcraft.[207] Some chiefs covertly heard witchcraft cases and mediated in witchcraft accusations.[208] Most, however, turned away the accusers of witchcraft, which eventually led communities to feel that chiefs were protecting witches and siding with the government.[209] Ultimately, the act undermined the chiefs' authority and the community's faith in customary law.

To many members of traditional cultures, the Witchcraft Suppression Act punished the victims of witchcraft and allowed witches to run free.[210] The act essentially forced community members to create alternative routes to justice.

204. I. Schapera, ed. THE BANTU-SPEAKING TRIBES OF SOUTH AFRICA 204 (I. Schapera ed., 1937).

205. Minnaar, *supra* note 92, at 1; Niehaus, *supra* note 147, at 132; Niehaus, *supra* note 80, at 359; Hund, *supra* note 78, at 366.

206. *See supra* Chapter 1, Section II(A).

207. Niehaus, *supra* note 80, at 265. Reports in the 1930s suggest that the colonial and white governments condoned witchcraft trials because they wanted to avoid "unnecessary conflicts" with the indigenous populations. Johannes Harnischfeger, *Witchcraft and the State in South Africa*, 2 AFR. LEGAL STUD. 78, 83 (2001).

208. Niehaus, *supra* note 80, at 127; Ralushai, *supra* note 5, at 15.

209. Niehaus, *supra* note 80, at 266.

210. COMM'N OF INQUIRY REP., *supra* note 3, at 54.

Under customary law, accusers had an opportunity to have their witchcraft accusations heard in a court and the chiefs had an opportunity to mediate any underlying dispute or provide compensation for misfortune linked to witchcraft. By removing the authority of traditional courts to hear witchcraft cases, the Witchcraft Suppression Act blocked community members' access to the justice to which they had been accustomed.[211]

Without the support and structure for handling witchcraft accusations provided by the customary courts and customary law, community members resorted to informal trials. Many of the procedural protections built into the traditional system disappeared. No longer did complainants of witchcraft bring their accusations to chiefs before acting, erasing the opportunity chiefs had to control the manifestations of witchcraft belief.[212] In many cases, accusers chose disreputable diviners or ones who came from within the community or nearby. This eliminated the impartial nature of and the faith people had in the traditional system.[213] No longer were advisors sent to watch over the divination process to ensure complainants did not influence the diviners. People became more vulnerable to witchcraft accusations and accused witches lost any chance they had for a fair trial under customary law. As one scholar reported:

> By criminalizing these judicial remedies on the ground that they were repugnant to the 'civilizing mission' of the white, eurocentric apartheid government the seeds of chaos were sown. In the wake of this confusion unfounded witchcraft accusations have proliferated and are frequently used as pretexts for personal animosity, vendettas, inter-generational and domestic rivalry, agendas for political action, and so on.[214]

Nor was there any control over sentences meted out to witches. Sparked by the inaction of the government and chiefs, feeling defenseless, alleged victims of witchcraft turned to vigilantism. In *S v. Ndlovu*, the defendant explained that he had killed the witch who had killed his son after his accusations had been rejected by both the traditional leader and the police.[215] The resort to vigilante justice often is condoned within a community because it is seen as public service, an act of protecting the community, making heroes of the participants.[216]

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211. Niehaus, *supra* note 80, at 359.

212. Bhlodhio, *supra* note 130, at 409.

213. *Id.* at 409. In many instances during the 1980s and 1990s, diviners were forced against their will by community members to determine who was a witch. Additionally, the community members, typically the youth, forced other community members to contribute money for the divination ceremony on the threat of violence.

214. Hund, *supra* note 78, at 368. Witchcraft violence increased significantly in the late 1980s and early 1990s. Minnaar, *supra* note 92, at 1. These witch murders have led many family members of accused witches to flee their homes for fear of being accused of witchcraft because of the association. *Id.*

215. 1979 (1) SA 430, 432 (A).

216. COMM'N OF INQUIRY REP., *supra* note 3, at 15 and 31; Niehaus, *supra* note 80, at 287. At least one scholar reports that even the police treat accused witch-killers as heroes. Minnaar, *supra* note 92, at 9.

There are members of communities who condemn vigilante justice primarily because the accusations are not proved in a traditional court.[217] Unfortunately, there is little they can do to protest these changes. As described in Section III (C) of this Part, the South African government recognizes the problem of witchcraft related violence and has begun to consider how to handle vigilante justice, but no reforms have been formulated.

B. Treatment of Witchcraft Under the Common Law System

This section describes how the government officially deals with witchcraft and witchcraft accusations. The contrast between the approaches is stark and serves as a basis for analyzing how the common law system treats customary beliefs that do not underlie the common law system.

1. Witchcraft Legislation

For over a century, South African governments have made every effort to suppress witchcraft belief through legislation.[218] To the colonial and white South African state courts, it was impossible to convict a person of witchcraft when there was no empirical link between the alleged witchcraft and the harm.[219] Such difficulties made witchcraft trials incompatible with the rule of law and all the more repugnant to a "civilized" society.[220] Over time, the successive white governments expected that their cultural influence, combined with legislation, would civilize the indigenous population, eradicating witchcraft beliefs. Until such "civilizing" occurred, the South African governments hoped legislation would protect innocent persons from superstitious accusations that lead to death.[221] An added benefit of such legislation for the white governments was that it removed more power from chiefs.[222]

The earliest enactments targeting witchcraft belief included the Cape of Good Hope Act 24 of 1886, the Black Territories' Penal Code Chapter XI Act 2 of 1895, The Witchcraft Suppression Act of 1895, the Natal Law 19 of 1891, and the Transvaal Ordinance 26 of 1904. These laws were enforced to varying degrees.[223] The Apartheid government unified the colonial laws under the Suppression of Witchcraft Act, hoping to standardize the harsh response to the belief. Once Apartheid began, the South African government increased the

217. NAT'L. CONF. REP., *supra* note 5, at 25. Some community members feel that the older people in the community and the traditional healers are using the breakdown in witchcraft justice and the willingness of the youths to fight witches to destroy enemies and opposition. *Id.*

218. Niehaus, *supra* note 80, at 339-40; Redding, *supra* note 83, at 558.

219. Hund, *supra* note 78, at 368; COMM'N OF INQUIRY REP., *supra* note 3, at 57; Bennett & Scholtz, *supra* note 83, at 300.

220. Anderson, *supra* note 82, at 54.

221. S v. Mafunisa, 1986 (3) SA 495, 497 (Venda Supreme Court); van Blerk, *supra* note 155, at 332.

222. Niehaus, *supra* note 80, at 339. "Colonial Officials also saw the customary court prosecution of witches as a challenge to their authority." Niehaus, *supra* note 147, at 118.

223. Niehaus, *supra* note 80, at 340.

pressure on traditional leaders to stop hearing witchcraft cases, finding the cases "repugnant, baseless, and even diabolic."[224]

The Witchcraft Suppression Act, as amended in 1970 and 1999, remains in force in South Africa's new democracy. The provisions of the act create offences for:

> Section 1: Any person who:
>
> (a) Imputes to any other person the causing, by supernatural means, of any disease in or injury or damage to any person or thing, or who names or indicates any other person as a wizard;
>
> (b) In circumstances indicating that he professes or pretends to use any supernatural power, witchcraft, sorcery, enchantment or conjuration, imputes the cause of death, injury or grief to, disease in, damage to or disappearances of any person or thing to any other person;
>
> (c) Employs or solicits any witchdoctor, witch-finder or any other person to name or indicate any person as a wizard;
>
> (d) Professes a knowledge of witchcraft, or the use of charms, and advises any person how to bewitch, injure or damage any person or thing, or supplies any person with any pretended means of witchcraft;
>
> (e) On the advice of any witchdoctor, witch-finder or other person or on the ground of any pretended knowledge of witchcraft, uses or causes to be put into operation any means or process which, in accordance with such advice or his own belief, is calculated to injure or damage any person or thing;
>
> (f) For gain pretends to exercise or use any supernatural power, witchcraft, sorcery, enchantment or conjuration, or undertakes to tell fortunes, or pretends from his skill in or knowledge of any occult science to discover where and in what manner anything supposed to have been stolen or lost may be found.

Section 1(a) aims to punish accusations of witchcraft leveled at individuals. Section 1(b) targets diviners or traditional healers who 'smell out' witches, while 1(c) criminalizes efforts to hire diviners or traditional healers to find a witch. Anyone claiming to be a witch or who sells or advises in the use of charms, medicines or other tools of witchcraft can be punished under sections 1(d) and (e). Finally, section 1(f) targets persons who use "supernatural" powers to locate missing or stolen property upon payment.

The Act allows punishment of a fine or imprisonment under any offense listed in Section 1.[225] Anyone convicted under 1(a) or (b) whose accusation or smelling out is found to have resulted in the death of the alleged witch can be sentenced to twenty years imprisonment.[226] The Act also creates a rebuttable presumption that when the accuser has been convicted under 1(a) or (b) and the alleged witch was killed, the death was the direct result of the accusation.[227]

The Witchcraft Suppression Act criminalizes all aspects of witchcraft and witchcraft accusations except the actual practice of witchcraft. The statute pros-

224. *Id.* at 339. There is some suggestion that the colonial governments accepted witchcraft belief to a certain extent because of its popularity and strength, finding it more disruptive to eradicate the belief. Redding, *supra* note 83, at 556.

225. § 1(iii) limits fines to R500 or no more than five years imprisonment for violations of §§ 1(c)–(e). § (f) incurs a fine of no more than R200 or imprisonment no longer than two years. § 1(iv).

226. § 1(i).

227. § 2(a).

ecutes "pretended" witchcraft as though it is a fraud, and not a harmful act. To the believers in witchcraft, this Act punishes attempts to stop witches and it allows witches to continue causing harm at will.[228]

Despite the hopes that the Witchcraft Suppression Act would be a tool to eradicate witchcraft belief, the common law courts seem to have decided more cases of witchcraft related violence or civil cases arising from witchcraft accusations than prosecutions under the Act. As described in the next section, common law courts were forced to develop their own mechanisms for dealing with witchcraft violence and accusations beyond the Witchcraft Suppression Act.

2. *Witchcraft in the Common Law Courts*

The common law courts use their criminal law jurisdiction to handle cases of witchcraft-related violence and violations of the Witchcraft Suppression Act. With their civil law jurisdiction, the common law courts determine divorce and defamation cases that have some relationship to witchcraft and witchcraft accusations. Judicial decisions on divorce and defamation related to witchcraft accusations depend heavily on the customary treatment of witchcraft, while criminal law decisions treat witchcraft belief as wholly unreasonable.

a. Witch-Killings

The treatment of witch-killings offers the clearest view of how common law courts value cultural beliefs they do not share. From the earliest court cases the author could locate, witch-killing is treated as a murder the sentence for which may be mitigated by cultural belief under the doctrines of diminished capacity—including insanity, provocation, involuntary reaction or emotion-induced diminished capacity. Courts throughout the last century continually have refused to recognize witch-killing as a form of self-defense. As time passes and judges conclude that South Africa has been 'civilized,' the decisions reflect a growing impatience with and intolerance of witchcraft beliefs.

South African courts are unwilling to accept self-defense as a justification for witch-killings. In *S v. Mokonto,* the defendant alleged that the deceased had told his brothers and him "they would all die."[229] Both of the defendant's brothers died shortly after the threat. Carrying a cane knife, the defendant confronted the deceased, who allegedly repeated that the defendant would soon die. The defendant killed the deceased. The court refused a plea of self-defence because the deceased posed no immediate threat to the defendant, as she did not have a weapon or suggest she was going to kill him at that moment.[230] The court also refused the plea because the defendant's belief that he was in danger was not reasonable: "the beknighted belief in the blight of witchcraft cannot be regarded as reasonable. To hold otherwise would be to plunge the law backward into the

228. Niehaus, *supra* note 80, at 340. It also creates murderers out of traditional leaders enforcing the death penalty against the tamers of evil spirits. *Id.*

229. 1971 (2) SA 319 (A).

230. *Id.* at 324.

Dark Ages."[231] The standard the *Mokonto* court used was subjective in that the reasonable standard was based on minority beliefs or those of the "civilized" culture.

South African courts also reject a defense that an accused acted under the superior order of the chief and his customary law powers to put a witch to death. A defendant hoped to use obedience to an order as a justification for his act, negating the unlawfulness of it. In *Rex v. Masongo*,[232] the court held that the accused could not rely on this defense because the chief did not have the authority to make the order under applicable witchcraft legislation. Furthermore, the court wrote:

> But assuming, merely for argument's sake, you were ordered to do this, it is no excuse . . . if we were to accept your plea it would mean that in every case where witchcraft is involved, and where an allegation is made that the persons considered were ordered to commit the deed by their Chief, those persons are to be allowed to go free.[233]

The court also suggested that the chief in the instant case likely would be forced to stand trial for his part in the murder.[234]

With uneasiness, the common law courts have been willing to treat the belief in witchcraft as an extenuating circumstance mitigating a murder sentence where the defendant honestly believed the deceased intended to use witchcraft to harm the defendant or his relations, or where the defendant believed he was acting in the public interest.[235] The courts seem to have at least some sympathy for accuseds who acted on genuine fears of witchcraft. An extenuating circumstance is defined as "a fact associated with a crime which serves in the minds of reasonable men to diminish, morally albeit not legally, the degree of the prisoner's guilt."[236] Typically, extenuating circumstances involve some form of di-

231. *Id.* In the 1917 *Rex v. Hlatshwayo* decision, the Native High Court rejected a self-defense plea with little explanation. Because the court suggested that the accused could argue an insanity defense, it seemed to be saying that the belief in witchcraft is unreasonable, therefore insufficient to meet the standard for self-defence. In certain circumstances, an accused may qualify for an insanity defense. 1917 Native High Court 262, 262 (Natal).

232. 1916 Native High Court 42 (Natal).

233. *Id.* at 45.

234. *Id.* This case seems correctly decided given that, under the Witchcraft Suppression Act, traditional authorities cannot prosecute witchcraft cases, making the underlying order unlawful. Had the traditional leader carried out the order himself, it would still be unlawful.

235. S v. Lukhwa, 1994 (1) SACR 53 (A); S v. Motsepa, 1991 (2) SACR 462 (A) (mitigating factor if accused believed he was acting to protect the community); S v. Nxele, 1973 (3) SA 753 (A); R v Bungweni, 1959 (3) SA 142 (Eastern Cape); S v. Thonga, 1993 (1) SACR 365 (V) (holding that the belief that one is serving the community by killing or banishing witches may be a mitigating factor); S v. Magoro, 1996 (2) SACR 359 (A) (court refused to accept belief in witchcraft as an extenuating circumstances where no evidence of such belief was put forth at trial;) The headnotes of S v Dikgale, 1965 (1) SA 209 (A) explain: "Where accused are convicted of murder, and the only probable reason why they had so treated the deceased and committed the crime was that they believed that he was a bad and dangerous witchdoctor, then his must be an extenuating circumstances, even if the witchdoctor did not affect the accused or their near relations." Some scholars fear that defendants take advantage of the doctrine of mitigating circumstances by claiming to believe in witchcraft when they do not or the motivation for killing had nothing to do with the belief. Minnaar, *supra* note 92, at 8.

236. Minnaar, Wentzel & Payze, *supra* note 83, at 179.

minished capacity[237]—whether due to intoxication, provocation, or severe emotional stress.[238] By common law standards, witchcraft beliefs seem to be one of the "factors which may contribute towards the conclusion that he [the accused] failed to realize what was happening or to appreciate the unlawfulness of his act," thus mitigating the accused's moral blameworthiness.[239] Keeping in mind that witchcraft belief is not legally reasonable, this is one of the few options open to courts to limit an accused's liability.[240]

Not every circumstance of witch-killing leads to mitigation. Where a person not believed to be a witch is injured or killed along with the alleged witch, the defendant may be prosecuted fully, without consideration of extenuating circumstances.[241] The accused in *R v. Bungweni* burned the hut of an alleged witch believing that an innocent child also was inside.[242] The court found that this recklessness for another's life, in combination with the calculation with which the accused murdered the deceased, eliminated any extenuating circumstances based on a strong cultural belief.[243] Nor can a defendant invoke a belief in witchcraft as a mitigating factor when he or she was paid to kill a witch. In *S v. Ngubane*,[244] the defendant claimed he was commissioned by friends to kill a witch whom they believed was killing children in the community. While the court agreed that "a belief in witchcraft, forming the motive for the killing of one believed to practice it, almost invariably is a relevant consideration,"[245] the defendant did not prove that he acted because of a genuine fear of harm or for the 'common good' of the community, rather, he killed for payment.[246] To be considered an extenuating circumstance, the belief in witchcraft must have motivated the crime.

Although ultimately rejected on the facts, court decisions suggest that insanity and provocation can mitigate the culpability of an accused in a witch-killing case. In *S v. Mokonto*,[247] the court stated that, where an accused kills a person he or she believes to be a witch because the victim provoked the accused with an immediate threat of witchcraft, the charge could be lessened from murder to culpable homicide.[248] To qualify for a provocation defense, the accused must act in the heat of the moment, without time to think through his or her behavior. In the instant case, the defendant brought a cane knife with him when

237. CR SNYMAN, CRIMINAL LAW 152 (1995); EM BURCHELL & PM HUNT, SOUTH AFRICAN CRIMINAL LAW AND PROCEDURE 201 (vol. 1, 1996).

238. BURCHELL & HUNT, *supra* note 237, at 204-05.

239. *Id.* at 204 (quoting S v. Van Vuuren, 1983 (1) SA 12 (A)).

240. *See also* S v. Netshiavha, 1990 (2) SACR 331, 333 (A) ("Objectively speaking, the reasonable man so often postulated in our law does not belief (sic.) in witchcraft.").

241. *Bungweni*, 1959 (3) SA at 146.

242. 1959 (3) SA 142.

243. *Bungweni*, 1959 (3) SA at 241.

244. 1980 (2) SA 741 (A).

245. *Id.* at 745.

246. *Id.* at 746. *See also*, S v. Mafu, 1992 (2) SACR 494 (A) (where motive was to punish the deceased for refusing to allow his son to belong to the comrades, witchcraft belief is not a mitigating factor).

247. 1971 (2) SA 319.

248. *Id.* at 325.

he confronted the deceased about practicing witchcraft. Although the deceased may have threatened the accused with more witchcraft, the court concluded that because he brought the cane knife, he must have premeditated the death.[249]

Insanity also may remove a defendant's culpability for witch-killings. The Natal Native High Court, in its 1917 *Hlatshwayo* decision, stated that an accused may plead insanity in defense to a witch-killing charge.[250] In that case, the accused killed a person he believed used witchcraft to cause lightning to strike his hut. Despite the suggestion, the court noted that the defendant did not actually appear insane.[251] The tenor of the court's decision suggests that belief in witchcraft alone is insufficient to support an insanity plea.

In at least one instance, a South African High Court accepted as a defense to assault the involuntary reaction of a defendant to what he believed to be a *tokoloshe*, a particularly evil spirit, but was in fact a friend. In *R v. Ngang*,[252] the defendant had a nightmare that there was a *tokoloshe* in the room. When he awoke after the dream, the defendant placed a knife under the bed and went back to sleep. When he awoke again, the defendant mistook his friend for a *tokoloshe* and stabbed him. Finding no possible motive, the court accepted that the defendant's action was a reflex, removing the necessary criminal intent for assault. The court distinguished the defendant's action from a belief in witchcraft that leads a fully conscious and competent person to kill an alleged witch:

> This was not proved to be a case merely of mistaken belief in magic or witchcraft or something like that by a person whose mind was not otherwise affected so that a possibility of finding the necessary mens rea could be said to arise. The appellant acted involuntarily or automatically and cannot be held criminally responsible for his act which was no more than a purely physical reflex.[253]

Implicitly, it seems the court accepted a belief in *tokoloshes* as sufficiently reasonable to justify an involuntary reaction defense.

There is at least some indication that South Africa's courts may further limit the use of the witchcraft belief to mitigate an accused's culpability for attacks against alleged witches because of the continued "modernization" of South Africa. In *S v. Phama*,[254] the court refused to allow a defendant to argue that his belief in witchcraft mitigated the murder of two alleged witches. In strong dicta, the court argued:

> Modern South African courts have for over a hundred years been passing sentence in cases where the background to or motivation for a killing is a belief in witchcraft. In many cases this has been regarded as strong mitigation: cases where the accused and the victim come from a primitive society steeped in superstition, where the accused and his immediate family have been exposed to disease, death and disaster, and where the accused kills the deceased because in his mind this is the only way to put a stop to the curse which he firmly believes has been put on him and his family by supernatural means. This degree of mitigation is not pre-

249. 1971 (2) SA at 325.
250. *Hlatshwayo*, 1917 Native High Court at 262.
251. *Id.*
252. 1960 (3) SA 363 (T).
253. *Id.* at 366.
254. 1997 (1) SACR 485 (EC).

> sent here. The accused is uneducated and from a simple rural background, but he is not a tribesman from some remote district completely cut off from the influences of modern civilization. . . He now lives in a suburb in quite a large, developing town which is the local political and commercial capital. He is able to function properly to hold his own in modern society. While he may not have escaped entirely from the beliefs and superstitions of his forebears, he is expected to control those beliefs and superstitions instead of allowing them to regulate his behaviour towards his fellow human beings. The accused, the victims, and their families do not come from a primitive society, and the message which my sentence must shed out is not a message from a primitive society.[255]

The court's language implies that a person living in the modern world, no matter how uneducated or how strong his belief, should be able to control himself when faced with a witch.[256] Ultimately, the court found that the defendant sincerely believed in witchcraft and believed the deceased were witches. The court, however, did not believe that he killed them to protect his family or community from an imminent threat of witchcraft, but that the killing was revenge for prior witchcraft.[257] What makes this decision difficult from a cultural perspective is that the court ignored that people who believe in witchcraft see it as truly dangerous and threatening, so much so that witchcraft must be eradicated no matter what the cost and despite so-called "modern influences."

The decision in *S v. Matala*,[258] further suggests that South African courts are less willing to use witchcraft belief as an extenuating circumstance. This decision requires the defendant to provide support for his or her belief that the deceased practiced witchcraft before a court can mitigate a sentence. In *Matala*, the defendants attended a meeting where the speaker urged the participants to aid in the battle against witches. Following the meeting, a mob of people went to individual houses to kill alleged witches. Facing criminal charges, the defendants initially stated that they did not believe in witchcraft, while also stating that they participated in the actions to stop witches. The court held that a denial of a belief in witchcraft is not conclusive where there is evidence to the contrary. In the instant case, however, the court concluded, "There is not the slightest evidence that the deceased had ever behaved in any way which could have afforded grounds, reasonable or otherwise, for a belief that she [the deceased] was practicing witchcraft or anything remotely akin to witchcraft."[259] By requiring such evidence, the court is applying something like a reasonableness test to believing a person is a witch. Absent a basis for believing the deceased was a

255. *Id.* at 487-88.

256. Even before the advent of the Witchcraft Suppression Act, the court in *Rex v. Magebeni*, 1911 Native High Court 107 (Natal) felt South Africa too civilized to accept a belief in witchcraft as a mitigating factor. The court commented, "When is it to come that these Natives are to learn that consulting diviners and committing murders will not be tolerated by the British Government? As I have already said, these men lived under a Magistrate for ten or twelve years. Is this sort of thing to continue for ever?" *Id.* at 111.

257. *Phama*, 1997 (1) SACR at 487.

258. 1993 (1) SACR 531 (A).

259. *Id.* at 535.

witch, an accused could not depend on a belief in witchcraft by itself to be a mitigating factor.[260]

The actions of the government of the Transkei from the 1970s to the 1980s provide an interesting commentary on the extenuating circumstances doctrine. In 1977, the independent government of the Transkei grew frustrated with the number of witch-killing cases that came before the courts. The government enacted legislation removing witchcraft belief from the list of extenuating circumstances to be considered in a murder case.[261] They hoped this would deter witch-killings, as it meant all witch-killers would be given the death penalty if no other extenuating circumstances were found.[262] After the change in rules, the witch-killings continued at the same rate and members of the legal community complained about the number of hangings as a result of the policy.[263] In 1988, after a military takeover in the Transkei, the act forbidding the use of witchcraft belief as an extenuating circumstance was repealed in large part because of the complaints in the legal community.

b. Ritual and Medicine Murders

In contrast to witch-killing cases, South African courts do not tolerate or mitigate ritual or medicine murder offenses. Ritual or medicine murder cases lack the element of belief of real and imminent harm necessary to mitigate a witch-killing. Furthermore, the targets of ritual or medicine murder typically are not those believed to practice witchcraft, but are innocent victims and often children. The court in *S v. Modisadife* refused to accept a belief in witchcraft as a mitigating factor for a defendant who killed his brother's eleven-year-old stepdaughter to use certain parts of her body in a medicine that would protect him from harm.[264] The court noted that the harm being protected against was an amorphous one and that the victim had nothing to do with any threat of harm.[265] Conviction for ritual and medicine murder is treated no differently than other murder convictions primarily because the goal is to kill for gain, not to protect family or the community from perceived imminent harm.[266]

c. Violations of the Witchcraft Suppression Act

Somewhat surprisingly, there are few published decisions on violations of Section 1(a) of the Witchcraft Suppression Act, which makes pointing out or

260. *Id.* at 536.

261. DS Koyana, *The Demise of the Doctrine of Extenuating Circumstances in the Republics of South Africa and Transkei*, CONSULTUS 115, 116 (1991).

262. *Id.*

263. *Id.*

264. 1980 (3) SA 860, headnote (A).

265. *Id.*

266. S v. Munyai, 1993 (1) SACR 252 (A); S v. Marhungu, 1981 (1) SA 56 (A); Rex v. Magebe, 1916 Native High Court 167 (Natal); Rex v. Magundane, 1915 Native High Court 64 (Natal); Rex v. Fayedwa, 1915 Native High Court 44 (Natal); *Chief Butelezi*, 1910 Native High Court 84 (Natal); Rex v. Qoqa, 1911 Native High Court 112 (Natal); Rex v. Mabebana, 1911 Native High Court 235 (Natal).

naming a witch an offense.[267] Interesting questions of interpretation have arisen in these cases. The first is whether violations of this section must meet the criteria for defamation. The court in *S v. Mafunisa* determined that a person may be convicted of naming another as a witch by making the allegation directly to the alleged witch, meaning that the accusation need not be published more broadly as required in other defamation cases.[268] Perhaps more interesting, the same court had to decide whether the terms "witch" and "wizard" are intended to include both males and females or whether someone can indicate only women as witches and men as wizards. The *Mafunisa* court noted that dictionaries define witches as women and wizards as men. But, the court held, the purpose of the statute is to protect against all accusations of witchcraft, regardless of gender, so each term includes both male and female witches and wizards.[269] South African courts also confronted the issue of whether a person can be charged under the Witchcraft Suppression Act for indicating someone as a healer who uses supernatural powers to cure illness. One case flirted with answering this question, suggesting that pointing out a healer who uses the power for good likely would not contravene the Act.

The majority of the cases the author was able to locate in which persons were convicted of divination were prosecuted under predecessor statutes to the Witchcraft Suppression Act and significantly before 1957. These opinions condemn diviners for the harm that results from having smelled out someone as a witch. For example, the Natal Native High Court, in *Rex v. Nozindhlela*, wrote: "If a man is smelt out as an *Mtakati* [witch], it is no exaggeration to say that he is in grave danger. The stigma is not easily removed; he is regarded with suspicion."[270] That all these cases were decided long before the enactment of the Witchcraft Suppression Act and that they are relatively few in number is surprising because scholars believe the diviner is a key actor in the witchcraft-related crimes.[271]

The South African courts have faced some interesting difficulties when dealing with charges for professing knowledge of witchcraft.[272] In *S v.*

267. From the decisions recorded in the *Commission of Inquiry Report*, 190 persons were accused of naming others as witches. Niehaus, *supra* note 147, at 120. Forty-five percent of the allegations resulted in convictions. *Id.* Unfortunately, the report does not provide sufficient detail to analyze any trends in what leads to acquittals or to convictions.

According to some scholars, the successive white governments were unwilling to enforce the act because of the amount of policing and force it would require. *Id.*; Harnischfeger, *supra* note 207, at 82.

268. 1986 (3) SA 495, 499 (Venda).

269. *Id.* at 497. For another interesting interpretation question, see S v. Mmbengwa, 1988 (3) SA 71 (Venda) (holding that, where a defendant acts upon the suggestion by another that a person is a witch, the defendant contravenes the Act).

270. 1916 Native High Court 163, 164 (Natal). *See also* Rex v. Fayedwa, 1905 Native High Court 84, 90 (Natal), Rex v. Mabebana, 1911 Native High Court 235 (Natal); Fayedwa, 1915 Native High Court 44.

271. Niehaus, *supra* note 147, at 128 (citing the COMM'N OF INQUIRY REP.).

272. For decisions in which a defendant was convicted of professing knowledge of witchcraft, *see* R v. Butelezi, 1961 (1) SA 91 (Natal); Mpanza v. Mtembu, 1929 NAC 148 (Natal and Transvaal).

Patel,[273] the complainant paid the defendant to help protect her house from whatever was causing her children to die in infancy. The defendant sold her a rabbit's foot to keep in her home and was charged with professing knowledge of witchcraft. The court found the sale of the charm insufficient evidence of professing such knowledge.[274] Furthermore, the court differentiated between professing knowledge of witchcraft aimed at bewitching someone and attempts to undo "a purported prior magicking."[275] The court changed the charge from a violation of the Witchcraft Suppression Act to one of fraud because the accused pretended for payment he could undo the curse on the complainant's family.[276]

Perhaps even more difficult, the Natal Provincial Division in *S v. Dlamini* had to decide whether a priest in the Zionist Church should be convicted of professing knowledge of witchcraft.[277] During the course of a religious ceremony, the priest used stones and objects that were supposed to have supernatural powers. The court refused to convict the priest because religious leaders are expected to have a relationship with God that may involve supernatural powers. The court explained:

> To a member of the faith concerned the conduct of the accused would be absolutely normal in the discharge of his duties as a minister of God. However strange the ceremonies of the Zionist Church might seem to people outside the Church, it is clear that there is no question of witchcraft involved here. The accused professed a knowledge of God, and this seems prima facie to exclude a profession on his part of a knowledge of witchcraft. Nor does the use of symbolic objects or belief in the efficacy thereof constitute witchcraft. The pilgrim to Lourdes believes in the 'supernatural' quality of the waters of the grotto. Moreover, many shrines and even cathedrals housing relics would be unattended by pilgrims seeking divine assistance where the 'supernatural' objects of belief and intercession to be dismissed as no more than the tools of witchcraft.[278]

The Natal court concluded that the practices of the accused were in accordance with Christianity and, at a minimum, the state had failed to meet the burden of proof that the priest professed knowledge of witchcraft.[279] As in the *Patel* case above, this court noted that the priest was not using his connection to god or his supernatural powers to bewitch anyone.[280]

The two previous decisions considered whether the person accused of professing knowledge of witchcraft seemed to be using the powers for good or evil, also suggesting that when supernatural powers are used for good, the 'pretended' use is not witchcraft.

Finally, the author located one decision charging an accused with consulting a diviner under a predecessor statute to the Witchcraft Suppression Act. The

273. 1973 (2) SA 208 (Northern Cape).
274. *Id.* at 216.
275. *Id.* at 217; *see also*, Rex v. Ngodhleweni, 1904 NAC 48 (Natal) (overturning a conviction for practicing as a diviner for lack of evidence).
276. *Patel*, 1973 (2) SA at 217.
277. 1973 (3) SA 629.
278. *Id.* at 632. It would be interesting to see a court explain the difference between witchcraft and Satanism.
279. *Id.*
280. *Id.*

court in *Rex v. Behngu* held that where a person approaches a healer to use his or her powers for good purposes, there is no violation of the predecessor statute.[281] The accused had approached a healer to help his wife become pregnant. The court wrote, "there is no offence in a man consulting a doctor because his wife won't get in the family way . . . There is not a bit of evidence to show that this man was a diviner or a lightning or rain doctor."[282] The court differentiated between seeking the aid of supernatural powers to name witches and approaching a traditional healer for help with a medical problem.

d. Civil Cases

At least in the past, South African courts looked to customary law treatment of witchcraft accusations before making decisions in defamation and divorce cases.[283] As described above, a person accused of witchcraft can approach a traditional leader or traditional court for damages for false accusations. The South African courts follow this lead, allowing accused persons to recover damages for defamation.[284] Interestingly, in *Twala v. Nboqo*,[285] the court held that, since "witchcraft is not recognized by the law of the land, an action for damages for such a claim could only be granted under customary law."[286] While common law has no remedy, a complainant could claim defamation under customary law. Whether the customary and common law distinction remains today is unclear.[287]

Common law courts treat defamation under customary law similarly to how common law treats defamation, with variations necessary because of the state's stance on witchcraft. The plaintiff must show that the defendant actually called the complainant a witch.[288] Hiring a diviner who identifies a witch is not

281. 1916 Native High Court 18 (Natal).

282. *Id.* at 20.

283. The author was unable to locate any decisions on divorce resulting from being smelled out as a witch after the adoption of the Witchcraft Suppression Act.

284. Moumakwa v. Nageng, 1951 NAC 14 (Central); Tsepe v. Tjamela, 1946 NAC (4) 98 (Natal and Transvaal); Nqoko v. Nqoko, 1942 NAC (3) 86 (Natal and Transvaal); Mothoagae v. Mothoagae, 1941 NAC 105 (Natal and Transvaal); Ngobese v. Zulu, 1939 NAC (2) 71 (Natal and Transvaal); Mansa v. Temba, 1938 NAC 115 (Natal and Transvaal).

285. 1968 BAC 10 (North-Eastern).

286. *Id.* at 13. *See also*, Buthelezi v. Msimang, 1964 BAC 105 (Johannesburg) (holding that the customary apportionment of damages applies to civil claims of imputation of witchcraft, not common law) and Tubela v. Roemese, 1946 NAC 24 (Cape and Orange Free State) (concluding that because no actions lie in customary law of defamation for accusing someone of seeking the assistance of a diviner, the defendant did not defame the plaintiff).

287. *See* Ntembo v. Nohlovu, 1947 NAC 93 (Natal and Transvaal) (holding "if the imputation of witchcraft is a criminal offense, it must also be defamatory of a person's character to accuse him of practicing supernatural means").

288. Ngcobo v. Mzobe, 1950 NAC 235, 236-37 (North-Eastern Division) (refusing to make defendant vicariously liable for the statements of the diviner he hired); Dhlamini v. Gwebu, 1944 NAC 7, 8 (Transvaal). In 1970, a case came before the Bantu Appeals Court where the diviner had smelled out a witch with the description of the person but no name. The description was that the witch was a person who accompanied the defendant to see the diviner. There was conflicting evidence on the number of people who went on the trip. The court refused to grant damages because there was no evidence that the defendant named the plaintiff as a witch, simply that the plaintiff assumed he had been named. Buthelezi v. Magwaza, 1970 BAC (3) 33, 35 (Natal and Transvaal).

enough to support a defamation action under the doctrine of vicarious liability. The defendant in a defamation case cannot defend on the basis of truth of the statement, as common law courts refuse to hear any such evidence.[289]

What privileges to apply to defamation cases is a more difficult question for South African courts, particularly when faced with whether to grant damages when the accusation of witchcraft is made to a traditional leader. The courts had to consider that traditionally community members brought all such accusations to the traditional leader. In one decision, the Native High Court in Natal set aside a damages award to a complainant because the alleged defamatory statement was made to a traditional authority under "an honest, although mistaken belief, without malice and in good faith."[290] More recently, the Bantu Appeals Court found a privilege for certain situations in which witchcraft accusations were made to a chief. When a person approached a chief in hopes of beginning a witchcraft trial, accusations of witchcraft before the chief could form the basis of an action in defamation.[291] No privilege would attach to situations, as the chief had no authority to hear such cases. On the other hand, when the chief had to look into a defamation complaint, accusations made to the chief were privileged.[292] The courts appeared caught between the traditional role of the chief, the privileges that attach to that role, and the perceived necessity of suppressing witchcraft belief.

Another privilege may arise when the complainant agreed to join the smelling out ceremony.[293] Publication of the results of the ceremony to those who participated in and paid for the ceremony is insufficient to meet the requirements of defamation.[294] When persons present at the ceremony report the results beyond this limited group, however, they can be found liable for damages resulting from the loss of reputation.[295]

In the past, South African courts also followed customary law with respect to divorces that were carried out on grounds of having been smelled out as a witch.[296] Almost all of the cases were decided well before the Witchcraft Suppression Act came into force but after the enactment of the first suppression statutes. Essentially, when a man had his wife "smelled out" as a witch and she

289. Hund, *supra* note 78, at 368.

290. Yoli v. Sitendeni, 1900 Native High Court 34 (Natal).

291. Makhoba v. Makhoba, 1966 BAC (1, 2) 28, 30 (Eshave); Zungu v. Zungu, 1942 NAC 8, 9 (Natal); Sibisi v. Mtshali, 1939 NAC (2) 137, 139 (Natal and Transvaal).

292. *Makhoba*, 1966 BAC at 30; Ngcobo v. Mdhlalose, 1949 NAC (1) 68 (North Eastern Division). There is some suggestion that this privilege also applies to a report to a kraal-head, Fungula v. Sithole, 1956 NAC (4) 172, 173 (North-Eastern), or to a family meeting. Majola v. Ngubane, 1970 BAC (3) 36, 37 (Natal and Transvaal).

293. Ziqubu v. Ziqubu, 1953 NAC 72, 74 (North-Eastern); Miya v. Miya, 1947 NAC 108, 108-109 (Transvaal and Natal).

294. *Id. See also, Buthelezi*, 1970 BAC (3) at 35. *But see, Sibisi*, 1939 NAC (2) 137 (holding that the privilege does not exist simply because the plaintiff agreed to the meeting with diviner; plaintiff must have consented to the report back to the chief for the privilege to arise).

295. *Ziqubu*, 1953 NAC at 74.

296. It appears from one case that by statutory law, a woman could be granted a divorce for being smelled out as a witch under certain conditions. Ngubane v. Ngubane, 1937 NAC 27, 28 (Natal and Transvaal).

returned to her home, if the man did not request her return within a short period of time, a divorce followed.[297] The wife and her father were expected to report the divination to the chief on her return to her father's home, giving the chief the opportunity to question the husband about the wife's claim.[298] Where this criteria was not met, the court would require evidence that the wife was driven from her home or that the situation was so intolerable she was forced to leave before recognizing a dissolution.[299]

Once the divorce ensued, the ex-husband lost any privileges he normally would have received from a wife as a result of the divorce. For example, the husband could not claim entitlement to repayment of *lobola* or dowry, a common entitlement when a wife leaves a husband.[300] Nor could the ex-husband receive the benefits he would have been entitled to had he remained married or had not caused the divorce. For example, the ex-husband lost the right to *lobola* paid for daughters born to the ex-wife after the dissolution of the marriage, even if he is the natural father.[301] The father of the woman smelled out as a witch by her husband could request damages.[302] These same rules applied when the husband's family had the wife smelled out as a witch on the husband's death.[303]

There are conflicting decisions on whether the woman also lost her rights to the husband's estate following a divorce on these grounds. In *Mdungzawe v. Mabecela*,[304] the widow was allowed to claim against the estate of her husband on behalf of her minor son born to the husband but after the divorce.[305] Three years later, the Native Appeals Court decided that any child born after the woman was smelled out and had returned to her own family was a non-marital child, which under customary law means the child cannot inherit from his father.[306]

From this review of the government and common law treatment of witchcraft belief, it becomes evident that the government and common law courts will

297. Mafaka v. Dyaluvana, 1903 NAC 65, 66 (Transkeian Territories). Even where a husband did return for his wife, courts have found that a divorce ensued. Links v. Mdyobeli, 1947 NAC 96, 97 (Cape and Orange Free State).

298. OLIVIER, BEKKER, OLIVIER, JR., & OLIVIER, *supra* note 16, at 66; Mxonya v. Moyeni, 1940 NAC 87, 88 (Cape and Orange Free State). *But see* Nyamekwangi v. Maduntswana, 1951 NAC 313, 314 (Southern Division).

299. Mqitsane v. Panya, 1951 NAC 354, 355 (Southern Division).

300. Nqambi v. Nqambi, 1939 NAC 57 (Cape and Orange Free State); Petrus v. Alice, 1916 Native High Court 86, 86 (Natal). Under customary law, when a woman marries, she becomes a part of her husband's family. The husband's family is required to pay *lobola* or the dowry for the woman, which may be returned to the husband's family should the woman cause a divorce.

301. *See* Maxobongwana v. Funda, 1909 NAC 273, 273 (Transkeian Territories); Mtuyedwa v. Tshisa, 1906 NAC 122, 122 (Transkeian Territories); Juleka v. Sihlahla, 1905 NAC 88, 88 (Transkeian Territories). There is some authority that if the wife is pregnant at the time she is smelled out, the ex-husband remains entitled to *lobola* paid for that child. *Nyamekwangi*, 1951 NAC at 314. This may imply a reciprocal duty of the father to maintain the child.

302. Somabokwe v. Slooto, 1911 NAC 118, 119 (Transkeian Territories); *Maxobongwana*, 1909 NAC at 273.

303. *Tsibiyan v. Ngoceni*, 1908 NAC 204 (Transkeian Territories).

304. 1908 NAC 219 (Transkeian Territories).

305. *Id.* at 219.

306. *Somabokwfe*, 1911 NAC at 119.

suppress cultural beliefs whose manifestations they find abhorrent. Witchcraft belief can never be a defense to witchcraft-related violence. To the extent a defendant in a witchcraft violence case can prove he or she could not discern right from wrong because of that belief, the court may reduce the charge to a lesser crime or shorten the sentence for the crime. Where the crime seems particularly cold or calculated, the mitigation witchcraft belief provides will likely be erased. The government and its courts may not suppress particular aspects of the customary law treatment of these cultural beliefs when the results of the customary law meet the goal of eliminating the belief. For example, the common law courts willingly enforce customary law treatment of witchcraft accusations that punishes accusers—such as in defamation or certain divorce cases. Surprisingly, in light of the courts' desire to protect the 'innocent' victims of witchcraft accusations, the courts seem hesitant to punish persons violating the Witchcraft Suppression Act, or, perhaps, prosecutors were unwilling to prosecute the cases.

3. Proposed Reforms to the Witchcraft Suppression Act

Changes to customary practices and law related to witchcraft and the failure of the Witchcraft Suppression Act to alter witchcraft beliefs or to control witchcraft violence have forced the government to begin thinking about a reform process for the Witchcraft Suppression Act.[307] Described below are a few proposals for reforming the Act.

The Minister of Safety and Security of the Northern Province in 1996, Seth Nthai, declared witch-killings the number one social problem in the province.[308] In 1996, the Executive Council of the Northern Province commissioned a report researching the causes of witchcraft violence and ritual and medicine murder. The head researcher was Professor NV Ralushai of the University of the North. Professor Ralushai approached the issue from the perspective that the government can no longer deny or suppress witchcraft beliefs. Instead, the government needs to integrate the customary law and common law treatment of witchcraft to reach a more effective solution to witchcraft accusations and violence. This holds particularly true since the witchcraft belief itself is not the problem, but the actions taken on those beliefs. The *Commission of Inquiry Report* makes many recommendations but for purposes of this Article, the author will describe recommendations for the role of law in combating witchcraft violence.[309]

The report's recommendations on the role of law begin by describing how most sub-Saharan African countries continue to outlaw "the practice of magic and witchcraft . . . which [is] not readily appreciated by people, of whom a large number regard the operation of magic as normal events of everyday life."[310]

307. Hund, *supra* note 170, at 49. From 1990-1995, and in 1997 and 1998, over 400 witchcraft related cases a year were recorded in the Northern Province. Faure, *supra* note 107, at 172-73.

308. Hund, *supra* note 170, at 23.

309. It is not the purpose of this Article to critique the Commission of Inquiry Report or the Draft Witchcraft Control Act, which it recommends, as a critique will do little to answer the questions posed in the paper.

310. COMM'N OF INQUIRY REP., *supra* note 3, at 61.

Recognizing the unpopularity of witchcraft-suppression legislation, the report recommendations presume that the success of any reforms depends on whether the populations at whom the reforms are aimed accept them.[311]

In place of the Witchcraft Suppression Act, which it concludes is wholly ineffective, the *Commission of Inquiry Report* recommends the adoption of the Witchcraft Control Act. The proposed act accepts that witchcraft in fact exists and believes law can control it.[312] Under the proposed act, only an unreasonable and unjustifiable cause for naming a person a witch will be prosecuted.[313] A victim of witchcraft, however, cannot seek the aid of a diviner to find a witch, no matter how reasonable or justifiable the belief a witch was involved in the harm.[314] Nor is it legal for a diviner to practice his or her craft.[315] The Act also would criminalize: (1) "any act which creates a reasonable suspicion that he is engaged in the practice of witchcraft"[316] and (2) anyone who "on the advice of any witchdoctor, witch-finder or other person or on the ground of any knowledge of witchcraft, uses or causes to be put into operation any means or process which, in accordance with such advice or his own belief, is calculated to injure or damage any person or thing."[317] These provisions deem the belief in witchcraft as reasonable, which would alter the common law significantly. And, unlike under the existing Witchcraft Suppression Act, all acts of witchcraft would be criminalized under the Witchcraft Control Act.

The *Commission of Inquiry Report* does recognize that witchcraft cannot be proved through eyewitnesses, and perhaps not at all.[318] The recommendations do not suggest how to deal with evidentiary problems in common law courts, nor does the report say whether jurisdiction over witchcraft trials should be returned to customary law courts.

In September 1998, a few years after the completion of the *Commission of Inquiry Report*, the Commission for Gender Equality, a national statutory body, organized a Conference on Witchcraft Violence. The conference members approved the recommendations of the *Commission of Inquiry Report*, including the integrated approach to reform.[319]

The *National Conference Report*, which reflects the events of the conference, includes a list of working groups, the action the working groups hope to take, by whom the actions will be completed and time frames for the completion. Under the working group on legislation, the first action expected is the repeal of the Witchcraft Suppression Act and its replacement with new legisla-

311. *Id.*
312. For a discussion of the problems courts would face in prosecuting witches, see Harnischfeger, *supra* note 207, at 83-86
313. Draft Witchcraft Control Act, *in* COMM. OF INQUIRY REP., *supra* note 3, at 55.
314. *Id.* This provision seems incongruous with the goal of treating witchcraft as real. If witchcraft is real, how are people supposed to protect themselves? Perhaps the *Commission of Inquiry Report* envisions an institutional mechanism to meet this need.
315. *Id.*
316. *Id.*
317. *Id.*
318. COMM'N OF INQUIRY REP., *supra* note 3, at 57.
319. Harnischfeger, *supra* note 207, at 100.

tion.[320] The Department of Justice and Constitutional Development was expected to call a meeting with stakeholders including the Department of Safety and Security, the Departments of Education and Welfare, traditional leaders, traditional healers and victims of witchcraft violence.[321] The target date for the meeting was the end of October 1998. The second piece of expected legislation would govern traditional healers by bringing them under regulation.[322] The Department of Health planned to coordinate with stakeholders by August 1999 to discuss this legislation. According to the working group schedule, the Department of Constitutional Development planned to complete a greenpaper on controlling the manifestations of witchcraft belief by August 1999.[323] The government has not produced a greenpaper.

The Institute for Multi-Party Democracy recommends the creation of special witchcraft courts to hear witchcraft cases.[324] These courts would handle the same issues as the chiefs formally did and would fine people for false, reckless or self-serving accusations of witchcraft as well as fines for the practice of witchcraft.[325]

Each of these recommendations provides for reforms that accept the belief in witchcraft as true, while fighting the negative manifestations of the belief. As discussed in the next section, whether South Africa will adopt the provisions that integrate customary and common law mechanisms for controlling the manifestations of witchcraft belief remains unclear and seems unlikely.

V.
IMPLICATIONS

This Article has shown that the present answer to the question of how the common law system treats witchcraft, a traditional belief accepted by customary law that is not valued by the common law system, is that it attempts to suppress the belief. The implications of this include: (1) that the repugnancy clause instituted by colonists remains intact, and (2) that common law solutions to customary problems may lead to distortions of customary law that harm society in general. Unfortunately, these implications apply more broadly than to just the witchcraft belief.

A. Repugnancy Clause

The language of recent court decisions on witchcraft violence, together with the acquiescence of the new South African government to the Witchcraft Suppression Act and the apparent halt on discussions to reform the act, lead the

320. NAT'L. CONF. REP., *supra* note 5, at 64.
321. *Id.*
322. Keep in mind that diviners fall under the category of traditional healers.
323. COMM'N OF INQUIRY REP., *supra* note 5, at 64.
324. Hund, *supra* note 170, at 52. These courts may have problems complying with the constitutional rights to a fair trial if the concept of fair trial remains based in Western norms and values.
325. *Id.* Many fear that it will be impossible for traditional courts to regain the trust and the perception of legitimacy they had before the Black Administration Act and before the Witchcraft Suppression Act. *Id.*

author to believe that little will change in the treatment of witchcraft belief under the new constitutional dispensation. Somewhere between unreasonable and insane, witchcraft belief may never be treated as more than mere superstition. It appears that customary beliefs and practices, particularly the witchcraft belief, will continue to be subjected to a repugnancy clause, despite the change to a democracy in which believers are in the majority. As a reminder, the colonial and successive white governments used the repugnancy clause to measure customary law and its underlying beliefs and values against the white, minority notions of "public policy" and "natural justice." Any customary law that did not measure up to these Western notions could not be recognized by the common law courts or enforced by customary law courts. Under the new democratic system, both common law and customary law were intended to be subordinate to the Constitution, but not to each other. Yet, the continued use of the repugnancy clause suggests that customary law remains subordinate to common law, as the government can suppress customary law it deems unacceptable.

Several tools are available for the government to subordinate customary law. South Africa's parliament has the most far-reaching power, as it can legislate away any customary law it deems repugnant or less than repugnant through statutes aimed directly at customary law.[326] Parliament, however, also has the power to legislate away common law based on Western values and norms. By itself, the existence of the power to legislate against customary law does not subordinate it.

The courts, however, can access an explicit repugnancy clause provided in Section 1 of the Law of Evidence Amendment Act, which states that courts cannot recognize customary law to the extent to which it is "opposed to the principles of public policy and natural justice." This clause is a remnant of the colonial past devised to suppress and subordinate indigenous beliefs and practices. Inherently, the repugnancy clause measures customary law against Western and minority values and norms. From the common law court discussions of uncivilized indigenous beliefs and the modernizing and civilizing effects of white influence, the concepts of public policy and natural justice explicitly are based on Western norms and values.[327] The courts also can apply a repugnancy clause implicitly by explaining how customary law violates public policy, without specific reference to the Law of Evidence Amendment Act.

326. There are some limitations to this power—it must not be used to violate anyone's rights to culture or beliefs, unless the practice or belief itself is inconsistent with the Constitution. CONST. §§ 15, 30 and 31. How well such rights arguments will succeed depends on the justification for legislating against the customary law. This burden does not seem too difficult in repugnancy clause application, as by definition the custom targeted must be against 'public policy' and "natural justice."

327. Fortunately, the Supreme Court of Appeal recognizes the need to change the basis of public policy away from the norms of the minority to those of the majority. In Amod v. Multilateral Motor Vehicle Accidents Fund, 1999 (4) SA 1319, the Court wrote: "it is quite inimical to all the values of the new South Africa for one group to impose its values on another and that the Courts should only brand a contract as offensive to public policy if it is offensive to those values which are shared by the community at large, by all right-thinking people in the community and not only by one section of it." *Id.* at 1329.

There is at least some question as to whether the Bill of Rights serves as a repugnancy clause. Section 211 makes application of customary law "subject to the Constitution." Because the Constitution predominantly protects individual rights, rather than collective rights, scholars argue that the Constitution is based on Western norms and values rather than African norms and values. Reading Section 211 with this argument in mind leads to the conclusion that customary law is once again being subordinated by the minority system.[328] This may, in fact, be true to the extent Parliament reforms customary law by replacing it with common law rather than developing customary law to bring it into compliance with the Constitution.[329]

That the tools for subordinating customary law exist does not mean they will be used. Unfortunately, the language of a post-Apartheid common law cases on witchcraft-related violence, which relied on past treatment of witchcraft, and the continued validity of the Witchcraft Suppression Act provide ample evidence that the repugnancy clause remains in effect. Since the early twentieth century, common law decisions have deemed witchcraft belief primitive and uncivilized. In 1911, hearing a witch-killing case, the Natal Native High Court lamented the tenacity of such primitive beliefs: "When is it to come that these Natives are to learn that consulting diviners and committing murders will not be tolerated by the British Government? As I have already said, these men lived under a Magistrate for ten or twelve years. Is this sort of thing to continue forever?"[330] Sixty years later, the South African High Court declared that any acceptance of witchcraft belief by the white government would "plunge" South Africa back into the Dark Ages.[331]

The exceptions common law courts make to the treatment of witchcraft beliefs as uncivilized further support the proposition that witchcraft belief has always been measured against Western values. In a few decisions, courts acquitted persons of professing knowledge of witchcraft when the common law judge could relate the alleged professions to Western superstition or practice. As described above, in *S v. Patel*,[332] a traditional healer sold a woman a rabbit's foot to place in her home, which the defendant claimed would stop the complainant's children from dying in infancy. Finding insufficient evidence of professing knowledge of witchcraft, the court altered the charge to fraud. By contrast, the Natal Provincial Division convicted a woman of professing knowledge of witchcraft because she implied through her conduct that a bottle and its

328. For example, customary law as practiced in South Africa follows rules of primogeniture and patriarchy, which stands in direct conflict with gender equality. Some scholars suggest that the equality clause could eliminate up to 85 percent of customary law. Mqeke, *supra* note 34, at 5. *See also* Loenen, *supra* note 32, at 123 ("Because African culture is pervaded by the principle of patriarch, the gender equality clause now threatens a thorough-going purge of customary law"); AJ Kerr, *Inheritance in Customary Law Under the Interim Constitution and Under the Present Constitution*, S. AFR. L. J. 263, 267 (1998).

329. Integrating customary law and the common law could keep the two systems equal, unlike wholesale implantation of common law.

330. *Magebeni*, 1911 Native High Court at 111.

331. *Mokonto*, 1971 (2) SA at 324.

332. 1973 (2) SA 208.

contents had supernatural powers that would allow the defendant to diagnose the complainant with an ailment.[333] The court wrote: "it is sufficient to bring home the present charge, for the Crown to prove that the appellant claimed or represented by his words or conduct that the bottle with its contents was endowed with a quality such as to render its use by him in the circumstances the exercising of a kind of supernatural power or witchcraft."[334] The difference between these two cases seems to be the defendant's choice of objects he or she claimed had supernatural powers. The court in the first decision, at least implicitly, recognized a rabbit's foot as a good luck charm under Western superstition and treated the case as one of fraud, not witchcraft. It seems unlikely the court would have reached the same conclusion if the traditional healer had sold her a goat's ear. When the court could not understand the idea that a bottle and its contents held supernatural powers, the court convicted the defendant of professing knowledge of witchcraft.[335]

Another example of the difference it makes when the judge relates to the alleged witchcraft practice is *S v. Dlamini.* In that case, the court understood a priest's claim to access to supernatural powers through charms because of the similarity with Western Christian priests who are believed to have similar access.[336] The court explained that a Zionist priest using supernatural powers in a religious ceremony is no different than charms endowed with supernatural powers used in churches and cathedrals around the world. This understanding for Church-related supernatural belief stops when people who are not priests claim to have access to the spirit world that provides them with Western notions of supernatural power.

In *S v. Phama,* one of the few post-Apartheid witch-killing trials, the court explicitly accepted the Western premise that witchcraft belief is primitive and uncivilized. The court found the defendant was uneducated and genuinely believed in witchcraft, yet refused to accept the belief as a mitigating factor to a murder conviction because: "The accused, the victims, and their families do not come from a primitive society, and the message which my sentence must shed out is not a message from a primitive society."[337]

Even to the extent other South African court decisions will continue to treat witchcraft belief as an extenuating circumstance, as long as the belief remains an extenuating circumstance based on diminished capacity the repugnancy clause will remain in force. Judging a belief as unreasonable requires it to be measured against something. Without explicit language to the contrary, it can be assumed that Western perceptions of "public policy" and "natural justice" will remain the measuring stick. Although public policy should "mirror the community's sense

333. *Butelezi,* 1961 (1) SA 91.

334. *Id.* at 93.

335. *Cf. Mpanza,* 1929 NAC 148 (Natal and Transvaal) (licensed doctor agreed to protect a kraal against evil for payment; was convicted under Zululand proclamation No. VII of 1895 §§ 268, 269 and 270, which prohibited the use of spells and charms and make it a criminal offence to do these things).

336. *Dlamini,* 1973 (3) SA at 632.

337. *Phama,* 1997 (1) SACR at 487-88.

of justice,"[338] here it will represent Western beliefs and legal values. If public policy were truly indicative of the community's beliefs and values, it would reflect that the majority of South Africans believe in witchcraft. No longer would the belief be legally unreasonable.

Other evidence of an implicit repugnancy clause is the unchanged Witchcraft Suppression Act. "The underlying premise of this Act was that witchcraft did not exist . . . and moreover that these practices were merely superstitious African nonsense."[339] By keeping the Witchcraft Suppression Act intact, despite the frustration of the majority of South Africans with legislation that allows witches to run free and unfulfilled plans to reform the Act, the new multi-cultural government implicitly accepts and is willing to enforce these Western premises. The express purpose of the Witchcraft Suppression Act is to suppress witchcraft belief. Many of the provisions are aimed directly at the belief, not just at its negative manifestations. This Act could be challenged as a violation of the constitutional rights to one's culture and beliefs, although no action has been taken so far. The likelihood of success for such a challenge is beyond the scope of this Article.

The treatment of witchcraft by the government and common law courts provides an easy example of the continued existence of a repugnancy clause. Unfortunately, there is no easy solution to witchcraft that would erase the repugnancy clause. Scholars believe that many problems will arise if witchcraft is formally recognized and controlled by the South African government. It is not the purpose of this Article to analyze or recommend reform efforts; however, it will describe a few of these problems. First, problems arise from the patterns in the accusations of witchcraft. Of great concern is the belief that women are more likely to be witches, especially older women. Would the recognition of witchcraft serve as another hurdle to equality? Regarding the poor, one scholar remarked: "More significantly, the condoning of witchcraft accusations would entrench social inequality . . .Villagers believe the witches are deprived, marginal, and poorer persons . . . Persons who have relatively greater status and influence have manipulated this cultural fantasy to their own advantage."[340] Others argue that formal acceptance of witchcraft belief will hamper development and exacerbate racism: "the recognition of the existence of crimes of an occult nature would be counter-productive to modernity and development, perpetuating the stereotyped notions of atavism and African barbarism that racist theories are always quick to use as a political argument."[341] Finally, scholars fear that formal mechanisms to control witchcraft will violate the constitutional guarantees of a fair trial because of the difficulty of proving a causal link between alleged witchcraft and the harm.

This Article has focused on witchcraft to show that the government and common law courts (1) continue to perpetuate a Western bias in the treatment of

338. Van Niekerk, *supra* note 15, at 416.
339. Minnaar, *supra* note 92, at 3.
340. Niehaus, *supra* note 147, at 135.
341. Faure, *supra* note 107, at 171-72.

customary law and beliefs, and (2) have not acted to eradicate the repugnancy clause. As long as customary law, beliefs and values continue to be measured against Western norms and values, customary law will never be equal to common law, despite the intentions of the drafters of the Constitution.

B. Distortion of Customary Law

A similarly important implication of this research is that statutory law intended to suppress or remove aspects of customary law actually may distort it. This creates the possibility that the effects of the statute may be worse than the customary law. A comparison of customary legal treatment of witchcraft before and after the enforcement of the Witchcraft Suppression Act illustrates this point. The Witchcraft Suppression Act failed to meet its primary goal of suppressing witchcraft, as indicated by reports that witchcraft belief remains prevalent among indigenous cultures. The Act did accomplish the goal of removing some power from traditional leaders, but it also proved the adaptability of living customary law. When the government built roadblocks to the community's access to witchcraft justice, community members dug a tunnel under it. Society paid a heavy price for that tunnel: (1) the statute eliminated the procedural protections to witchcraft trials, while not eliminating the actual trials; (2) the statute removed chiefs from hearing witchcraft cases, replacing them with individuals who believe they have been wronged; (3) diviners garnered a new power to destroy opponents and enemies (or the enemies and opponents of others for pay); and (4) vigilantism came to seemingly reigns over social order.

In the end, the attempts of one legal system to suppress another in a legal dualist society erased what may have been a potentially adequate mechanism for controlling the manifestations of witchcraft belief and replaced it with a less fair, more dangerous mechanism.[342] People are far more vulnerable to witchcraft accusations and accused witches no longer benefit from procedures designed to make witchcraft trials fair. Now, as one law enforcement official reports, customary law no longer can control the negative manifestations of witchcraft beliefs after the common law's failed attempts: "Even traditional authorities, formerly considered to be the guardians of customary law, are now at pains to cope with the situation, because of the considerable changes in the incidence, content, and form of witchcraft accusations over time, and the compromising attitude of traditional authorities during the Apartheid regime."[343]

The end result of the common law's supremacy over customary law is that no mechanism exists to control witchcraft-related violence. The solution to violence caused by witchcraft beliefs turned out far worse than the problems initially identified by colonial and successive white governments. This research

342. Because there are so few resources that examine customary treatment of witchcraft, it is difficult to ascertain whether prior customary legal treatment adequately handled the negative manifestations of witchcraft belief.

343. Dirk Kohnert, *Witchcraft and the Democratization of South Africa*, 2 AFR. LEGAL STUD. 177-78 (2001).

should remind reformers to proceed with caution when attempting to replace customary law with foreign law and practices.

VI.
CONCLUSION

An examination of the treatment of witchcraft belief by the government and by common law courts shows that the repugnancy clause—created by the colonial and perpetuated by successive white governments—remains in force. The "civilized" solution to repugnant customary beliefs can result in such distortions to customary law that the solution may become worse than the initial "primitive" problem. The government, courts and reformers need to rid themselves of cultural and ideological biases when approaching problems in customary law. Until they do so, customary law is likely to remain subordinate to common law. Secondly the government, courts and reformers need to search for solutions within the communities whose problems they are trying to address. Unless reform efforts gain the acceptance of the citizens at whom legislation is aimed, such efforts will fail.

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The Under-Theorization of Universal Jurisdiction: Implications for Legitimacy on Trials of War Criminals by National Courts

Anthony Sammons

The "Under-Theorization" of Universal Jurisdiction: Implications for Legitimacy on Trials of War Criminals by National Courts

By
Anthony Sammons

There is a dramatic disparity between the circumstances of the accusers and of the accused that might discredit our work if we should falter, in even minor matters, in being fair and temperate.[1]

I.
INTRODUCTION

The end of the Cold War allowed deep-seated ethnic and religious tensions, previously contained by the conflict, to rise to the surface in many regions of the world.[2] Ironically, more bloodshed rather than less seemed to herald the new era as full-scale genocidal campaigns began in Europe and Africa. As former U.N. Secretary General Boutros Boutros-Ghali characterized the post-Cold War era, "[w]e have entered a time of global transition marked by uniquely contradictory trends."[3] In Eastern Europe, nationalist and ethnic identities, previously suppressed by the ruling communist regimes, reasserted themselves as the Soviet Union receded.[4] In the Socialist Federal Republic of Yugoslavia, internal conflict resulted almost immediately in "widespread violations of international

1. Justice Robert Jackson, Opening Remarks of the International Military Tribunal Sitting at Nuremberg, Germany (Nov. 21, 1945) *in* THE TRIAL OF GERMAN MAJOR WAR CRIMINALS, London 1946, at 51 [hereinafter Jackson Opening Remarks].

2. Although Samuel Huntington's ultimate thesis that the world is destined for conflict along predominantly cultural lines seems overly simplistic, his work accurately recognizes that over the past decade "multiple communal conflicts have superseded the single superpower conflict." *See* SAMUEL P. HUNTINGTON, THE CLASH OF CIVILIZATIONS 272 (1997); *see also* ROGER A. COATE, U.S. POLICY AND THE FUTURE OF THE UNITED NATIONS 6 (Roger A. Coate ed., 1994) ("[A]lthough the liberal democratic and economic values of the West have prevailed over fascism and communism, long-repressed forces of ethnic identity, religious fundamentalism, and militant nationalism threaten to destroy peace at flashpoints around the world.").

3. BOUTROS BOUTROS-GHALI, AN AGENDA FOR PEACE: PREVENTIVE DIPLOMACY, PEACEMAKING AND PEACE-KEEPING 41 (2d ed. 1995).

4. *See* James Gow, *Shared Sovereignty, Enhanced Security: Lessons from the Cold War, in* STATE SOVEREIGNTY: CHANGE AND PERSISTENCE IN INTERNATIONAL RELATIONS 151, 165 (Sohail H. Hashmi ed., 1997) ("[W]hile the communists professed to transcend ethnic identities so that both majority and minority national groups would disappear, this did not happen. For the most part, the communist regimes managed only to suppress national problems . . .").

humanitarian law."[5] Three years later, beginning in April 1994, Hutu extremists began a systematic campaign of terror and violence that killed an estimated 500,000 to 800,000 Tutsis and Hutu moderates in a period of 100 days.[6] With the rise of these internal conflicts, the international community sought new means of vindicating the humanitarian wrongs it had been unable to prevent. The U.N. Security Council for the first time in its history established international criminal tribunals, first for the crimes committed in the former Yugoslavia[7] and subsequently for those in Rwanda,[8] in the hope of creating a system of international criminal responsibility based on the rule of law.[9]

Yet, the attempted formulation of such aspirations into a working system of criminal justice raises difficult questions that must be answered carefully to preserve the legitimacy of the proceedings. For example, critics have argued that the two tribunals have been inconsistent in their sentencing of perpetrators of like crimes, apparently relying on different sentencing methodologies.[10] The problem of sentencing alone raises concerns of fairness and consistency, which are central to the legitimacy of applying international criminal law. These problems of legitimacy are not unique to international tribunals, however, and become particularly profound when national courts exercise jurisdiction over crimes committed outside their territory when neither the perpetrators nor their victims are nationals.[11] The trend toward prosecution and adjudication of international crimes by national courts may increase in the coming years in light of the sheer number of culpable perpetrators compared to the resources of international tribunals. Indeed, during the past decade several countries undertook aggressive new domestic initiatives to legislate and prosecute extraterritorial

5. 1 VIRGINIA MORRIS & MICHAEL P. SCHARF, AN INSIDER'S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 21 (1995).

6. *See* United Nations, Report of the Independent Inquiry Into the Actions of the United Nations During the 1994 Genocide in Rwanda (Dec. 15, 1999), available at http://www.un.org/News/ossg/rwanda-report.htm; Alan J. Kuperman, *Rwanda in Retrospect*, FOREIGN AFFAIRS, Jan.-Feb. 2000, at 94, 101 (arguing that approximately 500,000 Tutsis and an additional 10,000 to 100,000 Hutus were killed, as calculated by his comparison of pre-genocide census figures and post-genocide identification of survivors by aid organizations); *see also* STEVEN R. RATNER & JASON S. ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY 176 (2d ed., 2001) (estimating that genocidal violence killed between 500,000 and 1,000,000).

7. S.C. Res. 808, U.N. SCOR, 48th Sess., Res. & Decisions 1993, at 28, U.N. Doc. S/RES/808 (1993).

8. S.C. Res. 955, U.N. SCOR, 49th Sess., Res. & Decisions 1994, at 15, U.N. Doc. S/RES/955 (1994).

9. *See* Bartram S. Brown, *The International Criminal Tribunal for the Former Yugoslavia*, *in* 3 INTERNATIONAL CRIMINAL LAW 489 (2nd ed. 1999).

10. Allison Marston Danner, *Constructing a Hierarchy of Crimes in International Sentencing*, 87 VA. L. REV. 415, 501 (2001) ("[T]he Tribunals . . . have discretion over most aspects of international sentencing, and they have done little over the past seven years to clarify the standards by which they impose sentences.").

11. OSCAR SCHACHTER, INTERNATIONAL LAW IN THEORY AND PRACTICE 270 (Martinus Nijhoff Publishers 1991) (1915) ("[T]hese cases present special problems that bear on the fairness and propriety of the judicial proceedings in a State removed from the site of the crime and having no link of nationality to the accused.").

atrocities committed by non-resident aliens. Most notable of these countries, perhaps, is Belgium.

In 1993, Belgium enacted legislation authorizing its national courts to try offenses arising under the 1949 Geneva Conventions and Additional Protocols I and II regardless of where committed.[12] The Belgian legislature subsequently amended the law in 1999 to add jurisdiction over acts of genocide and crimes against humanity.[13] Belgium's legislation conferring universal jurisdiction is arguably the broadest state effort to date to enforce international humanitarian law in its domestic courts.[14] It has proceeded to use this legislative authority aggressively to pursue a wide variety of alleged perpetrators of international crimes. For instance, a Belgian jury in 2001 convicted two Roman Catholic nuns, Sisters Gertrude and Maria Kisito, on June 8, 2001 for complicity in the commission of genocide in Rwanda.[15] It also began a criminal investigation of Israeli Prime Minister Ariel Sharon regarding his activities in Lebanon in 1982.[16]

Not surprisingly, Belgium's aggressive use of its national legislative authority is controversial. The Democratic Republic of the Congo initiated a case before the International Court of Justice (ICJ), arguing that Belgium had violated its sovereign domestic jurisdiction by issuing an arrest warrant for a government official.[17] On February 14, 2002, the ICJ held that Belgium's actions violated Congo's sovereignty and long-established principles of diplomatic immunity.[18] Apparently influenced by this decision, the Belgium Court of Appeals subsequently dismissed the indictment against Ariel Sharon on June 26, 2002, holding that "suspects had to be on Belgian soil to be investigated and tried."[19] Thus, whether Belgium's zeal has advanced the cause of justice or ultimately will hinder the development of international criminal law remains debatable.

This Article will consider the increasing national activism in prosecuting violators of international humanitarian law, particularly Belgium's aggressive use of its courts, and the concerns of legitimacy raised by a nation's unchecked invocation of universal jurisdiction. These concerns regarding the legitimate reach of a nation's courts stem from the incomplete theoretical development of universal jurisdiction, the linchpin of international criminal law. In the headlong

12. Law of 16 June 1993, 2 Codes Belge (Bruylant), at 240/5 (62d Supp. 1996).

13. *See* Loi relative à la repression des violations graves de droit international humanitaire, Art. 3 §§ A-B (1999), *published in* Moniteur Belge, Mar. 23, 1999.

14. Stefaan Smis & Kim Van der Borght, Introductory Note, *Introduction to* Belgium: Act Concerning the Punishment of Grave Breaches of International Humanitarian Law, 38 I.L.M. 918 (1999), *available at* http://www.asil.org/ilm/smis.htm (last visited Oct. 4, 2002) (labeling the Belgian act as "one of the most progressive of its kind").

15. *See Special Report: Judging Genocide*, THE ECONOMIST, June 16, 2001, at 23-24.

16. CNN, *Sharon Hearings Begin in Belgium*, (Nov. 28, 2001) *at* http://www.cnn.com/2001/WORLD/europe/11/28/sharon.belgium/ [hereinafter *Sharon Hearings*].

17. Case Concerning the Arrest Warrant of 11 April 2002 (Congo v. Belg.), 2002 I.C.J. No. 121, at 4 (Feb. 14).

18. *Id.* at 29.

19. Keith B. Richburg, *Belgian Court Dismisses Sharon War Crimes Case: Israeli Leader Accused in 1982 Massacre*, WASH. POST, June 27, 2002, at A24.

rush to give practice to justice, few have paused to consider the full theoretical intricacies of applying this jurisdictional principle. As one commentator noted, "[u]niversal jurisdiction as a concept has been under-theorized for, until quite recently, it was seldom invoked."[20] "Under-theorization" of the core principle on which the international criminal system rests stymies the development of a "fair and temperate" system to govern the invocation of universal jurisdiction as the basis for prosecuting humanity's worst offenders. In the hope of promoting this development, this article primarily will explore the concept of universal jurisdiction as being integrally related to evolving notions of state sovereignty. Particularly, it will argue that the assertion of universal jurisdiction, as the basis for the prosecution and trial of war criminals, is merely a form of intervention into another state's domestic jurisdiction, which must be exercised with great caution.

In Part II, I will explore a model for conceptualizing state sovereignty by reference to the legal philosophy of property, which presupposes control over a territory with the corresponding right to exclude others. I will argue that, as international humanitarian law has eroded the Westphalian model under which states possessed the absolute right to non-interference, the analogy of property as a "bundle of sticks" provides a useful framework for appreciating the present balance between state sovereignty and the international legal order. Inherent within this balance is the notion that states increasingly are subject to international validation of their governance. A nation's violation of the most basic norms of international law results in a corresponding transfer of a limited portion of its sovereignty to the international community, which in turn may exercise the domestic jurisdiction previously reserved exclusively for that nation.

Part III will examine the principle of universal jurisdiction, arguing that its proper assertion rests upon a determination that the territorial state in which an international crime has been committed has ceded a portion of its sovereignty to the international community. This examination will begin with a brief overview of universal jurisdiction's roots in the crime of piracy as a demonstration of its foundation in the idea of *terra nullius*. I will argue that the concept of *terra nullius* remains the conceptual core of universal jurisdiction. The fact that certain heinous crimes, such as genocide or crimes against humanity, occur is indicative that the territorial state has ceded some of its "sovereign sticks" to the international community. In effect, the state becomes analogous to *terra nullius* for purposes of criminal jurisdiction.

Part IV will reflect the heightened concerns that attend a nation's invocation of universal jurisdiction as its sole basis for prosecuting perpetrators of international offenses. These concerns center primarily on the nation's self-appointment to the role of agent acting on behalf of the international community. I will argue that each self-appointed agent should examine carefully its fitness for assuming the prosecutorial mantle, perhaps abstaining from prosecu-

20. Leila Nadya Sadat, *Symposium: Universal Jurisdiction: Myths, Realities, and Prospects: Redefining Universal Jurisdiction*, 35 NEW ENG. L. REV. 241, 244 (2001).

tion if its past colonial history contributed to the circumstances resulting in international crimes, such as Belgium's colonial past in Rwanda, or if the particular circumstances do not warrant assumption of another state's jurisdiction. I will conclude by suggesting that nations invoking universal jurisdiction should adhere rigorously to international legal principles, regardless of their domestic law to the contrary.

II.
THE EVOLVING NATURE OF STATE SOVEREIGNTY

In recent decades, international law has recognized that intervention into a state's domestic jurisdiction is permissible under some circumstances. Therefore, state sovereignty, which for centuries was conceptualized as "the absolute power of the State to rule,"[21] has become delimited by recognition that the state may be responsible for its breach of certain international obligations. Among these obligations, a state must provide for the general safety of the human person and may not permit widespread violations against its citizens, such as the commission of genocide, slavery, and apartheid.[22] Though state responsibility and individual criminal responsibility are separate concepts under international law,[23] a state that undertakes the prosecution of a foreign citizen for crimes committed in a foreign state assumes that state's domestic jurisdiction. Therefore, the valid assertion of universal jurisdiction as the sole basis for the prosecution of international crimes requires a conclusion that the state of the perpetrator's nationality, or of the crime's commission, either has breached or failed to enforce its international obligations to such a degree that partial assumption of its domestic jurisdiction is permissible.

The next section will address the concept of sovereignty as it exists under international law today. I propose a model for understanding the current boundaries of state sovereignty derived by analogy to the theory of property law. By considering sovereignty as a form of property right, one may understand more clearly the fluctuation of authority between the sovereign state and the international community.

A. Sovereignty as a "Bundle of Sticks": An Analogy to Property Law

The concept of sovereignty is analogous to the idea of private property.[24] Both ideas have developed from the expectation of deriving certain advantages from physical things. As the English legal philosopher Jeremy Bentham explained, property "is a mere conception of the mind" that "consists in an established expectation. . . . of being able to draw such or such an advantage from the

21. KRIANGSAK KITTICHAISAREE, INTERNATIONAL CRIMINAL LAW 5 (2001).
22. *Id.* at 7 (citing Art. 19, §3(c) of the Draft Articles on State Responsibility).
23. *Id.* at 9.
24. Friedrich Kratochwil, *Sovereignty as Dominium: Is There a Right of Humanitarian Intervention?*, *in* BEYOND WESTHPHALIA? STATE SOVEREIGNTY AND INTERNATIONAL INTERVENTION 21, 22 (Gene M. Lyons & Michael Mastanduno eds., 1995) (hereinafter BEYOND WESTPHALIA).

thing possessed."[25] This expectation has developed and exists only as a product of law.[26] An owner of a thing has rights in that thing that the rest of the world respects through non-interference. The concept of state sovereignty fulfills a similar expectation, as each state expects as a matter of legal right that other states will not interfere in its domestic affairs.

Although circumstances in which an individual or entity maintains control over territory, resources or people through force is certainly imaginable, the development of any efficient society is possible only through the recognition of the right to exercise control through law. As Bentham discussed:

> There have been from the beginning, and there always will be, circumstances in which a man may secure himself, by his own means, in the enjoyment of certain things. But the catalogue of these cases is very limited. The savage who has killed a deer may hope to keep it for himself, so long as his cave is undiscovered; so long as he watches to defend it, and is stronger than his rivals; but that is all. How miserable and precarious is such a possession! If we suppose the least agreement among savages to respect the acquisitions of each other, we see the introduction of a principle to which no name can be given but that of law.[27]

Thus, for Bentham the beginning of the idea of property marks the beginning of law itself as an alternative to control solely through force. The law thus originated from historical behavioral norms that recognized mutual rights of exclusive control over the ground on which they sat and the things in their possession.

The concept of sovereignty developed in an analogous manner. The Treaty of Westphalia, signed in 1648, begat the idea of the modern state. It was the product of the evolution of thought following centuries of conflict between secular and church interests. These tensions eventually culminated in the Thirty Years' War, which was actually a series of conflicts between Europe's Catholic and Protestant monarchs beginning in 1618.[28] These conflicts came to an end with the Treaty of Westphalia, which paved the way for modern statehood by recognizing the sovereign equality of monarchs.[29] More accurately, "the concept of sovereignty was then integrated into theories of international relations through a set of ideas that evolved with the end of the moral authority of the church over the secular rulers of Europe."[30]

Sovereignty thereby emerged as the constitutional norm governing Europe.[31] Although the treaty's provisions "did not include the words *sovereign state*, all of the essential provisions for the practice of sovereignty were pre-

25. JEREMY BENTHAM, THEORY OF LEGISLATION: PRINCIPLES OF THE CIVIL CODE 111-13 (Ogden ed., 1931).

26. *Id.*

27. *Id* at 112-113.

28. KITTICHAISAREE, *supra* note 21, at 4.

29. *Id.* at 4-5.

30. Gene M. Lyons & Michael Mastanduno, *Introduction: International Intervention, State Sovereignty, and the Future of International Society*, *in* BEYOND WESTPHALIA, *supra* note 24, at 1, 5.

31. *See* Daniel Philpott, *Ideas and the Evolution of Sovereignty*, *in* STATE SOVEREIGNTY: CHANGE AND PERSISTENCE IN INTERNATIONAL RELATIONS 15, 28 (Sohail H. Hashmi ed., 1997) (discussing the Treaty of Westphalia as the culmination of sovereign statehood, labeling the treaty "Europe's governing constitution").

sent."[32] The treaty respected each state's choice of religious practice by incorporating the principle that the ruling monarch was the exclusive, legitimate authority within his or her territory and could act within that territory without interference from other powers. After Westphalia, nations party to the treaty began "to respect one another's sovereignty."[33] Thus, by the exercise of positive law the nations of Europe effectively created a new legal norm recognizing each member's "rights" of "territorial integrity, autonomy, and noninterference."[34]

The rights inherent in sovereignty mirror those traditionally constituting property under most systems. Traditionally, a property owner's rights were similarly inviolable. Blackstone, for example, elaborated on the tort of trespass as follows:

> For the right of meum and tuum [mine and thine] or property, in lands being once established, it follows, as a necessary consequence, that this right must be exclusive; that is, that the owner may retain to himself the sole use and occupation of his soil: every entry, therefore, thereon without the owner's leave, and especially if contrary to his express order, is a trespass or transgression.[35]

The property rights of exclusive occupation and control over land necessarily include the corollary right of noninterference. Indeed, the United States Supreme Court has consistently recognized the right to exclude others as "one of the most essential sticks in the bundle of rights . . . [of] property."[36] Thus, the Anglo-American system of law effectively has recognized that property is the equivalent of sovereignty within a particular society. As one commentator has written, "[p]roperty is sovereignty, or rather, thousands of little sovereignties parceled out among the members of society."[37]

The sovereignty of property within society, however, always has been delimited by the police power of the state.[38] Conversely, the police power of the state also has been limited to the extent that private boundaries are recognized as inherent to property rights. In other words, "[n]either property nor police power is an absolute right; each evolves contextually and over time."[39] All legal regimes have faced the challenge of striking the proper balance between the police power and absolute property rights. The American legal analogy that correlates property to a "bundle of sticks," envisioning a number of distinct rights in some identifiable thing, is useful for conceptualizing the balance between the individual right to non-interference and the proper extent of police power. Rights may

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32. *Id.* at 30 (emphasis in original).

33. *Id.* at 28-29.

34. Kratochwil, *supra* note 24, at 34.

35. 3 WILLIAM BLACKSTONE, COMMENTARIES 575-76 (Ehrlich ed., 1959).

36. Dolan v. City of Tigard, 512 U.S. 374, 384 (1994) (quoting Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979)).

37. Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885, 972 (2000).

38. *See, e.g.*, Justice Philip A. Talmadge, *The Myth of Property Absolutism and Modern Government: The Interaction of Police Power and Property Rights*, 75 WASH. L. REV. 857 (2000) (discussing the limitations placed on property through the police powers of a state).

39. *Id.* at 908-09 (quoting Douglas W. Kmiec, *Inserting the Last Remaining Pieces into the Takings Puzzle*, 38 WM. & MARY L. REV. 995, 1012 n.78 (1997)).

be transferred or taken from the possessor's bundle of sticks and given to others or even assumed by the overarching regime.

This analogy is useful for understanding the theoretical limits of state sovereignty.[40] It recognizes *ipso facto* that sovereignty is not unlimited.[41] Rather, sovereignty is an amalgamation of numerous rights held by an "owner," which in the international system is the *de jure* government of a nation. This amalgamation of rights includes the right of a state to exercise extensive control over its physical territory and over individuals within its borders. However, sovereignty necessarily implies a certain respect and recognition of a state's neighbors and their equivalent rights within their territory. This model of sovereignty as a "bundle of sticks" allows for an analysis of the balance between the sovereign rights of the state and the collective rights of the international community to exert legal authority in that same state.

The next section will examine the dichotomy that has emerged since the end of the Cold War between the continuing importance of state sovereignty and the increasing cohesiveness of the international community as a collective entity.[42] I will review the international community's response to Iraq's invasion of Kuwait as an example of the changing balance between the absoluteness of state sovereignty and the expanding assertiveness of the international community in enforcing certain universal norms.

B. New Levels of International Cooperation: Reaffirmation of State Inviolability

The competition and political tensions between the United States and the Soviet Union dominated international affairs between 1945 and 1985.[43] The two nations' "ideological polarization . . . [had] precluded agreement on whether human-rights norms embodied" the principles of equality, political freedom, and the right to representative government.[44] The end of the Cold War, however, dramatically altered "the landscape of international relations."[45] The Soviet Union receded from Eastern Europe and became the Russian Federation, Yugoslavia essentially disintegrated, Czechoslovakia divided into two separate countries, Germany was reunited into one country, and the regional conflicts between

40. *See* Celia R. Taylor, *A Modest Proposal: Statehood and Sovereignty in a Global Age*, 18 U. PA. J. INT'L ECON. L. 745, 755 (1997) (arguing that sovereignty, conceptualized as a "bundle" of sovereign sticks, "facilitates a more accurate understanding of an international legal order populated by many different actors wielding differing degrees of power and control."); The Rt. Hon. The Lord Geoffrey Howe of Aberavon, *The Role of Law in International Affairs*, 55 U. PITT. L. REV. 277, 283-84 (1994) (employing the analogy of a "bundle of sticks" to modern notions of sovereignty).

41. Kratochwil, *supra* note 24, at 25

42. *See* Gene M. Lyons & Michael Mastanduno, *State Sovereignty and International Intervention: Reflections on the Present and Prospects for the Future*, *in* BEYOND WESTPHALIA, *supra* note 24 at 250, 252.

43. *See* AMOS A. JORDAN, ET AL., AMERICAN NATIONAL SECURITY 337-39 (5th ed. 1999).

44. Gregory H. Fox, *New Approaches to International Human Rights*, *in* STATE SOVEREIGNTY: CHANGE AND PERSISTENCE IN INTERNATIONAL RELATIONS, *supra* note 31 at 105, 126-27.

45. Robert H. Jackson, *International Community Beyond the Cold War*, *in* BEYOND WESTPHALIA, *supra* note 23, at 59.

the United States and Russia ceased as relations between the countries improved.[46] The political restructuring of the world created the possibility for unprecedented international cooperation among states and the enforcement of international norms.

When Iraq invaded Kuwait on August 2, 1990, a new international consensus affirmed the inviolability of the Kuwaiti state's territory. The U.N. Security Council met on the day of the invasion, condemned Iraq's violation of Kuwaiti sovereignty, and demanded it "withdraw immediately and unconditionally."[47] Iraq refused to comply. The Security Council then gave Iraq a "final opportunity" to withdraw by January 15, 1991, at which time the U.N. member states were authorized to use "all necessary means" to force Iraq's compliance and "to restore international peace and security to the region."[48] When Iraq again refused to comply with the Security Council's demand, an international coalition led by the United States forced Iraq to withdraw from Kuwait.[49]

The success of the collective action against Iraq reinvigorated the United Nations and gave a renewed sense of importance to its founding principles. The maintenance of peace and international security through fostering the "principle of sovereign equality" of states was the central reason for the United Nations' existence.[50] The drafters of the U.N. Charter believed that maintenance of peace was ensured best through firm recognition and enforcement of the principle of non-intervention.[51]

As Article 2(4) states: "[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations."[52] Article 2(7) further reflects that the principle of non-intervention must be adhered to not only by member states but also by the United Nations itself: "[n]othing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter. . . ."[53]

The only exception provided in the Charter to the rule of non-intervention was in cases where a state committed a "breach of the peace" or "act of aggres-

46. *Id.*

47. S.C. Res. 660, U.N. SCOR , 45th Sess., Res. & Decisions 1990, at 19, U.N. Doc. S/RES/660 (1990) (adopted by a vote of 14-0, with Yemen abstaining).

48. S.C. Res. 678, U.N. SCOR, 45th Sess., Res. & Decisions 1990, at 27, U.N. Doc. S/RES/678 (1990).

49. *See, generally,* L. FREEDMAN, THE GULF CONFLICT, 1990-1991: DIPLOMACY AND WAR IN THE NEW WORLD ORDER (1993).

50. U.N. CHARTER art. 2, para. 1.

51. *See also* Carsten F. Ronnfeldt & Henrik Thune, *Conflicting Global Orders: The Principle of Non-Intervention and Human Rights*, 29, 30 *in* SOVEREIGN INTERVENTION (Anthony McDermott ed., 1999) ("The principle of non-intervention is the logical corollary of state sovereignty based on the political idea that, within a given territory, there is a supreme political authority with a formal right to rule and regulate the life of its citizens without interference from external actors.").

52. U.N. CHARTER art. 2, para. 4.

53. U.N. CHARTER art. 2, para. 7.

sion" that threatened "international peace and security."[54] The condemnation of the Iraqi invasion and the Security Council's subsequent authorization of force constituted a renewed commitment to the enforcement of the territorial independence of states and the principle of non-intervention. Although a state's right to exclude other nations from its territory and to prevent interference in its domestic affairs has remained a central tenet of the international system,[55] these rights do have boundaries. As the next section will demonstrate, the continuing development of international humanitarian principles represents such a limit on the right to non-intervention.

C. Human Rights and the "Normative Revolution" of Sovereignty

Since the end of the Cold War, international law has come to recognize the permissibility of intervention in circumstances other than in response to a nation's external acts of aggression. This growth has focused primarily on the violation of basic human-rights norms as a basis for intervention. As discussed, during the Cold War the ideological polarization between communist and democratic countries "precluded agreement on whether human-rights norms embodied such liberal values, other values, or no values at all."[56] Since then, the current consensus indicates that a state's violation of its citizens' most basic rights may permit intervention into its affairs. Indeed, "international law today recognizes, as a matter of practice, the legitimacy of collective forcible humanitarian intervention, that is, of military measures authorized by the Security Council for the purpose of remedying serious human rights violations."[57]

Although this concept is not uncontroversial, most commentators agree that intervention into a sovereign state's internal affairs is possible when the government is committing serious human rights abuses against its people.[58] The exact boundary, however, between a state's right to non-interference in its domestic affairs and the international community's permissible intervention remains uncertain.

Without question, the intervening entity or state must exercise great caution before concluding that intervention is necessary to avert humanitarian wrongs. At the very least, it always should consider the following controlling principles. The definition of a state based on physical territory remains the "dominant norm" of the international system.[59] Therefore, the emphasis must remain on "serious" violations of humanitarian rights, as non-intervention remains the

54. U.N. CHARTER art. 39.

55. *See generally* Jack Donnelly, *State Sovereignty and International Intervention: The Case of Human Rights*, *in* BEYOND WESTPHALIA, *supra* note 24 at 115, 116-18.

56. Fox, *supra* note 44, at 126-27.

57. Fernando R. Tesón, *Changing Perceptions of Domestic Jurisdiction and Intervention*, *in* BEYOND SOVEREIGNTY: COLLECTIVELY DEFENDING DEMOCRACY IN THE AMERICAS 29, 29 (Tom Farer ed., 1996).

58. *See generally* RATNER & ABRAMS, *supra* note 6, at 7 (discussing the Nuremberg Tribunal as a "springboard for the development of [an] international human rights law [that considers] . . . a government's treatment of its citizens [to be] . . . appropriate for general international regulation.").

59. Fox, *supra* note 44, at 129.

"preemptive international norm, and intervention is what requires justification."[60] Intervention thus is permissible only if a government is violating clearly established international obligations, such as committing genocidal acts.[61] Furthermore, the crisis should be so serious that no less intrusive option, such as diplomacy, the implementation of sanctions, or other means, exists.[62] Finally, the intervention should receive "some form of collective legitimization" from the international community.[63] As sovereignty arises from the mutual recognition that states give to one another,[64] it is not within the power of one state to act contrary to the system of mutual recognition by unilateral intervention.

Though somewhat helpful, the ambiguity in even these limited guidelines indicates that the balance between sovereignty and the collective authority of the international community remains uncertain. Unquestionably, a "normative revolution is taking place with regard to the rights and responsibilities inherent in claims to sovereignty."[65] In view of this revolution, however, a new model for understanding sovereignty and its limits must precede the formulation of coherent and beneficial norms of practice. The model of sovereignty based on the analogy to property law's "bundle of sticks" provides a framework for the conceptual balancing of state interests with permissible intervention. The model recognizes that sovereignty is a legal concept that "must be defined in relation to the entire body of international law, against which such claims are measured."[66]

Recent international legal theory supports this view of sovereignty as an "allocation of decision-making authority between national and international legal regimes."[67] A state's total "bundle" of sovereign rights remains extensive, as sovereignty remains the preemptive international norm. Nonetheless, the international legal regime requires all states to maintain a minimum standard of observation of human rights. By the existence of this minimum standard, international law imposes obligations which a state must meet continuously in order to maintain legitimacy under the international system:

> [A state's] rights and obligations come into play when a state, or at least certain actions of a state, has been found to be illegitimate within the framework of the New Sovereignty. That is, when a state violates human rights or cannot meet its obligations *vis-à-vis* its citizens, those citizens have a right to ask for and receive assistance and the international community has a right and obligation to respond in a manner most befitting the particular situation, which may involve ignoring the sovereignty of the state in favour [sic] of the sovereignty of individuals and groups.[68]

When a state instigates or acquiesces in the commission of serious violations of international humanitarian norms, it exceeds its allocation of authority as a mat-

60. Jackson, *supra* note 45, at 80.
61. Kratochwil, *supra* note 24, at 39-40.
62. *Id.* at 40.
63. *Id.*
64. *Id.* at 40-41.
65. KURT MILLS, HUMAN RIGHTS IN THE EMERGING GLOBAL ORDER: A NEW SOVEREIGNTY? 165 (1998).
66. Fox, *supra* note 44, at 114.
67. *Id.* at 107.
68. MILLS, *supra* note 65, at 163-64.

ter of law. International law thus places conditions on a state's sovereign right to non-interference to the extent the state must meet its human rights obligations or face military intervention or trial of its nationals by foreign tribunals.[69]

The assessment that a government has maintained a minimally legitimate domestic regime, however, does not require a finding that the "will of the people" is the source of the government's authority.[70] An international law model that prohibits a state from slaughtering its people en masse or from allowing them to be slaughtered, though more liberal than in the past, does not indicate that democratic institutions are the legal norm. Instead, the standard is that of a "reasonable state" that is subject to an international norm of civilized behavior.[71] This norm recognizes that a state's sovereign rights with regard to the internal treatment of its population are not absolute and, by implication, states are subject to international oversight.

The recognition of sovereignty as a bounded legal norm leads to the further conclusion that sovereignty is not static within a nation, but is transferable. When a state exceeds its authority through commission of human-rights violations, the state cedes its sovereign stick representing its right to non-interference.[72] It cannot exclude other states acting collectively on behalf of the international community.[73] This transference of sovereignty to the international community, however, is temporary and less than total,[74] as the international community does not assume "permanent supervisory authority."[75] Instead, it acquires only the temporary authority to assert protection over the victimized segment of the state's population as it attempts to reform the national institutions according to a minimally acceptable international model.[76]

This idea of sovereignty as transferable authority has historical precedent. The next section briefly will examine some historical occasions when sovereignty has fluctuated between states.

D. The "Transference" of Sovereignty Between States

As discussed, debate continues about the extent to which new limits have been placed upon state sovereignty as a result of post-Cold War developments in international law.[77] An understanding of the "institution" of sovereignty within

69. *See* RATNER & ABRAMS, *supra* note 6, at 12 (International human rights norms "are usually formulated as obligations upon states, whether to refrain from certain conduct or to provide remedies in case of their commission.").

70. *See* William W. Burke-White, *Reframing Impunity: Applying Liberal International Law Theory to an Analysis of Amnesty Legislation*, 42 HARV. INT'L L.J. 467, 469-74 (2001).

71. *See* J.L. BRIERLY, THE LAW OF NATIONS 279-80 (Sir Humphrey Waldock ed., 6th ed. 1963) (discussing minimal treatment that international law requires nations to give to aliens).

72. *See* Taylor, *supra* note 40, at 755.

73. *See* Kratochwil, *supra* note 24, at 40 (discussing the requirement that intervention into a state's domestic affairs be preceded by "collective legitimization").

74. Taylor, *supra* note 40, at 759.

75. Fox, *supra* note 44, at 125.

76. *See id.* at 126-27 (noting that the "international model . . . does not speak to every aspect of the political process").

77. *See, e.g.*, Jackson, *supra* note 45, at 61 ("The centrality of sovereignty in international relations is frequently questioned nowadays, but it is impossible to ignore.").

the international system, however, is crucial to the formulation of reasoned exceptions permitting intervention.[78] The core "rights" of a state include the right to territorial integrity and autonomy, as well as non-interference in its domestic affairs.[79] These rights emanate from the essence of a state as a legal person having a defined territory, a permanent population, a form of government, and the capacity to participate in international relations.[80] The qualifications for statehood, and attendant embodiment of sovereignty, apply regardless of the nature of the government ruling the territory. Once the parameters for statehood come into existence, sovereignty follows automatically.[81]

Yet, the sovereignty of a new state must have a source.[82] When the United States Supreme Court considered the source of the United States' sovereignty, it held that "the investment of the federal government did not depend upon the affirmative grants of the Constitution."[83] In other words, the states were not the source of the United States' federal sovereignty. The states themselves had never possessed international powers, and therefore they could not have transmitted those powers to the national government. Instead, "[a]s a result of the separation from Great Britain by the colonies acting as a unit, the powers of external sovereignty passed from the Crown not to the colonies severally, but to the colonies in their collective and corporate capacity as the United States of America."[84] Sovereignty, as the political will governing a society, always has existed somewhere and "is never held in suspense."[85] At some theoretical instant, therefore, sovereignty over the territory and people of the American colonies passed in its entirety from Great Britain to a new state, the United States of America.

Sovereignty is thus dynamic and fluid, flowing at times from one country to another by some event of political restructuring within the international community of states. If sovereignty can pass from one state to another, it conceivably can flow from a state to the international community, or vice versa. Perhaps the most illustrative example of this is the transfer of German sovereignty at the end of World War II. Although actually an example of a state-to-state transfer, the defeat of Nazi Germany is a unique example of sovereignty passing from one state to several collectively. With the German government's unconditional

78. *See* Kratochwil, *supra* note 24, at 22.

79. *Id.* at 34.

80. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 201 (1987).

81. Jackson, *supra* note 45, at 61 ("[T]he moment any colony ceases to be a dependency of a (foreign) state it simultaneously and automatically becomes a subject of international law. In other words, as soon as constitutional independence occurs, the international law of sovereignty and non-intervention simultaneously takes effect.").

82. *Cf.* Juergen Schwarze, *Towards a European Foreign Policy—Legal Aspects*, *in* TOWARDS A EUROPEAN FOREIGN POLICY 69, 71 (J.K. De Vree, et al. eds., 1987) ("The legal capacity of a nation state is original, not derived from anyone").

83. United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 318 (1936).

84. *Id.* at 316.

85. *Id.* at 317.

surrender on May 8, 1945,[86] the Allied powers destroyed Germany as a sovereign nation and it "ceased to exist as a state in the sense of international law."[87] As the Berlin Declaration of June 5, 1945 declared:

> The Governments of the United States of America, the Union of Soviet Socialist Republics and the United Kingdom, and the Provisional Government of the French Republic, hereby assume supreme authority with respect to Germany, including all the powers possessed by the German Government, the High Command and any state, municipal, or local government or authority.[88]

Thus, the Berlin Declaration recognized the transfer of all sovereign rights possessed by Germany to the United States, the Soviet Union, Britain, and France, acting in concert. The Berlin Declaration itself, however, merely formalized that which already had occurred through the Allies' military occupation. At the instant marking Germany's complete defeat, its sovereignty as a state passed, theoretically, to the victors.[89]

As shown by the historical record, this transfer of sovereignty was the jurisdictional basis for the Allies' trials of the German war criminals at Nuremberg.[90] An element of Germany's sovereignty, one stick in the bundle, was to maintain a system of criminal justice over its citizens, which included the legislation of offenses, as well as the prosecution and punishment of offenders. Upon Germany's unconditional surrender, "the sovereignty of Germany was being 'held in trust by the condominium of the occupying powers.'"[91] The Allies assumed "whatever jurisdiction Germany would have had over the specific offenses."[92] Therefore, the Allies' primary authority to act at Nuremberg derived from their assumption of German sovereignty, permitting prosecution of the Nazi war criminals on the traditional bases of nationality and territorial jurisdiction.[93]

However, on another level, the proceedings at Nuremberg proceeded pursuant to an invocation, at least impliedly, of a concept of jurisdiction transcending sovereignty. Justice Robert Jackson, in his opening statement at Nuremberg, argued that the charges against the Nazi war criminals were being brought on behalf of civilization itself due to the unprecedented extent and number of atroc-

86. G.S.P. FREEMAN-GRENVILLE, CHRONOLOGY OF WORLD HISTORY: A CALENDAR OF PRINCIPAL EVENTS FROM 3000 B.C. TO A.D. 1973 606 (1975).

87. Hans Kelsen, *The Legal Status of Germany According to the Declaration of Berlin*, 39 AM. J. INT'L L. 518, 519 (1945).

88. Declaration regarding Germany by the United States of America and the United Kingdom of Great Britain and Northern Ireland, the Union of Soviet Socialist Republics, and the Provisional Government of the French Repbulic, June 5, 1945, 60 Stat. 1649, 1650.

89. *See* Kelsen, *supra* note 87, at 524.

90. *See* Madeline H. Morris, *Universal Jurisdiction in a Divided World: Conference Remarks*, 35 NEW ENG. L. REV. 337, 342 (2001).

91. Beth Van Schaack, *The Definition of Crimes Against Humanity: Resolving the Incoherence*, 37 COLUM. J. TRANSNAT'L L. 787, n.86 (1999) (quoting George Finch, *The Nuremberg Trial and International Law*, 41 AM. J. INT'L L. 20, 22 (1947)).

92. Morris, *supra* note 90, at 343 (quoting Kenneth Randall, *Universal Jurisdiction Under International Law*, 66 TEX. L. REV. 785, 805-06 (1988)).

93. *See also* RATNER & ABRAMS, *supra* note 6, at 164 ("[I]n many cases, jurisdiction . . . turned on the territorial or nationality principles, and the jurisdiction of the Allied occupation tribunals also derived from Germany's residual jurisdiction.").

ities committed by the Nazis.[94] As Jackson stated, "the wrongs which we seek to condemn and punish have been so calculated, so malignant, and so devastating that civilization cannot tolerate their being ignored because it cannot survive their being repeated."[95] Scholars have relied upon Jackson's characterization of the Nuremberg proceedings as the first modern assertion of universal jurisdiction over war crimes.[96]

Although Nuremberg has served as the leading precedent for the application of universal jurisdiction over a limited category of particularly atrocious international crimes, Jackson probably argued indirectly for a higher principle of jurisdiction not because the tribunal lacked other bases of jurisdiction, but in order to soften the appearance of "victor's justice." This concern was apparent throughout his opening statement, as indicated when he said, "[w]e must never forget that the record on which we judge these defendants is the record on which history will judge us tomorrow."[97] This formulation of universal jurisdiction, however, clearly operated as a secondary basis to the more traditional principle of jurisdiction arising from state sovereignty. In all likelihood, he did not envision future prosecutions relying on the concept of universal jurisdiction as a sole basis for the prescription and adjudication of war crimes.

Universal jurisdiction, as it develops, certainly has the potential to operate more broadly than Jackson likely envisioned. Yet, for it to retain legitimacy as a "fair and temperate" basis for the prosecution of war criminals, it must evolve in a manner consistent with furthering humanity's interests in justice while simultaneously respecting the continuing importance of state sovereignty. The Nuremberg precedent demonstrates that universal jurisdiction is a form of intervention into the domestic jurisdiction of a state. The fact that the modern beginning of universal jurisdiction arose from circumstances in which the sovereign authority of one nation was transferred to several illuminates the reach of this jurisdictional basis. As Part III will argue, for the exercise of universal jurisdiction to be valid, a correlative finding that a state's sovereignty has passed in part to the international community must occur. Part III begins with a brief look at universal jurisdiction's conceptual beginning.

III.
A THEORY OF INTERNATIONAL CRIMES SUBJECT TO UNIVERSAL JURISDICTION

A. The Origin of Universal Jurisdiction

The historical roots of universal jurisdiction originated with the construction of legal norms designed to further the pursuit and punishment of pirates. By some accounts, piracy has been deemed an international crime permitting the

94. Jackson Opening Remarks, *supra* note 1.

95. *Id.*

96. *See, e.g.*, Henry T. King, Jr., *Universal Jurisdiction: Myths, Realities, Prospects, War Crimes and Crimes Against Humanity: The Nuremberg Precedent*, 35 NEW ENG. L. REV. 281 (2001).

97. Jackson Opening Remarks, *supra* note 1.

exercise of universal jurisdiction since the 1600s.[98] Those seafaring marauders, who murdered and looted indiscriminately, only to flee from justice across the high seas, were declared by civilized nations as *hostis humani generis*, or the "enemy of all mankind."[99] Any state that was able to capture such villains could try and punish them under their domestic own laws without objection from the international community.[100] Nations soon expanded this "universal" authority to provide for the seizure of slave traders on the high seas by British naval vessels.[101] Thereafter, the Nuremberg Tribunal's efforts to punish the German perpetrators of mass crimes again enlarged the scope of universal jurisdiction. For purposes of this discussion, piracy remains the best illustration of the development of universal jurisdiction.

The act of piracy, by its very nature, demonstrates the considerations embodied in the conceptual core of universal jurisdiction. Technological advances in shipbuilding and navigation in the fifteenth and sixteenth centuries transformed piracy from a matter within the purview of coastal state authorities to a matter of international concern.[102] Making use of these new technologies, pirates launched attacks from and on the high seas against the vessels and citizens of many nations, and then fled across the open seas.[103] Through their utilization of international waters, they thus operated beyond the territorial reach of any single nation. For this reason, nations predicated their formulation of universal jurisdiction over piracy on the notion that the crime usually was committed in *terra nullius*, such as on the high seas where no nation exercised territorial control.[104]

The transnational aspect of piracy is the most significant factor in justifying the exercise of universal jurisdiction over it.[105] Further, piracy is a useful basis for understanding the exercise of universal jurisdiction over war crimes because both pirates and war criminals take advantage of the absence of legitimate criminal justice systems that can or will prosecute and punish their actions.[106] The

98. M. Cherif Bassiouni, *Sources and Theories of International Criminal Law*, *in* 1 INTERNATIONAL CRIMINAL LAW 83 (2d ed. 1999).

99. United States v. Smith, 18 U.S. (5 Wheat.) 153, 156 (1820) ("[P]irates being hostes humani generis, are punishable in the tribunals of all nations. All nations are engaged in a league against them for the mutual defence and safety of all.").

100. *See* ALFRED P. RUBIN, ETHICS AND AUTHORITY IN INTERNATIONAL LAW (1997) (providing an extensive examination of piracy in relation to the conceptual development of universal jurisdiction, questioning its application due to the lack of positive precedent).

101. SCHACHTER, *supra* note 11, at 262.

102. *See generally* DAVID CORDINGLY, UNDER THE BLACK FLAG: THE ROMANCE AND THE REALITY OF LIFE AMONG THE PIRATES 158-60 (1997) (discussing the seaworthiness and speed of ships employed by historical pirates).

103. *See* Michael P. Scharf, *The ICC's Jurisdiction Over the Nationals of Non-Party States: A Critique of the U.S. Position*, 64 LAW & CONTEMP. PROBS. 67, 81 (Winter 2001) (noting that "pirates can quickly flee across the seas, making pursuit by the authorities of particular victim states difficult.").

104. *See* WILLIAM A. SCHABAS, GENOCIDE IN INTERNATIONAL LAW 354 (2000).

105. *See* Bassiouni, *supra* note 98, at 138.

106. *See* Kenneth C. Randall, *Universal Jurisdiction Under International Law*, 66 TEX. L. REV. 785, 803-04 (1988) (noting that "war crimes and crimes against humanity are analogous to piracy in that they are typically committed in locations where they will not be prevented or punished easily.").

assertion of universal jurisdiction over war criminals is usually tied to the unlikelihood of prosecution by the states where the crime occurred, "either because the perpetrators remain in power or influence, or . . . because a post-genocide social and political *modus vivendi* is built upon forgetting the crimes of the past."[107] As the power controlling the territory will not prosecute, other states must exercise universal jurisdiction in order to bring the perpetrators to justice.[108] Like the pirate, the war criminal intends to take advantage of the absence of a legitimate criminal justice system that can or will prosecute and punish his actions. In the absence of a minimally competent criminal enforcement regime, the state thus ceases to act like a true sovereign and its territory, as a legal matter, becomes analogous to *terra nullius*.

The next section further explores the prevailing idea that universal jurisdiction applies to all wrongs in a limited category of crimes labeled by treaty and customary international law as "heinous." It will further argue that without an analysis of sovereignty and a finding of *terra nullius*, the justification for asserting jurisdiction over a crime solely because it is "heinous" is erroneous and suffers from circular reasoning.

B. The Attachment of "Heinous" to Crime: Without an Analysis of Sovereignty, A Circular Basis for the Assertion of Jurisdiction

The basis for the assertion of universal jurisdiction does not rest on the criminal *per se*, whether pirate or *genocidaire*, the "heinous" nature of the crimes committed, or even with the perpetrator's subjective feeling of impunity in the absence of potential domestic prosecution.[109] Rather, it rests on an assessment of sovereignty. Many commentators and jurists incorrectly seek to divorce the assertion of universal jurisdiction from principles of state sovereignty.[110] They assert that the basis for universal jurisdiction arises from the "heinous" nature of the crime itself.[111] The basis for this reasoning is that every state has condemned certain violations of international law and may punish the perpetrators for their commission.[112]

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107. SCHABAS, GENOCIDE, *supra* note 104, at 354.

108. *Id.* ("[I]t is often said that universal jurisdiction must be a *sine qua non* if those responsible for genocide are to be brought to book.").

109. Scharf, *supra* note 103, at 83 ("As regards both piratical acts and war crimes there is often no well-organized police or judicial system at the place where the acts are committed, and both the pirate and the war criminal take advantage of this fact, hoping thereby to commit their crimes with impunity.").

110. *See, e.g.*, Johan D. van der Vyver, *Prosecution and Punishment of the Crime of Genocide*, 23 FORDHAM INT'L L.J. 286, 322 (1999) ("The criterion for application of the principle of universal jurisdiction must accordingly be sought in the heinous nature of the crime (of which its dimensions are an element) and not so much in the absence of territorial jurisdiction of nation states with regard to the locality of the crime.").

111. *See, e.g.*, United States v. Yunis, 681 F. Supp. 896, 900 (D.D.C.), *rev'd on other grounds*, 859 F.2d 953 (D.C. Cir. 1988) ("The crucial question for purposes of defendant's motion is how crimes are classified as 'heinous' and whether aircraft piracy and hostage taking fit into this category.").

112. *See* William J. Aceves, *Liberalism and International Legal Scholarship: The Pinochet Case and the Move Toward a Universal System of Transnational Law Litigation*, 41 HARV. INT'L L.J. 129, 154 (2000).

Though appealing in its vindication of the interests of justice, this rationale does not acknowledge the original justification for asserting jurisdiction over pirates, i.e., states prosecuted them wherever found because they operated in *terra nullius*. Establishment of jurisdiction over a category of crimes simply because of their "heinous" nature reflects an inadequate appreciation of universal jurisdiction's conceptual foundation. Doing so is comparable to a state answering the question, "Why do we have jurisdiction over this crime?," by responding "well, because the crime is so bad." This reasoning is flawed and lacks a sound foundational basis for the assertion of jurisdiction. Inevitably, such a lack of foundation will result in inconsistent application that could undermine the credibility, and thus the legitimacy, of the theory of universal jurisdiction.

Therefore, the legitimate assertion of universal jurisdiction must begin with the state itself, which remains the "foundation-stone" of the international system, both politically and legally.[113] The assertion of universal jurisdiction is a product of positive law created by states. Whether through the operation of multilateral treaties or as a product of customary international law, the international community has prescribed certain crimes as being subject to universal jurisdiction.[114] The core reason that states may prescribe certain crimes as being subject to universal jurisdiction arises from the nature of the crimes being beyond any single state's capacity to punish the perpetrators. In other words, universal jurisdiction arises not because the crimes are "heinous" but because they are committed in *terra nullius*.

States have the authority to exercise "sovereignty over its territory and general authority over its nationals."[115] With the rights that accompany this internal sovereignty, a state also acquires obligations to its citizenry. These obligations include the duty to provide a system for the codification, prosecution and punishment of crimes.[116] This of course does not mean that, in order to be a legitimate state, every criminal must be found and punished; international law does

113. BOUTROS-GHALI, *supra* note 3, ¶ 17, at 44 ("The foundation-stone . . . is and must remain the State. Respect for its fundamental sovereignty and integrity are crucial to any common international progress.").

114. *See generally* THOMAS M. FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS 122 (1995) (though not mentioning universal jurisdiction *per se*, Franck notes that "states collectively have the authority to determine minimum standards of conduct [including prohibition of genocide and aggravated denials of political rights], from which none may deviate for long without endangering their membership in the [international] club.").

115. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 206.

116. *See* Alexander Orakhelashvili, *The Position of the Individual in International Law*, 31 CAL. W. INT'L L.J. 241, 271-72 (2001):

> When crimes for which individuals may be held accountable under international law are committed, the State under whose jurisdiction the crime occurred incurs international responsibility. The State is responsible under international law for all internationally wrongful acts or *omissions* of its organs as these wrongs constitute acts of the State. The unlawful conduct of individuals acting in private capacity, however, does not in itself constitute an act of the State under international law. The State can be held responsible if the State—through its legislative, administrative, or judicial activities—supported, assisted, consented to, or *failed to punish* the acts committed by the individual.

not demand the impossible. Yet, at some level a state that does not possess an effective and functioning system of criminal enforcement may be deemed to have ceded some portion of its sovereignty.[117] When war crimes occur, or are even possible, a legal conclusion follows that the legitimate functioning of a state has diminished or ceased. Often because the national authorities either ordered or condoned the commission of the crimes, the perpetrators of such atrocities are "immune *de facto* and/or *de jure* from criminal prosecution and punishment under their legal system."[118] At this point a portion of the domestic state's sovereignty is conceptually transferred, as a matter of law, to the international community and the state's territory becomes for purposes of law *terra nullius.*

Contrary to the general scholarship on the subject,[119] the criterion for the application of universal jurisdiction must parallel the *terra nullius* justification for the historical prosecution of piracy. Otherwise, the prosecution of war crimes lacks the legitimacy conferred by a sound conceptual framework. The act of torture offers a good example for contrasting the ideas of *terra nullis* and the "heinous" nature of the crime. Torture is a horrible act whether committed by non-state actors or by state officials. Yet, only official acts of torture are crimes subject to universal jurisdiction. As the 1984 Convention Against Torture defines the crime:

> For the purposes of this Convention, the term torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, *when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.*[120]

> The consequences arising out of the commission of war crimes and crimes against humanity gives rise to secondary obligations in the field of State responsibility. The State responsible for such crimes is under obligation to provide full reparation vis-à-vis to the victims of the breaches. The reparation includes restitutio in integrum and compensation for both material and moral damage. *Additionally, the State has the obligation to punish the individuals that committed the crimes.* This obligation is independent of the obligation to prevent the initial breach and survives the violation of it.

(Citations omitted) (Emphasis added).

117. This seems a logical expansion based on the prevailing scholarship recognizing that the humanitarian obligations every state owes to its people impose limits on its sovereignty. *See, e.g.,* Mills, *supra* note 65, at 163-64 ("[W]hen a state violates human rights or cannot meet its obligations *vis-à-vis* its citizens, those citizens have a right to ask for and receive assistance and the international community has a right and obligation to respond in a manner most befitting the particular situation, which may involve ignoring the sovereignty of the state in favour [sic] of the sovereignty of individuals and groups.").

118. KITTICHAISAREE, *supra* note 20, at 6.

119. *See* van der Vyver, *supra* note 110.

120. Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, art. 1, 1465 U.N.T.S. 85 (emphasis added).

Over 120 nations are party to the Convention Against Torture.[121] The majority of nations, therefore, do not consider private, non-official criminal acts that inflict severe pain and suffering for the purpose of intimidation or coercion to be an international crime. Private acts of torture, of course, may constitute an element of a greater wrong resulting in international criminal liability, such as "crimes against humanity" when committed secondary to a "widespread or systematic attack against any civilian population."[122] However, an additional element such as the requirement of a "widespread or systematic attack" is necessary to transform the crime into one of international concern. Torture, in itself, is an international crime only when committed by persons acting in an official capacity.[123] From the torture victim's perspective, however, the status of the perpetrator hardly would seem to change the degree of suffering. So, if the "heinous" nature of the crime is the determinant for the assertion of universal jurisdiction, then private, criminal acts of torture should subject the perpetrators to prosecution wherever they may be captured. But this is not the case. The "heinous" nature of the crime, therefore, must invoke other considerations.

Since an act of torture is not "heinous" unto itself, that depending on the actor committing it, the international condemnation of the act is the result of a value determination concerning the legitimate functioning of government within its own territory. International law prohibits governments from torturing their own citizens.[124] The international criminalization of torture thus is a delimitation of state sovereignty. A state that permits or is incapable of preventing its public officials from engaging in acts of torture has ceased operating to some degree as a legitimate sovereign and, thus, loses a portion of its sovereign right to non-interference in its affairs.[125] In other words, some of its "sovereign sticks" have been ceded to the international community and other states may intervene to try crimes committed within the offending state's borders. Therefore, the conceptual foundation of universal jurisdiction remains centered on a determination of the legal status of a territorial sovereign as a minimally competent and legitimate criminal enforcement regime.

The international community's right to intervene in a state's domestic affairs varies depending on the extent to which the governing regime maintains legitimate control over its territory. Rwanda, from April to July 1994, is an example of the near or total breakdown of normal state functions. Sub-national interests were able to operate with impunity, at which point Rwanda's sovereign

121. *See* U.N. website *at* http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIV/treaty12.asp

122. *See* S.C. Res. 955, *supra* note 8, art. 3.

123. *See, e.g.*, RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 404 (1987), comment a, reporter's notes 1. *See also* Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1984) (concluding that acts of torture committed by state officials violates established norms of international human rights law).

124. *See Filartiga*, 630 F.2d at 884.

125. *See* Ronnfeldt & Thune, *supra* note 51, at 40 (advancing an "idea of state sovereignty, which asserts that a state's external sovereign rights vis-à-vis other states should be conditional on the state's carrying out its duties towards its own population.").

control reached its nadir.[126] If it could have acted quickly enough, the international community would have been justified in intervening with military force to stop the genocide.

Rwanda subsequently has begun to operate a functioning legal system, regaining its sovereign right to exercise control over its territory and nationals. Nevertheless, Rwanda decided to appeal to the Security Council to create an international tribunal to try the major perpetrators of the genocide. Though Rwanda may have done this solely to regain credibility,[127] that the government felt it lacked the capacity to handle the matter indicated that it had yet to reacquire its full sovereignty as a state. Yugoslavia and Nazi Germany are examples of an otherwise functioning state failing to maintain minimally acceptable systems of justice. The failure to maintain a minimally competent system of criminal justice, either through inability or refusal, results in the ceding of a portion of that state's sovereignty to the international community. This state failure is thus the justification for the legitimate exercise of universal jurisdiction.

Having deconstructed the "heinous" nature of international crimes as the principal rationale for universal jurisdiction, the next section will attempt to show the proper place of "heinous" as a factor indicating that sovereignty has passed from a particular state to the international community.

C. "Heinous" Crimes As An Insufficient Basis for Jurisdiction: The Need for A Reassessment of Sovereignty

Now that the breakdown of a state's criminal justice system has been demonstrated to be the basis for the exercise of universal jurisdiction, the question becomes one of establishing a threshold at which a state can be deemed to have lost some portion of its otherwise complete sovereignty. Both the criminal actor and the nature of the crime now become material as barometers gauging when sovereignty has passed from its natural vessel, the state, to the international community. The "heinous" nature of certain crimes indicates that the state's government has failed in its obligations to adequately protect its citizens, and therefore the international community is justified in intervening. The diminution of state sovereignty is serious and requires clear evidence that the state cannot or will not meet its international obligations. Such evidence arises when open and obvious violations of a narrow classification of crimes are committed.

126. *See* Boutros Boutros-Ghali, *Introduction* to THE UNITED NATIONS BLUE BOOK SERIES, vol. X, THE UNITED NATIONS AND RWANDA: 1993-1996 37-49 (1996) ; *see also* RATNER & ABRAMS, *supra* note 6, at 176 ("[T]he destruction from the civil conflict and the flight of the former government left Rwanda without a functioning judicial system.").

127. SCHABAS, GENOCIDE, *supra* note 104, at 345:

> Where a domestic judicial system operates in an effective manner, it may be quite capable of dealing appropriately with the crimes of the past. But sometimes, a domestic judicial system will be operational yet require, for its own credibility, that some international trials be held to deal with major cases. Rwanda chose this approach when, in 1994, it requested that the Security Council establish an international criminal court.

This limited classification of crimes recognizes certain fundamental norms of customary international law, often referred to as *jus cogens* or peremptory norms.[128] By definition, a peremptory norm is "a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted."[129] Although this definition is from the Vienna Convention on the Law of Treaties, its meaning is synonymous under customary international law.[130] Peremptory norms thus guarantee the protection of interests important to the international community.[131]

The number of crimes considered to be *jus cogens* violations remains restricted to the most serious crimes that affect the international community. Nations have recognized many peremptory norms in multilateral treaties that define their violation as international crimes, including torture,[132] piracy,[133] genocide,[134] crimes against humanity,[135] aggression,[136] slavery and slave-related practices,[137] and war crimes.[138] Similarly, the *Restatement (Third) of the Foreign Relations Law of the United States* has recognized the permissibility of universal jurisdiction over "piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism."[139] Under customary international law, these crimes have acquired the status of *jus cogens* because they are so horrible they threaten "the peace and security of mankind, and the conduct or its result is shocking to the conscience of humanity."[140] A *jus cogens* norm imposes obligations on all nations. Scholars frequently refer to this concept as an obligation *erga omnes*, or duty flowing to all states.[141] Thus, whether labeled *jus cogens* or a peremptory norm, the compelling nature of the principle is the same. A state that incites, permits, or engages in the commission of genocide, crimes against humanity, or other crimes of similar magnitude,

128. Vienna Convention on the Law of Treaties, May 23, 1969, art.53, 1155 U.N.T.S. 351.

129. *Id.*

130. *See* Bassiouni, *supra* note 98, at 40-41 (discussing meaning of *jus cogens*).

131. *Id.* at 210 ("This means that in certain serious international matters the rights of the international community must not be violated or ignored in the practice of states.") (citing Barcelona Traction, Light and Power Co. Ltd. Case (Spain v. Belg.), 1970 I.C.J. 3 (Feb. 5) , at 3).

132. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *supra* note 120.

133. *See* Convention on the Law of the Sea, Dec. 10, 1982, art. 105, 1833 U.N.T.S 397.

134. Bassiouni, *supra* note 98, at 67.

135. *Id.* at 70.

136. *Id.* at 62.

137. *Id.* at 79.

138. *Id.* at 70.

139. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 (1987).

140. Bassiouni, *supra* note 98, at 42.

141. *See id.* at 44.

commits violations of *jus cogens* norms.[142] As the Vienna Convention reflects, such derogation is impermissible.[143]

Based on the proposed theory of sovereignty, any state that derogates from these essential norms abdicates a portion of its sovereignty by operation of law. The effect is the same when a state loses the power to prevent the occurrence of such crimes within its territory. States have an obligation to prevent their citizens from violating peremptory norms and must maintain an effective system for the prevention and punishment of such transgressions within their borders.[144] Thus, the occurrence of continuous or multiple violations of peremptory norms, *ipso facto*, demonstrates the absence of a fully competent sovereign. A finding of state action, therefore, is not essential for the exercise of universal jurisdiction, though some crimes may require it as an additional element.

When violations of a *jus cogens* norm occur, a state no longer possesses its full sovereignty. The state's otherwise exclusive right to exercise criminal jurisdiction over its citizens transfers to the international community, and any state that acquires custody of an individual perpetrator of such crimes may try and punish the offender. Thus, the determination that a particular act constitutes an international crime permitting the exercise of universal jurisdiction should rely on a conclusion that the crime's commission resulted secondary to the territorial state's partial loss of sovereignty. An a priori assessment of the authoritative capacity of the territorial sovereign potentially can resolve some otherwise unsettled questions affecting the application of universal jurisdiction in practice. By way of example, the next section will seek to add clarity to the somewhat nebulous definition of crimes against humanity, by showing that the element of "widespread and systematic" actually envisions a determination as to the legal sovereign status of a state in which such crimes have been committed.

142. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 (1986) ("A state violates international law if, as a matter of state policy, it practices, encourages, or condones" genocide, slavery, forced disappearances, torture, arbitrary detention, systematic racial discrimination, or "a consistent pattern of gross violations of internationally recognized human rights.").

143. *Supra* note 128, art. 53.

144. *See* Kevin A. Bove, *Attribution Issues in State Responsibility*, 84 AM. SOC'Y INT'L L. PROC. 51, 54-55 (1990) (discussing the International Court of Justice's decision in the Iran Hostage Case (U.S. v. Iran), 1980 I.C.J. 3, in which the ICJ held that Iran was responsible for its failure to end the hostage crisis as it had a clear and affirmative duty to protect foreign embassies within its territory). *See also* MILLS, *supra* note 65, at 163-64 (1998):

> [R]ights and obligations come into play when a state, or at least certain actions of a state, has been found to be illegitimate within the framework of the New Sovereignty. That is, when a state violates human rights or cannot meet its obligations *vis a vis* its citizens, those citizens have a right to ask for and receive assistance and the international community has a right and obligation to respond in a manner most befitting the particular situation, which may involve ignoring the sovereignty of the state in favour [sic] of the sovereignty of individuals and groups.

D. *Crimes Against Humanity: "Widespread and Systematic" as the Element Indicating a Transference of Authority to the International Community*

The balance between sovereignty and the permissible assertion of universal jurisdiction over a limited category of crimes has permeated the contemporary development of international criminal law. The definition of "crimes against humanity," for example, has developed rapidly within the last decade. The most significant, recent development regarding the crime's definition resulted in the elimination of the anachronistic element that crimes against humanity could occur only within the context of a war.[145] However, when the label of "crimes against humanity" attaches to an act has not been conclusively established. As one scholar has noted, the "dividing line between crimes against humanity under international criminal law . . . and violations of human rights" that are subject to domestic proceedings has remained unclear."[146] Greater focus on universal jurisdiction's theoretical underpinnings may clarify the proper allocation of authority between the international and domestic legal regimes in regard to internationalizing crimes against humanity.

The International Military Tribunal at Nuremberg first recognized the crime in 1945 and defined it by inclusion of a war-nexus element.[147] The Tribunal introduced the idea of crimes against humanity from a concern that "under the traditional formulation of war crimes, many of the defining acts of the Nazis would go unpunished."[148] This formulation of the crime was a novel innovation which recognized the primacy of international law by criminalizing certain acts "whether or not [they were] in violation of the domestic law" of Germany.[149] In defining the crime, however, the proponents attached a war-nexus element to it in order to justify the extension of international jurisdiction over crimes committed exclusively within the territorial jurisdiction of Germany.[150] The war-nexus requirement represented a compromise that balanced state sovereignty against matters of international concern.[151] Under this construction, crimes against humanity could occur only within the context of a war.

145. *See, e.g.,* Prosecutor v. Tadic, ICTY, Case No. IT-94-1-AR72, ¶ 141 (Decision on the Defence's Motion For Interlocutory Appeal on Jurisdiction, Oct. 2, 1995).

146. KITTICHAISAREE, *supra* note 21, at 99.

147. *See* Agreement for the Prosecution and punishment of the Major War Criminals of the European Axis Powers and Charter of the International Military Tribunal, Aug. 8, 1945, art. 6(c), 59 Stat. 1544, 82 U.N.T.S. 279 (defining a crime against humanity as "murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, *before or during the war* . . . whether or not in violation of the domestic law of the country where perpetrated.") (emphasis added); *see also* WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 34-35 (2001) (discussing the political considerations behind the Allies' inclusion of a war-nexus element in crimes against humanity).

148. *See* Van Schaack, *supra* note 91, at 789 (citations omitted).

149. *Id.* at 791.

150. *Id.*

151. *See* Van Schaak, *supra* note 91, at 791-92.

The development of crimes against humanity did not gain new impetus until the atrocities of the early 1990's occurred in Yugoslavia and Rwanda.[152] In 1994, for example, the Security Council adopted Resolution 955 establishing the International Criminal Tribunal for Rwanda to try crimes committed during the Rwandan genocide.[153] In Resolution 955, the Security Council completely eliminated any war-connection element with regard to "crimes against humanity" and defined the wrong as follows:

> The International Tribunal for Rwanda shall have the power to prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds:
>
> Murder;
> Extermination;
> Enslavement;
> Deportation;
> Imprisonment;
> Torture;
> Rape;
> Persecutions on political, racial and religious grounds;
> Other inhumane acts.[154]

With its modern reformulation of crimes against humanity, the Security Council was building on work performed by the International Law Commission ("ILC"), which had replaced the element of an international conflict with a requirement that inhumane acts were committed "in a systematic manner or on a mass scale."[155] Thus, the Security Council replaced the war-nexus requirement with a "mass-scale" element, which permitted the distinction between ordinary municipal crimes and crimes against humanity.[156]

Regrettably, the ILC further refined the definition in the 1996 Draft Code of Offences Against the Peace and Security of Mankind by criminalizing the previously enumerated acts as crimes against humanity "when committed in a systematic manner or on a large scale and instigated or directed by a Government or by any organization or group."[157] The ILC's attempted clarification could lead future tribunals to place excess emphasis on the government connection, notwithstanding the disjunctive including private organizations and groups.[158] However, the reformulation of the "mass-scale" requirement through the phrase "widespread or systematic attack" more succinctly achieved the es-

152. *See* Nancy Amoury Combs, *International Criminal Jurisprudence Comes of Age: The Substance and Procedure of an Emerging Discipline*, 42 HARV. INT'L L.J. 555, 559-60 (2001) (discussing the rapid development of international criminal law, emphasizing crimes against humanity, that emerged in the 1990s).

153. *See* S.C. Res. 955, *supra* note 8.

154. *Id.* at art. 3.

155. *Draft Code of Crimes Against the Peace and Security of Mankind*, [1991] 2 Y.B. INT'L L. COMM'N 103, U.N. Doc. A/CN.4/SER.A/1991/Add.1, art. 21.

156. *See* Van Schaak, *supra* note 91, at 823-24.

157. *Report of the International Law Commission to the General Assembly*, U.N. GAOR, 51st Sess., Supp. No. 10, at 93-94, U.N. Doc. A/51/10 (1996).

158. *See The Rome Statute of the International Criminal Court*, U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, 1998 Session, at 5, U.N. Doc. A/CONF./83/9 (1998) (incorporating the "widespread or systematic" language of the ICTR.

sence of the boundary between a matter of internal, domestic concern and a crime permitting universal jurisdiction.

As the International Criminal Tribunal for Rwanda explained, the term "widespread" means "massive, frequent, large scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims."[159] It further defined the term "systematic" as meaning "thoroughly organized and following a regular pattern on the basis of a common policy involving substantial public or private resources."[160] As interpreted, the "widespread or systematic" requirement has captured the essence of the crime. If crime is being committed on a massive scale or pursuant to a well-financed and systematic policy, then the territorial state has breached or failed to meet the minimum standard of state responsibility for preventing serious atrocities. Crime committed in a "systematic" manner against a targeted segment of a civilian population is sufficient in itself to trigger international jurisdiction. The utilization of "widespread or systematic" benefits from its simplicity of language and adequately captures the essence of the judgment that tribunals inevitably must make prior to finding jurisdiction. If violent crimes of the nature delineated in (a) through (i) of Resolution 955 are occurring on a widespread or systematic basis, it follows that the government is causing, condoning, or is unable to prevent the acts.

The phrase "widespread or systematic," however, likely concerned the ILC for its perceived lack of practical guidance in application. Unfortunately, no bright line can be drawn as to when an attack on a particular segment of a society has become sufficiently "widespread or systematic" to meet the modern conceptualization of the crime. It may always be necessary, at least into the foreseeable future, to make this determination on a case-by-case basis due to the inherently theoretical nature underlying the crime. The "widespread or systematic" requirement demarcates the line between domestic crime handled internally by a sovereign state's criminal justice system and a matter of such consequence that the international community, or any agent thereof, may assert universal jurisdiction over it.

The phrase "widespread or systematic" further establishes an objective criterion that evinces the subjective, frequently internalized, awareness on the part of the perpetrator that he or she can act with impunity in the commission of a crime.[161] The perpetrator gains this awareness, or *mens rea*, when the targeting of a particular segment of society has become so "widespread or systematic" that the perpetrator feels free to act in the absence of any likely prosecution by the territorial government. Even a single act against an individual victim can

The manner in which the future ICC will interpret and apply this provision, however, remains uncertain).

159. Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4-T, ICTR T. Ch. I, ¶¶ 579-81 (2 Sept. 1998); *see also* Kittichaisaree, *supra* note 21, at 96 (citations omitted).

160. *See* Prosecutor v. Akayesu, *supra* note 159, ¶¶579-81.

161. *See* RATNER & ABRAMS, *supra* note 6, at 62 (discussing the *mens rea* of an accused regarding the attack on a civilian population, that the accused must be aware of the widespread or systematic nature of the attack in order to be found guilty).

qualify as a crime against humanity if a link exists between the act and the widespread or systematic attack against a civilian population.[162] The perpetrator's subjective awareness arises from the government's perceived lack of power to prevent the commission of systematic crimes against an identifiable group or its acquiescence to and even encouragement of such crimes. At that point, a legal determination may follow that the state itself has "broken down"; it follows that some portion of the state's sovereignty has passed to the international community as a whole. Again, some of the state's sovereign sticks, those representing its criminal enforcement jurisdiction, have passed to or are shared with the international community of states.

Having developed the balance between the international community and the limitations on state sovereignty as the basis for universal jurisdiction, Part III will look at the issue from the position of the prosecuting nation. As a state's sovereignty transfers to the international community when certain "heinous" crimes are committed within the state, a particular nation that assumes the authority to prosecute essentially acts as the agent of the international community. It therefore must exercise restraint in its determinations as to which perpetrators and which crimes to prosecute consistent with its representative capacity.

IV.
THE PROSECUTION OF WAR CRIMINALS BY NATIONAL COURTS

A. *The Prosecuting State As The Agent Of The International Community.*

Throughout this paper, the term "international community" represents the collectivity of all states. Although itself an abstract term, "international community" is now a well-accepted phrase and logically recognizes that states collectively make international law.[163] As states can make law only through collective efforts, whether through multilateral conventions or custom and practice, "it is axiomatic that every [s]tate is as such a member of the international community."[164] Thus, the right to exercise universal jurisdiction belongs truly to the international community acting collectively and not the respective, individual states. When an individual state undertakes the prosecution of a perpetrator pursuant to an assertion of universal jurisdiction, that state acts as the *de facto* agent for the international community.[165]

This agent, however, is normally self-appointed and therefore not subject to direct control by any internationally constituted body. This frequently opens the prosecuting national tribunal to criticism that the trial either is politically motivated or constitutes an act of "judicial imperialism."[166] Both of these accusations can undermine the legitimacy of the process. Unfortunately, considering

162. KITTICHAISAREE, *supra* note 21, at 97.

163. *See* James R. Crawford, *Responsibility to the International Community as a Whole*, 8 IND. J. GLOBAL LEGAL STUD. 303, 314 (2001).

164. *Id.*

165. Bruce Broomhall, *Towards the Development of an Effective System of Universal Jurisdiction for Crimes Under International Law*, 35 NEW ENG. L. REV. 399, 403 (2001).

166. *See id.* at 416.

the enormous effort and potential expense in collecting evidence, gathering witnesses, and trying accused perpetrators of horrific crimes committed extraterritorially, the motivation for almost every such national proceeding likely would have some foundation in politics or arise from a sense of judicial, and most likely Western, superiority. Even those countries having the best intentions cannot escape such charges completely.

The next section will continue with a short examination of Belgium's controversial exercise of universal jurisdiction over the past few years, beginning with its conviction of two Rwandan nuns, to explore whether its courts appreciate the limitations on Belgium's authority to invoke universal jurisdiction.

B. Belgium's Trial and Conviction of Two Rwandan Nuns

On June 8, 2001, a Belgian jury convicted Sisters Maria Kisito and Gertrude, two Benedictine nuns, for complicity in the commission of genocide.[167] The jury found that the nuns forced approximately 7,000 Tutsis, who had sought shelter at the Sovu convent compound, to leave, with the knowledge that armed Hutu militia were waiting to kill the Tutsis.[168] They subsequently provided gasoline to the militiamen to enable them to burn down a barn in which 500 additional Tutsis had hidden.[169] Some evidence further suggested that the nuns provided vehicles, additional information and support to the Hutu militia in furtherance of killing Tutsis.[170] The nuns were sentenced to prison terms of 12 and 15 years.[171] Reportedly, this was the first occasion that a jury of citizens from one nation judged defendants accused of committing war crimes in another country.[172] The nuns were convicted pursuant to Belgium's 1999 law that provided Belgian courts with the authority under domestic law to exercise universal jurisdiction over genocide and crimes against humanity.[173]

At first impression, Belgium's exercise of universal jurisdiction to bring justice to perpetrators who furthered brutal acts of genocide appears completely impartial, noble, and inspiring. However, Belgium's colonial past in Africa potentially undermines the legitimacy of its efforts in prosecuting these and other accused perpetrators of the Rwandan genocide. Belgium acquired the territory of Rwanda from Germany after WWI and administered it as a protectorate under both the League of Nations and the U.N.[174] Germany had maintained a system of indirect rule, relying on the system of governance already in existence.[175] This pre-colonial system had been controlled predominantly by the Tutsis, who

167. *Special Report: Judging Genocide, supra* note 15, at 24; Linda M. Keller, *Belgian Jury to Decide Case Concerning Rwandan Genocide by May 2001*, AMERICAN SOCIETY OF INTERNATIONAL LAW INSIGHTS, *at* http://www.asil.org/insights/insigh72.htm, (last visited on October 13, 2001).
168. *Special Report: Judging Genocide, supra* note 15, at 24.
169. *Id.*
170. Keller, *supra* note 167.
171. *Special Report: Judging Genocide, supra* note 15, at 24.
172. *Id.*
173. *See* Keller, *supra* note 167, at 2.
174. Boutros-Ghali, *supra* note 126, at 7-8.
175. *Id.*

occupied the higher positions within the social system.[176] Social mobility, however, was possible and successful Hutus could become assimilated as Tutsis.[177] When Belgium acquired control of the territory, its administrators required that individuals specify their ethnicity on identity cards.[178] The identity cards gave the Tutsi dominated social structure a legal permanence, effectively eliminating any social mobility previously enjoyed by the Hutus.[179] The Tutsis were favored both in the educational system and in the civil administration established by the Belgians.[180] At the time, the Tutsis accounted for only approximately 17 percent of the population, with Hutus constituting the overwhelming majority.[181]

The identity-card system implemented by the Belgians later served as a tool for the Hutus in their genocidal campaign, permitting the identification of Tutsis.[182] By establishing a rigid hierarchy based on ethnicity, and effectively excluding the overwhelming-majority ethnic group from social advancement, the Belgians created a situation that was ripe with the potential for a disastrous ethnic conflict. In 1959, due to additional pressures secondary to the decolonization movement, the situation exploded when a Hutu uprising resulted in the deaths of hundreds of Tutsis and the displacement of thousands more.[183] These tensions continued through the years, erupting into periodic violence, until the Rwandan genocide in 1994 claimed the lives of as many as one million people.[184]

In light of this history, Belgium's recent zeal for prosecuting war criminals on the basis of universal jurisdiction could be criticized as being motivated by a desire to improve its own national legacy. Belgium's colonial legacy in Rwanda could diminish the propriety of Belgium's self-appointment to the role of prosecutor. Yet, the unfortunate fact is that at the present time the international community lacks a sufficiently constituted body with the authority to prosecute and try war criminals. Even a fully supported International Criminal Court could not try more than a small fraction of the total number of war-crimes perpetrators in such conflicts.[185] If national courts do not undertake the role of the prosecutor, then the undesirable alternative may be that perpetrators will escape all punishment.[186] This obviously is unsatisfactory. Until the establishment of a permanent, supranational court that has sufficient authority to rise above politics but that also can foster continuing respect for respective states' sovereignty national

176. *Id.* at 7.
177. *Id.*
178. *Id.* at 8.
179. *Id.*
180. *Id.*
181. *See* Kuperman, *supra* note 6, at 95.
182. *See* Jose E. Alvarez, *Crimes of State/Crimes of Hate: Lessons from Rwanda*, 24 YALE J. INT'L L. 365, 388-89 (1999) (citing ALAIN DESTEXHE, RWANDA AND GENOCIDE IN THE TWENTIETH CENTURY 47 (Alison Marschner trans., New York University Press 1995)).
183. BOUTROS-GHALI, *supra* note 126, at 8.
184. *Id.* at 37.
185. Broomhall, *supra* note 165, at 408.
186. *See id.* at 409.

courts should continue their work in investigating war crimes and punishing their perpetrators.[187] National courts, however, always should consider the theoretical source of their authority to prosecute crimes under universal jurisdiction. These courts can avoid undesirable political ramifications and the appearance of impropriety only through objective self-scrutiny of their authority and the appropriateness of their assumption of the prosecutorial mantle on behalf of the international community.[188]

The next section will summarize some practical concerns and considerations arising from the nature of a nation's self-appointment to the role of international prosecutor. It will explore briefly the very real danger to international relations which nations may cause when they indiscriminately invoke universal jurisdiction. This danger results mainly from the fact that nations focus solely on the "heinous" crime without an objective, accompanying determination that the wrongs alleged indicate the breakdown of another sovereign state.

C. The Self-Appointed Agent for the International Community: Practical Concerns and other Considerations

Problems and criticism inevitably result when national courts undertake the prosecution of war crimes, primarily because the development of universal jurisdiction is still in its theoretical infancy.[189] National efforts to prosecute war crimes began in earnest relatively recently, resulting in an unprecedented assertion of universal jurisdiction that departs from the more traditional bases of territoriality or nationality. The indiscriminate invocation of universal jurisdiction, however, has the potential to cause substantial tears in the fabric of international relations. Any government invariably considers another state's exercise of external jurisdiction over its territory and nationals as a threat to its sovereignty.[190] As Bruce Broomhall has commented:

> Concerns about the potentially real consequences of universal jurisdiction proceedings on interstate relations are not trivial. It would be one thing for France to prosecute a former head of state of Haiti before its domestic courts, and quite another for the Marshall Islands to prosecute a former President of the United States.[191]

These potential problems ultimately arise because nations self-appoint themselves as an agent for the international community when they invoke universal

187. *See, e.g.*, Lt. Col. Michael A. Newton, *Comparative Complementarity: Domestic Jurisdiction Consistent with The Rome Statute of the International Criminal Court*, 167 MIL. L. REV. 20 (2001) (criticizing the perceived structural flaws with the present treaty providing for the International Criminal Court).

188. *Cf.* Dan Smith, *Sovereignty in the Age of Intervention*, *in* SOVEREIGN INTERVENTION 13, 23 (Anthony McDermott ed., 1999) (arguing that it "is a mistake to go very far with this analogy between national societies and international society". . . . as "acting in the name of international law necessarily politicizes humanitarianism.").

189. *See, generally*, Theodor Meron, *International Criminalization of Internal Atrocities*, 89 AM. J. INT'L L. 554, 563 (1995) (discussing, for instance, that "the penal element of international humanitarian law is still rudimentary").

190. *See* Bartram S. Brown, *The Evolving Concept of Universal Jurisdiction*, 35 NEW ENG. L. REV. 383, 389-90 (2001).

191. Broomhall, *supra* note 165, at 418.

jurisdiction. As discussed, when a state condones or loses the ability to prevent the widespread commission of crimes such as genocide, crimes against humanity, official torture, or similar "heinous" offenses, a portion of its total sovereign "bundle" passes to the international community as a whole. Unfortunately, with few historical exceptions such as Nuremberg, the ICTY and the ICTR, the international community has lacked the political consensus to establish effective enforcement mechanisms for trying war criminals.[192] The international community generally remains too diffuse and decentralized to present a consistent and unified effort in war-crimes prosecution.[193]

For the same reasons, no internationally agreed upon mechanism currently exists for the appointment of a particular nation most suitable for the prosecution of an identifiable set of war-crimes perpetrators. However, when individual nations act pursuant to universal jurisdiction, in theory they are acting pursuant to an implied mandate from the collective international community. If states do not consider the theoretical limits of their authority, those initiating prosecutions could foment increased tension in international relations that would outweigh the benefits of individual justice. The idea of reasonableness as a limitation on the exercise of jurisdiction thus takes on special importance when universal jurisdiction is the sole basis for extraterritorial prosecution.[194] A state should commence such a prosecution only after an objective self-determination that it can appropriately represent the interests of the international community.

Any nation acting pursuant to an assertion of universal jurisdiction should gauge whether the accused perpetrator's acts were so egregious, or were secondary to a conflict so awful, that a general international consensus of condemnation of those acts could be expected or assumed. Most recent national prosecutions pursuant to universal jurisdiction have not given much consideration to the presence of any international consensus. Belgium's institution of proceedings against Ariel Sharon[195] and its issuance of an arrest warrant for the Democratic Republic of the Congo's Abdulaye Yerodia Ndombasi,[196] for instance, indicate that its courts have recognized few if any theoretical, or practical, constraints on their authority. In the former proceeding, Belgium until recently was investigating the present, democratically elected leader of Israel for war crimes. Although Israel's handling of conflict with its neighbors certainly

192. *See* Randall, *supra* note 106, at 829, n.251 ("At present, domestic jurisdiction to prosecute international crimes is particularly important, because 'mankind has not yet proved mature enough to have set up an international criminal court.'") (quoting Feller, *Jurisdiction Over Offenses with a Foreign Element*, *in* 2 A TREATISE ON INTERNATIONAL CRIMINAL LAW 5, 41 (M. Cherif Bassiouni & Ved P. Nanda eds., 1973)).

193. *See* Brown, *supra* note 190, at 383-84 ("Universal jurisdiction is a functional doctrine based on the need to remedy, in some small measure, the inability of the decentralized international system to enforce even its most fundamental laws.").

194. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 403 (listing several factors for evaluating the reasonableness of the exercise of jurisdiction, including the importance of the regulation to the international community and the extent to which the assertion of jurisdiction is consistent with the traditions of the international system).

195. *See Sharon Hearings*, *supra* note 16.

196. *See* Case Concerning the Arrest Warrant of August 11 April 2000 (Congo v. Belg.), 2002 I.C.J. No. 121 (Feb. 14), at 4.

has been controversial, it remains highly questionable whether a legal conclusion that a portion of Israel's sovereignty transferred to the international community could follow from commission of the alleged crimes. As discussed, such a finding should precede the exercise of universal jurisdiction over any perpetrator. Otherwise, legal action violates the sovereignty of the territorial state or state of the accused.

Belgium further had resolved to arrest Yerodia on the spot if he entered its territory. Yerodia was Congo's Minister of Foreign Affairs when Belgium issued its arrest warrant and recently held the position of Minister of Education.[197] The arrest warrant alleged that during Congo's civil war Yerodia, who then was the Principal Private Secretary to the president, made televised statements in which he called for the continued massacre and persecution of the country's Tutsis.[198] In response to Belgium's arrest warrant, Congo filed and proceeded on an application to the International Court of Justice arguing that Belgium's actions violated the principle of sovereign equality, the principle that a state may not exercise jurisdiction over another state, and principles of diplomatic immunity.[199] Although the charges against Yerodia of inciting genocide certainly would constitute a crime of international concern,[200] Belgium likely did not consider whether Yerodia's outrages were such that it should conclude that Congo's sovereignty had ceded in part to the international community or that its assumption of jurisdiction on behalf of the international community was proper. On February 14, 2002, the ICJ ruled against Belgium for its unilateral assumption of the authority to prosecute Yerodia on the basis of universal jurisdiction.[201] Although the majority of the ICJ in the *Arrest Warrant* case did not expound in any detail on universal jurisdiction, it did conclude that Belgium's attempted exercise of jurisdiction violated long-established principles of diplomatic immunity.[202]

The ICJ's ruling against Belgium ultimately may discourage the principled use and development of universal jurisdiction. Rather than advancing the cause of international justice, Belgium's zeal may have retarded it. If international law is ever to take precedence over international politics, restraint in the use of universal jurisdiction will be necessary. The ICJ's rejection of Belgium's overzealous attempt to rely on this principle demonstrates the delicate balance at issue between the prosecution of international criminals and mutual respect for sovereignty. The *Arrest Warrant* case thus raises the question whether the international community truly can cooperate sufficiently for the development of any principle of law as profound as the concept of universal jurisdiction.

197. *Id.* at 4.
198. *Id.* at 25.
199. *Id.* at 4.
200. *See* Prosecutor v. Akayesu, ICTR-96-4-T, ICTR T. Ch. I, ¶¶ 579-81 (1998).
201. Case Concerning the Arrest Warrant, 2002 I.C.J. No. 121.
202. *Id.* at 26.

V.
CONCLUSION

The assertion of universal jurisdiction by one nation over another's citizens for crimes committed in the latter's territory is an abrogation of that state's sovereignty and constitutes a limited exception to the principle of non-intervention. Though conceptually permissible when serious violations of international humanitarian norms are systematically occurring, the assumption of another state's domestic criminal jurisdiction involves many theoretical nuances and complexities. This is the very reason that a sound theoretical appreciation of universal jurisdiction vis-à-vis the sovereign rights of states to exercise exclusive domestic jurisdiction over crimes within their territory is so crucial. This paper sought to develop the theoretical balance between the use of universal jurisdiction and the continuing importance of state sovereignty and its general inviolability. The analogy of sovereignty to property law as a "bundle of sticks" was proposed as a means of conceptualizing this balance. Though the "owner" of a state's sovereignty possesses numerous rights, the international community has imposed some limits on those rights. When crimes of the magnitude of genocide, crimes against humanity, and others in this limited category are capable of perpetration in a state, the international community may claim for itself some portion of that state's sovereignty and may exercise jurisdiction to bring the perpetrators to justice.

Unfortunately, the international community still depends on individual nations for the general enforcement of humanitarian norms. The respective nations thus act as self-appointed agents in the pursuit and prosecution of international offenders. But the potential for disruption within the international order, and the resulting ramifications for international peace and security, are greater than often appreciated. For when nations assume the authority to prosecute pursuant to universal jurisdiction they, in essence, make a legal determination that another state has abdicated some portion of its sovereignty. That is a serious conclusion. Due to the "under-theorization" of universal jurisdiction, most nations probably do not appreciate the full import of their actions. As a result, the potential for international disruption greatly increases.

Unquestionably, the concept of universal jurisdiction remains in its theoretical and practical infancy. Its emergence into a respected and legitimate basis for the prosecution of major offenders of humanitarian law will depend largely on individual nations. National prosecutorial efforts should exercise restraint in selecting which criminals to pursue and maintain strict adherence to principles that foster substantive and procedural fairness. Otherwise, international consensus will judge the judges, and the result will be that universal jurisdiction becomes discredited and again falls into disuse. Such a tragedy would greatly undermine the efforts of the international community to build a more just and peaceful global order. Far worse, however, would be the betrayal of the victims in whose name the principle of universal jurisdiction is invoked.

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Association of American Law Schools (AALS) 2001 Annual Meeting - Section on International Law Friday, January 5, 2001 in San Francisco, California

PANEL

Cities, States, and Foreign Affairs: The Massachusetts Burma Case and Beyond

Association of American Law Schools (AALS) 2001 Annual Meeting—Section on International Law Friday, January 5, 2001 in San Francisco, California

I.
EDITORIAL PREFACE

The following essays are drawn from a panel discussion taped live on January 5, 2001 at the Annual Meeting of the American Association of Law Schools in San Francisco. The Panel was convened to discuss the involvement of both states and municipalities in the foreign affairs of the United States and assess the significance of the U.S. Supreme Court's decision in 2000 in *Crosby v. National Foreign Trade Council.*[1]

The general question examined concerns the manner and degree to which the municipalities and States of the United States may take actions that are intended to have effect on particular foreign policies of the United States. It is a question that has arisen for other countries. It is a question that had arisen for the United States before the *Crosby* case, particularly during the 1980s. At that time, many States and municipalities adopted statutes and ordinances similar to the one present in the *Crosby* case, though in that instance they concerned South Africa.

The *Crosby* case considered by the Panel concerns a Massachusetts statute[2] that was, in the terminology of this arena, an anti-procurement statute. It restricted the awarding of contracts by state agencies to particular bidders if those bidders had certain specified ties to Burma.

Awareness of and protest of human rights violations by Myanmar (formerly known as Burma) had increased in 1988 when the military government of Burma refused to relinquish power despite its defeat in a democratic election.[3]

1. 530 U.S. 363 (2000).
2. MASS. GEN. LAWS ch. 7, § 22G-M (2002).
3. *Myanmar: 1988 to 1998—Happy 10th Anniversary? A Chronology of Events* (Jan. 5, 1998), *at* http://www.web.amnesty.org/802568F7005C4453/0/7C11AD2A90BD83CA802569A5007

While the U.S. Department of State, Congress, and President Clinton implemented federal sanctions against Burma,[4] Massachusetts enacted the anti-procurement statute at issue in *Crosby*. In essence, the Massachusetts statute placed bidders at a disadvantage in securing state government contracts if they had certain specified relationships with Burma.[5] The Massachusetts statute thus arguably situated a state of the United States as an actor in the foreign affairs of the United States. U.S. trading partners launched a variety of protests on behalf of those of their nationals whose business affiliations with Burma prevented or would prevent Massachusetts from purchasing from them. The European Union and Japan asked the World Trade Organization to resolve the matter, claiming that the Massachusetts law violated multilateral trade agreements signed by the United States.[6] Meanwhile, within the United States, the National Foreign Trade Council brought suit against Massachusetts in federal court.[7] The District Court and the U.S. Court of Appeals for the First Circuit both found that the Massachusetts law unconstitutionally violated the federal government's power over foreign policy.[8] The Supreme Court in 2000 affirmed the Massachusetts statute's invalidity under the Supremacy Clause.[9]

Four panelists addressed various aspects of the following topic: Cities, States, and Foreign Affairs: The Massachusetts Burma Case and Beyond. They are in the order of their presentation here: First, Professor Spiro of Hofstra University; next, Professor David Golove of Cardozo University, Visiting Professor at the University of Texas School of Law; then, Professor David D. Caron of the University of California at Berkeley, Visiting Professor at New York University; and finally, Professor Naomi Roht-Arriaza of the University of California at San Francisco, Hastings College of the Law.

1935B?Open&Highlight=2,Burma. *See also U.N. Resolution on Human Rights Violations in Burma*, U.N. Economic and Social Council, 57th Sess., Agenda Item 9, U.N. Doc. E/CN.4 (2001).

4. *See* Foreign Operations, Export Financing, and Related Programs Appropriations Act of 1997, Pub. L. No. 104-208, § 570, 110 Stat. 3009-121 (enacted by the Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, § 101(c), 110 Stat. 3009 (1996)).

5. *See id.*

6. *See Panel Established in Government Procurement Dispute, DSB Considers Three New Panel Requests* (Oct. 29, 1998), *at* http://wto.org/english/newse/news98e/wdsboct.htm.

7. Nat'l Foreign Trade Council v. Baker, 26 F. Supp. 2d 287 (D. Mass. 1998), *aff'd by* Nat'l Foreign Trade Council v Natsios, 181 F.3d 38, (1st Cir. 1999).

8. Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363 (2000).

9. *Id.* at 388.

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Crosby as Way-Station

Peter Spiro

Crosby as Way-Station

By
Peter Spiro*

I would like to set out a bit of the factual and doctrinal backdrop for the Massachusetts Burma case. Then, I'll undertake a brief description of the *Crosby* decision itself, a narrow ruling that will leave many students of the issue unsatisfied. Unfortunately, the court does not write for academics, although it's obviously important to look closely at its pronouncements. And then, finally, I would like to look at the implications of the decision for this sort of activity on the part of state and local governments for the future.

I.
THE FACTUAL UNDERPINNINGS OF *CROSBY V. NATIONAL FOREIGN TRADE COUNCIL*

Until the mid-1980s, there were very few instances in which state and local governments sought directly and intentionally to influence events beyond American shores. In this respect, the anti-apartheid movement represented a very significant innovation in the strategic playbook of activists seeking to push international agendas. Faced with resistance by the federal government on the issue of sanctions against the apartheid regime in South Africa, the anti-apartheid movement turned to state and local governments to use the investment and procurement muscle of those governments against South Africa. There were two basic models of anti-apartheid legislation at the state and local level: the "divestment measures," those under which state and local governments divested their pension fund holdings of companies doing business in South Africa; and then more effectively, the "selective purchasing measures," under which state and local governments prohibited a company doing business in South Africa from competing for huge state and local government procurement dollars. There were several companies which did pull out of South Africa for fear of losing contracts with state and local governments. By the early 1990s, the anti-apartheid movement had more than one hundred state and local governments that had adopted such measures. Many think that these measures were an important element in the downfall of apartheid itself.

II.
CROSBY'S DOCTRINAL CONTEXT

That is an important factual element in the backdrop to the Burma law. The doctrinal context implicates three strands of Supreme Court decisions.

* Professor of Law, Hofstra University School of Law. In the spring of 2001, Spiro was a visiting professor at the University of Texas School of Law.

First—the broadest and most controversial—was the "dormant foreign affairs power," articulated only most recently in 1968 in the case of *Zschernig v. Miller*.[1] There, the Supreme Court struck down a state probate law because it had more than "an indirect or incidental effect" on foreign relations. This probate law denied reciprocity for inheritance in certain East Bloc nations, and had been implemented by state court judges with all sorts of derogatory political characterizations. The Court in *Zschernig* set a fairly low threshold for striking down state and local actions implicating foreign relations.

The second doctrinal strand is the "dormant foreign commerce clause," the best articulation of which appears in the 1979 *Japan Line*[2] decision. There, the Court found it a paramount requirement that the nation "speak with one voice when regulating commercial relations with foreign governments."[3] In *Japan Line*, the Court struck down a state tax which fell more heavily on foreign corporations and which had excited some opposition from foreign governments. This was actually the first articulation of the "one voice test," which has been used as a shorthand, or mantra, to characterize the exclusivity principle of the federal government over foreign relations.

Finally, the third doctrinal strand is that of preemption. In contrast to dormant powers, it works from affirmative federal action, as is true with preemption doctrine in general. Here, however, at least in one incarnation, it functions with a vengeance in the form of "field preemption," so that if the federal government steps in just a little bit, it occupies the field and all state regulations must fall. The best example of this is *Hines v. Davidowitz*,[4] in which the Court struck down a state law regulating the registration of aliens even though it paralleled a federal measure. Under this doctrine, even if a state law is ostensibly consistent with the federal regulation, it is preempted by the federal action.

I think all three of these doctrines have in common a functional underpinning, namely, the specter of the severe externalities of state-level action in the international context, at least in the traditional world of hostile nation-states. The dangers of states undertaking independent action on the international level were too great to be tolerated to any extent. States would have structural reasons for not taking into consideration national interests on the international plane, which would systematically result, if tolerated, in exciting foreign offense and retaliation not just against the single acting state, but against the nation as a whole. The context in which the doctrine developed was one in which the international relations posed grave dangers to the nation, potentially even its survival, especially as against the Cold War backdrop. In that context, one could not tolerate what would otherwise be constitutionally protected action on the part of the states. That, I think, is the functional underpinning for this doctrine, which antedated the Cold War, but reached its zenith during that sensitive period.

1. 389 U.S. 429 (1968).
2. Japan Line, Ltd. v. L.A. County, 441 U.S. 434 (1979).
3. *Id.* at 449.
4. 312 U.S. 52 (1941).

That is the doctrinal context, with the South African laws as an innovation clearly implicating all three strands of this doctrine. The courts never got a whack at the anti-apartheid laws. Nobody was willing to bring a challenge against the divestment laws for fear of appearing pro-South Africa. The only decision to result from the episode was a state supreme court decision[5] upholding a divestment measure. But there were no federal court cases and the Supreme Court did not consider the issue.

In the wake of the anti-apartheid example, human rights advocates did, in fact, use it as a model. It was a successful strategy for advancing other causes, and one found other examples, involving Northern Ireland, Nigeria, Indonesia, Cuba, and Tibet, of human rights activists succeeding in winning the adoption of similar measures at the state and local level through the late 1980s and into the 1990s. But none garnered any great success until the Burma campaign, which by early 2000 counted measures in four states and twenty-six municipalities.

There was one intervening doctrinal development of significance here. In its 1994 decision in the *Barclays Bank*[6] case, the Court upheld a California tax that had excited significant opposition from foreign governments. The decision marked an apparent retreat from the one voice approach in a context in which state-level action had provoked such opposition.

III.
THE *CROSBY* DECISION

The question in *Crosby*, or what everybody was looking for, was whether the Court would extend *Barclays* beyond the foreign commerce clause context to beat a retreat from the *Zschernig* case and the dormant foreign affairs power. The Court ducked that challenge. It found the Massachusetts law infirm, but on the narrowest of grounds. There was no dormant power ruling in *Crosby*—it was not even a field preemption case. Rather, the court struck down the Massachusetts law under garden-variety preemption analysis. In other words, it used the same approach in *Crosby*, at least ostensibly, as it would, for example, with a garden-variety bankruptcy or tax provision in terms of looking at whether the state law is acceptable in the face of intervening federal legislation. The Court found the state law to be an obstacle to the accomplishment of the purpose of Congress' full objectives under a 1996 federal measure[7] imposing certain sanctions against Burma and clearing the way for others. So one did have a piece of federal legislation here and it was on the basis of that legislation that the Court found the Massachusetts law to have been preempted.

There are three provisions in the federal Burma law warranting a closer look. First, the federal measure provided the President with flexible and effective authority over economic sanctions against Burma, allowing the President to

5. Bd. of Trs. of Employees' Ret. Sys. of Baltimore v. Mayor and City Council of Baltimore, 317 Md. 72 (1989).

6. Barclays Bank Plc. v. Franchise Tax Bd. of Cal., 512 U.S. 298 (1994).

7. 50 U.S.C. § 1701 (2002). The law concerns the exercise of presidential authority to deal with an unusual and extraordinary threat during a national emergency. *Id.*

impose certain sanctions or to waive other ones. The Court found it implausible that Congress would compromise presidential effectiveness by accepting state-level action differently calibrated than those federal sanctions. Second, the federal measure limited economic pressures to a different range of activities and actors than did the Massachusetts measure. For instance, the federal law only prohibited new investment in Burma, whereas the Massachusetts law impacted those who already had operations in Burma. The federal measure only purported to regulate United States entities, whereas the Massachusetts law was not so restricted. The Court found this to undermine congressional calibration of economic force.

The third provision of the federal Burma law which the Court found at odds with the Massachusetts law directed the President to develop "a comprehensive multilateral strategy to bring democracy to and improve human rights practices . . . in Burma."[8] Here, Congress had directed the President to undertake this multilateral strategy. The Court found the state law to compromise the capacity of the President under this provision to speak for the nation with one voice when dealing with foreign governments. Here, *Crosby* resonates the *Zschernig* and *Japan Line* cases in using this one voice articulation. Nonetheless, this was only a constitutional resonance and not a constitutional ruling, insofar as the ruling did hinge on the statutory direction to the President to undertake this multilateral strategy. Thus, even though we have echoes in this case of broader dormant powers in the foreign relations area, by its own terms the decision does not hold up as anything of constitutional significance. *Crosby* emerges as a very narrow ruling, explicitly ducking the *Zschernig*, foreign commerce, and field preemption issues. It leaves the status of one voice doctrine largely unresolved.

IV.
The Future of State-Level Actions

A. The Potential Role of Savings Clauses in Sanctions Regimes

In the wake of *Crosby*, where do such state-level actions stand? I think there are two possibilities. One is that this is just a bump in the road. Congress could in effect negate the *Crosby* ruling by adopting boilerplate savings clauses in future sanctions regimes, indicating a lack of preemptive effect for such regimes. This is a preemption analysis; it hinges on congressional intent. If Congress does not want to have these laws preempted with respect to future sanctions regimes, it can just say so explicitly, and then *Crosby* would not apply. I actually think that, to the extent such savings clauses became boilerplate, they would have constitutional significance on their own, as evidence of a change in constitutional norms with respect to such activity on the part of state and local governments, *Crosby*'s constitutional echoes not withstanding.

At the same time, it is quite clear that these state measures do complicate federal foreign policy making. Folks from the State Department are always

8. Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 369 (2000).

jumping up and down about state sanctions initiatives; they care enough about them now, for example, to testify against the consideration of such measures in front of state legislators. But I think it is also possible that in the face of globalization, those complications are now tolerable. Here I would make an argument that such activity is sustainable in the face of globalization, and that it would be a good thing if Congress came back with some sort of boilerplate savings clauses to the effect that such activity is not preempted. To get back to the functional underpinnings of the old rule, one voice was driven by a concern about the externalities of state-level action. If a state acting on its own excited retaliation from another country, that retaliation would be against the entire nation as a whole, having potentially serious consequences. But in the face of globalization, other countries now understand that when Massachusetts acts, it is acting on its own, and it is not something that Washington is responsible for.

At the same time, economic globalization gives other countries the opportunity to retaliate discretely against an acting sub-national entity. If *Crosby* had upheld the Massachusetts law, I think it is quite possible that other countries would have come back to Massachusetts (as they had been intimating) and said, "Okay, you want to impose these sanctions against us, we have a lot of companies that we have located in Massachusetts and maybe they would be just as happy in New Jersey or Connecticut." These investments represent a lot of jobs, as do export sales of Massachusetts' products in European and Japanese markets. Perhaps Massachusetts would have changed its tune if it had faced significant concrete losses as a result of its sanctions regime. That, I think, is the argument for tolerating such state-level activity. It is also a context in which *Crosby* emerges as an ephemeral decision, over the long run.

B. Globalization: An Impediment to Independent State Action?

The other possibility here is that Congress will not come back with savings clauses indicating a lack of preemptive effect for future sanction regimes. But neither will this necessarily evidence a reaffirmation of federal exclusivity over foreign policy making. Rather, I think it may be consistent with, or be a part of, the continued diminishment of the power of governmental authorities in general in the wake of globalization, at all levels of government. Economic globalization has forced nation-states to accept increasingly entrenched free trade regimes. It is not as if what Massachusetts was doing was something that the U.S. could have done in its stead. Although I am not a trade expert—so I cannot conclusively say that for the U.S. to have adopted Massachusetts-type laws, they would have been inconsistent with the world trade regime—it is clear that things are moving in a direction that such activity at the national level would be intolerable, as at the sub-national level. In this sense, the failure of moves in the wake of *Crosby* to affirm the power of states to undertake these kind of sanctions will not indicate a confirmation of Washington's power, but, rather, an aspect of the new global regime under which governments in general cannot undertake such activity. I think that is where this would have ended up even if *Crosby* had

affirmed the Massachusetts law. Massachusetts would have ended up dropping these sanctions because of the economic pressures of the new global regime.

From that, I will conclude with one broader lesson from this issue: These doctrines are contingent on the structure of international society, and to the extent that globalization represents a dramatic restructuring of that society, we have to reexamine and conform our doctrines of constitutional law with this new global context, especially in the foreign relations law area where we are dealing directly with issues of international society. In this sense, the old rules that applied to these issues were contingent on a different international context. Now that the international contexts have changed, I think we should and will see a corresponding shift in our own constitutional doctrine to reflect those changes at the international level.[9]

9. For an elaboration of the themes presented in these remarks, see Peter J. Spiro, *Globalization and the (Foreign Affairs) Constitution*, 63 OHIO ST. L.J. 649 (2002); Peter J. Spiro, *Foreign Relations Federalism*, 70 U. COLO. L. REV. 1223 (1999).

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The Implications of Crosby for Federal Exclusivity in Foreign Affairs

David M. Golove

The Implications of *Crosby* for Federal Exclusivity in Foreign Affairs

By
David M. Golove*

There is much in what Professor Spiro has said with which I agree, but some with which I disagree. To make my remarks more interesting, I thought I would focus on the areas of our disagreement. I had anticipated, of course, that John Yoo would be here and, in preparing my remarks, had in mind what he might say. So, you may hear in my remarks responses to the ghostly voice of John Yoo whose actual presence is, of course, much missed here today.

At the risk of oversimplifying Professor Spiro's remarks about *Crosby*, I think that he, and perhaps some others, believe that *Crosby* is a rather insignificant decision, in part because the Court ruled on narrow statutory preemption grounds rather than on the broader constitutional dormant power grounds that the lower courts relied upon. In particular, there was a good deal of anticipation about whether the Court would limit the scope of, or eliminate altogether, the dormant foreign affairs preemption doctrine as articulated in the *Zschernig* case[1] and would begin a process of revising the Court's traditional attitude towards federal-state relations in the area of foreign affairs. If I understand Professor Spiro correctly, he does not think that the *Crosby* decision has any particularly significant implications for either of these questions. In his view, *Crosby* should not be read as a strong reaffirmation of the Court's traditional endorsement of federal exclusivity in the realm of foreign affairs. Nor does it in any way suggest the continuing vitality of dormant foreign affairs preemption. Normatively, I understand him to argue that dormant foreign affairs preemption is undesirable and that perhaps it would have been better had the Court faced the dormant power question and forthrightly overruled *Zschernig* and its progeny. I disagree with all of these claims, although I am not sure whether Professor Spiro made all of them in exactly the way I have put them. I think a realistic appraisal of *Crosby* suggests that, notwithstanding the Court's recent and aggressive moves to recalibrate the federal-state balance on the domestic front, the Court remains fully wedded to the traditional view that foreign affairs are largely, if not exclusively, the domain of the federal government. I also think that *Crosby* suggests that dormant foreign affairs preemption is still a vital, if limited, doctrine.

* Professor of Law, New York University.

1. Zschernig v. Miller, 389 U.S. 429 (1968).

I.
THE IMPLICATIONS OF *CROSBY* FOR FEDERAL EXCLUSIVITY IN FOREIGN AFFAIRS

As an initial matter, I think that the *Crosby* case, even narrowly understood as a statutory preemption case, has wider significance for the federal-state balance in foreign affairs than may be obvious at first glance. Congress has legislated very widely in foreign affairs. There are many foreign affairs statutes and statutory framework regimes. If the Court persists in following *Crosby*'s extremely liberal approach to preemption in construing the preemptive effects of these statutes, then it may already be the case that the states are ousted from a very wide range of activities connected to foreign affairs. In the context of the Massachusetts case, the federal law that the Court relied upon was the federal Burma Sanctions Act. However, the President more often imposes sanction regimes not pursuant to a specific statutory authority like the Burma Sanctions law, but under a general framework statute known as the IEEPA (the International Emergency Economic Powers Act).[2] If one takes the reasoning of *Crosby* seriously, it suggests that sanctioning activity by states is, in any case, already preempted across the board by IEEPA and that it would be unnecessary to have more specific statutory authority, like the Burma Sanctions Act, to find preemption. Even more broadly, as I already mentioned, there are many other types of foreign affairs statutes on the books, and, applying *Crosby*'s liberal preemption approach would likely mean that, even before one takes into account more exotic lines of judicial authority, the states are widely preempted from acting in the realm of foreign affairs. In contrast, dormant foreign affairs preemption—certainly among the more exotic of those lines of decision—has always been a limited doctrine. As Professor Spiro pointed out, the Court has not applied it since the *Zschernig* case in 1968, and there are only a handful of lower court cases applying the decision thereafter. Since the decision was rendered, moreover, the conventional wisdom among scholars of foreign affairs and the Constitution has been that it is strong medicine and ought to be applied only very sparingly and in unusual cases. Thus, the more conventional decision in *Crosby* may well be of wider practical significance than would have been a decision clarifying the contours of a somewhat esoteric doctrine.

One of the particularly striking features of *Crosby* is that despite the weakness of the statutory preemption claim, at least as a matter of congressional intent, it was a unanimous decision by the Supreme Court. In turn, the Court was affirming a unanimous panel of the First Circuit,[3] which in turn was affirming the judgment of a district court[4] striking down the state sanctions law. That is a remarkable degree of judicial unanimity and seems to reflect an underlying consensus about the significance of the foreign affairs context in construing the permissibility of state activity. It is also particularly striking because in

2. 50 U.S.C. §§ 1701–07 (2002).
3. Nat'l Foreign Trade Council v. Natsios, 181 F.3d 38 (1st Cir. 1999).
4. Nat'l Foreign Trade Council v. Baker, 26 F. Supp. 2d 287 (D.Mass. 1998).

recent years a growing group of revisionist scholars (John Yoo being a notable example) has launched a vigorous assault on the conventional wisdom in the field of foreign affairs and the Constitution. One of the group's core claims is that federalism principles ought to apply as strictly in the context of foreign affairs as they apply in the context of domestic affairs. The unanimity of the courts, and the business-as-usual approach of the Supreme Court, suggest that the new revisionist foreign affairs thinking in the academy has not yet penetrated the jurisprudence of even the most states-rights oriented Justices on the Court.

Furthermore, there are several other respects in which the *Crosby* decision reaffirms the Court's traditional solicitude for the foreign affairs powers of the federal government even in the face of sensitive federalism considerations. This solicitude is reflected in a number of arguments which the Court either explicitly or implicitly had to reject in order to reach its ultimate conclusion that the Massachusetts sanctions were preempted.

One much discussed argument, for example, was a familiar Tenth Amendment-type objection to federal preemption. Some thought that the Court might carve out a kind of market participant immunity for states exercising their spending powers. Under this view, Massachusetts would be entitled to a constitutional immunity to be free of federal interference in deciding how to spend the tax revenues it raises from its citizens, at least in the context of the procurement of goods and services. The *Crosby* Court rejected this argument explicitly. The Court had, in fact, rejected a similar argument some years before in the *Gould*[5] case. *Gould*, however, was decided before the recent spate of federalism decisions, and one might reasonably have thought that it was a weak and vulnerable precedent. Apparently, not so, at least in the foreign affairs context.

Similarly, there was also a commandeering issue, reminiscent of *New York v. United States*[6] and *Printz*,[7] lurking in the background of the case. After all, at least as the Court interpreted the federal sanctions law, it affirmatively commandeers the states into purchasing goods and services from companies with which they do not wish to do business. Despite the Court's current enthusiasm for the anti-commandeering principle in the domestic realm, it deemed the issue not even worth mentioning in this context. More important, there was another related, and doctrinally more plausible, argument that the Court likewise decided not to address. In a number of recent cases, *New York* and *Reno v. Condon*[8] being two examples, the Court has suggested that when Congress wishes to regulate the states as states, it may have to do so pursuant to laws of general applicability. Congress, the Court has suggested, may not single out the states for regulation. Preemption necessarily raises a problem in this respect because preemption is in fact a regulation of states as states and of no one else. It is like an injunction that Congress imposes on the states not to adopt legislation in a particular area. Notwithstanding this apparent logical difficulty, it is of course

5. Wis. Dept. of Indus. v. Gould Inc., 475 U.S. 282 (1986).
6. New York v. United States, 505 U.S. 144 (1992).
7. Printz v. United States, 521 U.S. 98 (1997).
8. 528 U.S. 141 (2000).

highly doubtful that the Court will find that preemption in general somehow runs afoul of federalism limitations. Still, the kind of preemption that the Court applied in *Crosby* was of a very special, and arguably more problematic, kind. Rather than just enjoining the State of Massachusetts from adopting a regulation in a certain area, as would typically be the case when Congress preempts state law, the federal Burma sanctions law affirmatively required Massachusetts to purchase goods and services from companies doing business with Burma. Yet, while Congress imposed this requirement on the states, it did not impose a similar requirement on private participants in the marketplace. It might have been thought, therefore, that the federal sanctions law was not a law of general applicability as may arguably be required by the Court's recent federalism cases. Here, again, however, that proved not to be so, since the Court failed even to consider the point.

Finally, the Court's very narrow treatment of the *Barclays Bank*[9] decision from 1994, to which Professor Spiro referred, is especially significant. *Barclays* was a dormant foreign commerce clause not a dormant foreign affairs power case. Doctrinally, however, the two lines of authority are similar, and a number of revisionist scholars interpreted the Court's restrictive application of the one voice test in *Barclays* as virtually obliterating the dormant foreign affairs power doctrine of *Zschernig*. The *Crosby* Court's decision suggests that the revisionist view was, in this respect, little more than wishful thinking. The Court treated *Barclays* like a simple case of deference to a clear expression of congressional intent to allow states to regulate notwithstanding possible foreign affairs complications.

II.
THE CONTINUING VIABILITY OF DORMANT FOREIGN AFFAIRS PREEMPTION

What, then, are the implications of *Crosby* for the continuing viability of the dormant foreign affairs preemption doctrine? Of course, it is a bit like reading tea leaves to try to tease out the implications of a Supreme Court decision on one point for another issue in another case. Nevertheless, all of the various rulings, explicit and implicit, to which I have already referred seem to be at least strongly colored by the foreign affairs context in which the case arose and to indicate that the Court has no immediate intention of revisiting its traditional approach to foreign affairs cases. That may well extend even to its somewhat more marginal doctrines such as dormant foreign affairs preemption.

Professor Spiro seems to think that *Crosby* is just a garden-variety statutory preemption case, but I do not believe that description provides an accurate characterization of the decision. In the first place, the type of statutory preemption on which the Court relied is very similar to dormant preemption. *Crosby* was a case of implicit, not explicit statutory preemption. It fell within the conflicts branch of preemption doctrine, but it was not a case where it was impossible to

9. Barclays Bank Plc. v. Franchise Tax Bd. of Cal., 512 U.S. 298 (1994).

comply with both the federal and the state regulations, creating the kind of conflict that qualifies as garden-variety preemption. Rather, it fell within the so-called obstacle branch of conflict preemption, where the court will find a state statute preempted if it poses an undue obstacle to the full achievement of the aims and purposes of the federal legislation. It is widely recognized that this is the most attenuated form of preemption and that it requires the Court to make sensitive policy assessments of a kind that many have claimed are essentially legislative in character. In that sense, the same kind of separation of powers objections that apply to dormant preemption apply as well to this sort of obstacle-type preemption. My point is that the distinction between obstacle preemption as the Court applied it in *Crosby* and dormant powers preemption is vanishingly thin.

Furthermore, if one pays close attention to what the Court actually said in justifying its application of obstacle preemption in *Crosby*, there is even more reason to doubt that the Court is hostile to dormant foreign affairs preemption. Much of the Court's analysis would have been equally applicable even if there had been no federal Burma Sanctions Act in the first place. For example, as Professor Spiro brought out, one of the grounds that the Court cited as a basis for preemption was a provision in the federal Burma Sanctions Act which granted the President authority to waive application of the federal sanctions if he found that they would pose a threat to the national security. That is, in fact, a standard provision in virtually all sanctions laws, and the Court pointed out that there was no comparable power lodged in the President under the state law to waive the state sanctions in the event that the state sanctions proved to be a threat to the national security. The Court cited this as one of the principal grounds for preemption. Yet, it is not at all clear why the federal statute has any bearing on this particular reason for granting preemption. Irrespective of whether Congress had gotten around to passing the Burma Sanctions Act, the state sanctions might have posed a threat to the national security, and either way, the state law did not accord the President power to waive the state sanctions should such an eventuality arise. In other words, the state law posed the same potential threat to the national security irrespective of whether Congress passed a federal sanctions bill. Moreover, the passage of the federal sanctions law in no way suggested any greater congressional concern than would otherwise be the case about the possibility that such state laws might threaten the national security. Thus, if concern about the potential threat to the national security that the state law posed was a ground for preemption, it was so irrespective of whether Congress adopted a federal sanctions law. I do not doubt that having a statute to point to gave the Court some comfort, but nothing in its reasoning suggests that the statute really mattered.

Similarly, the Court relied heavily on a provision in the federal sanctions law which purported to direct the President to adopt a multilateral strategy for encouraging democratic change in Burma. Professor Spiro quoted from that part of the statute and also acknowledged that the Massachusetts law did complicate, and perhaps to some degree undermine, the President's diplomatic strategy vis à

vis Burma. Ordinarily, Congress does not have the power to tell the President how to carry out diplomatic discussions. If this provision of the sanctions law was intended to be more than purely hortatory, there is certainly a strong argument that it was unconstitutional as an invasion of the President's exclusive power as sole organ of the nation in its communications with foreign governments. In any case, it is not clear why the federal statute makes any difference to the preemption analysis. If the Massachusetts sanctions interfered with the President's ability to carry out a multilateral diplomatic strategy, the interference would have been the same whether or not Congress had given its support to the President's multilateral strategy or the President had developed that strategy solely on his own independent constitutional authority. Either way, the state law would have interfered with the recognized constitutional authority of the national government – whether belonging to Congress or the President or both – to develop a multilateral diplomatic strategy for encouraging democratic change in Burma.

I make these remarks to demonstrate that *Crosby*, although on its face a narrow decision based on statutory preemption, actually reflects a rather strong endorsement both of the Court's traditionally skeptical attitude towards the role of states in foreign affairs and of the kind of reasoning that undergirds the application of dormant foreign affairs preemption.

III.
In Defense of Dormant Foreign Affairs Preemption

Let me now turn briefly to providing a limited defense of dormant foreign affairs preemption as a normative matter. Of the various justifications for the dormant power doctrine in the area of foreign affairs—a number of which Professor Spiro has raised—I would emphasize three particularly salient considerations. First, the issues at stake in foreign affairs are often of great, sometimes momentous, importance, and this remains the case even after the end of the Cold War. Second, there is the very pervasive problem of externalities, to which Professor Spiro referred, and, third, there is the importance of unity in foreign negotiations. As to this last, in order for the United States to be able to advance its aims to the maximum extent possible, it is crucial that the federal government be able to negotiate on behalf of the whole country and to present its negotiating partners with a united home front. Independent state activities tend to undermine that capacity. Given the strength of these three considerations, therefore, it makes a great deal of sense to begin with a limited presumption in favor of preemption of potentially interfering state activities and to put the burden of congressional inertia on those states which wish to depart from the ordinary constitutional practice. This is especially the case given the longstanding constitutional tradition in which states have only an extremely limited role in foreign affairs and the federal government is understood as having a virtual monopoly.

I do not think Professor Spiro disagrees with any of this, although I think he would emphasize externalities to a greater extent than I would. Rather, he thinks that certain developments associated with globalization have made the

externalities problem disappear—in particular, the purported capacity of foreign nations to impose sanctions in a precisely targeted way that would affect only the state whose activities they are offended by, and not the rest of the nation. As long as the European countries can impose sanctions on Massachusetts that do not affect the rest of the country, he argues, then there are no externalities and the problem disappears. I think this is a very creative and provocative argument, but I also think that Professor Spiro may be moving too far too fast. Let me raise a few points to which Professor Spiro may wish to respond.

First, I am skeptical about the whole idea of targeted sanctions in this context. Given the highly interdependent character of the national economy, I wonder whether, and how often, sanctions can really be effectively targeted in the sense that he has in mind. Even if the European Union may sometimes be able to make its sanctions particularly painful for an offending state like Massachusetts, it is likely in the process to harm the interests of other states as well.

Second, the trend that he identifies is very preliminary and is based on only a small amount of anecdotal evidence. It is unclear whether this trend will really develop into a widespread international practice.

Third, the standard that he imposes on himself for when the externalities problem would disappear is too lenient. Even assuming that foreign nations are now capable of targeting sanctions in the way he suggests, the question is not whether international law *permits* them to target sanctions on subnational units, like the U.S. states, but whether it *requires* them so to target their sanctions. Otherwise the externalities problem still exists. I do not believe that there is any evidence that international law is moving in that direction, and there are powerful reasons to think that there is not, probably will not be, and perhaps should not be movement in that direction.

Finally, I am not sure that, even if all of the objections could be satisfied, the externalities problem would really disappear. The United States government will likely find itself under intense pressure to defend the interests of a state that is subjected to international coercion in an international dispute. Indeed, it is arguably a fundamental underlying premise of the national compact that the whole will come to the defense of the part in the event that the part is threatened from abroad. To the extent that observation is true, the externality problem remains.

Of course, there is much more to say about this interesting subject, but I believe that my time is now up. Thank you very much.

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The Structure and Pathologies of Local Selective Procurement Ordinances: A Study of the Apartheid-Era South Africa Ordinances

David D. Caron

The Structure and Pathologies of Local Selective Procurement Ordinances: A Study of the Apartheid-Era South Africa Ordinances

By
David D. Caron*

The wisdom and legality of city participation in the foreign affairs of the United States has been long debated and studied. In the past few years, this debate has centered on actions taken by local governments to express their concerns regarding the human rights practices of Myanmar, formerly referred to as Burma. The proceedings in *Crosby v. National Foreign Trade Council* provided a focal point for this debate as it wound its way upward through the courts.[1] During the 1980s, a similar debate had centered on the actions of cities who took roughly the same set of actions to express their concerns with the system of apartheid then in place in South Africa.

At the close of the 1980s, I undertook a study of the selective procurement ordinances adopted by cities and counties in the United States as indirect sanctions of South African apartheid regime. For several reasons, the project was put aside and over time the project dropped into the background of my research. It was my interest in the fascinating questions presented by sub-national foreign policy that led me as Chair of the AALS International Law Section to organize

* C. William Maxeiner Distinguished Professor of Law, University of California at Berkeley, Boalt Hall School of Law and Chair, International Law Section, American Association of Law Schools, 2000-2001. I wish to acknowledge the assistance during the original research of Peter Root, Joseph Giansiracusa, Tal Herman, Janelle London, and Paul Startz; the support of the Committee on Research of the University of California at Berkeley; and, most recently, the assistance of Laura Altieri. The ordinances and background documents described in this essay are on file with the author.

1. The 1996 Massachusetts "Burma Law," *codified at* MASS. GEN LAWS ch. 7, §§ 22G-22M and 40F ½ (West Supp. 1998) was challenged by the National Foreign Trade Council (NFTC) as (1) preempted by federal sanctions against Burma imposed under the authority of the Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, § 570, 110 Stat. 3009, 3009-166-167, (2) violative of the dormant foreign commerce clause of the Constitution, and (3) intrusive on the federal government's exclusive foreign affairs power. The District Court found the burden of preemption to not be established, but ruled in favor of the NFTC on the two Consititutional bases. NFTC v. Baker, 26 F. Supp. 2d 287 (D. Mass. 1998). The First Circuit Court of Appeals affirmed the district court decision, adding its conclusion that the law also was preempted by the federal actions *vis-à-vis* Burma in *NFTC v. Natsios*, 181 F.3d 38 (1st Cir. 1999). The Supreme Court in *NFTC v. Crosby*, 530 U.S. 363 (2000), affirmed the lower decisions, resting its decision solely on the preemption grounds.

its 2001 Panel around the *Crosby* decision and the local sanctions adopted with regard to Burma. At the very last moment, one of the panelists was unable to participate and that absence provided the opportunity for me to revisit my earlier project both in terms of what was learned then and the perspective it gives on *Crosby*. For this opportunity, I am thankful.

The work I undertook in the 1980s was unusual in that it attempted to explain what the cities were, in fact, doing. The motivation behind the choice of that approach deserves mention.

In the case of local governmental action regarding South Africa (and Burma also), there were two main types of action. First, there were ordinances requiring the divestment of public holdings of stocks in firms related in specified ways to the South Africa.[2] Second, and less present in practice or literature, there were ordinances restricting the procurement of goods and services where the bidder for a city contract had a specified relationship with South Africa.[3]

Much has been written about the role of municipalities in the foreign affairs of the United States.[4] But that body of writing, for the reasons which follow, was not satisfying in explaining several important aspects of what was happening with the actions regarding South Africa.

The substantial legal literature analyzed the limited number of textual sources and decisions that existed on the constitutionality of such actions.[5] Although the literature tended to be quite confident of the law (one way or the other), there was in fact no litigation and that made the extensive analysis seem oddly irrelevant. No cases like *Crosby* were brought, although industry and the federal government were most certainly aware of the arguments to be made.

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2. The scholarly literature regarding South African divestment was quite substantial. *See, e.g.*, John H. Langbein, *Social Investing of Pension Funds and University Endowments: Unprincipled, Futile and Illegal, in* DISINVESTMENT: IS IT LEGAL? IS IT MORAL? IS IT PRODUCTIVE? 1 (J. Langbein, R. Schotland, and A. Blaustien, eds. 1984); Grayling M. Williams, *In Support of Azania: Divestiture of Public Pension Funds as One Answer to United States Private Investment in South Africa*, 9 BLACK L.J. 167-187 (1985); Grace A. Jubinsky, *State and Municipal Governments React Against South African Apartheid: An Assessment of the Constitutionality of the Divestment Campaign*, 54 CINCINNATI L. REV. 543-578 (1985); Jennifer Davis, et al., *Economic Disengagement and South Africa: The Effectiveness and Feasibility of Implementing Sanctions and Disinvestment*, 15 LAW & POL'Y IN INT'L BUS. 529 (1983). *See also* Valerie Lezin & Lauren Milicov, *Divestment from South Africa: Public Protest v. Public Trust*, L.A. LAW., Nov. 1985, at 12.

3. A third and uncommon type of action is contained in the Los Angeles selective purchasing ordinance and might be more appropriately described as a selective dealing ordinance. A provision of that ordinance prohibited the awarding of leases on city land to anyone who does business with South Africa. Since many pipelines of oil and natural gas, for example, are on lands leased from local governments, operation of the ordinance when a lease was up for renewal potentially posed a much greater issue for such business than the awarding of a particular procurement contract.

4. For a particularly valuable piece published during the time of this study, *see* Peter J. Spiro, *State and Local Anti-South African Action as an Intrusion upon the Federal Power in Foreign Affairs*, 72 VA. L. REV. 813 (1986).

5. A central and contested precedent in this area is the U.S. Supreme Court decision in *Zschernig v. Miller*, 389 U.S. 429 (1968). In that case, the Court struck down a state statute that it found to be precluded by the dormant foreign affairs clause in that the statute "affects international relations in a persistent and subtle way." *Id*,. at 440. The dissent in *Zschernig*, among other things, pointed to the seemingly indistinguishable holding of the Court in *Clark v. Allen*, 331 U.S. 503 (1947), a mere twenty-one years earlier and involving a similar state statute.

Everyone conceded that Congress could explicitly preempt local action, but that did not occur either. Municipal foreign affairs is an arena of strange contrasts. On the one hand, the Constitution is said to be very clear prohibiting "state involvement in foreign affairs and international relations—matters which the Constitution entrusts solely to the Federal Government. . . ."[6] On the other hand, in the course of conducting interviews that underlie this study, it was apparent that law (constitutional or otherwise) had little effect on what the municipalities were willing to do or what they got away with. Although our Constitution places the conduct of foreign relations in the hands of the Executive and Congress, the day to day reality is not so clear. Given this separation of law from practice, the literature seemingly had nowhere to go. For the most part, it was set off in a circle referencing itself and piling on to one side or the other.

Throughout this literature, assumptions were made about what these ordinances provided, how they might bring about change in South Africa, how they were an expression of a truer democracy, how they were harmful to business, and how they interfered with the foreign affairs power of the federal government. Yet, there was little analysis of what the local actions precisely prescribed and what impact they had on bidders, the local municipality, the foreign affairs of the United States or the policies of the target country. My project undertook to find out more about the ordinances, what they provided and how they operated in practice. The project was not about the Constitution, but rather the ordinances themselves. And, for me, the ordinances presented surprises.

The research that was set aside in 1989 is offered here, not as a complete answer to the questions posed, but as a snapshot of the selective procurement ordinances through approximately 1988. Part I sets forth the facts. I describe the method I employed and the set of ordinances this study reviews. The structures of thirty-six ordinances are compared with particular attention to patterns apparent in those structures. Part II offers seven observations about the ordinances described in Part I. In Part III, I bring the experience of this project to bear on the implications of the recent *Crosby* decision.

I.
STRUCTURE AND PATTERNS

A. The Ordinances

This study focuses on selective procurement ordinances adopted by local governments as an expression of their opposition to the system of apartheid then in place in South Africa. Selective procurement ordinances are sometimes referred to as "anti-procurement" ordinances; I prefer the term "selective procurement" because, as this study makes clear, the term "anti-procurement" overstates the strength of most of the ordinances.

An initial, and by no means easy, task in this study was to identify the various local governments that were said to have had selective procurement or-

6. *Zschernig*, 389 U.S. at 436 (1968).

dinances and to collect such laws. Drawing from the mention of particular cities in the news, from lists prepared by organizations advocating the adoption of such ordinances and from consulting firm surveys, this study ultimately confirmed thirty-six laws[7] that restricted procurement of goods or services where the transaction or the bidders had a specified relationship with South Africa.[8] These ordinances and their originating jurisdictions are summarized in Table 1. This Part sets forth the results of a comparative analysis of these ordinances. Observations based on that analysis are offered in Part II.

TABLE 1 – LOCAL ORDINANCES CONSIDERED IN THIS STUDY

STATE	MUNICIPALITY OR COUNTY	SIZE OF CITY IN TERMS OF POPULATION IN THE MID 1980S	YEAR ORDINANCE ADOPTED	CITATION
Arizona	Tucson	>100,000 <500,000	1985	Tucson, Ariz., Report on Investments in Firms Doing Business in South Africa (adopted Sept. 3, 1985).
California	Alameda County	Not applicable	1986	Alameda County, Cal., Ordinance 01-28-86 (Jan. 28, 1986).
	Berkeley	>100,000 <500,000	1986	Berkeley, Cal., Resolution 53080 (January 7, 1986).
	Los Angeles	>500,000	1987	Los Angeles, Cal., Ordinance 162336 (May 1, 1987).
	Oakland	>100,000 < 500,000	1985	Oakland, Cal., Ordinance 10611 (July 23, 1985).

7. One of these "laws" is a state statute. For the sake of convenience, they hereinafter are referred to collectively as "ordinances."

8. Some limitations to the completeness of this list should be noted.

First, a number of cities mentioned in the press or included on a list prepared by the business community or a non-governmental organization did not in fact have such an ordinance. Why this might be the case is discussed in the text in Part II. All states, counties and cities listed were contacted and in a few instances the local governmental entity replied that such an ordinance had not been adopted by the city or county. For example, the Washington Post reported in a 1986 story that "[a]t least 31 local governments and two states [Michigan and Maryland] have passed [selective procurement ordinances] during the past twelve months." *See Local Boycotts Power Pullouts by U.S. Business*, WASH. POST, Nov. 17, 1986, at A1, [hereinafter "*Local Boycotts*"]. I was never able to confirm that Michigan had a selective procurement statute. In some instances, the circumstance appears primarily to be a result of others mistakenly characterizing a divestment ordinance as one dealing with selective procurement. Some lists, for example, indicated that Kansas City, Missouri, had a selective procurement ordinance. Kansas City did adopt Resolution 58323 on August 29, 1985. Although that ordinance calls on businesses to reconsider their relationships with South Africa, it contains no discussion regarding procurement and is thus not included in this study. Similarly two cities and two counties that were said to have selective procurement ordinances, to the best of my knowledge, did not. Ordinances for these cities and counties did prohibit the provision of public funds to certain financial institutions and may therefore have been confused with selective procurement ordinances. The four local governments and their ordinances are New Orleans, La., Ordinance 10593 (May 23, 1985), St. Paul, Minn., Resolution 86-948 (July 10, 1986); New Castle County, Del., Ordinance 86-005 (Jan 31, 1986); and Prince George's County, Md., COUNTY CODE Subtitle 10, § 10-117.1 (1983).

Second, although there is substantial confidence that the list in Table 1 is complete, particularly through the year 1987, it is quite possible that further ordinances were adopted in the closing years of the apartheid era in South Africa. The selective procurement ordinance adopted by the city of Berkeley, CA was not ended until October 19, 1993. Sasha Thurman, *City Votes to End 14-year South Africa Sanctions*, DAILY CALIFORNIAN, Oct. 22, 1993, Ordinances not listed or corrections to those included are welcome from readers of this study.

California (cont'd)	Richmond	< 100,000	1985	Richmond, Cal., Ordinance 10-86 (Feb. 10, 1985).
	Sacramento	>100,000 < 500,000	1987	Sacramento, Cal., Ordinance 87-030 (April 27, 1987).
	San Diego	>500,000	1987	San Diego, Cal., Ordinance 268530 (June 8, 1987).
	San Francisco	>500,000	1986	San Francisco, Cal., Ordinance 36-86 (Jan. 21, 1986).
	Sonoma County	Not applicable	1989	Sonoma County, Cal., Ordinance 86-0201 (Feb 8, 1989).
	Stockton	>100,000 < 500,000	1985	Stockton, Cal., Ordinance 85-0335 (May 13, 1985).
	West Hollywood	>100,000 < 500,000	1986	West Hollywood, Cal., Ordinance 100 (Feb. 6, 1986).
Colorado	Fort Collins	< 100,000	1985	Fort Collins, Colo., Resolution 85-134 (August 20, 1985).
Illinois	Chicago	>500,000	1986	Chicago, Ill., Ordinance 26-26.2 (April 4, 1986).
Indiana	Gary		1985	Gary, Ind., Resolution 1869 (Jan. 8, 1985).
Kansas	Kansas City	>100,000 <500,000	1985	Kansas City, Kan., Resolution 36179 (Oct. 17, 1985).
	Topeka	>100,000 <500,000	1986	Topeka, Kan., Resolution 5232 (Jan. 28, 1986).
Maryland	State of Maryland	Not applicable	1986	State of Maryland State Finance and Procurement Code, § 14-501 *et seq.* (May 27, 1986, amended 1988)
	College Park	< 100,000	1985	College Park, Md., Resolution 85-R-2 (April 23, 1985).
Michigan	East Lansing	< 100,000	1977	East Lansing, Mich., Resolution on South Africa (August 3, 1977).
Minnesota	Hennepin County	Not applicable	1985	Hennepin County, Minn., Resolution 85-12-863 (Dec. 10, 1985).
Nebraska	Omaha	>100,000 <500,000	1985	Omaha, Neb., Resolution 30823 (Oct. 8, 1985).
New Jersey	Camden	< 100,000	1985	Camden, N.J., Resolution Condemning the Violation of Human Rights in South Africa and Namibia and Directing the Divestment of Economic Interests (Sept., 12, 1985).
	Newark	>100,000 <500,000	1984	Newark, N.J., Ordinance 6STFBC (Oct. 3, 1984).
New York	New York	>500,000	1985	New York City, N.Y., Local Law 19 of 1985, Council Int. No. 900 (1985). New York City, N.Y., Resolution 92-1985 (March 26, 1985).
	Rochester	>100,000 <500,000	1985	Rochester, N.Y., Ordinance 85-133 (1985) {N.d.}.
	Yonkers	>100,000 <500,000	1985	Yonkers Resolution 92-1985 (adopted Mar. 26 1985)
North Carolina	Raleigh	>100,000 <500,000	1985	Raleigh, N.C., Resolution 1986-62 (Jan. 21, 1986).
Pennsylvania	Pittsburgh	>100,000 <500,000	1985	Pittsburgh, Pa., Ordinance 1929 (Feb. 12, 1985).
South Carolina	Charleston	< 100,000	1985	Charleston, S.C., Resolution (August 20, 1985). [no title nor number]
Texas	Houston	>500,000	1986	Houston, TX., Ordinance 86-1279 (July 23, 1986) and Ordinance 86-1312 (July 30, 1986)

Virginia	Richmond	>100,000 <500,000	1986	Richmond, VA Resolution 85-R344-313 (Jan. 13, 1986). Ordinance 10-86 (Feb. 10, 1986).
	Washington, D.C.	>500,000	1986-5	Washington, D.C., 6-116 (1986). Washington, D.C., Code, § 1-1181.1 *et seq.* (1987 supp.).
West Virginia	Fairmont	<100,000	1986	Fairmont, W.V., Resolution (June 17, 1986).
Wisconsin	Madison	>100,000 <500,000	1976	Resolution 29,355 (June 29, 1976)
	Milwaukee	>500,000	1985	Milwaukee, Wis., Resolution 84-1514 (Feb. 12, 1985).

B. The Framework of Analysis

In analyzing the ordinances that restricted procurement from bidders with specified relationships to South Africa, four aspects of the ordinances are compared by this study.

First, the study examines the circumstances which trigger application of a selective purchasing regime *vis-à-vis* a particular bidder or transaction. Selective procurement ordinances restrict procurement from bidders that are in some way thought to be supportive of, or benefiting from a relationship with, the target country. But how is this relationship with the target country specified in the ordinance? A few ordinances are vague on the point. But in general, the South Africa ordinances looked to whether the goods offered originated in South Africa, whether the bidder itself or its suppliers complied with the Sullivan Principles,[9] whether the bidder did business with Apartheid-enforcing agencies, or, most broadly, whether the bidder did business in or with South Africa.

Second, the study compares the nature and degree of the resulting prohibition on procurement. Assuming that a particular bidder did have the relationship

9. The Sullivan Principles refer to "a corporate code designed in 1977 by Reverend Sullivan, a West Virginia minister and then a member of the General Motors Board of Directors, to help eliminate apartheid by obligating American corporate signatories to eliminate racial inequities within their South African operations." Robert R. Kuehn, *Access to Justice: The Social Responsibility of Lawyers—Denying Access to Legal Representation. The Attack on the Tulane Environmental Law Clinic*, 4 WASH. U.J.L. & POL'Y 33, 119 n.410 (2000). These Principles were amended and refined, and continue today as a code of principles for businesses operating anywhere in the world. Leon Sullivan more recently wrote:

> The objectives of the Global Sullivan Principles are to support economic, social and political justice by companies where they do business; to support human rights and to encourage equal opportunity at all levels of employment, including racial and gender diversity on decision making committees and boards; to train and advance disadvantaged workers for technical, supervisory and management opportunities; and to assist with greater tolerance and understanding among peoples; thereby, helping to improve the quality of life for communities, workers and children with dignity and equality. I urge companies large and small in every part of the world to support and follow the Global Sullivan Principles of Social Responsibility wherever they have operations.

Available at, http://globalsullivanprinciples.org/principles.htm (last visited 10/30/2002). *See also* Arthur D. Little, Inc., "Communications Task Group of the Sullivan Signatory Companies, Meeting the mandate for change: a progress report on the application of the Sullivan principles by U.S. companies in South Africa" (1986); Arthur D. Little, Inc., "Report on the signatory companies to the Sullivan principles," (1986); Christopher McCrudden, *Human Rights Codes for Transnational Corporations: What Can the Sullivan and MacBride Principles Tell Us?*, 19 OXFORD J. LEGAL STU. 167-201 (1999).

of concern with the target country, what was the sanction prescribed by the ordinance? Although in some cases the consequence would be that the local government could not award the procurement contract to the bidder in question (what is called in this study a "total prohibition"), other ordinances instead gave a preference to complying companies, others required only a statement of concern and some were simply unclear as to what was to happen. Moreover, in those ordinances which contained a "total prohibition," there were in many cases exceptions to the total prohibition.

Third, the study examines the mechanisms employed by the various ordinances to identify whether a bidder or transaction had the specified relationship to South Africa which would trigger application of the ordinance. Again, a few ordinances were unclear as to how tainted bidders were to be identified. The remaining ordinances provided for either a listing of companies maintained by some institution or some form of statement from all bidders as to the origin of the goods or as to the bidder's relationship with South Africa.

Finally, this study compares the degree to which the ordinances examined the relationships to South Africa of not only the bidder, but possibly also the bidder's parent company, subsidiaries, affiliates, subcontractors or suppliers.

The following four sections examine each of these four aspects in greater detail. Examples are provided as to the language utilized in the various ordinances. The language of the San Francisco ordinance is cited in particular because that ordinance was one of the last passed in the time frame of this study and, arguably, was the most detailed.

C. The Link to South Africa

In approaching the selective procurement ordinances, a fundamental point to investigate is which aspect of a possible purchase triggered the local government's concern. In this section, I summarize how the ordinances themselves identified certain transactions as the ones of concern. Broadly speaking, the trigger was defined by one of four tests.[10] These tests to varying degrees encompassed the possible relationships a bidder might have with South Africa. As with contemporary discussions on the design of smart sanctions, the various tests targeted relationships more or less close to the core of concern with South Africa, i.e., the apartheid system. Many of these local sanctions were opposed on the grounds that they would not alter South Africa, but only injure U.S. business. It is therefore perhaps not surprising that some of the triggers for selective procurement regimes were quite narrow and limited the application of the ordinance to affect only those who most benefit from the apartheid system.

One of the narrower tests focused on the agencies by which apartheid was upheld. In particular, seven of the thirty-six ordinances focused, among other things, on purchases from bidders who did business with specific apartheid-en-

10. In addition to the four tests discussed in the text, two of the ordinances, Charleston, SC, and Milwaukee, WI, were vague as to what circumstances would trigger application of the prohibition. For example, Charleston, SC, applied prohibitions to companies that "support the apartheid system through their investments in South Africa."

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forcing agencies in South Africa.[11] These agencies included the South African (1) Police, (2) Military, (3) Prison Department and (4) Department of Cooperation and Development. Here the bidders were thought to be profiting from business with the institutions directly sustaining apartheid.

The other relatively narrow test focused on whether the bidder itself, and in some instances the supplier to the bidder, operated its business in South Africa in accordance with the Sullivan Principles. Five of the ordinances identify non compliance with these Principles by the bidder as a trigger for application of the ordinance.[12] In the Maryland statute, for example, non-compliance with the Principles is listed as a possible triggering circumstance.[13] Under that statue the bidder must certify that "in the conduct of operations in the Republic [of South Africa] or Namibia" it

(1) maintains nonsegregation of the races in all eating, comfort and work facilities and locker rooms;
(2) promotes equal and fair employment . . .;
(3) provides equal pay . . .;
(4) initiates and develops training programs that will prepare . . . nonwhites for supervisory, administrative, clerical and technical jobs;
(5) increases the number of . . . nonwhites in management and supervisory positions; and
(6) improves the quality of employee's lives outside the work environment.[14]

Before describing the two relatively broader tests, it is important to note that the narrower tests generated information about bidders and that such information itself had implications. An example of this was the acrimonious battle between Xerox Corporation and Eastman Kodak for business with New York City. Both companies had business activity in South Africa at the time. Both also stated, however, that they did not do business with the Apartheid enforcing agencies there: the relevant trigger under the City's ordinance. The ordinance was not strictly applicable. However, the process of educating the City as to the extent of their operations in South Africa itself began to generate its own political dynamic. A Xerox official was reported to have said that "[t]he whole discussion became: who's the better person in South Africa."[15]

The remaining two tests are broader in the sense that they relate to South Africa generally. They appear to flow from the view that reform would come not from a focus solely on the institutions or practices of the apartheid system, but rather pressure generally on South Africa. One trigger of this broad view involved a quite limited number of purchase situations in practice. This trigger focused on the source of the goods to be purchased. If the goods were produced

11. Five of these ordinances are quite detailed and appear to follow the model set by the March 1985 New York City ordinance. These five ordinances are Fort Collins, CO; Chicago, IL; New York, NY; Yonkers, NY; and Houston, TX. The two further resolutions are also similar, but also briefer. They are the ordinances for Rochester, NY, and Raleigh, NC.

12. The State of Maryland; and the cities/county of Rochester, NY; Fort Collins CO; Hennepin County, MN; and Raleigh, NC. For all except Hennepin County, the prohibition trigger extends also to the suppliers of the bidder.

13. Maryland Statute, § 14-503.

14. *Id.*

15. *See Local Boycotts, supra* note 8.

in South Africa, even by a company in full compliance with the Sullivan Principles, the application of the ordinance was triggered. I term this a limited example because in fact South Africa produced few goods that might be purchased by local governments in the United States. Twelve of the thirty-six ordinances used the South African origin of the goods as a trigger.[16] The College Park, MD, ordinance, for example, provided that "the City Administrator is hereby directed to make no further purchases of goods or services originating in the Republic of South Africa." These twelve overlap with the previously described ordinances because ordinances with a South African goods trigger tended to have at least one other trigger. Only four of the twelve ordinances do not have some other trigger as well.[17]

It is the remaining broad trigger that was employed in most of the ordinances. Although the precise wording varies, twenty-four of the thirty-six ordinances focused on whether the bidders did business, broadly speaking, in or with South Africa.[18] Although the definition of "doing business" is obviously critical to understanding this test, only a few of the twenty-four ordinances provide one. The San Francisco ordinance provides the most detailed statement of this type of trigger. Under the San Francisco ordinance, the City is prohibited from purchasing any commodity from:

(1) the government of South Africa;
(2) a business organized under the laws of South Africa;
(3) any person or entity doing business in South Africa.[19]

The implementing regulations for the San Francisco ordinance go on to define an entity as "doing business" in South Africa if the entity:

(1) is organized under the laws of South Africa;

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16. Sacramento, CA; Stockton, CA; Fort Collins, CO; Chicago, IL; The State of Maryland; College Park, MD; Omaha, NE; New York, NY; Rochester, NY; Yonkers, NY; Raleigh, NC; and Houston, TX.

17. Sacramento, CA; Stockton, CA; College Park, MD; and Omaha, NE.

18. Tucson, AZ ("conducting business with South Africa"); Alameda, CA (list of American companies doing business in South Africa); Berkeley, CA; Los Angeles, CA ("doing business in or with South Africa"); Oakland, CA (list of American companies doing business in South Africa); Richmond, CA ("does business in or with South Africa or Namibia"); San Diego, CA ("companies which have business operations in South Africa"); San Francisco, CA ("entity doing business in South Africa"); Sonoma County, CA (business in the Republic of South Africa or Namibia"); West Hollywood, CA ("business in or with in the Republic of South Africa or Namibia"); District of Columbia ("on the prohibited list or * * * doing business in or with * * * South Africa or Namibia"); Gary, IN ("doing business in South Africa"); Kansas City, KS ("business in or with * * * South Africa"); Topeka, KS ("business in or with * * * South Africa"); Hennepin County, MD ("direct business involvement within the Republic of South Africa"); East Lansing, MI ("investments, licenses or operations in South Africa"); (Camden NJ ("operating in * * * South Africa or Namibia"); Newark, NJ ("having investments, licenses or operations in * * * South Africa or Namibia"); Pittsburgh, PA ("any contractual arrangements [with or] actually operating in * * * South Africa or Namibia"); Charleston, SC ("companies * * * that support the apartheid system through their investments in South Africa"); Richmond, VA (doing business with entities in South Africa); Fairmont, WV ("which provides services to the Republic of South Africa, any instrumentality or agent thereof"); Milwaukee, WI ("business relationship with or in the Republic of South Africa") and Madison, WI ("economic interests in South Africa").

19. The City was also prohibited from purchasing any commodity manufactured, produced or grown in South Africa.

(2) does business with another business entity for the express purpose of assisting the second entity's operations or trading with an public or private entity located in South Africa;
(3) has an agent, employee or authorized representative in South Africa;
(4) owns property in South Africa;
(5) permits its trademark, copyright or patent to be used by an entity in South Africa;
(6) has an office in South Africa;
(7) has ownership or control of an "Associated Entity" which is doing business in South Africa;
(8) has a direct buyer of goods or services located in South Africa;
(9) is a seller of commodities and knows or should know the buyer will resell the commodities to another entity in South Africa, or will use the commodity in furtherance of its South Africa business operations.[20]

D. The Prohibition

We have seen that a variety of circumstances triggered application of the various ordinances. One might think that, once triggered, a selective procurement ordinance would bar the particular local government from entering into the particular transaction. This would be a mistake. Indeed, to the contrary, there was a wide range in severity of the restrictions on procurement from tainted bidders.

TABLE 2 – THE NATURE AND DEGREE OF THE PROHIBITION

Total Prohibition	Preference	Mayoral Statement Of Concern	Unclear
22 of the 36	9 of the 36	2 of the 36	3 of the 36
• 15 are quite detailed or quite clear in the choice of atotal prohibition • 7 contain only a general statement appearing to prohibiting procurement	• 6 have a specific % preference to be awarded in contract evaluation • 1 assigns demerits but with a % cap to the effect of such demerits • 2 provide a preference in the event of low tied bids		

The strongest sanction in the ordinances reviewed was a total prohibition on procurement from specified bidders. Twenty-two of the thirty-six ordinances had a total prohibition, restricting outright the granting of purchase orders to tainted companies. Fifteen of these twenty-two ordinances were relatively clear and the sanction appeared to be one made seriously.[21] However, the other seven of these twenty-two ordinances were so brief, and either so vague or phrased in such general terms, that the seriousness of the procurement bar is questionable and difficult to assess.[22] For example, these latter ordinances often did not in-

20. San Francisco, Cal., Regulations Governing the Implementation of Article XIX of the San Francisco Administrative Code (October 19, 1987) at 8, para. 3.

21. Berkeley, CA; Los Angeles, CA; Richmond, CA; San Diego, CA; San Francisco, CA; West Hollywood, CA; Chicago, IL; State of Maryland, College Park, MD; Raleigh, NC; Omaha, NE; Newark, NJ; Pittsburgh, PA; Houston, TX; and Fairmont, WV.

22. Camden, NJ; Charleston, SC; Gary, IN; Rochester, NY; Stockton, CA; Tucson, AZ; and Richmond, VA.

clude any exceptions to the prohibition, or provide a clear definition of the circumstances that would trigger application of the prohibition.

Nine of the thirty-six ordinances, instead of prohibiting procurement, provided a preference in awarding contracts to bidders who were not regarded as tainted by their relationship to South Africa. Six of these nine ordinances provided a specific percentage preference formula.[23] The preferences embodied in the remaining three ordinances are less obvious. The Washington, D.C. ordinance, for example, provided for the assignment of "demerits" to tainted bidders and the consideration of such demerits as a negative factor, weighing against the award of the contract.[24] The negative impact accorded demerits, however, could not exceed six percent of the lowest bid.[25] The remaining two ordinances essentially provided that a preference for the untainted bidder should be given in the event of "low-tied bids."[26]

A subtle twist involves the transformative effect of exceptions on the prohibition. Two of the fourteen serious "total prohibition" ordinances contained an exception to their application if the resultant cost to the city exceeded a specified percentage.[27] In effect, these two ordinances operated in a similar fashion to a contract preference. Moreover, many of the total prohibition ordinances operated under some unspecified cap on the possible loss to the city involved. The Raleigh, NC, ordinance, for example, provided for a total prohibition "unless no reasonable * * * alternative" existed.

Yet a further two ordinances (the earliest in this study, adopted in 1976 and 1977) required only that the Mayor include a statement of concern on all invoices and bids.[28] For example, in the case of the Madison, WI ordinance, the Mayor was to attach to all contracts where the bidder had "economic interests in South Africa" the following statement:

> The City of Madison wishes to express its grave concern about your company's policy of developing economic interests in the Republic of South Africa and its apartheid system. The great moral issue involved is forcing us to seek competitive suppliers for this product or service in future transactions.

Finally, the remaining three ordinances were vague about the prohibition to be applied. Two of these ordinances, those for Kansas City, KS, and Topeka, KS, were very similar and likely were drawn up with knowledge of the other. They resolved, with no further discussion, that the city involved should "utilize alternatives wherever possible."[29] The ordinance adopted by Milwaukee required that the disclosure of a bidder's relationship with South Africa be reviewed "for whatever policy implications that might be indicated and be

23. Alameda, CA (five percent or $5,000, whichever is less); Oakland, CA (five-point-one percent); Sacramento, CA (five percent); Fort Collins, CO (five percent); New York, NY (five percent) and Yonkers (five percent).

24. Washington, D.C., §1002a(A).

25. *Id.* §1002a(A).

26. Hennepin County, MN; and Sonoma County, CA.

27. Chicago, IL (eight percent); and Richmond, CA (five percent or $25,000, whichever is less);

28. East Lansing, MI, and Madison, WI.

29. Kansas City, KS, and Topeka, KS.

available as a public record to all interested citizens."[30] A City of Milwaukee summary of the disclosure statements received for the second quarter of 1986 indicates that forty-two firms provided disclosures and entered into procurement contracts with the city for an amount of business totaling almost seven million dollars. One of the forty-two bidders—receiving a contract—disclosed a relatively minor relationship with South Africa. Yet another bidder—also receiving a contract—is indicated as not providing a disclosure at all, although the summary indicated that it intended to do so shortly.[31]

The San Diego, CA ordinance, which had two operative sections, deserves brief mention. First, it directed the City Manager to "forbear" from making purchases from companies with operations in San Diego when the purchase was less than $500. Although "forbear" is a somewhat unusual term, the City Manager in practice regarded it as a total prohibition.[32] This aspect of the ordinance is included in Table 3 as a total prohibition. The second operative section of the ordinance is curious. It required bidders on contracts with a value over $10 million to certify that they were "in compliance with Public Law 99-440," the 1986 Federal Anti-Apartheid Act. The interesting question is how to look at this requirement in terms of the nature of the prohibition. In practice, it may have been the equivalent of a total prohibition in the sense that if a bidder was unwilling to provide such a certification then a contract might not have been awarded.[33]

A clear lesson from this recitation is that the ordinances on their face had quite different capacities for possible interference with the foreign affairs of the United States. Would the analysis in the *Crosby* case be applicable to selective procurement ordinances as mild as that adopted by Madison or Milwaukee? In the *Zschernig* case, the U.S. Supreme Court found portions of the Oregon probate statute had "a direct impact upon foreign relations and may well adversely affect the power of the central government to deal with those problems."[34] Justice Douglas, writing for the Court, acknowledged that there were other areas of state or local action that had an impact on foreign relations, but that often such actions had no more than "some incidental or indirect effect in foreign countries."[35] This group of actions the court termed "the category of a diplomatic bagatelle."[36] An important observation of this study is that a significant number of the ordinances may be little more than diplomatic bagatelles. The Milwaukee

30. Milwaukee, WI.

31. *See* "City of Milwaukee South Africa Disclosure Statements Report from 2nd Quarter—5/12/86—8/11/86 Firms That Responded this Period," an enclosure to Letter of Edward A. Witkowski, Purchasing Agent for the City of Milwaukee dated December 1, 1986, copy on file with the author.

32. An exception to this prohibition denied it of all effect in practice; *see, e.g.*, text accompanying note 71.

33. The City of San Diego considered adoption of a more encompassing selective procurement ordinance, but was informed by its City Attorney that, in his opinion, the City Charter did not permit the City to exclude a low bidder from receiving a contract because of its involvement in South Africa. *See* Memorandum of the City Attorney to Jack Thorpe, Purchasing Agent dated Nov. 20, 1986, on file with the author.

34. *Zschernig*, 389 U.S. at 441.

35. *Id.* at 434.

36. *Id.* at 435.

ordinance did no more than create a public record, and therefore perhaps public knowledge, concerning the business operations in South Africa of the City's suppliers.[37]

Finally, it is important to note that the ordinances often had exceptions to the prohibitions. The detailed ordinances contained exceptions when, for example, the tainted company was the sole bidder or when the prohibition would pose a substantive financial hardship for the city. For example, the Pittsburg ordinance contained a common set of exceptions:

> The prohibitions contained in this section can be waived if they are:
> (1) inconsistent with existing laws;
> (2) inconsistent with other obligations of current contractual relationships;
> (3) would constitute undue financial burden on the City;
> (4) or no other source of supply exists.[38]

The exceptions to San Francisco ordinance's total prohibition on the City's purchase of goods/services from affected companies are more detailed but in many respects the same as those for Pittsburg:

> (1) Contract entered into prior to effective date of the Ordinance (9/4/86);
> (2) Contracts for $5000 or less;
> (3) "Not South Africa Free" company is sole source;
> (4) No source is capable of compliance;
> (5) Application of prohibitions is inconsistent with other contractual obligations;
> (6) City will incur financial loss or breach fiduciary duty (ten percent differential or $50,000).[39]

Many of the above exceptions are to be expected. Indeed, the surprising point is that seven of the "total prohibition" ordinances did not have any exceptions.[40] (Five of these are among the seven ordinances listed above as being of questionable seriousness.) The operation of the exceptions in practice is beyond the scope of this study. A few instances of practice, however, indicate the exceptions were utilized. For example, a seemingly large number of exemptions from the Los Angeles selective procurement ordinance were noted in the press. One report indicated 300 exemptions between the adoption of the ordinance in July 1986 and May of 1988.[41] More dramatically, a City Administrative Officer's report on the ordinance indicates that there were 348 exemptions granted between July 1 and December 31, 1988.[42]

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37. Although such an ordinance might be seen in terms of *Zschernig* as affecting "international relations in a persistent and subtle way," *Zschernig*, 389 U.S. at 440, an action of a city that only generates public information would more likely be protected by the Constitution. *See* Michael Shuman, *Dateline Main Street: Local Foreign Policies*, 65 FOREIGN POL'Y 154, 162-63 (Winter 1986-87).

38. Pittsburgh, PA.

39. San Francisco, Cal., Regulations Governing the Implementation of Article XIX of the San Francisco Administrative Code (October 19, 1987) at 8, para. 3.

40. Camden, NJ; Charleston, SC; Fairmont, WV; Gary, IN; Omaha, NE; Stockton, CA; and Tucson, AZ.

41. Richard Simon, *Firm Exempted from Anti-Apartheid Law*, L.A. TIMES, May 14, 1988 Part 2 at page 3.

42. City Administrative Officer, City of Los Angeles South Africa Contracting Ordinance Semiannual Report of Exemptions, referrals to City Council and Barriers or Impediments to the Efficient and Full Enforcement of the Ordinance—July 1 through Dec. 31, 1988, transmittal date of February 27, 1989, copy on file with author.

E. The Identification Mechanism

Eighteen ordinances identified the bidders' relationships with South Africa by requiring either a "Disclosure Statement," "Affidavit," "Declaration" or "Contract Stipulation."[43] Three ordinances identified bidders who conduct business in or with South Africa via a list prepared by the city from official sources.[44] Three other ordinances employed both the list and declaration mechanisms.[45] The Washington, D.C. ordinance, for example, identified bidders by both means. It provided for the determination that a bidder is a "South Africa related-company" if its required affidavit indicated it had "business interests in" South Africa or if the bidder was included on the "prohibited list" maintained by the City and had not successfully petitioned for removal from that list.[46] The remaining twelve ordinances were completely silent on how the relationship of the bidder to South Africa was to be ascertained.[47]

The San Francisco ordinance required the Contracting Officer to obtain an affidavit, in the form prescribed by the City, from the bidder prior to contracting for goods or services.[48] In addition, the ordinance set forth a specific compliance clause that was required to be incorporated as a material condition in each contract for the supply of a commodity to the City.[49]

F. The Scope of Examination

As the selective procurement ordinances were adopted more widely, cities and the non-governmental organizations promoting such ordinances adopted the view that the web of ordinances should not only widen, but also deepen. "To some extent, people are still learning how to create selective purchasing legislation," said Richard Knight of the American Committee on Africa in 1989.[50] Thus as new selective procurement ordinances were considered, one focus was to ensure that the ordinances asked the right questions of the bidder. "But if a subsidiary of that corporation—or a parent company—is conducting business in South Africa, the city won't necessarily find out because often the question is never asked."[51] The sense that a deeper examination was needed was also fueled by the suspicion that U.S. companies selling their assets and operations in

43. Tucson, AZ; Los Angeles, CA; Richmond, CA; Sacramento, CA; San Francisco, CA; Sonoma County, CA; Fort Collins, CO; Chicago, IL; State of Maryland; Hennepin County, MN; Omaha, NE; Newark, NJ; New York, NY; Yonkers, NY; Pittsburgh, PA; Houston, TX; Fairmont, WV; and Milwaukee, WI.

44. Alameda, CA; Oakland, CA; and Madison, WI.

45. Berkeley, CA; West Hollywood, CA; and Washington, D.C.,

46. Washington, D.C., §1003(a).

47. San Diego, CA; Stockton, CA; Gary, IN; Kansas City, KS; Topeka, KS; College Park, MD; East Lansing, MI; Camden, NJ; Rochester, NY; Raleigh, NC; Charleston, SC; and Richmond, VA.

48. San Francisco, Cal., Regulations Governing the Implementation of Article XIX of the San Francisco Administrative Code (October 19, 1987) at 8.

49. *Id.*

50. *Quoted in, Chipping Away at the Divestment Con Game*, BULL. MUN. FOREIGN POL'Y 30, Autumn 1989.

51. *Id., quoting* Stephen Davis of the Investor Responsibility Research Center.

South Africa actually might be engaging in "corporate shell games" and thereby maintaining an indirect interest in South Africa.[52] The focus of the early ordinances primarily on the bidder alone did not address such a possibility. More generally, a focus on only the bidder's status led to troubling applications of local ordinances. For example, the Pittsburg ordinance placed a total prohibition on procurement from bidders that did business in and with South Africa. The ordinance did not examine beyond the bidder. In one instance, Xerox Corporation is reported to have been the low bidder on the supply of copiers to the Pittsburg School Board but to have lost the bid to Monroe Systems because of Xerox's business in and with South Africa. The relevant twist is that Xerox was reported to have argued in vain that Monroe Systems was merely the local distributor for a Japanese corporation that did business in South Africa and which, unlike Xerox, was not in compliance with the Sullivan Principles.[53]

Most ordinances, particularly the earlier ones, inquired only into the relationship of the bidder to South Africa. Nine ordinances addressed the South African relationships of *subsidiaries* of the bidder.[54] Four of those nine and one further ordinance inquired into the South African relationships of *affiliates*.[55] Again, four of the previous nine and one further ordinance examined the South African relationships of the *parent company*.[56] In the case of Los Angeles, the low bidder for a $12 million sewage treatment contract, the firm of Daniel Mann Johnson & Menderhall, ran into a problem under the City's selective procurement ordinance when it came to light that the bidder's parent, Ashland Oil, sold its products in South Africa through a distributor. Ashland Oil is reported to have pledged to terminate the distributorship in three months, and the bidder received the contract.[57] Finally, two of the last mentioned ordinances, namely those of San Francisco and Los Angeles, and two further ordinances, examined the South African relationships of *suppliers* to the bidder.[58] In total, thirteen of the ordinances looked in some way beyond the bidder.

Under the implementing regulations for the San Francisco ordinance, for example, the City deemed the bidder to be "Not South Africa Free" if the bidder:

> (1) owns 5% or more of the stock or other equity of another company which does business in or with South Africa;
>
> (2) is 5% or more owned by another company which does business in or with South Africa (Note: the 5% standard applies to all "links" in the parent-subsidiary chain);

52. *Local Boycotts, supra* note 8. *See, e.g.* James M. Leas, *I.B.M. Still Bolsters Apartheid*, N.Y. TIMES, Apr. 4, 1988, at A19; James Reilly, *I.B.M. Still Proud of Role in South Africa*, N.Y. TIMES, Apr. 13, 1988, at A18.

53. *See Local Boycotts, supra* note 8.

54. Alameda, CA; Los Angeles, CA; Oakland, CA; San Francisco, CA; Fort Collins, CO; District of Columbia; State of Maryland; New York, NY; and Houston, TX.

55. Alameda, CA; Oakland, CA; and Charleston, SC.

56. Los Angeles, CA; San Francisco, CA; and District of Columbia.

57. *See Local Boycotts, supra* note 8.

58. The San Francisco ordinance (as explained in the Interim Informal Guidance) is somewhat broader than the Los Angeles ordinance, which examines "exclusive distributors."

(3) has formed a Partnership or Joint Venture with a second company to form a third entity for the purpose of assisting the second company's business in or with South Africa;
(4) is a distributor of goods which are manufactured by a South Africa "tainted" company.

Ironically, as discussed within, because of an overly rigid design the San Francisco ordinance's search for even relatively attenuated connections to South Africa resulted in that ordinance having less effect.

G. Reintegrating the Comparison

Pulling these comparisons back together, it can be seen that the ordinances had five basic types, each with several subtypes. Basically there are four types flowing from a two by two matrix of total prohibition versus contract preference and a "doing business" trigger versus all other triggers. The fifth type encompasses the ordinances that were essentially symbolic and of only *de minimus* direct effect. These types are summarized in Table 3.

TABLE 3 – SUMMARY OF THE TYPES OF ORDINANCES

Type of Ordinance	Subtypes		
Type 1: Total Prohibition on Those "Doing Business" in or with South Africa 13	3 Ordinances were detailed Pittsburg, PA, 1985 San Francisco, CA, 1986 Los Angeles, CA 1986	6 Ordinances were brief, yet apparently serious Newark, NJ, 1984 Richmond, CA, 1985 Tucson, AZ, 1985 Berkeley, CA, 1986 West Hollywood, CA, 1986 Fairmont, WV, 1986	4 Ordinances were brief and somewhat vague Gary, IN, 1985 Charleston, SC, 1985 Camden, NJ, 1985 Richmond, VA, 1985
Type 2: Total Prohibition for — one or more of the following triggers – (1) Those Who Do Business with Apartheid Enforcing Agencies, (2) When the Goods Originate from South Africa or (3) Noncompliance with the Sullivan Principles 7	3 Ordinances were triggered by all three circumstances Rochester, NY, 1985 Raleigh, NC, 1986 Chicago, IL, 1986	3 Ordinances were triggered by the origin of the goods College Park, MD 1985 Omaha, NE, 1985 Stockton, CA 1986	1 Ordinance was triggered by the origin of the goods and noncompliance with the Sullivan Principles State of Maryland, 1986
Type 3: Contract Preference Against Those "Doing Business" in or with South Africa 4	3 Ordinances had specific preference percentages Oakland, CA, 1985 Alameda County, CA, 1986 Sacramento, CA, 1986	1 Ordinance awarded demerits Washington, D.C., 1986	
Type 4: Contract Preference Against — one or more of the following triggers – (1) Those Who Do Business with Apartheid Enforcing Agencies,	3 Ordinances were triggered by either the origin of the goods or business with Apartheid enforcing agencies New York, NY, 1985 Yonkers, NY, 1985 Houston, TX, 1986	1 Ordinance was triggered by all three circumstances Ft Collins, CO, 1985	

Type 4 (cont'd) (2) When the Goods Originate from South Africa or (3) Noncompliance with the Sullivan Principles 4					
Type 5 *De Minimus* Effect Against (1) in all cases those "Doing Business" in or with South Africa and (2) in one case also for Noncompliance with the Sullivan Principles. 8	2 Ordinances required only a Mayoral statement of concern Madison, WI, 1976 Et Lansing, MI, 1977	2 Ordinances required only that the City use "alternatives wherever possible" Kansas City, KS, 1985 Topeka, KS, 1986	2 Ordinances had a preference if low bids were tied Hennepin County, MN, 1985 Sonoma County, CA, 1986	1 Ordinance required only certification by bidder that it complied with Federal restrictions and that the City "forbear" from purchases from bidders doing business in South Africa when below $500 San Diego, CA, 1987	1 Ordinance required disclosure "for whatever policy implications that might be indicated Milwaukee, WI, 1985

An important conclusion to be drawn from the Table is that a significant number of the ordinances had little effect. Eight of the ordinances by their terms have a minimal sanction. A further five ordinances were triggered only when the origin of the goods to be purchased was South Africa, a rare situation.[59] To determine the effect of the remaining ordinances, a much closer examination would be needed into the implementation of the ordinances, including the application of the various exceptions, and into whether the mere existence of an ordinance caused tainted companies to refrain from bidding. The limited findings I made in this regard, and report in Part II, suggest that many of the remaining twenty-three ordinances also had little practical effect.

H. Situating the Burma Statute

In terms of the patterns outlined, the 1996 Massachusetts Burma statute is relatively moderate. The statute did not call for a total prohibition, but rather gave a preference to bidders that did not have the specified relationship to Burma. As with a number of the South African ordinances, the statute contained the language of a total prohibition: "a state agency or other entity may not procure goods or services from. . . ." As to the circumstance that triggered application, the statute looked to whether the bidder was doing business in Burma; this was determined from a list constructed by the Secretary of Administration and Finance.

59. A further eight ordinances, in addition to the origin of the goods trigger, looked to whether the bidder did business with the Apartheid enforcing agencies or did not comply with the Sullivan Principles for its business operations in South Africa. It is not known how often these situations arose. One reported example involved sales by General Motors of cars and trucks to the South African police which GM reportedly terminated when those sales raised questions under the New York City selective procurement ordinance. *See Local Boycotts, supra* note 8.

In terms of the Table 3 scheme, Massachusetts's Burma statute thus would be a Type 1. But, as was the case in some of the South African Type 1 ordinances, an exception to the total prohibition on procurement makes clear that the prohibition is *de facto* a contract preference, that is, under the statute, an agency may not procure goods or services from the tainted bidder unless the other qualifying bids are more than ten percent greater.

II.
PATHOLOGIES

A. Perception and Reality

It is crucial to recognize that all parties have an interest in overstating both the number of ordinances and their potential impact. It was surprising to me at first to see how difficult it was to identify precisely which cities had adopted selective procurement ordinances, never mind collecting copies of such ordinances. The perception generated in the media, and by those both for and against such ordinances, was that there were many ordinances and that they could have a serious impact on business or South Africa. The precision of the lists was not important in this calculus. What was important was that the number of cities on the list was as large as possible and that their collective impact appear substantial. The reality was that some cities mentioned in a public source were found not to have a selective procurement ordinance, although in most instances they did have some ordinance relating to South Africa.[60] Moreover, as stated above, a significant number of the ordinances had a *de minimus* sanction, little chance of effect because of a narrow scope of operation, or some broad exceptions which—depending on their implementation—potentially could deny the ordinance of force. The reality, rather than the perception, is crucial to understanding the ordinances.

B. Democratic, But . . .

One line of argumentation concerning municipal involvement in foreign affairs depicts such action as a desirable expression of democracy. Perhaps it is; my purpose here is not to question that argument *per se*. A close look at the ordinances, however, leads one to ask who is the *demos*, the people, that is expressing its view? In general, it need be seen that such ordinances in practice are not a decentralized expression of the American people, but rather an expression of a rather small number of subnational entities. Moreover, since some of the ordinances had more significance than others, we need ask which jurisdictions adopted which ordinances.

First, it is important to emphasize that only a very small number of local governments in the nation adopted selective procurement ordinances relating to South Africa.

60. *See supra* note 8.

Second, the ordinances likely to be most effective were those of cities with substantial procurement budgets that could be withheld. In other words, the larger cities are the ones that count in this game. The thirty-six originating jurisdictions are comprised of thirty-two municipalities, three counties, and one State. The thirty-two cities represent the full range of size. Roughly comparing the size of the thirty-two originating municipalities in terms of their populations in the middle of the 1980s (which also may be a fair proxy for the size of their respective procurement budgets), eight of the cities had populations of over 500,000, seventeen had populations between 100,000 and 500,000, and seven had populations less than 100,000.[61] The eight large cities to adopt selective procurement ordinances were Los Angeles, San Diego, San Francisco, Chicago, New York, Houston, Washington, D.C., and Milwaukee. The sanctioning power of the local selective procurement ordinances resided in these larger municipalities.[62] Moreover, if larger cities can be said to be more liberal in their politics than rural areas, then such ordinances empower a particular viewpoint of American society. It is not clear that it is necessarily representative of the country generally.[63]

Third, it is not clear how other cities, which take an opposing view or which believe that matters should be left to the federal government, can take an action of equal weight, i.e., an action that is more than a statement of their view.

Fourth, and supportive of these speculations, not only are the local governments listed in Table 1 a small percentage of the total number of such political entities in the United States, but there is a not insignificant overlap between the local governments contained in Table 1 and the local governments that reportedly adopted some sanction concerning Burma. One source indicates that "USAEngage" listed four states and twenty-four cities or counties as of March 2000 having some sanction related to Burma.[64] Bearing in mind that a lesson from the present study is that such lists are somewhat inaccurate, I note that eight of the twenty-four cities and counties are also local governments that adopted selective procurement ordinances regarding South Africa.[65]

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61. Population data taken from the U.S. Bureau of the Census, *1980 Census of Population, Supplementary Report, Metropolitan Statistical Areas* (PC80-S1-18); Statistical Abstract 1988; and County and City Data Books, U.S. Bureau of the Census 1988 (1986 data).

62. A similar observation can be made with the states. In particular, it is perhaps noteworthy that a significant percentage of the ordinances were adopted by cities in California. Nine of the thirty-four ordinances adopted by municipalities, or twenty-six percent, were adopted by cities in California. Three of the eight cities having a population greater than 500,000 in the mid-1980s were cities in California.

63. For what is in essence a public choice theory approach to the politics of municipal foreign policy, *see Insight Magazine Warns of Cities "Left" Tilt on Foreign Policy*, BULL. OF MUN. FOREIGN AF. 4, Spring 1987, and the article discussed therein.

64. Terrence Guay, *Local Government and Global Politics: The Implications of Massachusetts' "Burma Law,"* 115 POL. SCI. Q. 353, 357 (2000).

65. In addition, recalling the observation in note 62, nine of the twenty-four cities and counties are in California.

C. *Implementation and the Limitations on Municipal Foreign Affairs*

The longer and more detailed ordinances, an indicator in some respects of the seriousness of the ordinances, were adopted by the larger, rather than smaller, municipalities. In part, this circumstance likely reflects not only the burden of drafting such an ordinance, but also the burden on any locality of administering a more serious, and correspondingly complicated, set of selective procurement regulations. It costs money to run these ordinances. Concerning the Los Angeles ordinance, for example, the chief administrative analyst there stated it cost the City $220,000 (representing three part-time salaries) for a year and a half of administering their selective purchasing ordinance. In the case of San Francisco, it was reported that the chief administrator of the selective purchasing and contracting program had submitted a budget request for $398,000, but received only $107,000 from the Mayor's office.[66] The same report went on to state that implementation was lagging a year and a half after adoption.[67] It also takes time to administer a serious ordinance. John Hornsby, the purchasing director for Berkeley, CA, was reported to have said that "[i]t takes up a tremendous amount of time, because we have to check and double check . . . [i]t does preclude you from completing day-to-day operations more efficiently."[68] It is not only the larger municipalities that have the purchasing power to count; it likely is only the larger municipalities that can afford to count.

D. *The Network of Municipal Foreign Affairs*

The wording of the ordinances confirms a common observation; networks must exist to explain the repeating patterns in these ordinances and, for the most part, these coordinating networks were supplied by nongovernmental organizations. There is a clear sense when reading the ordinances that there existed model selective procurement ordinances which circulated around the country and evolved over time. There was, for example, an evolution tending toward an apparent increased severity. Not only was the local political effort that called for the adoption of such ordinances usually networked into a national civic effort, but local governments also were aware of what other cities had done or were contemplating. In some cases, nongovernmental organizations supplied model ordinances or copies of the ordinances adopted by other cities. In other cases, cities may have been communicating directly with other cities, seeking their experience. Some ordinances refer in the preamble to the actions of other specific cities. Committees of the Sacramento City Council instructed its City Attorney "to prepare a draft ordinance similar to the ordinance adopted by the City of Oakland."[69] Topeka, KS, adopted the same ordinance passed by Kansas

66. *San Francisco Evaluates Anti-Apartheid Ordinance,* BULL. OF MUN. FOREIGN POL'Y 48, Autumn 1987.

67. *Id.*

68. James Rainey, *Apartheid Policy—A Dilemma for West Hollywood,* L.A. TIMES, Dec. 19, 1985, part 2, at 1.

69. Memorandum of the Office of the City Attorney for Sacramento to the Sacramento City Council, dated December 26, 1986, copy on file with the author.

City. The Raleigh, NC ordinance referred to the Rochester, NY ordinance, the latter having clearly inspired the former. The Houston, TX ordinance followed quite closely the language of the ordinance adopted by New York City.

E. The Symbolism of Some Selective Procurement Ordinances

On a spectrum running from symbolic statement to legislative sanction, a local government resolution condemning the human rights practices of a foreign country would be placed toward the symbolic end. A selective procurement ordinance would be placed more toward the legislative sanction end of the spectrum. This study suggests several ways in which selective procurement ordinances are more symbolic than might be thought.

First, at least eight of the thirty-six ordinances are explicitly of minimal effect or are so non-specific that they must be thought of as primarily symbolic statements.

Second, despite the fact that the ordinances attempted to become tighter and more substantial over time, it is interesting that none of the municipalities amended its ordinance in order to strengthen it. (One of the few amendments was that adopted by West Hollywood; that amendment, however, did not make the amendment stronger but rather added exceptions to what the City had come to realize was an overly strict first version.[70]) Once a city adopted an ordinance, it apparently stopped consideration of making its action more effective. It may be that in time, municipalities would have revisited and strengthened their ordinances. But it is curious that not one did so in the period encompassed in this study. For me, this suggests that selective procurement ordinances, at least for some cities, were a means to make a statement about South Africa that appeared to have more substance than merely a resolution expressing a city's condemnation of the policy of apartheid. A selective procurement ordinance implies a willingness to sanction those supporting the apartheid system and a willingness to bear the added costs. In this sense it has substance, is noted by the press, and is added to the total number of cities with such ordinances. There was much less payoff, however, to tightening a city's ordinance.

Third, the ordinances adopted were implemented with varying degrees of intensity. For example, Washington, D.C., one of the large municipalities, had a relatively strict and detailed ordinance. It provided that it was "to be implemented by regulations." I learned to my surprise from interviews with city officials in Washington, D.C. that as of 1989, three years after its passage, the ordinance was not in operation because implementing regulations had not been adopted.

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70. The city of West Hollywood amended its ordinance to allow the city to purchase goods from companies who do business in South Africa when "[t] the special characteristics of (a) particular product offered by the firm are necessary for the efficient operation of the city or the health, safety and welfare of the public and no comparable product is available at a reasonably comparable price." This exception was commonly present in the more detailed ordinances. *See* James Rainey, *Apartheid Policy—A Dilemma for West Hollywood,* L.A. TIMES, Dec. 19, 1985, part 2, at 1; James Rainey, *W. Hollywood Council OKs Modified Policy on Divesture*, L.A. TIMES, Jan. 11, 1986, part 2, at 1.

Fourth, because of the operation of the exceptions to the prohibition on procurement, some ordinances in fact were quite weak. In the case of San Diego, a Senior Purchasing Agent for the City in 1989 stated that the ordinance had "no effect on my life whatsoever."[71] The Agent remarked that the ordinance's prohibition on making purchases under $500 from companies that had "business operations" in South Africa was basically short-circuited by the "sole source" exception.[72]

Fifth, it was difficult to make the ordinances stricter. For example, the apparent growing strictness of new ordinances over time disguised the fact that, for at least one, this increased strictness resulted in a weaker ordinance. One way the ordinances, at least superficially, became more strict was by the inclusion of a definition of "doing business in or with South Africa" that was more exacting and probing. The prime example, cited above, was the San Francisco selective procurement ordinance. The San Francisco ordinance went so far as to provide that if a bidder had a five percent interest in a subsidiary or an affiliate, or if five percent of it was owned by a parent, who does business in South Africa, then the bidder was also, for purposes of the ordinance, doing business in South Africa.[73] But in the case of the San Francisco ordinance (as in Massachusetts's Burma statute), there is an additional provision that states if none of the bidders on a particular contract are South Africa clean, then the city may procure the goods or services from any of the bidders. The irony is that as the San Francisco ordinance adopted a superficially very strict approach, it in fact was quite weak because virtually all of the bidders were tainted by a five percent connection to a company doing business in or with South Africa. Every major office supply company was tainted. Every major oil company was tainted. Everyone was at least five percent tainted. Consequently, everyone was clean and everyone could bid. In other words, the exception made no distinction between a felony and a misdemeanor; a remote taint was as much of a taint as direct and substantial business in South Africa.

Perhaps the San Francisco ordinance problem could have been addressed by redrafting. The Richmond, CA ordinance, for example, provided that if all the bidders were tainted, then the contract should be granted to the bidder "which conforms to the greatest extent." However, in the closely scrutinized world of governmental procurement, such discretionary and subjective standards are often avoided. More importantly, the difficulty of constructing a more exacting ordinance goes beyond mere redrafting. On the one hand, it was necessary to examine the relationship of the bidder to other entities and their relationship to the target country. On the other hand, it need be recognized that a tremendous cost was placed on all bidders, not only tainted ones, to ascertain, in most cases negatively, their corporate status.

71. Interview of Ann Stock by Paul Startz, as recorded in memorandum dated May 9, 1989, on file with author.

72. *Id.*

73. *See supra* text accompanying note 38.

In addition, it should be recognized that such a wide examination can be counterproductive to the overall objectives of the ordinance. Assume that both Company X and Company Y do business with South Africa. Company X has extensive business operations in South Africa. Company Y has very little business with South Africa. Company X owns five percent of Company Y. Company Y seeks to do business with San Francisco. Company Y would be willing to end its business with South Africa in order to gain the possibility of business with San Francisco—an objective of the ordinance. Company X is not willing to end it business with South Africa in order to further the business of company Y and it is not willing to sell its five percent interest in company Y unless a substantial markup on the value of that interest is paid. Since San Francisco will regard company Y as tainted even if it terminates it business sales to South Africa because it is five percent owned by company X, company Y has two options. Pay a substantial markup to the company X thereby rewarding the company more involved in South Africa—not an objective of the ordinance. Alternatively, it can not bid for San Francisco business and keep its business with South Africa—also not an objective of the ordinance.

F. The Bootlegger-Prohibitionist Alliance

Politics gives rise to strange bedfellows. Both the prohibitionist and the bootlegger have an interest in seeing liquor outlawed in a given jurisdiction. Both environmentalists and U.S shrimp fishermen supported U.S. import sanctions placed on shrimp caught abroad in a manner endangering sea turtles. In the case of selective procurement ordinances, support comes most apparently from groups concerned with the practices of the target country. But there are other complementary forces possibly present.

It should be recalled that a different vein of state and local activism possibly impinging on foreign affairs involved a variety of "Buy America," or even "Buy State," statutes.[74] The important point for this study is that selective procurement ordinances distinguishe between potential bidders and thus affect competition. To the extent that the foreign or large U.S. bidder is more likely to have the specified relationship with South Africa and thereby be tainted, small local suppliers will benefit from such ordinances. In this sense, it should not be a surprise that as I listened to a tape recording of a particular city council's debate prior to adoption of its resolution, there was brief, but nonetheless open, discussion of the fact that such an ordinance would likely benefit small local businesses that, unlike the large corporate bidders, would be unlikely to have any relationship with South Africa.

74. *See, e.g.*, Richard Bilder, *East-West Trade Boycotts: A Study in Private, Labor, Union, State and Local Interference with Foreign Policy*, 118 U. PA. L. REV. 841 (1970); Earl H. Fry, *State and Local Governments in the International Arena*, 509 THE ANNALS OF THE AMERICAN ACADEMY 118, 121-22 (1990).

G. *Externalities and Unexpected Costs*

The two mechanisms employed to identify tainted bidders were either an affidavit from the bidder, in some instances signed by the head of the company, or the use of a list constructed by the City or drawn from some other source.

Administratively, affidavits are the easier mechanism for the city. They transfer the burden of identification to the bidders. However, interviews with company officials revealed that the affidavit can generate a great deal of pressure within a company. If the degree of examination, for example, extends beyond the bidders to its suppliers, its parents, etc., then the bidder needs to undertake an extensive analysis. It needs to check with its affiliates and subsidiaries to see whether they conduct any business in or with South Africa. An affidavit, carrying with it penalty for perjury, was appropriately seen by bidders I spoke with as a serious matter. Companies indicated they would spend a significant amount of time and money so that they might submit an affidavit with confidence of its accuracy. But, some proportion of the bidders performing this examination, depending upon the target country involved and the type of procurement involved, will not be tainted. By using the affidavit mechanism, a city placed significant (and recurring, since the business practices of affiliates could change) costs on *all* bidders. A particularly troubling demonstration of this cost involved Washington, D.C. In that case, the city had a rather strict detailed ordinance that utilized the affidavit mechanism. As described above, implementing regulations, at least as of 1989, had not been adopted and the ordinance had not been implemented. The city official interviewed, however, indicated that although the ordinance had not come fully into operation, the affidavits had been filed by bidders.

III.
OBSERVING *CROSBY*

A. *Crosby as a Reassertion of Control*

Professor Spiro contrasts the image of the State as a unitary actor with the reality of a globalized world and porous States. I find that image and reality intriguing. The contrast raises the question of how a State may restore, even if selectively, its primacy; of how it might seek to control the behavior of individuals, corporations, and political subdivisions it views as in conflict with its efforts as a unitary actor. In considering these questions, we could ask under what circumstances has a State sought to regain such control; under what circumstances should a State as a normative matter seek such control; and, generally, what are the costs and benefits to the State, to the international community and to the international issue of concern, of the State regaining exclusive control and foreclosing particular sub-national foreign affairs? A crucial observation about the *Crosby* decision, is that if the State or private plaintiff in a particular instance cares enough to seek to reassert federal control, it is possible.

B. *Crosby and Municipal Interest in Foreign Affairs*

During the mid-1980s, it was asked whether municipalities in general were becoming more interested in foreign affairs or whether the movement was driven by the particular situation in South Africa and the resonance for the United States of that racial situation. The Burma ordinance demonstrates that municipal and individual concern to be more widespread. It may be that the familiarity cities gained with such ordinances because of South Africa has led to their adoption in other situations. But it also appears that the inclination of some cities to act in foreign affairs is deep and resilient.

Simultaneously, however, the decision in *Crosby* forces us to ask why there was no plaintiff for a case about the sanctions adopted regarding South Africa. Why did the NFTC not bring a case against the South African sanctions? Striking to me, at that time, was that there was no plaintiff willing to step forward and challenge the South African statutes. Interviews with corporate officials make clear that it was not thought to be politically wise to challenge the municipal actions related to South Africa. Even a trade association as plaintiff was not thought to provide enough political cover. Likely, there was a similar calculus of interest in the federal government.[75] This yields an important insight into a dynamic between politics and law. It may be that certain municipal actions would be found to impermissibly intrude on the foreign affairs of the United Sates, but if political support for the cause underlying such actions is sufficiently deep and widespread, that fact will militate against any legal challenge. The significance of the intrusion on foreign affairs and the depth of political support for action on the underlying issue will be weighed before the government moves to challenge the municipal action.[76] The proof of whether it is a truer expression of democracy is whether any plaintiff would risk the wrath of those denied their view.

C. *Crosby and the Dynamics of City Councils*

In listening to tape recordings of city officials discussing the adoption of such ordinances, it was clear that, even if the resolution was adopted unanimously, the debate was often quite close. The dynamic I heard involved a few members of the council very strongly supporting the ordinances, one person opposing and otherwise a great deal of silence. I think it quite open to question whether the dynamic in the room would change if someone had said: "Don't you remember *Crosby*? You can't do this. It is just going to be knocked down, so why are we going to all this trouble?" It should not be assumed that these ordi-

75. For a discussion, see the comparison made between the South African and Burmese situations in Erika Moritsugu, *The Winding Course of the Massachusetts Burma Law: Subfederal Sanctions in a Historical Context*, 34 G.W. INT'L L. REV. 435, 453-58 (2002).

76. During this same time period of this study, the federal government quickly filed a complaint for declaratory and injunctive relief against operation of a City of Oakland, CA, 1988 Nuclear Free Zone ordinance that would have prohibited, *inter alia*, the transport of radioactive materials on highways crossing the city limits. *See* United States v. City of Oakland, California, Civil Action No. C 89 3305 (Sept. 6, 1989). The ordinance in this instance was adopted by citizen initiative. *See* Bill O'Brien, *The Nuclear Offense: Measure T Challenged in Court*, EXPRESS (May 26, 1989) at 2.

nances were strongly endorsed by all members of the city governments that adopted them.

III.
CONCLUSION

In 1993, Harry Scheiber wrote "the category of diplomatic bagatelle . . . embraces much of the vaunted paradiplomacy that attracts attention today."[77] The details of the South African selective procurement ordinances basically support Scheiber's view. The reality that emerges from this study is that there were two basic groups of ordinances. First, there were the serious selective procurement ordinances which potentially intruded on the foreign affairs of the United States, which in the case of South Africa were probably no more than one quarter of the ordinances adopted. Second, there were the selective procurement ordinances, which I came to regard as "costly symbols." This is not to say symbols are without value. But neither is it to say that these symbols were without costs.

77. Harry N. Scheiber, *International Economic Policies and the State Role* in U.S. FEDERALISM: A PROCESS REVOLUTION IN STATES AND PROVINCES IN THE INTERNATIONAL ECONOMY 65, 82-3 (Douglas M. Brown & Earl H. Fry, eds., 1993).

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From Country-Based to Corporate-Based Campaigns

Naomi Roht-Arriaza

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By
Naomi Roht-Arriaza*

I.
THE FUTURE OF LEGISLATIVE SANCTIONS

I was asked not to focus on the case per se, but to try to put myself in the role of an advisor to a municipality or a state post-*Crosby* and say, "Well now what?" I am going to try to do that very briefly. A couple of preliminary points. Picking up on Professor Caron's point, that the way these things happen is not because a city councilperson has a good idea one morning, these things happen as a result of constituent pressure, mostly from organized constituencies in NGOs and in local groups who are usually running campaigns that extend beyond a certain municipality and that are done on either a state or national level. I think that tempers a little bit the pressures coming from, "Well, let's clean up the streets first." The only reason these initiatives get on the agenda in the first place is because there is a fairly well orchestrated and organized campaign that is pushing them onto agendas, usually in more than one place at a time.

What that means is that, first, there will not tend to be a whole lot of these campaigns because it is hard to do. There have been, as Professor Spiro mentioned, attempts to do this with Tibet, Cuba, Nigeria, and five or six other places, and they have not really taken off as national campaigns. They have not gotten the weight behind them to do so. Second, I do not think these kinds of movements are going away. I think the idea that our purchases, our investments, our economic might as states and as localities should reflect our values, is a very powerful idea. I think it is one that grabs the imagination of a fair number of people, so, one way or another, you are going to keep getting attempts to align how states use the significant amount of resources that they have at their disposition with what at least these organized groups of constituents think should be done with that money. So, *Crosby* or no *Crosby,* there are going to be continuing attempts to try to do this sort of thing.

* Professor of Law, University of California at San Francisco, Hastings College of the Law. The author has been a principal co-investigator on a multidisciplinary project looking at corporate accountability and public policy, from which these ideas are borrowed. *See* "Beyond Good Deeds," *available at* http://www.nautilus.org/cap (last visited Apr. 16, 2003).

II.
SANCTIONS AS A FORM OF CORPORATE CONTROL?

Now that leads me to the theme of what I am going to say. Post-*Crosby*, the movement that has focused up until now on specific countries, like South Africa and Burma, and the movement that is bubbling up throughout the world around corporate accountability, will start coming together. I think you will start seeing more and more of a push to use the purchasing and investing power of states and localities framed in terms of what we want our corporations to do generally, rather than what we want our corporations to do *vis-à-vis* a particular country. In practice, these can come out to be exactly the same thing, but the way they are framed will start moving away from this rather problematic focus on Burma, because that raises all the *Crosby* flags, to a focus on forced labor in pipelines. By focusing primarily on the corporate behavior and only incidentally on whatever country may happen to be at the end of the line where the effects are found, you end up in the same place, but without raising the same kind of preemption or foreign affairs problems.

So let me talk a little bit about a couple of ways that this could be done. First, I will address what the Burma case is about—procurement. One thing that I think you will start seeing—and you are already starting to see this in the state of California—is that rather than conditioning procurement on companies not investing in or producing for certain countries, states and localities will start conditioning procurement on companies not engaging in certain specified unethical behaviors. Notice that these can be framed in two ways: first, they can be framed as a preference, like the Burma law; or second, they can be framed more strongly as a prohibition. Either way you get to the same place. The easiest example would be the use of child labor, or the use of forced labor. You see prohibitions on the federal level and you see them on the state level. The state of California just passed legislation on child labor abroad this past year, and a number of other states are looking at or passing similar ordinances.

Notice that they do not single out any particular country, and so you avoid the "one voice" idea, and the ordinance becomes much more incidental to foreign affairs. You could do a fair amount with this method. For example, you could have a purchasing preference for companies that have adequate environmental or social monitoring with independent verification systems in place. You could tie it to recognized principles; for instance, the CERES [Coalition for Environmentally Responsible Economies] principles, the OECD [Organization for Economic Co-Operation and Development] guidelines on multinationals, or the work being done in the U.N. Sub-Commission on Human Rights on a code of conduct for multinationals. There are a number of places you could tie it to, and going back again to something that Professor Caron said, from the point of view of a municipal officer or state official, this has the added advantage of being a "quick-and-dirty" screen: there is an on/off, did they sign/did they not sign. It is much less expensive to do this than to go into the actual underlying behavior of corporations, and deciding whether or not to include subsidiaries and affiliates, or more than fifty percent stock ownership, or whatever other criteria. To the

extent that these screens exist, they will tend to help make the decision as to whether a certain kind of company is likely to engage in egregious, unethical behavior. I think you are going to find cities, municipalities, and states turning to them as easy screens.

III.
SANCTIONS AND TRADE

There is an issue that came up a couple of times, and I want to flag it. It is that the trade issue still persists in these behavior-based screens, but again it is attenuated. There may also be problems with these kinds of conditionalities under the WTO [World Trade Organization] procurement code. However, there are a couple of ways out from under these problems. First, the WTO Code only applies to states and not to localities; so one way would be to have every city in California pass requirements instead of having the state do it. Another easy way out of it is by saying, "Well, this does not apply to countries that have ratified the procurement code." It turns out that there are twenty-some-odd countries that have done so; almost all of them are OECD countries. They are generally not the countries that you are interested in targeting, and then you do not have a problem and there is no issue. I did want to flag, however, that the trade issues are still there.

IV.
ALTERNATIVES TO SANCTIONS

A. Disclosure as a Tool for States and Municipalities

Another thing that you could do, and that there is been some talk about doing, is to use disclosure as a tool for states and municipalities. The idea here is that information is a powerful tool to consumers; you get consumer market movements on the basis of disclosure, at least in industries where branding is important, where there is a consumer product at the end of the line, or industries that are in a supply chain where there is a consumer product at the end of the line. You can also use disclosure as a way of influencing investors, bankers, insurers, lessors, etcetera. You could use disclosure as a way of getting corporate management itself to sit up and wonder what they are doing. For instance, you could require companies to publish a list of countries where they have operations or where their subsidiaries or major suppliers have operations. You are not singling out any one country, you are not saying, "Tell us which companies do business in Burma." Instead, you are just saying, "Tell us where you do business, where your operations are," and then you leave it to the NGO networks to publish the report that says, "Top ten companies doing business in Burma." There is no state action there, because it is the NGOs doing the report, but the disclosure requirement comes from the state or the municipalities.

B. Requiring the Creation of Human Rights Policies

You could also have a very interesting policy that has been implemented over the last year and a half in the United Kingdom regarding public pension funds. All they have to do is to disclose whether or not they have human rights policies—not what they are, or even if they are good—but just whether they have them. This is a very minimal requirement. What has ended up happening, according to people who work with companies in the U.K., is that all of a sudden you have a bunch of people running around going "Oh my goodness, do we have a human rights policy, and if not, why not?" and, "What is our human rights policy?" and, "What should it be?" It started a ball rolling and you have banks going to companies and saying, "Well, do you have a human rights policy?". So you start creating movements within the companies themselves, as well as within the larger society, simply through a disclosure requirement. It is very non-invasive, it does not require you to take a long time, and it does not cost a lot of money, etcetera.

C. Strengthening Laws on Unfair Trading Practices

Another thing that states might do particularly is to beef up the unfair trading practice laws to make it easier for consumers to challenge misleading or deceptive statements made by corporations about these policies. This would provide a check against what has affectionately been called "greenwashing" by the NGO community. It is the "people do" sort of idea, with no particular content to it. I cannot go into this issue here except to say it is now before the California courts.

D. Divestment Ordinances

The other way in which I think you are going to start seeing much more activity is in the "state-as-investor" kind of idea. This of course is not a new idea—it goes back to long-standing South African divestment ordinances. I think you are going to see a renewed, probably more focused, effort at looking at divestment as a tool. Let me give a couple of examples. In the wake of *Crosby*, a number of municipalities have passed divestment-related ordinances concerning Burma. Minneapolis, in October of 2000, passed a resolution prohibiting new investment and the retention of investments in companies that engage in economic development of resources located in Burma. This is not concerned with companies doing business, and this is not about the sales office. Rather, this is aimed specifically at resource extraction industries. The Los Angeles City Council voted to recommend to the management of the city's pension funds that they sell the stock of all companies that invest in Burma. CalPERS [California Public Employees' Retirement System], which is the largest U.S. pension fund and is for California state public employees, passed a rule in November that said when investing in emerging markets, the managers had to take into account the human rights situation and political stability of the countries they were investing in, so as not to invest in certain companies. It was framed in

economic terms; such as, we do not want risky investments in counties that are going to go blow up. The net effect is that you have a kind of human rights screen on the investments of CalPERS. All of this, of course, feeds into a much larger socially responsible investment movement that now controls anywhere from one in every ten dollars to one in every seven dollars, depending on which study you look at in the U.S.

The other part of investment is the use of stock ownership as a way of requesting information from management and changing management practices. This not just divestment because, of course, once you have divested, you are out of the game with respect to this company's shareholder resolutions. The resolutions are not a new idea, but one that goes back at least a hundred years. I think you are going to see more municipalities in more states, to the extent that they have investments in publicly traded companies, using that leverage as part of large, existing coalitions to try and influence corporate behavior. In short, what you end up getting is a confluence with the people who have worked on country-specific actions focused on the economic power of states and municipalities coming together with a movement that tries to use the economic power of consumers, investors, banks, insurers, etcetera, to try and influence corporate behavior. You start getting campaigns that are focused on specific aspects of corporate behavior rather than focused on countries.

Thank you.